

# The Supreme Court's Bout With Insanity: *Clark v. Arizona*

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*Clark v. Arizona* promised to raise significant issues regarding the constitutional nature of the insanity defense and the constitutional right to present evidence. In reality, it presented neither issue, though all nine Justices mistakenly assumed that it did. Instead, *Clark* raised and implicitly resolved something that is equally as significant: namely, whether a state may require defendants to bear the burden of negating *mens rea* that the prosecution otherwise has the burden of proving beyond a reasonable doubt.

## I. ERIC CLARK'S PATHWAY TO THE SUPREME COURT

The people of Arizona lived through two events in 1989 that resembled events in England 150 years earlier.

England watched in 1843 as Daniel M'Naghten first shot and killed a person whom M'Naghten mistakenly believed was trying to kill him and, then, won an acquittal on grounds of insanity. Arizona watched in 1989 as Mark Austin first stabbed and killed his ex-wife in a jealous and frustrated delusion that she might reconcile with him and, then, won an acquittal on grounds of insanity.<sup>1</sup>

Both events led to legislative reforms in legal definitions of criminal insanity. In England, Parliament responded to Daniel M'Naghten's acquittal by adopting a two-part test of insanity, pursuant to which an accused has a defense to criminal liability for conduct if as a result of mental disease—

- (1) [cognitive component] He did not know "the nature and quality of the act he was doing," or if he did,
- (2) [moral component] he did not know that his act was "wrong."<sup>2</sup>

The *M'Naghten* test soon became the most widely-used definition of criminal insanity in the Anglo-American world, including Arizona at the time Mark Austin killed his ex-wife.

The Arizona legislature responded to Austin's acquittal by taking four actions in 1993 with respect to Arizona's defense of criminal insanity: (1) the Arizona

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<sup>1</sup> See Renee Melancon, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 288–89 (1998).

<sup>2</sup> M'Naghten's Case, (1843) 8 Eng. Rep. 718, 720.

legislature repealed a provision that adopted the words of *M'Naghten's* cognitive component; (2) the legislature retained a provision that adopted the words of *M'Naghten's* moral component, while reaffirming that defendants must prove it by clear and convincing evidence; (3) the legislature implicitly reaffirmed a rule to the effect that defendants who possess evidence of insanity may offer it to support an affirmative defense of insanity but not to negate the *mens rea* elements of an offense; and (4) Arizona clarified that certain self-induced states and certain emotional states do not qualify as mental illnesses for purposes of the defense of criminal insanity.<sup>3</sup>

Eric Clark's case arose after the 1993 amendments took affect. Clark, who had previously been institutionalized and prescribed medication for mental illness, had told acquaintances that the town was being invaded by aliens and that he was going to kill a policeman. On the night of the killing, he cruised a residential neighborhood with his sound system blaring. When on-duty officer Jeffrey Moritz, wearing a uniform and driving a marked car with emergency lights flashing, pulled Clark to a stop, Clark shot and killed him and then fled. Clark later told psychiatrists and others that he thought Moritz was an alien.

Clark elected to be tried by a judge for the crime of first degree murder, i.e., the crime of killing Moritz while "intending" or "knowing" that Moritz was a police officer.<sup>4</sup> Clark presented uncontested evidence that he was psychotic on the night of the shooting. He also presented evidence through family, acquaintances, and court-appointed psychiatrists that he thought Officer Moritz was an alien. The trial judge considered the evidence on the issue of insanity but purported to bar Clark from using the evidence to show that he did not "intend" or "know" that he was killing a police officer. The trial judge convicted Clark of murder, finding that Clark had failed to show by clear and convincing evidence that he "did not know that his conduct was wrong."

Clark appealed his conviction to the Arizona Court of Appeals. Clark based his appeal on two grounds—namely, (1) that Arizona denied him due process by eliminating *M'Naghten's* cognitive component, and (2) that Arizona abridged his due process and compulsory process rights to present evidence that he did not "intend" or "know" that he was shooting a police officer as opposed to an alien.

The Arizona Court of Appeal ruled against Clark on both counts, and the Arizona Supreme Court denied review. The U.S. Supreme Court granted certiorari and by a vote of 5–4 affirmed Clark's conviction.

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<sup>3</sup> See Melancon, *supra* note 1, at 297–312; ARIZ. REV. STAT. ANN. § 13-502(A) (2001). The rule prohibiting the use of mental illness to negate *mens rea* was an interpretation by the Arizona Supreme Court in *State v. Mott*, 931 P.2d 1046, 1050–51 (Ariz. 1997), of earlier legislation that the Court of Appeals in *Clark* held survived the 1993 amendments.

<sup>4</sup> ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2001).

II. TWO SPECIOUS ISSUES IN *CLARK*—AND ONE GENUINE ISSUE

Clark's claims intrigued the scholarly community because Clark argued that his case presented two significant constitutional claims. In reality, Clark's case presented neither claim; though it did raise a third constitutional claim, distinct from the other two. The third claim is important and challenging in its own right. Unfortunately, because the Court erroneously thought that it could avoid the claim by means of a peculiar evidentiary distinction of its own making, the Court implicitly rejected the claim without giving it the attention it deserved.

A. *The Specious Issues in Clark*

*Clark* purported to present two important claims: (1) a rare and potentially transformative constitutional claim regarding substantive criminal law; and (2) a cutting-edge constitutional claim regarding criminal procedure.

**Substantive Criminal Law—*A Constitutionally-Mandated, Minimum Definition of Criminal Sanity.*** Clark argued that by repealing language that codified *M'Naghten's* cognitive component, Arizona enlarged the standards of sanity in such a way as to treat as sane (and, hence, as *possessing* criminal responsibility) persons whom the Constitution deems as insane for criminal purposes (and, hence, as *lacking* criminal responsibility)—namely, persons who do not know that they are in fact doing what a statute prohibits. The claim was potentially transformative. Accepting the claim would mean that the Constitution establishes certain “minimum”<sup>5</sup> cognitive functions that persons must possess in order to be blamed for engaging in prohibited conduct. Rejecting the claim would mean retreating from venerable decisions holding that the Constitution does, indeed, require that persons possess blameworthy minds of a certain sort before the state may punish them for engaging in admittedly prohibited conduct.<sup>6</sup>

**Criminal Procedure—*A Constitutionally-Mandated Rule of Exculpatory Evidence.*** Clark also argued that by purporting to prohibit him from introducing evidence of mental illness to show that he did not “intend” to or “know” he was killing a policeman, Arizona abridged his constitutional right to present evidence. This claim, too, was significant because upholding the claim would mean holding

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<sup>5</sup> *Clark v. Arizona*, 126 S. Ct. 2709, 2722 (2006) (“constitutional minimum”).

<sup>6</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (requiring minimum intentional conduct); *Lambert v. California*, 355 U.S. 225 (1957) (requiring minimum knowledge of the law); see also *Sandstrom v. Montana*, 442 U.S. 510, 521–23 (1979) (a state may not rule that by voluntarily engaging in conduct that has the ordinary consequence of causing death, a person is conclusively presumed to have *intentionally* caused death, because doing so effectively “eliminate[s]” any requirement of intentionality). See generally Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999).

that defendants have a near absolute right to present any evidence that could rationally influence a jury to acquit defendants of elements of offenses, regardless of state concerns about its probative value. Rejecting the claim would mean enlarging the grounds on which states may exclude exculpatory evidence that, if admitted, could rationally influence jurors to acquit.

In reality, however, *Clark* presented neither of these two constitutional claims.

### 1. A Constitutional Test of Insanity?

*Clark* does not present a constitutional claim regarding the blameworthy minds persons must possess to be lawfully punished, because the Arizona courts construed the Arizona statute in such a way as to avoid the issue.

Admittedly, the Arizona courts *could* have construed the statute in such a way as to present the issue that Clark had in mind. Thus, the Arizona courts could have held that (1) *M’Naghten’s* cognitive component, which the 1993 amendments repealed, exculpates persons who, because of mental illness, do not know that they are *in fact* doing what the relevant statute prohibits (e.g., killing a policeman in the line of duty) and (2) *M’Naghten’s* moral component, which the 1993 amendments retained, exculpates all *other* persons who, because of mental illness, do not know they are doing anything wrong (e.g., a person who knows that he is killing policeman but, because of mental illness, does not know that killing policemen is wrong). If the Arizona courts had construed the 1993 amendments in this way, the trial judge would have barred Clark *altogether* from showing that he mistakenly thought he was killing an alien—both to negate his having “knowingly” killed a policeman *and* to show that he was criminally insane—because his evidence would have supported what Arizona repealed, not what it retained.

In reality, however, the Arizona courts construed the statute to encompass at least two classes of mentally ill persons that are broad enough to include what Clark claimed to have been: (1) persons who, because of mental illness, do not know that they are in fact doing what they know the relevant statute prohibits (e.g., a person who knows that killing human beings is illegal but who mistakenly believes that he is killing an alien rather than a human being) and (2) persons who, because of mental illness, know what they are in fact doing but do not know that it is wrong (e.g., a person who knows that he is killing a human being rather than an alien but who does not know that doing so is wrong). Indeed, as the Court in *Clark* pointed out, it was precisely *because* the trial court so construed the statute that the trial court allowed Clark to try to prove that he was insane by introducing evidence that he mistakenly believed he was killing an alien rather than a human being.<sup>7</sup>

In that respect, the Arizona courts construed the statute in accord with the Model Penal Code’s so-called “cognitive” defense of insanity. The Model Penal

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<sup>7</sup> *Clark*, 126 S. Ct. at 2732–34.

Code (“MPC”) provides two alternative grounds for exculpating mentally ill persons: (1) they lack “cognition” (i.e., they lack substantial capacity “to appreciate the criminality [wrongfulness]” of their conduct); and (2) they lack “volition” (i.e., they lack substantial ability to “conform [their] conduct” to the requirements of the law).<sup>8</sup> The MPC’s cognitive defense of insanity is stated in language (in both alternative forms the MPC presents) that is analogous to Arizona’s, because the MPC provides a defense to persons who, because of mental illness, lack substantial capacity “to appreciate the criminality [wrongfulness] of [their] conduct.”<sup>9</sup> However, just as the MPC understands that language to encompass persons who, because of mental illness, do not appreciate that they are in fact doing what the relevant statute prohibits (e.g., killing a human being),<sup>10</sup> so, too, the Arizona courts construe the Arizona statute to encompass a person who, though he may know that killing human beings is illegal, does not know that he is in fact killing a human being as opposed to an alien.

To be sure, the Court makes statements in Part II.A of its opinion that may suggest that it is adjudicating the issue of substantive criminal law that I claim is absent. For the Court says in Part II.A that due process does not require states to provide a defense to a person who, because of mental illness, did not know “the nature and quality” of his act.<sup>11</sup> However, the suggestion is false. What the Court denies in Part II.A of its opinion is a due process claim regarding the *form* that insanity defenses must take, not a due process claim regarding their *substance*. Part II.A denies that due process requires states to say *in so many words* that a person has a defense if, because of mental illness, he did not “know the nature of his conduct.” Part II.A does not hold that states may deny a defense to persons such as Clark claimed to be who, because of mental illness, did not know that they were in fact doing what the relevant statute prohibits.

I say this on two grounds. First, the Court’s stated reason for sustaining Arizona’s repealer is a reason of form, not of substance. The Court starts by reminding us that the legislative repeal of a substantive criminal law statute is not a violation of due process unless the repealer “offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>12</sup> The reason Arizona’s repealer does not violate that standard, the Court says, is that only 19 states possess statutes that mirror the repealed statute.<sup>13</sup> Most states do not—including, the Court says, 27 states that follow the Model Penal Code’s cognitive test in exculpating persons who, as a result of mental

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<sup>8</sup> MODEL PENAL CODE § 4.01 (1984).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 4.01 cmt. 2–3.

<sup>11</sup> *Clark*, 126 S. Ct. at 2718–22.

<sup>12</sup> *Id.* at 2719.

<sup>13</sup> *Id.* at 2720–21 nn.12–13.

illness, do not know their acts are “wrong.”<sup>14</sup> Yet the Court openly admits that, although the Model Penal Code’s cognitive test does not use the *wording* of *M’Naghten*, the MPC replicates the *substance* of *M’Naghten* by providing a defense to persons such as Clark claimed to be who, because of mental illness, do not know that they are in fact doing what the relevant statute prohibits.<sup>15</sup> It follows, therefore, that the Court could not have intended in Part II.A to be addressing the substance of what the repealed provision prescribed because, if it had, the Court might well have been obliged to admit that the provision was, *indeed*, “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” given that at least 46 states<sup>16</sup> *do* possess provisions that provide a defense to persons who, because of mental illness, do not know that they are in fact doing what the relevant statute prohibits.

Second, it is unlikely that the Court intended in Part II.A of its opinion to be addressing substance because, given the Court’s subsequent observations in Part II.B of its opinion, any such substantive analysis would have been dicta. The Court rightly observes in Part II.A that, although Arizona repealed the wording of *M’Naghten*’s cognitive component, Arizona interprets the wording of *M’Naghten*’s moral component to incorporate the former component by reference. Thus, Arizona reasons that a person who does not know that he is in fact doing what a statute prohibits is a person who does not know he is doing something “wrong” for purposes of its insanity statute. Given the Court’s recognition that Arizona protects the substance of what the repealed provision addressed, it is unlikely that the Court intended to rule that states may deny such protection, for any such ruling would have been pure dictum.

For both these reasons, the Court should be understood to be doing two things in Part II of its opinion: (1) stating in part II.A that due process does not require states to adopt the *wording* of *M’Naghten*’s cognitive component;<sup>17</sup> and (2) stating in Part II.B that the Court is not addressing the *substance* of *M’Naghten*’s cognitive component because Arizona interprets its existing test as incorporating the cognitive component by reference.<sup>18</sup> By this analysis, the Court takes no position at all on whether states may adopt an insanity defense that precludes a

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<sup>14</sup> *Id.* at 2721 nn.14–17.

<sup>15</sup> *Id.* at 2721 nn.13–15.

<sup>16</sup> I say “at least” 46 states because an additional four states allow defendants to use mental illness to rebut *mens rea*, including *mens rea* of “knowledge,” *Id.* at 2722 n.22, and there is no showing that the remaining states would inculpate a person who, as a result of mental illness, does not know he is doing what the statute prohibits.

<sup>17</sup> *See Clark*, 126 S. Ct. at 2722 (stating that due process requires “no single canonical formulation of criminal insanity”).

<sup>18</sup> *See id.* (noting that since Arizona interprets its statute as implicitly incorporating what part 1 of *M’Naghten* prescribes, *Clark* does “no[t] . . . raise a proper claim that some constitutional minimum has been shortchanged”).

person from showing that, because of mental illness, he did not know that he was in fact doing what a statute prohibits.

## 2. A Constitutional Right to Present Evidence?

*Clark* also raises no issue regarding a defendant's right under *Chambers v. Mississippi*<sup>19</sup> to present evidence in his defense, though all nine Justices thought it did. Accordingly, everything the Court says about a state's authority to "curtail" or "restrict"<sup>20</sup> the admission of evidence that has a tendency to "confuse" or "mislead"<sup>21</sup> the trier of fact—and everything the Court says about a state's authority to "channel" or "confin[e]"<sup>22</sup> defensive evidence to the issue of insanity—is pure dictum.

Nevertheless, the reason that *Clark* fails to present evidentiary issues is *not* the reason that Arizona advances in its brief. Arizona agrees that *Clark* presents no issue regarding the right of a defendant to present evidence, but it does so by mistakenly invoking the Court's prior decision in *Montana v. Egelhoff*.<sup>23</sup>

*Egelhoff* arose under a Montana statute that limited the extent to which defendants may introduce evidence of voluntary intoxication to show that they lacked the *mens rea* required for offenses.<sup>24</sup> James Egelhoff was tried on two counts of murder based on evidence that, while riding in the rear seat of a car, he took a pistol, held it to the backs of the heads of the driver and a front-seat passenger, fired into the heads of each, and then sought with a long stick to continue operating the car from the rear seat.<sup>25</sup> To rebut the state's evidence that the killings were intentional, Egelhoff sought to introduce evidence that because of excessive drinking, he was acting in a state of automatism or alcohol-induced blackout that precluded him from being conscious of what he was doing.<sup>26</sup> The trial judge excluded the evidence; Egelhoff was convicted; and Egelhoff sought review in the United States Supreme Court.

Egelhoff based his appeal on the claim that, by excluding his evidence of alcohol-induced automatism, Montana had abridged his right under *Chambers* to present evidence in his defense.<sup>27</sup> Interestingly, eight of the nine Justices of the Court agreed with Egelhoff that the case turned on his right under *Chambers* to

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<sup>19</sup> 410 U.S. 284 (1973). For an analysis of *Chambers*, see Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1256–74 (1999).

<sup>20</sup> *Clark*, 126 S. Ct. at 2731 ("curtail[1]"); *id.* at 2730 n.36 ("restrict").

<sup>21</sup> *Id.* at 2735 ("confuse"); *id.* ("mislead").

<sup>22</sup> *Id.* at 2732 ("channe[1]"); *id.* at 2733 ("confin[e]").

<sup>23</sup> 518 U.S. 37 (1996).

<sup>24</sup> *Id.* at 37.

<sup>25</sup> *Id.* at 40.

<sup>26</sup> *Id.* at 41.

<sup>27</sup> *Id.* at 53–55.

present evidence in his defense, though they disagreed on the outcome—four Justices concluding that Montana abridged Egelhoff's right to present evidence, and four Justices concluding the opposite. The significance of *Egelhoff*, however, lies with Justice Ginsburg's penetrating concurring opinion as the fifth Justice. Justice Ginsburg ruled against Egelhoff, but not on the ground that Montana had lawfully barred Egelhoff from introducing evidence that was logically relevant to the *mens rea* of murder. Justice Ginsburg reasoned—correctly, I believe—that Egelhoff presented no issue at all regarding a defendant's right to present evidence because Egelhoff's evidence of alcohol-induced automatism was not logically relevant to any element of Montana's murder offense. The evidence was not relevant, Ginsburg said, because the Montana voluntary intoxication statute had the functional effect of *redefining* the "intent" that murder requires in Montana to include all goal-directed conduct—as Egelhoff's conduct surely was—including goal-directed conduct that is alleged to be the product of automatism.

Montana's redefinition did not relieve the prosecution of the burden of having to prove intent beyond a reasonable doubt. Nor did Montana's redefinition bar a defendant from rebutting the prosecution's showing of intent by introducing evidence of voluntary intoxication (1) to establish an alibi that some other person committed the homicide, or (2) to show that, although he committed the homicide, he did so accidentally or by a mistake of fact. Rather, Ginsburg said, the reason Montana was allowed to bar a defendant from introducing evidence of alcohol-induced automatism to negate intent was that Montana redefined "murder" to *include* goal-directed automatism among the kinds of intent with which it is unlawful to kill a human being. Moreover, Montana could legitimately redefine murder in that way, because Montana could legitimately doubt that anything such as alcohol-induced automatism—as opposed to the after-the-fact amnesia that intoxication induces—actually exists.<sup>28</sup>

Arizona invoked *Egelhoff* to argue in *Clark* that, rather than excluding evidence of insanity that was logically relevant to the *mens rea* of murder, Arizona simply redefined the "intent" required for murder to *include* the psychotic state of mind regarding aliens that Clark claimed to have had. This argument might have had purchase if, in repealing the language of *M'Naghten's* cognitive component, the Arizona legislature had intended to repeal its substance. Arizona could then have argued that its insanity statute had the functional effect of redefining the "intent" required for murder to be consistent with the state of mind of a person who, because of mental illness, believes he is killing an alien rather than a human being. In that event, the U.S. Supreme Court would have been obliged to decide two issues: (1) whether Arizona's doubts about whether such insanity-induced psychoses exist is as legitimate as Montana's doubts about whether alcohol-induced automatism exists, and, if not, (2) whether a state may lawfully punish a person for knowingly killing a human being whom the state must concede knew no

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<sup>28</sup> See Westen, *supra* note 19, at 1227–59.



such thing. In reality, however, Arizona misapplies *Egelhoff* because, as we have seen, Arizona interprets its insanity statute to *allow* a defendant to escape conviction by showing that, because of mental illness, he did not know that he was in fact killing a human, provided that he does so by clear and convincing evidence.

That Arizona is mistaken about *Egelhoff*, however, does not mean that Clark is correct in contending that Arizona violated his right to present evidence in his defense. For reasons that I hope to clarify in Part III of this essay, Clark was allowed to introduce all of the evidence he offered to show that he did not knowingly kill a policeman, and the trial judge fully considered Clark's evidence for its weight. Contrary to the *Clark* dissenters, the trial judge did not "exclude"<sup>29</sup> Clark's evidence; and, contrary to the *Clark* majority and to Justice Breyer, the trial judge did not "restrict"<sup>30</sup> his evidence or "channel"<sup>31</sup> it away from the issue of "knowledge." The judge gave the evidence the full weight that he believed it possessed. If the judge had concluded that Clark had shown, by clear and convincing evidence that he thought he was shooting an alien rather than a human being, the judge would have acquitted Clark on the grounds, *inter alia*, that, despite his having killed a policeman, Clark did not "know" he was killing a policeman.

#### B. *The Genuine Issue in Clark*

Although *Clark* does not raise either of the issues that it purports to raise, it does raise a significant constitutional issue in its own right. And the Court resolved the issue *sub silencio* by affirming Clark's conviction. However, the Court does not appear to appreciate the magnitude of what it implicitly resolves.

The issue in *Clark* was not the constitutionality of Arizona's definition of insanity, or the sanctity of Clark's right to present evidence. The real issue was whether Arizona, having allowed Clark to introduce all the evidence he possessed regarding what he thought he was in fact doing when he shot his victim, could lawfully place the burden of persuasion on him to prove by clear and convincing evidence that, because of mental illness, he thought he was killing an alien rather than a human being.

As I will try to show in Part IV, Arizona's criminal-insanity statute effectively places the burden of persuasion on defendants who claim their states of mind resulted from mental illness to prove they did not know what they were in fact doing, regardless of the fact that Arizona otherwise places the burden of persuasion on the prosecution to prove beyond a reasonable doubt that persons charged with the offense *did* know what they were in fact doing. With respect to burdens of persuasion, Arizona effectively takes the following position:

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<sup>29</sup> *Clark*, 126 S. Ct. at 2744 (Kennedy, J., dissenting).

<sup>30</sup> *Id.* at 2730 n.36 (majority opinion).

<sup>31</sup> *Id.* at 2730 n.36.

- (1) The prosecution has the burden of proving all the elements of murder beyond a reasonable doubt, including the *mens rea* elements of “intending” or “knowing” that one is killing a police officer.
- (2) However, the prosecution can satisfy its burden by proving beyond a reasonable doubt the defendant possessed what, in anyone but the mentally ill, constitutes such “intent” or “knowledge”—thus creating a rebuttable presumption that a defendant who is mentally ill possessed such “intent” or “knowledge,” too.
- (3) A defendant who claims that by virtue of mental illness, he lacked such intent or knowledge may nevertheless prevail, provided that he proves it by clear and convincing evidence.<sup>32</sup>

The aforementioned burden of persuasion is a difficult one for defendants to sustain, and it may well have affected the trial judge’s assessment of Clark’s evidence. The real constitutional issue in *Clark* is whether a state may structure a defendant’s burden of persuasion in that way. More importantly, the Supreme Court implicitly *decided* that question by affirming Clark’s conviction. Unfortunately, the Court did not address the question in the context of its case law regarding presumptions and burdens of persuasion, because the Court did not realize what it was implicitly deciding.

### III. THE RELATIONSHIP BETWEEN *MENS REA* AND *M’NAGHTEN*

To understand why the Court misconceived the issues in *Clark*, one must appreciate the relationship between *mens rea* and *M’Naghten*. And to appreciate the latter relationship, one must understand why *M’Naghten* so quickly became the predominant test of insanity in the Anglo-American world.

The reason that *M’Naghten* swept the world of Anglo-American criminal law is that it does nothing very controversial. Indeed, to a significant degree *M’Naghten* simply makes explicit what would exist without it, by extending to the mentally ill the two defenses of *mistake of fact* and *mistake of law* that have always been possessed by the mentally healthy. Specifically, *M’Naghten*’s cognitive component provides a defense to persons who, because of mental illness, do not know the nature and quality of their conduct. Hence, it provides mentally ill persons with the same defense regarding mistakes of fact that mentally healthy persons nearly always possess—namely, the defense, “I did not know and, given my circumstances, I had no reason to know that I was in fact doing what the statute prohibits.” In addition, *M’Naghten*’s moral component provides a defense to persons who, because of mental illness, do not know that it is wrong to do what they may have realized they were in fact doing. It provides mentally ill persons

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<sup>32</sup> To compare this conceptualization of Arizona’s law with one that removes “intent” and “knowledge” as *elements* of the offenses and reinstates them as affirmative *defenses*, see *infra* text accompanying note 42.

with a defense mentally healthy persons often possess and ought to possess more widely—namely, the defense, “I did not know and, given my circumstances, I had no reason to know that the community that enacted the statute at hand regards it as wrong to do what I admit, arguendo, I knew I was in fact doing.”

To illustrate the extent to which *M’Naghten* extends to mentally ill persons defenses that mentally healthy persons already enjoy, imagine two cases involving a defendant named “David”: (1) “David-1” mistakenly kills a human being in the reasonable belief that he is shooting an animal, say because the victim is wearing a bear costume on the first day of bear-hunting season; (2) “David-2” kills a human being in the reasonable, but mistaken, belief that he has authority to do so, because a prosecutor has erroneously told David-2 that he has no duty to retreat if he is attacked in a public place.

David-1 (whose reasonable mistake is one of fact) and David-2 (whose reasonable mistake is one of law) both have defenses to unlawful homicide, and rightly so, because neither of them knew or had reason to know that he was doing anything that the people of the state wished to prohibit by means of criminal law. The significance of *M’Naghten* is that, narrowly construed,<sup>33</sup> it does for mentally ill persons what the two defenses of mistake of fact and law do for mentally healthy persons. Thus, *M’Naghten*’s cognitive component provides a defense to persons like Daniel M’Naghten and like the person Clark claimed to be, who, though they may know generally what the law prohibits, nevertheless do not know, and by virtue of their mental illnesses have reason not to know, that they are in fact doing what they may know the law generally prohibits. *M’Naghten*’s moral component, in turn, provides a defense to persons who, though they may know what they are in fact doing, nevertheless do not know, and by virtue of their mental illnesses have reason not to know, that the people of the state mean to prohibit such conduct by means of criminal law—say, because they believe in their insanity that an authority whom the people of the state accept has specifically authorized the conduct.

Now it might be thought that equating *M’Naghten* with traditional defenses of mistake of fact and law fails for four reasons: (1) mistakes of fact and law are often defenses for mentally healthy actors only if their mistakes are *reasonable*, while mentally ill actors possess defenses under *M’Naghten* merely by “not knowing” what they are doing, regardless of whether their not knowing is reasonable; (2) mentally healthy persons possess defenses only for mistakes of *law*, while mentally ill persons who know their conduct is contrary to law may possess defenses under *M’Naghten* if they do not know their conduct is *wrong*; (3) mentally healthy persons are sometimes held strictly liable for the facts of their conduct, while mentally ill persons under *M’Naghten* always possess a mistake of fact defense; and (4) mentally healthy persons are sometimes held strictly for the

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<sup>33</sup> I am not claiming judges and juries cannot interpret the language of *M’Naghten* more broadly than this but, rather, that this is what it necessarily means.

illegality of their conduct, while mentally ill persons under *M'Naghten* always possess a mistake of law defense.

Admittedly, these are genuine differences. However, they are largely a function of genuine differences between mentally healthy and mentally ill persons and, hence, are adaptations that are made in order to render traditional defenses of mistake of fact and law fully applicable to mentally ill persons. Let us consider these differences in order.

*The Reasonableness of Mistakes.* True, mistakes of fact are defenses to crimes of negligence by mentally healthy actors only if their mistakes are reasonable; and mistakes of law are typically defenses for mentally healthy actors only if they, too, are reasonable. And yet the contrary is true under *M'Naghten*; a mentally ill actor has a defense under *M'Naghten* if he did not know what he was doing, regardless of whether it was reasonable for him not to know.

The reason for this, however, is not that *M'Naghten* privileges the mentally ill, but that *M'Naghten* takes account of the distinctiveness of mental illness. "Reasonableness" is a normative measure of the heed and solicitude that society expects actors to pay to the interests of others.<sup>34</sup> Accordingly, a "reasonable mistake" is the kind of mistake that David-1 and David-2 made in killing their victims—namely, a mistake that, though devastating in its consequences, is nevertheless the product of appropriate attentiveness to the interests of others that the statute at hand seeks to protect. The reason that *M'Naghten*'s defenses are not conditioned upon "reasonableness" is *not* that *M'Naghten* implicitly exempts the mentally ill from all crimes of negligence. Rather, the very thing that causes mentally ill persons not to "know" the nature of their conduct also induces such ignorance and mistakes without any moral failing on their part—namely, mental illness to which they have fallen prey without fault on their part. *M'Naghten* recognizes that by virtue of their mental illness, conduct that *would* be unreasonable for others—that is, selfish, callous, or careless—is not so for the mentally ill. In short, *M'Naghten* does for crimes of negligence by mentally ill actors what would otherwise exist without it, provided that in making judgments of negligence, courts take into account circumstances over which defendants have no control.

*Ignorance of Conduct Being "Wrong."* True, a mentally healthy person who knows his conduct is illegal is rarely entitled to claim in his defense that he did not know it was *wrong*. And, yet, the contrary is true under *M'Naghten*: under *M'Naghten*, properly understood, a mentally ill person who knows his conduct is illegal may nevertheless claim in his defense that he did not know it was wrong.

Again, however, the reason for this is not that *M'Naghten* privileges the mentally ill, but that *M'Naghten* takes account of the distinctiveness of the

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<sup>34</sup> See Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 331 (2006).

mentally ill in order to treat them equally with mentally healthy persons. In reality, the law sometimes *does* excuse mentally healthy persons who know their conduct is illegal on the ground that it was reasonable for them to believe that the people of the state did not wish to punish their conduct.<sup>35</sup> And the law is right to do so. However, the reason the law usually requires mentally healthy persons to act in accord with what they believe the law to be is not that the law holds the mentally healthy to a different standard than the mentally ill. Rather, it is that by virtue of knowing what the law is, mentally healthy persons almost invariably know—or, at least, ought to know—what the people of the community that enacted the law expect of them. It is precisely that inference—which is so natural in most people—that may elude the mentally ill. By holding the mentally ill to knowledge of what is wrong, the law requires no less than what it requires of the mentally healthy—the difference being that by knowing that conduct is *illegal*, mentally healthy persons almost invariably also know that it is *wrong*.

*Strict Liability with Respect to Facts.* True, the law sometimes punishes mentally healthy actors even for reasonable mistakes of fact—namely, when the law makes persons strictly liable for facts—while, in contrast, *M’Naghten* excuses mentally ill actors for mistakes of fact, even with regard to strict liability offenses. This discrepancy does not obtain under the Model Penal Code that abolish strict liability with respect to facts.<sup>36</sup> The discrepancy does obtain, however, when jurisdictions impose liability without fault upon mentally healthy actors, while inconsistently exonerating mentally ill actors under *M’Naghten* for lacking fault. The answer to this discrepancy, however, is not to question *M’Naghten*, but to heed the standard view of modern criminal law scholars by grounding criminal offenses on fault with respect to facts. Ironically, with respect to the principle of “no punishment without fault,” *M’Naghten* reveals greater prescience in addressing the mentally ill than many modern penal codes display in addressing the mentally healthy.

*Strict Liability with Respect to Law.* True, nearly all jurisdictions hold mentally healthy persons to the rule that “ignorance of the law is no excuse,”<sup>37</sup> while, in contrast, *M’Naghten* excuses ignorance of the law in mentally ill persons. Some of this apparent discrepancy is more specious than real, because in purporting to apply the rule that “ignorance of the law is no excuse,” some courts are actually applying the rule that “*unreasonable* ignorance of the law is no excuse.” Nevertheless, it does indeed happen that courts hold mentally healthy persons strictly liable for the illegality of their conduct, despite their conscientious

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<sup>35</sup> “Desuetude” provides a defense to persons who, though they knew what the law *says*, reasonably believe that the law as written does not reflect community values. See generally Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006).

<sup>36</sup> See MODEL PENAL CODE § 213.6(1) (1962) (sexual intercourse with a girl “under 10”).

<sup>37</sup> But see 9 GUAM CODE Ann. tit. 9, § 7.55 (2006).

efforts to behave lawfully. However, the answer to this discrepancy between “ignorance of the law is no excuse” and *M’Naghten* is not to question *M’Naghten* but to heed the standard view of modern criminal law scholars that the defense of “ignorance of the law” ought to be enlarged. Again, with respect to the principle of “no punishment without fault,” *M’Naghten* reveals greater prescience in addressing the mentally ill than many modern penal codes display in addressing the mentally healthy. No person ought to be punished for doing what he reasonably believes the people of the state regard as lawful.

I will not say more here about how *M’Naghten* mimics the two defenses of mistake of fact and law, because I have written about it elsewhere<sup>38</sup> and because none of the aforementioned distinctions are relevant to *Clark*. After all, Clark did not claim that he knew what he was in fact doing but did not know that doing such things was *illegal* or *wrong*. Nor did he claim that he made a *reasonable* mistake with respect to a crime of *negligence*. Rather, he claimed that he did not possess the *mens rea* of “knowledge” required by the Arizona first-degree murder statute, because, by virtue of his mental illness, he mistakenly thought he was killing an alien rather than a human being.

In sum, with respect to the particular claim that Clark made, *M’Naghten*’s cognitive component—which the Arizona statute implicitly subsumes in its wording of *M’Naghten*’s moral component—reaffirms the defense of mistake of fact that would exist without it. Evidence under *M’Naghten*’s cognitive component is mistake of fact evidence, and by virtue of satisfying *M’Naghten*’s cognitive component, it negates any *mens rea* requirement of “knowledge.”<sup>39</sup>

#### IV. ARIZONA’S BURDEN OF PERSUASION REGARDING MISTAKES OF FACT RESULTING FROM MENTAL ILLNESS

I stated earlier that the constitutional issue in *Clark* is Arizona’s burden of persuasion regarding the absence of *mens rea*—not Clark’s right to present evidence. Now that we have analyzed the relationship between *M’Naghten* and the *mens rea* of homicide, we can appreciate three things: (1) that the issue in *Clark* is exclusively a matter of burdens of persuasion; (2) why the Court mistakenly thought otherwise; and (3) how the Court should have resolved the issue.

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<sup>38</sup> See Westen, *supra* note 28; Peter Westen, *Two Rules of Legality in Criminal Law*, 25 LAW & PHIL. (forthcoming 2006).

<sup>39</sup> Although “intent” and “knowledge” both suffice for murder in Arizona. *M’Naghten* explicitly negates knowledge, and by doing so, it implicitly negates purpose in all persons, like Eric Clark, whose purposes are based on belief. ALAN WHITE, MISLEADING CASES 49 (1991).

A. Exclusively a Matter of Burdens of Persuasion

Arizona argued that Clark's evidence of psychosis had nothing to do with whether he possessed the *mens rea* of "knowledge" required for murder.<sup>40</sup> In turn, the Court concluded that Clark's alleged psychosis was "relevant" to whether he had knowledge and, yet, was also "different" from it.<sup>41</sup> Both groups were mistaken. Clark's evidence that he believed he was killing an alien rather than a human being had *everything* to do with whether he possessed the *mens rea* of knowledge because, if true, it was the simple and complete negation of such knowledge.

The real question is whether Arizona could require Clark to bear the burden of proving the aforementioned negation of knowledge. To see why, imagine a hypothetical state of "Landia":

Landia

The law of "Landia" is identical in every respect to the law of Arizona, with one exception. The exception is that, in contrast to Arizona (which requires that a defendant show by clear and convincing evidence that because of mental illness he *did not know* his act was wrong), Landia requires the prosecution to prove beyond a reasonable doubt that despite his mental illness, the defendant *did know* his act was wrong. Whereupon a case arises in Landia that is identical in evidence to what Clark claimed his case to be—namely, a case in which the defendant's evidence of mental illness raises a reasonable doubt that he knew he was killing a human being, but does not prove by clear and convincing evidence that he did not know he was killing a human being.

What is the trial judge in Landia obliged to find? The answer is plain. The judge does not have to worry about whether, in addition to bearing upon insanity, the defendant's evidence also bears upon the elements of the offense, because the prosecution's burden of persuasion is the same with respect to elements and defenses. Instead, the judge will be obliged to make two identical rulings, one regarding criminal insanity and the other regarding *mens rea*. The judge will be obliged to make something like the following findings:

- (1) *Insanity*—the prosecution failed to prove beyond a reasonable doubt that the defendant knew the nature and quality of his act (i.e., that he was killing a human being) and, hence, knew that his act was wrong; and,

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<sup>40</sup> *Clark*, 126 S. Ct. at 2730 n.38.

<sup>41</sup> *Id.* at 2731 (insanity is "relevant" to *mens rea*); *id.* at 2735 (yet insanity is also "different" from *mens rea*).

(2) *Mens rea*—the prosecution also failed to prove beyond a reasonable doubt what the murder statute requires, i.e., that he “knowingly” killed a human being.

Now assume that a case arises in Arizona that is identical in every respect to *Clark*—say, “*Clark-II*”—with one exception. The exception is that the trial judge concludes that Eric Clark II has, indeed, proved by clear and convincing evidence that he *did not* know he was killing a human being—and, hence, that Clark II *did not* know his act was “wrong.” Given that the judge is required to make findings of fact, what will the judge say about Arizona’s allegation that Clark II possessed the *mens rea* of knowingly killing a human being? Will the judge rule that for purposes of the mentally ill, murder in Arizona is a strict liability offense to which *mens rea* requirements of “intent” or “knowledge” do not apply? Surely not, for the Arizona insanity statute does not *eliminate* requirements of *mens rea*. Alternatively, will the judge, having ruled in connection with the insanity defense that Clark II *did not* know he was killing a human being, rule in connection with the *mens rea* requirement, that Clark II *did* know he was killing a human? Surely not, for that would be a contradiction.<sup>42</sup> Rather, just as the judge ruled that Clark II lacked knowledge for purposes of the insanity defense, he will rule that Clark II lacked knowledge for purposes of the element of the offense.

Finally, let us contrast *Clark* itself with the two previous hypotheticals—assuming, as we must, that Clark raised a reasonable doubt that he knew he was killing a human being but did not prove by clear and convincing evidence that he did not know he was killing a human being. The difference between *Clark* and *Clark II* is *not* that the trial judge in *Clark II* considered the defendant’s evidence on the issue of lack-of-knowledge while the judge in *Clark* did not. On the contrary, given that the two cases differ only in the *amount* of evidence regarding the defendant’s mental state, and given that the judge in *Clark II* considered it on the issue of lack-of-knowledge, the judge in *Clark* must have, too, even though he did not realize it. By the same token, the difference between *Clark* and “Landia” is not that the defendant’s evidence was admissible on the issue of knowledge in “Landia” and not in *Clark*, but that a reasonable doubt sufficed in the former and not in the latter.

Now, admittedly, the Arizona statute *says*—as the trial judge also said—that evidence such as Clark’s is inadmissible on the issue of *mens rea*. Yet we can see from *Clark-II* that such statements cannot be taken seriously. Rather, the most one can say is that such evidence is inadmissible *until* a defendant has introduced enough of such evidence to satisfy his burden of persuasion and that the evidence then becomes not only admissible, but *dispositive*. Saying that, however, is merely a circuitous way of saying that Arizona does, indeed, allow a defendant to

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<sup>42</sup> See *id.* at 2724 n.26 (acknowledging that having found insanity, a judge in Arizona might be justified in finding a lack of *mens rea*).



introduce the evidence but *does not* permit the evidence to affect the verdict until it satisfies the defendant's burden of persuasion.

In sum, the reason that the judge convicted Clark was not that Arizona prevented Clark from introducing evidence on the issue of "knowledge," but that, in order to effectuate its legislative decision to place the burden of persuasion on defendants with respect to the *mens rea* consequences of insanity, Arizona implicitly abolished any requirement that the prosecution bear the burden of proving "knowledge" beyond a reasonable doubt in cases in which defendants allege that they lacked such knowledge because of mental illness.

### B. *Why the Court Missed the Issue*

The Court missed the real issue in *Clark* because it misunderstood what I discussed in Part III—namely, the normative relationship between *mens rea* and *M'Naghten*. The Court mistakenly thought that the two issues were essentially "different,"<sup>43</sup> when, in reality, the latter simply negates the former in cases such as *Clark*. The Court mistakenly assumed that the cognitive component of *M'Naghten* comes into play to "excuse" a defendant who has otherwise been adjudicated to be "responsible,"<sup>44</sup> when, in reality, *M'Naghten's* cognitive component does for the mentally ill what mistake of fact does for the mentally healthy: it negates responsibility.

Not realizing that *mens rea* asserts what *M'Naghten* negates, the Court mistakenly thought that it could have it both ways. The Court mistakenly assumed that it could—without contradicting itself—simultaneously (1) reaffirm *In re Winship*,<sup>45</sup> *Mullaney v. Wilbur*,<sup>46</sup> and *Sandstrom v. Montana*<sup>47</sup> and (2) reaffirm assertions in *Oregon v. Leland*<sup>48</sup> and *Dixon v. United States*<sup>49</sup> that defendants can be required to bear the burden of persuasion on insanity defenses (presumably including *M'Naghten*). The Court mistakenly thought that without contradicting itself, it could simultaneously declare that (1) the "presumption of innocence" places the burden on the prosecution to prove "knowledge" beyond a reasonable doubt and (2) the "presumption of sanity" places the burden on the defendant to prove *lack* of knowledge by clear and convincing evidence.

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<sup>43</sup> *Id.* at 2732.

<sup>44</sup> *Id.* at 2731 (*M'Naghten* "excuse[s]" persons who have been adjudicated to be "responsible").

<sup>45</sup> 397 U.S. 358 (1970).

<sup>46</sup> 421 U.S. 684 (1975).

<sup>47</sup> 442 U.S. 510 (1979).

<sup>48</sup> 343 U.S. 790 (1952).

<sup>49</sup> 126 S. Ct. 2437 (2006).

### C. What the Court Should Have Done

We have seen what the Court *did* by affirming Clark's conviction: It implicitly allowed the states to shift the burden of persuasion to defendants in insanity cases to disprove an issue of *mens rea* that the prosecution must otherwise prove beyond a reasonable doubt. What the Court *should have done* was address the constitutional standard that governs the allocation of burdens of proof in criminal cases.

This is not the place to discuss the much-mooted question as to what the standard ought to be.<sup>50</sup> However, two extreme proposals are: (1) the prosecution is always required to prove beyond a reasonable doubt any issue on which a defendant's guilt depends; and (2) the prosecution is not required to prove such issues beyond a reasonable doubt unless the state defines them as "elements" as opposed to "defenses." Neither proposal recognizes the complexity that exists. The first proposal ultimately prejudices by discouraging jurisdictions from recognizing defenses that are mildly controversial.<sup>51</sup> The second renders proof beyond a reasonable doubt hostage to legislative changes that are wholly formal in nature.<sup>52</sup>

Now it might be thought that the Court could have resolved *Clark* by allowing Arizona to do what Arizona, in its brief, endeavored to do—namely, to recharacterize what constitutes the "elements" of and "defenses" to murder under its law. After all, Arizona has undisputed authority to characterize its law in any way it wishes, provided that the characterization leaves the law's substance intact. And Arizona's law *can* be characterized in a way that is consistent with statements in *Mullaney* and *Sandstrom* that the prosecution must prove the "elements" of offenses beyond a reasonable doubt without the aid of rebuttable presumptions. Thus, rather than characterize Arizona law as consisting of a rebuttable presumption of the element of "knowledge" (as I previously characterized it),<sup>53</sup> Arizona can rightly claim that its law consists of the following:

Elements of Murder. "Murder" under Arizona law contains a *mens rea* requirement of "intent" or "knowledge," *but only in those who are sane*. It contains no *mens rea* requirements at all for persons who are insane.

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<sup>50</sup> See RICHARD BONNIE ET AL., CRIMINAL LAW 1027–48 (2d ed. 2004).

<sup>51</sup> England, for example, has enacted a liberal rule of "diminished responsibility" by which it reduces murder to manslaughter whenever a person suffers from an "abnormality of mind" that "substantially impairs his mental responsibility," but England was only willing to do so only because it could place the burden of persuasion on the defendant. Homicide Act, 1957, 5 & 6, Eliz. 2, c. 11, § 2 (Eng.).

<sup>52</sup> Thus, it would permit a state to define "murder" as consisting of (1) the element of an actor's "committing an act," plus (2) the defenses of his (a) not having killed a human being, or (b) not having done so with malice aforethought.

<sup>53</sup> See *supra* text accompanying note 28.

Affirmative Defenses. It is nonetheless a defense to murder to show by clear and convincing evidence that, because of mental illness, a person did not “know” that he was in fact killing a human being.

Contrary to the dissent,<sup>54</sup> Arizona clearly has authority to characterize its law in this way (the characterization being consistent with the law’s substance). And in contrast to the previous characterization—which violates *Mullaney* and *Sandstrom* by relieving the prosecution of the burden of proving an “element” beyond a reasonable doubt—this characterization does not violate *Mullaney* and *Sandstrom* because this characterization does not give the prosecution the benefit of a rebuttable presumption with respect to any “element.” However—and this is the rub!—the reason this characterization is consistent with Arizona law is that the difference between it and the previous characterization is *entirely formal*. Both characterizations are faithful to the substance of Arizona law. Yet paradoxically, one is constitutional, and the other is not.

The answer to the paradox lies in recognizing the conceptual flaw on which the Court’s statements regarding burdens of persuasion rest. The Court’s statements regarding burdens of persuasion are all tied to what a state declares the “elements” of its offense to be. Yet because the distribution of *elements* and *defenses* is entirely malleable, depending entirely upon how states choose to draft and characterize their offenses, the Court’s constitutional rules are themselves entirely malleable. The Court had an opportunity in *Clark* to give these rules the substance that *Patterson v. New York*<sup>55</sup> concedes they must possess if they are to have any meaning. But the Court let the opportunity slip.

In the end, no constitutional standard regarding burdens of persuasion will possess any respect, unless it takes account of the four factors that the *Clark* Court rightly emphasized in the course of wrongly dwelling on the defendant’s right to present evidence: (1) the strength of the state’s desire to relieve the prosecution of the burden of proving beyond a reasonable doubt an issue on which a defendant’s guilt depends; (2) the degree to which the state reduces the prosecution’s burden of persuasion or shifts it to the defense; (3) the legitimacy of the state’s skepticism regarding whether events on which such defenses are based ever actually obtain and/or regarding the probative value of the evidence by which they are proved; and (4) the parties’ relative access to such evidence.

#### V. THE COURT’S PECULIAR SUA SPONTE DISTINCTION

The trial judge in Arizona purported to exclude *all* of Clark’s evidence that bore upon his state of mind at the time of the shooting. The United States Supreme

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<sup>54</sup> *Clark*, 126 S. Ct. at 2738.

<sup>55</sup> 432 U.S. 197, 210 (1979) (emphasizing that “there are obviously constitutional limits beyond which the States may not go in [shifting burdens of persuasion by redefining elements of offenses]”).

Court upheld the exclusion in so far as it consisted of opinion evidence that either referred to Clark's "mental illness" or described his "mental incapacity," while ruling that Clark had waived his constitutional objections to the remaining evidence.<sup>56</sup> Nevertheless, the Court implied that if Clark had not waived it, he might have validly claimed that Arizona had wrongly excluded the part of his evidence that consisted of eye-witness "observations" by family members and acquaintances about what he was thinking at the time of the shooting.<sup>57</sup>

The Court not only fashioned this constitutional distinction out of whole cloth, but also failed to explain what *motivated* it. My guess is that, having framed the case in terms of a right-to-present-evidence, the Court felt that, while it could justify excluding testimony that consists of contested "judgments" or "opinions" regarding mental illness and capacity, it could not justify excluding testimony that consists of run-of-the-mill, eyewitness "observations."<sup>58</sup> If that is what motivated the Court, however, the Court is mistaken.

The Court's mistake is to conceptualize *Clark* in terms of the exclusion and admission of evidence rather than in terms of the burden of persuasion. For despite what the trial judge claimed he was doing, his actions consisted of, first, admitting all of Clark's evidence and, then, finding that Clark failed to produce *enough* evidence to prove clearly and convincingly that because of mental illness he mistakenly believed that he was killing an alien rather than a human being.

What is significant, therefore, is not whether testimony comes from a family member or acquaintance or whether it explicitly refers to "mental illness" or describes a "capacity." Rather, what is significant is *why* the defense is offering evidence. If the defense offers evidence to show that Clark had an alibi or that he lacked "knowledge" for reasons *other* than mental illness, then the evidence should be considered under the prosecution's burden of persuasion, regardless of whether it consists of opinion evidence or eyewitness observation. If, however, the defense offers evidence for the reason Clark offered it (i.e., to show that he thought, psychotically, that he was killing an alien rather than a human being), then the testimony must be considered under the defendant's burden of persuasion—regardless of whether it consists of opinion or eyewitness testimony and regardless of whether the witnesses are experts or laypersons.<sup>59</sup>

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<sup>56</sup> *Clark*, 126 S. Ct. 2724–27.

<sup>57</sup> *Id.* at 2728–29.

<sup>58</sup> *Id.* at 2735 (contrasting "opinions" and "judgments" with "observational evidence").

<sup>59</sup> Consider the task that the *Clark* Court would impose on the states; the task of instructing a jury—consistently with *Cool v. United States*, 409 U.S. 100 (1972)—that with respect to a defendant's eye-witness testimony that he lacked knowledge that he was killing a human being, the prosecution has the burden of proving beyond a reasonable doubt that the defendant *possessed* such knowledge, but that with respect to a defendant's opinion evidence that he lacked knowledge that he was killing a human being, the defendant has the burden of proving by clear and convincing evidence that he *lacked* that very same knowledge.

## VI. CONCLUSION

The United States Supreme Court is more comfortable with criminal procedure than substantive criminal law. *Clark* raised an important issue of criminal procedure regarding burdens of persuasion. Unfortunately, the Court failed to identify the procedural issue that *Clark* raises because the Court failed to understand a substantive issue of criminal law—namely, the relationship between the *mens rea* of “knowledge” and the mental states that *M’Naghten* negates.

## POSTSCRIPT

I agree with nearly everything Professor Ron Allen writes, and I have learned much, too, from Professor Alan Michaels’s comments on my essay. I have several comments.

1. Readers may come away thinking that Ron Allen and I disagree about *Clark*’s treatment of what Ron calls the “lousy” evidence that is constitutive of showings of criminal insanity. For Ron says, “Unlike Professor Westen, I think the Court actually did what it purported to do, which is to hold that the exclusion of evidence in this case was not sufficiently unreasonable or ill justified to amount to a due process violation.”

Yet in reality I think Ron and I agree on what the Court did and did not do. Thus, we agree that the Court stated in dictum—but clearly did not hold—that due process would have permitted Arizona to do something that Arizona did not presume to do, namely, to exclude altogether any opinion evidence that Eric Clark offered regarding his insanity or mental incapacity, whether Clark offered it on the issue of *mens rea* (on which the prosecution bore the burden of persuasion) or the issue of criminal insanity (on which he bore the burden of persuasion).

Further, I believe that Ron and I agree on what the Court actually held but did not justify by reference to precedent—namely, (1) that Arizona, having allowed Eric Clark to introduce evidence of mental illness-induced lack of knowledge that was relevant to *mens rea* and criminal insanity alike, could constitutionally require Clark to bear the burden of proving such lack of knowledge by clear and convincing evidence; and (2) that what justified Arizona in placing the burden of persuasion on Clark was the “lousy” nature of criminal insanity evidence.

2. Alan Michaels questions how I conceptualize Arizona law. Alan is inclined to accept Arizona’s and the *Clark* Court’s conceptualization of how Arizona law operates. Thus, Alan is inclined to say that the trial judge “excluded” Eric Clark’s evidence on the issue of *men rea* and “channeled” it to the issue of his criminal insanity instead, thereby raising a question whether Arizona abridged Clark’s constitutional right under *Chambers v. Mississippi* to present evidence in his defense.

In contrast, I believe that Arizona's law can be conceptualized entirely in terms of burdens of persuasion without any reference to the admissibility of evidence. Moreover, I think *Clark* ought to be so conceptualized for two reasons: (1) conceptualizing *Clark* in terms of evidence treats *Clark* as authority for doing something that Arizona did not deign to do, namely, to prohibit Eric Clark from introducing evidence that was relevant to his innocence for fear that the evidence was unreliable; and (2) failure to conceptualize *Clark* in terms of burdens of persuasion conceals how significantly *Clark* alters the landscape regarding such burdens. In essence, Arizona law operates no differently than if the Arizona legislature had explicitly said:

A defendant may introduce evidence to show that because of mental illness he lacked the "intent" or "knowledge" to kill required by the statute, but he shall not prevail unless he makes such a showing by clear and convincing evidence.

Alan asks the intriguing question: How would the trial judge have treated Eric Clark's evidence if Clark had pled 'not guilty' *without* entering a plea of insanity? Would the trial judge have allowed Clark to use the evidence to negate the *mens rea* of 'knowledge'? If not—and surely not!—doesn't it follow that the trial judge must have disallowed Clark from using the evidence to negate *mens rea* in Clark's actual case?

I agree with Alan that the trial judge would have barred Clark from introducing his evidence if Clark had failed to plead insanity. The reason, however, has nothing to do with evidentiary standards of admissibility and everything to do with burdens of persuasion. To allow Clark to introduce the evidence to negate an issue, i.e., "knowledge," on which the prosecution had the burden of persuasion would have negated Arizona's desire that defendants prove the very converse, i.e., lack of knowledge, by clear and convincing evidence.<sup>60</sup>

That is not so, however, once Clark pleads insanity. Clark then can introduce his evidence—thereby simultaneously negating the "knowledge" required by *mens rea* and establishing the lack of knowledge required by *M'Naghten*—within a context in which he bears the burden of persuasion that Arizona intends for him. In that respect, Clark's actual case is no different from Alan's hypothetical case, provided that in Alan's hypothetical case Clark agreed to bear the burden of negating the "knowledge" of *mens rea* by clear and convincing evidence. In that event, the judge ought to say, "Go ahead, Mr. Clark, and introduce your evidence on *mens rea*, provided you give pretrial notice of your intent to do so. For then you're not using a so-called 'offer of evidence' as a disingenuous ploy to subvert your burden of persuasion."

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<sup>60</sup> See *Clark v. Arizona*, 126 S. Ct. 2709, 2727 (2006).

3. Alan, still inclined to conceptualize *Clark* as an evidentiary “exclusion” or “restriction,” raises another question. Alan questions my claim that in the hypothetical event that Clark had *sustained* his burden of persuasion, the trial judge would have made two findings of fact: (1) that by virtue of Clark’s lacking “knowledge” that he was killing a human being, Clark did not know his act was “wrong” for purposes of *M’Naghten*; and (2) that by virtue of Clark’s lacking “knowledge” that he was killing a human being, Clark did not have the *mens rea* required by the statute. Alan doubts whether the judge would have made finding #2, because, Alan says, doing so would have prevented the trial judge from ordering the civil commitment that Arizona clearly intends for persons who are adjudicated “guilty unless insane” pursuant to findings of “guilty unless insane.”

I am less confident than Alan about what Arizona law prescribes in the event a judge finds #1 and #2. Alan assumes that Arizona would treat a finding of “not guilty” under #2 as *trumping* a finding of “guilty unless insane” under #1. In contrast, knowing that Arizona intends civil commitment for anyone found “guilty unless insane,” I assume the opposite—namely, that a finding of “guilty unless insane” under #1 trumps a finding of “not guilty” under #2, at least for purposes of civil commitment.

