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Criminal Law: Subjective Inquiry into a Defendant's State of Mind: Should Psychiatric Expert Testimony Be Allowed to Disprove Mens Rfai—State V. Anderson, 789 N.w.2d 227 (minn. 2010)

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**CRIMINAL LAW: SUBJECTIVE INQUIRY INTO A
DEFENDANT'S STATE OF MIND: SHOULD PSYCHIATRIC
EXPERT TESTIMONY BE ALLOWED TO DISPROVE
MENS REA?—STATE V. ANDERSON, 789 N.W.2D 227
(MINN. 2010).**

Brittany E. Bachman[†]

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In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind.¹

I. INTRODUCTION

“Murder is the unlawful killing of a human being with malice aforethought.”² When accused of first-degree murder in Minnesota, the prosecution must prove that a defendant physically committed the act *and* that he or she premeditated³ and intended⁴ to kill.⁵ The jury is asked to look into the defendant’s subjective state of mind and determine if the prosecution has proven its case beyond a reasonable doubt.⁶ Conversely, defendants have a constitutional right to present relevant evidence refuting the prosecution’s allegations.⁷ Nonetheless, this constitutional right is restricted by the court’s power to deny the admission of certain evidence.⁸ With this power, Minnesota courts hold that psychiatric testimony cannot be used to disprove a defendant’s subjective state of mind during trial.⁹

1. 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* 164 (15th ed. 1993).

2. 18 U.S.C. § 1111(a) (2006).

3. “[P]remeditation’ means to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission.” MINN. STAT. § 609.18 (2010).

4. “‘Intentionally’ means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” *Id.* § 609.02, subdiv. 9(3).

5. A person is guilty of first-degree murder and will be sentenced to life in prison if he or she premeditated and intended to kill another. *Id.* § 609.185(a)(1). A person is guilty of second-degree murder and will be sentenced to prison for no more than forty years if he or she intended to kill without premeditation. *Id.* § 609.19, subdiv. 1(1).

6. See 10 STEPHEN E. FORESTELL & WAYNE A. LOGAN, *MINNESOTA PRACTICE SERIES: JURY INSTRUCTION GUIDES* § 11.02 (5th ed. 2010).

7. See U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; MINN. CONST. art. I, §§ 6–7 (amended 1988); MINN. R. EVID. 402; *Washington v. Texas*, 388 U.S. 14, 17–19 (1967) (“[The] right to offer the testimony of witnesses . . . is in plain terms the right to present a defense . . . [and] a fundamental element of due process of law.”); *State v. Graham*, 764 N.W.2d 340, 349 (Minn. 2009) (“Both the United States Constitution and the Minnesota Constitution provide a defendant with a fundamental constitutional right to present a full defense.”).

8. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MINN. R. EVID. 403.

9. See *State v. Peterson*, 764 N.W.2d 816, 821–22 (Minn. 2009); *State v. Bird*,

Recently, in *State v. Anderson*, the Minnesota Supreme Court was asked to determine whether barring psychiatric testimony about a defendant's Asperger's Disorder (Asperger's)¹⁰ denies a defendant his constitutional right to due process.¹¹ Michael Anderson was charged with premeditated and intentional murder.¹² At trial, Anderson attempted to offer psychiatric evidence of Asperger's to explain his odd mannerisms, uncontrolled body movements, and brain function.¹³ His motion to admit this psychiatric evidence was denied.¹⁴ On appeal, Anderson argued the denial of this testimony greatly hindered his ability to challenge the State's allegations that Anderson intended and premeditated murder.¹⁵ However, the Minnesota Supreme Court refused to budge from years of existing case law establishing that psychiatric testimony is irrelevant to the legal definitions of intent and premeditation.¹⁶

This note first examines the history of criminal mens rea¹⁷ and the evolution of evidentiary rules relating to mental culpability in

734 N.W.2d 664, 677–78 (Minn. 2007); *State v. Griese*, 565 N.W.2d 419, 425 (Minn. 1997); *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992); *State v. Brom*, 463 N.W.2d 758, 762 (Minn. 1990); *State v. Jackman*, 396 N.W.2d 24, 29 (Minn. 1986); *State v. Brown*, 345 N.W.2d 233, 238 (Minn. 1984); *State v. Bouwman*, 328 N.W.2d 703, 705–06 (Minn. 1982); *State v. Torkelson*, 404 N.W.2d 352, 356 (Minn. Ct. App. 1987).

10. Asperger's is a form of autism that is characterized by "severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities . . ." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 80 (4th ed. 2000). "Perhaps the simplest way to understand Asperger's syndrome is to think of it as describing someone who perceives and thinks about the world differently [than] other people." TONY ATTWOOD, THE COMPLETE GUIDE TO ASPERGER'S SYNDROME 12 (2007).

11. *State v. Anderson*, 789 N.W.2d 227, 234 (Minn. 2010).

12. *Id.* at 232.

13. *Id.* at 235.

14. *Id.* at 233.

15. See Appellant's Brief and Addendum at 19–20, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

16. *Anderson*, 789 N.W.2d at 237. "Existing case law provides that a defendant's due process rights are not violated by exclusion of psychiatric testimony . . ." *Id.* (citing *State v. Peterson*, 764 N.W.2d 816, 822 (Minn. 2009); *State v. Bird*, 734 N.W.2d 664, 673 (Minn. 2007); *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992); *State v. Brom*, 463 N.W.2d 758, 763–64 (Minn. 1990); *State v. Jackman*, 396 N.W.2d 24, 29 (Minn. 1986)).

17. "Mens rea" is the state of mind that the prosecution must prove a defendant had when committing a crime; it is an essential element of every crime at common law. BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).

criminal law.¹⁸ It then details the facts and arguments made in *Anderson*, focusing on the Minnesota Supreme Court's holding.¹⁹ An analysis of the decision then follows.²⁰ Finally, this note concludes by asserting that current Minnesota law barring psychiatric testimony is based on outdated and impractical philosophies on mental health, and likely violates a defendant's constitutional right to due process.²¹

II. HISTORY

The law has long established that murder consists of two elements: a physical wrongful deed (the "actus reus") and a guilty mind that produces the act (the "mens rea").²² "The mens rea doctrine is most commonly associated with the Latin maxim *actus non facit reum nisi mens sit rea*: an act does not make one guilty unless his mind is guilty."²³ The concept of mens rea originated in 597 A.D. with St. Augustine and his writings on evil motive.²⁴ In the thirteenth century, the leaders of England's legal system embraced St. Augustine's ideas that the evil intent of a person was the most important factor in all crimes.²⁵

By the eighteenth century, an offender's evil motive and vicious will became essential components in English criminal law.²⁶

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

22. See 21 AM. JUR. 2D *Criminal Law* § 117 (2011).

23. Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 463 (2008) (citing Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932)) (stating similarly that an "evil mind" is required for a crime).

24. See *id.* at 463. St. Augustine discussed the necessity of a guilty mind in relation to perjury by stating that "one commits perjury when he knowingly states what he believes to be false, even though he is in fact mistaken and his statement is true." Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 355 (1966).

25. See Gilles Phillips & Woodman, *supra* note 23, at 464. Henry Bracton, an English judge at the time, wrote:

[W]e must consider with what mind . . . or with what intent . . . 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

Sayre, *supra* note 23, at 985 (quoting BRACTON DE LEGIBUS ET CONSEQUETUDINIBUS ANGLIA I01b).

26. See Gilles Phillips & Woodman, *supra* note 23, at 466 (citing Kelly A.

In 1769, England recognized that lunatics suffered from a deficiency in will that rendered them unable to tell right from wrong.²⁷ This lack of free will prevented the courts from punishing these offenders.²⁸ England's first case that excused an insane offender from criminal liability established a rule of law that is still present in English and American courts today—the *M'Naughten* rule.²⁹

A. *The M'Naughten Rule*³⁰

In 1843, Daniel M'Naghten attempted to assassinate England's prime minister by discharging a firearm into the prime minister's carriage.³¹ At trial, the court found that M'Naghten suffered from paranoid delusions and found him not guilty by reason of insanity.³² For the first time, England recognized that it was a valid defense if the defendant could prove he did not possess the mental state necessary to appreciate the wrongfulness of his conduct.³³ M'Naghten's case resulted in a standardized insanity test, which many American jurisdictions implemented in their own criminal laws.³⁴

In 1885, Minnesota codified its version of the *M'Naughten* rule.³⁵ Similar to England's law, Minnesota's statute stated that a

Swanson, Note, *Criminal Law: Mens Rea Alive and Well: Limiting the Public Welfare Offenses—In Re C.R.M.*, 28 WM. MITCHELL L. REV. 1265, 1266–67 (2002).

27. Gilles Phillips & Woodman, *supra* note 23, at 467 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1769) (cited with approval in *Atkins v. Virginia*, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting))).

28. *Id.*

29. See Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R.4TH 526, § 3(a) (1981).

30. The spelling of this name may vary. "M'Naghten" was the name of the defendant, while the rule has been spelled as "M'Naughten" or "McNaughten."

31. M'Naghten believed there was a conspiracy by the Prime Minister to kill him. See *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.) 719, 10 Clark & Fennelly 200, 200–01; Judith A. Northrup, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797, 797 (1983). In his attempt to kill the prime minister, he actually killed the prime minister's secretary, who was riding in the carriage at the time. *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.) 719, 10 Clark & Fennelly 200, 200–01.

32. See *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.) 720, 10 Clark & Fennelly 200, 202.

33. See *id.* 8 Eng. Rep. 718 (H.L.) at 720–21, 10 Clark & Fennelly at 205.

34. See Gee, *supra* note 29, § 3(a).

35. As codified in the Minnesota Penal Code, Minnesota's *M'Naughten* rule stated:

A person is not excused from criminal liability as an idiot, imbecile,

defendant would not be liable for a crime if he did not know the nature and quality of the act or he did not know the act was wrong.³⁶ Minnesota first applied its newly drafted statute four years later in *State v. Scott*.³⁷ Early on, beginning in 1889, Minnesota established that expert witnesses were not to testify on whether a defendant had insane delusions when he or she committed murder.³⁸

In 1960, many jurisdictions criticized the practicality of the *M'Naughten* rule.³⁹ Yet Minnesota courts refused to change the rule. Minnesota courts stated that because the rule was consistently used in the past,⁴⁰ they would not modify the rule unless the legislature chose to do so.⁴¹ The legislature refused to change the *M'Naughten* rule. In 1972, however, the Minnesota Supreme Court modified its rules of evidence when the defendant raised a defense of insanity.⁴² It held that when the issue of a defendant's sanity is raised, evidence could be received freely so that the fact finder could take account of the person and his or her mind as a whole.⁴³

lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either (1) not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong.

State v. Scott, 41 Minn. 365, 369, 43 N.W. 62, 63 (1889) (quoting MINN. PENAL CODE § 19 (1885)).

36. *Id.*

37. A man was charged with second-degree intentional murder after killing his wife. *See id.* at 366, 43 N.W. at 62. Scott claimed that he suffered delusions. *Id.* at 368–69, 43 N.W. at 63.

38. *Id.* at 368–69, 43 N.W. at 63.

39. *State v. Finn*, 257 Minn. 138, 140–41, 100 N.W.2d 508, 511 (1960) (“Those who oppose the rule argue . . . that under modern psychiatric concepts [a] man’s reason is not the sole determinant of his conduct . . .”). Instead, opponents suggested emotional drives and pressures must be recognized in formulating an accused’s responsibility. *Id.*

40. *Id.*; *see also State v. Simenson*, 195 Minn. 258, 262 N.W. 638 (1935) (discussing insanity as stated in *Scott*, 41 Minn. at 369, 43 N.W. at 63); *State v. Towers*, 106 Minn. 105, 109, 118 N.W. 361, 362 (1908) (“[I]nstructions with reference to the defense of insanity were in accord with the rule which is thoroughly established in this court.”).

41. After the court drew attention to the problems the *M'Naughten* rule was creating, the only change the legislature chose to implement was to include the phrase “mentally ill or mentally deficient” in lieu of former terminology, including “a state of idiocy, imbecility, lunacy, or insanity.” MINN. STAT. § 611.026 (1961) (amended 1971).

42. *See State v. Rawland*, 294 Minn. 17, 46, 199 N.W.2d 774, 790 (1972) (allowing psychiatric evidence to establish that defendant’s mental illness prohibited him from knowing that murder was wrong).

43. *Id.*

The court held that what evidence was appropriate or relevant was now up to the judge's discretion.⁴⁴

B. The Insanity Defense Reform Act

Nearly a century after M'Naghten's case, a well-known case involving John Hinckley raised serious questions about the future of the insanity defense and rules of evidence relating to mens rea.⁴⁵ After Hinckley's acquittal, the public outrage that resulted prompted Congress to reexamine and modify its evidentiary rules.⁴⁶ In 1984, Congress enacted the Insanity Defense Reform Act (the Act).⁴⁷ The Act amended the Federal Rules of Evidence to preclude expert witnesses from stating opinions on whether a defendant had the required mental capacity for the crime charged.⁴⁸

In passing the Act, Congress intended to eliminate the doctrines of diminished capacity and diminished responsibility.⁴⁹

44. *Id.*

45. John Hinckley attempted the assassination of President Reagan. *See* United States v. Hinckley, 525 F. Supp. 1342, 1345 (D.D.C. 1981). Psychiatric testimony was admitted in Hinckley's trial to prove that the defendant was insane. *Id.* Ultimately, Hinckley was acquitted, despite shooting four people, including President Reagan. United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982). Hinckley's acquittal drew criticism from politicians. Lincoln Caplan, *The Insanity Defense, Post-Hinckley*, N.Y. TIMES, Jan. 17, 2011, <http://www.nytimes.com/2011/01/18/opinion/18tue4.html> ("After the acquittal, politicians . . . blamed the insanity defense for excusing a detestable and miserable man from imprisonment.").

46. *See* PATRICIA E. ERICKSON & STEVEN K. ERICKSON, CRIME, PUNISHMENT, AND MENTAL ILLNESS: LAW AND THE BEHAVIORAL SCIENCES IN CONFLICT 97-98 (2008). Adding fuel to the fire, in a 1983 interview with Penthouse magazine, Hinckley described a typical day: "I see a therapist, answer mail, play my guitar, listen to music, play pool, watch television, eat lousy food, and take delicious medication." Allan Sonnenschein, *John W. Hinckley, Jr.*, PENTHOUSE, Mar. 1983, at 103, 168, available at <http://www.scribd.com/doc/51388040/Hinckley-Interview>.

47. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (codified as amended at 18 U.S.C. § 20 (1985) and renumbered 18 U.S.C. § 17 (1986)). Section 17 states:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. § 17 (1986).

48. *See* FED. R. EVID. 704(b) (amended 1984).

49. *See* Judi S. Greenberg, *Criminal Law and Evidence—Using Psychiatric Testimony to Negate Mens Rea Under the Insanity Defense Reform Act—United States v. Pohlott*, 827 F.2d 889 (3d Cir. 1987), cert. denied, 108 S. Ct. 710 (1988), 61 TEMP. L.

However, Congress did not intend to bar all evidence relating to mental defects when a defendant did not use the insanity defense.⁵⁰ Even after Congress implemented the Act, courts were still left to interpret whether expert testimony could be used when a defendant did not plead an insanity defense.⁵¹

Congress's ratification of the Act had little effect on Minnesota law.⁵² Two years before the Act, Minnesota had already modified its evidentiary rules to prohibit psychiatric testimony regarding a defendant's state of mind.⁵³ Minnesota's rules stated that a defendant who wished to introduce evidence regarding his or her mental culpability needed to raise the insanity defense.⁵⁴ After pleading insanity, the offender would receive a bifurcated trial.⁵⁵ During the second phase of the bifurcated trial, after a defendant was already found guilty, psychiatric testimony could be admitted to help the court determine the defendant's punishment—jail time or hospitalization.⁵⁶

Later in *State v. Provost*, Minnesota recognized the problems that occurred when courts prohibited all psychiatric evidence regarding a defendant's mens rea.⁵⁷ As a result, the Minnesota

REV. 955, 974 (1988) (citing S. REP. NO. 225, at 229 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3404, 3411). The doctrine of diminished responsibility separates offenders into two subgroups: "a group of 'normal' fully culpable criminal offenders, and a group of mentally abnormal but sane offenders with reduced culpability." Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 860 (1977). A jury can then "mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act." *Id.* at 829.

50. Greenberg, *supra* note 49, at 974–75 (citing H.R. REP. NO. 577, at 14–15 & n.23 (1983)) (stating that use of evidence of mental abnormality to negate mens rea is not to be confused with diminished capacity).

51. See Gee, *supra* note 29, at §§ 3–4; see also Greenberg, *supra* note 49, at 977 ("Since the passage of the Insanity Defense Reform Act, federal courts have inconsistently interpreted it with respect to the use of psychiatric testimony to negate mens rea.").

52. See cases cited *supra* note 9 and accompanying text.

53. See *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982) (holding expert testimony is not relevant in determining premeditation or intent because intent must be inferred from the circumstances surrounding a particular crime, to which psychiatric evidence does not relate); 11 MARK B. DUNNELL, DUNNELL MINNESOTA DIGEST: CRIMINAL LAW § 3.02(f) (5th ed. 2004).

54. See MINN. R. CRIM. P. 20.02, subdiv. 5.

55. In a bifurcated trial, the defendant's guilt is determined before the issue of mental illness. *Id.* 20.02, subdiv. 7(a).

56. *Id.* 20.02, subdiv. 8(1)–(2).

57. See *State v. Provost*, 490 N.W.2d 93, 103–04 (Minn. 1992).

Supreme Court created two exceptions allowing a defendant to introduce psychiatric testimony during the guilt phase of trial.⁵⁸ The first *Provost* exception permits psychiatric evidence if a defendant's mental disorder, which affects his subjective state of mind, is inconsistent with criminal mens rea.⁵⁹ The second *Provost* exception allows psychiatric evidence if the defendant has a past history of mental illness and the testimony could explain "the whole man" as he was before the crime.⁶⁰ To date, neither *Provost* exception has been utilized in a criminal trial.⁶¹

C. *The Model Penal Code*

Even after the enactment of the Act, the *M'Naughten* rule has been subjected to heavy attack. Critics primarily complain that the *M'Naughten* rule fails to consider many mental illness symptoms, enforces outdated and erroneous psychological theories, and restricts relevant expert testimony.⁶² Further, the *M'Naughten* rule does not exonerate someone who knows and "understands exactly what he is doing but because of his mental disabilities cannot stop himself from committing a crime."⁶³

In response to these attacks, the American Law Institute (ALI) developed a new insanity test to replace the *M'Naughten* rule.⁶⁴ The new test excuses a defendant who, because of a mental disease or defect, "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."⁶⁵ A number of jurisdictions have adopted the ALI's test for criminal insanity.⁶⁶ Courts have raved over this test's advantages for several reasons: it is more realistic and conforms to the practical experience of psychiatrists, it moves away from the absolute requirement of total incapacity and

58. *Id.* at 104.

59. *Id.*

60. *Id.* at 103–04.

61. See Appellant's Brief and Addendum at 41, *State v. Anderson*, 789 N.W.2d 227 (Minn. 2010) (No. A09-1141) ("There is no reported example of . . . [the] implementation [of the *Provost* exceptions].").

62. Gee, *supra* note 29, § 2(a) (explaining why states have modified the *M'Naughten* rule).

63. Arenella, *supra* note 49, at 842.

64. See MODEL PENAL CODE § 4.01 (2001).

65. *Id.*

66. See Gee, *supra* note 29, § 5 (listing twenty-four states that have adopted the ALI's test for criminal liability).

toward one that permits substantial incapacity, and it encourages maximum informational input from expert witnesses while preserving the jury's role as trier of fact and ultimate decision-maker.⁶⁷

Today, Minnesota law conflicts with the majority of jurisdictions, the Model Penal Code, and the American Bar Association standards because it does not allow psychiatric testimony to be admitted to disprove mens rea.⁶⁸ As the *Anderson* appellants suggest, the continued use of Minnesota's *M'Naughten* rule should be closely examined because it directly affects a defendant's right to due process.⁶⁹

III. STATE V. ANDERSON

A. Facts and Procedural Posture

On October 26, 2007, the Savage Police Department received a phone call that a discarded purse had been found at Warren Butler Park in Savage, Minnesota.⁷⁰ Katherine Olson's driver's license was found in the purse.⁷¹ Police contacted Olson's roommate, who stated that Olson had traveled to Savage for a babysitting job that was advertised online.⁷² After reviewing Olson's inbox, police discovered that Olson had responded to an e-mail request from a woman named "Amy" in Savage.⁷³ "Amy" had posted online that she needed a babysitter for her five-year-old daughter.⁷⁴ A few days later, police located Olson's vehicle and found her body in the

67. State v. Nuetzel, 606 P.2d 920, 927 (Haw. 1980). For a description of the ALI test's benefits, see *id.* at 927-28 (quoting Hill v. State, 251 N.E.2d 429, 438 (1969) for the proposition that the ALI's rule provides a framework "under which the jury will be afforded a complete picture of the defendant's state of mind").

68. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7-6.2 (1984); MODEL PENAL CODE § 4.0 (1962); see also Vitauts M. Gulbis, Annotation, *Admissibility of Expert Testimony as to Whether Accused had Specific Intent Necessary for Conviction*, 16 A.L.R.4th 666 § 4 (1982) (listing jurisdictions that allow and prohibit psychiatric testimony to negate mens rea).

69. See Appellant's Brief and Addendum at 21, State v. Anderson, 789 N.W.2d 227 (Minn. 2010) (No. A09-1141) (arguing defendant had a constitutional right to present his version of the facts).

70. State v. Anderson, 789 N.W.2d 227, 231 (Minn. 2010).

71. *Id.*

72. *Id.* "Olson had been looking for jobs as a nanny on an online service of classified ads and discussion forums for jobs, housing, and items for sale, along with personals . . ." *Id.* at 231 n.1.

73. *Id.* at 231.

74. *Id.* at 231-32.

trunk.⁷⁵

As police commenced their investigation, substantial evidence indicated that Michael Anderson was responsible for Olson's death.⁷⁶ Police took custody of Anderson, who later admitted to being present when Olson was killed.⁷⁷ Anderson stated that his friend "thought it would be funny" to kill Olson.⁷⁸ Police charged Anderson with second-degree intentional murder.⁷⁹ A grand jury indicted Anderson for first-degree premeditated murder and second-degree intentional murder.⁸⁰

At trial, Anderson pleaded not guilty by reason of mental illness.⁸¹ The defense retained a psychologist and a psychiatrist, each of whom diagnosed Anderson as having Asperger's.⁸² The district court ordered two mental examinations of Anderson; each examiner concluded that Anderson did not have Asperger's and was not mentally ill or deficient.⁸³ Anderson then withdrew his mental illness defense and pleaded not guilty, forgoing a bifurcated trial.⁸⁴ Anderson then claimed that the shooting was an accident.⁸⁵

75. *Id.* at 231. An autopsy revealed a gunshot wound to Olson's back, and injuries to Olson's knees, nose, and forehead. *Id.* at 232. The medical examiner stated it was likely that Olson was shot in the back, fell forward, and hit her knees and head. *Id.*

76. *Id.* at 231–32. Evidence included: a hair found on Olson's body matching Anderson's DNA profile, Anderson's fingerprints found on Olson's belongings, Olson's blood found in Anderson's home, and the fact that the gun used to kill Olson matched a gun that was owned by Anderson's parents. *Id.* Additionally, an analysis of Anderson's computer showed Anderson had posted the babysitting advertisement and responded to Olson's inquiry. *Id.* at 232. Within nearly one year, Anderson made sixty-seven postings on the online service including requests for female models and actresses, nude photos, a sexual encounter, babysitters, and car parts. *Id.*

77. *Id.* at 231.

78. *Id.*

79. *Id.* at 232. This charge was in violation of MINN. STAT. § 609.19, subdiv. 1(1) (2008). *Id.*

80. *Anderson*, 789 N.W.2d at 232; *see also* MINN. STAT. §§ 609.185(a)(1), 609.18 (2008) (setting forth the statutory provisions for first-degree premeditated murder and second-degree intentional murder).

81. *Anderson*, 789 N.W.2d. at 232; *see also* MINN. STAT. § 611.026 (2010) ("No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense.").

82. *Anderson*, 789 N.W.2d. at 232.

83. *Id.* A district court may order a mental examination of the defendant if the defense notifies the prosecutor that it plans to assert a mental illness defense. MINN. R. CRIM. P. 20.02, subdiv. 1(a).

84. *Anderson*, 789 N.W.2d at 232.

85. *Id.* at 233. The defense presented witnesses who testified that Anderson

Additionally, the defense claimed that Asperger's deprived Anderson of normal brain function, which affected his mens rea.⁸⁶

The lower court denied Anderson's motion to admit expert psychiatric testimony regarding Asperger's.⁸⁷ Accordingly, Anderson was left to argue that he lived in an "unreal world," and that the shooting was an accident.⁸⁸ The jury did not believe Anderson's defense and found him guilty of first-degree premeditated and second-degree intentional murder.⁸⁹ Anderson was sentenced to life in prison without the possibility of release.⁹⁰ Anderson then appealed to the Minnesota Supreme Court.⁹¹

B. *The Minnesota Supreme Court's Decision*

In his appeal, Anderson argued in part that the district court denied him a fair trial by precluding expert psychiatric testimony regarding Asperger's.⁹²

was clumsy and uncoordinated and that the gun may have accidentally discharged as Olson was running away. *Id.*

86. *See id.* at 235 (explaining that Anderson argued that evidence of his Asperger's was "necessary to explain the physical evidence of his condition, such as odd mannerisms, inability to empathize, show remorse, or respond properly to social cues").

87. *Id.* at 233.

88. *Id.* Anderson's attorney argued that Anderson did the following:

Anderson . . . lured Olson over with no clear idea of why He said that when she tried to leave, Anderson, who had no experience with women, fell back on his video game experience and pulled his father's gun on her. He said Anderson then shot her accidentally when he tripped or flinched.

He also asked jurors to consider that Anderson lives in an "unreal world."

". . . All we know is that this is a bizarre kid with no social skills."

CBS News, *Craigslist Killer Gets Life Without Parole*, CBSNews, Apr. 1, 2009, <http://www.cbsnews.com/stories/2009/04/01/national/main4911771.shtml>.

89. *Anderson*, 789 N.W.2d at 233.

90. *Id.*

91. *Id.*

92. *Id.* In addition to this issue,

Anderson argue[d] that (1) he did not waive his *Miranda* rights so his statement to the police [regarding Olson's murder] should have been suppressed; (2) the district court abused its discretion and denied him a fair trial when it denied his request to present expert psychiatric testimony on Asperger's and its effects on him; . . . and (4) the evidence was insufficient to support a conviction for first-degree premeditated murder.

Id. On appeal, the court reviews evidentiary rulings of the district court, including the admission of expert testimony, for abuse of discretion. *State v. Peterson*, 764 N.W.2d 816, 821 (Minn. 2009). The Minnesota Supreme Court affirmed the lower

First, Anderson argued that evidence of Asperger's was necessary to explain his physical appearance, odd mannerisms, and inability to empathize.⁹³ According to Anderson, without expert psychiatric testimony he was unable to educate the jury on Asperger's effects, which prevented him from testifying and receiving a fair trial.⁹⁴

The court recognized that Anderson had "a constitutional due process right to present a meaningful defense."⁹⁵ However, this right is not unlimited.⁹⁶ District courts may exclude expert testimony when the court finds that "the evidence is not helpful to the jury" or if "the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."⁹⁷ The court agreed that whatever the probative value of the expert testimony, it was substantially outweighed by the danger of confusing the jury.⁹⁸ Accordingly, the court rejected Anderson's first argument.⁹⁹

Anderson's second argument asserted that expert testimony regarding Asperger's effect on brain function was necessary to challenge whether Anderson had the requisite mens rea for a murder conviction.¹⁰⁰ Anderson argued that the court's denial of psychiatric testimony precluded him from presenting evidence that would refute the jury's incorrect presumption that his brain

court's decision on all arguments. *Anderson*, 789 N.W.2d at 243.

93. *Anderson*, 789 N.W.2d at 235.

94. *Id.* The defense argued that if Anderson had testified, (1) he would misread the situation and give an answer that would seem odd, (2) he would be easily manipulated by questioning, (3) his demeanor would be misunderstood, and (4) his answers to questions simply would not have made any sense to the jury unless Asperger's was explained by a professional. Appellant's Brief and Addendum at 27, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

95. *Anderson*, 789 N.W.2d at 235.

96. *Id.* A defendant's constitutional right to a fair trial, however, is shaped by the rules of evidence, which are designed to assure both fairness and reliability in assessing guilt or innocence. *See* State v. Reese, 692 N.W.2d 736, 740 (Minn. 2005).

97. *Anderson*, 789 N.W.2d at 235; MINN. R. EVID. 403, 702.

98. *Anderson*, 789 N.W.2d at 236.

99. The court relied on the lower court's observation that there was nothing particularly unusual about Anderson's physical appearance. *Id.* at 235. Further, Anderson failed to offer proof that Asperger's physically affected him. *Id.*

100. *Id.* at 236; *see also* Appellant's Brief and Addendum at 19-20, *Anderson*, 789 N.W.2d 227 (No. A09-1141) (asserting that his lack of normal brain function and the trial court's exclusion of psychiatric testimony denied his right to due process).

functioned normally.¹⁰¹ Accordingly, the jurors would believe that Anderson's mind could intend or premeditate in the same manner that their minds could.¹⁰²

The court again rejected this argument.¹⁰³ Minnesota law presumes that "defendant[s] standing trial [are] responsible for their acts, i.e., they have the capacity to intend what they do."¹⁰⁴ Because Minnesota does not recognize the doctrine of diminished capacity, the jury could only find Anderson legally sane or legally insane—nowhere in the middle.¹⁰⁵ The court agreed that any testimony implying Anderson's mental state lies in the middle must be precluded to prevent the jury from discussing a diminished capacity defense.¹⁰⁶

Third, Anderson argued that his situation fell within both *Provost* exceptions, and accordingly the court should allow psychiatric testimony during the guilt phase of his trial.¹⁰⁷ Regarding the first *Provost* exception, Anderson argued that Asperger's prevents an individual from having a guilty mind,¹⁰⁸ which is inconsistent with the required mens rea element of a crime.¹⁰⁹ The court rejected this argument, finding that Anderson failed to show how Asperger's prevents a person from premeditating or forming intent.¹¹⁰

101. *Anderson*, 789 N.W.2d at 236.

102. See Appellant's Brief and Addendum at 19–20, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

103. *Anderson*, 789 N.W.2d at 237.

104. *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982).

105. *Anderson*, 789 N.W.2d at 237 (citing *State v. Provost*, 490 N.W.2d 93, 100 (Minn. 1992)); see also *Bouwman*, 328 N.W.2d at 706 (espousing society's and morality's bifurcated division between "the legally sane, [and] on the other side . . . the legally insane").

106. *Anderson*, 789 N.W.2d at 237. Minnesota does not recognize the doctrine of diminished capacity or diminished responsibility. See *Provost*, 490 N.W.2d at 100.

107. *Anderson*, 789 N.W.2d at 237–38. See *supra* text accompanying notes 59–60 (discussing the two exceptions created by *Provost*).

108. See *infra* text accompanying note 153 (explaining that people with Asperger's function according to their own rules).

109. See *Provost*, 490 N.W.2d at 104.

110. *Anderson*, 789 N.W.2d at 238. In fact, Anderson's own psychiatric witness explained that a person with Asperger's was perfectly capable of forming intent and premeditation. See Appellant's Brief and Addendum at 30, *Anderson*, 789 N.W.2d 227 (No. A09-1141). The court also relied on other evidence to find his mind could premeditate: Anderson lured Olson to his home when nobody would be home; he retrieved a gun from his parents' bedroom and manually loaded and cocked the gun; when Olson arrived he immediately shot her in the back (Olson's blood was found in front of the home). *Anderson*, 789 N.W.2d at 242.

Anderson then asserted that expert psychiatric testimony was necessary to explain the “whole man” under the second *Provost* exception.¹¹¹ However, the second *Provost* exception only concerns a defendant’s *history* of mental illness,¹¹² and the court found that Anderson lacked a history of Asperger’s prior to this crime.¹¹³ Because doctors diagnosed Anderson with Asperger’s after his incarceration, nothing indicated that Anderson had a history of mental illness.¹¹⁴ As a result, the court ruled that Anderson fell under neither of the *Provost* exceptions.¹¹⁵

Finally, Anderson argued that his Asperger’s is comparable to other cases involving mental abnormalities where Minnesota courts have allowed psychiatric testimony.¹¹⁶ The court urged that even though expert testimony had been allowed in prior cases, the district court must still evaluate the evidence to ensure it will not confuse the jury.¹¹⁷ As the court had ruled with Anderson’s other three arguments, it found that the district court did not abuse its discretion in excluding psychiatric testimony regarding Asperger’s.¹¹⁸ Accordingly, the Minnesota Supreme Court affirmed Anderson’s conviction and sentencing.¹¹⁹

IV. ANALYSIS OF *STATE V. ANDERSON*

In *Anderson*, the court maintained precedent by precluding expert psychiatric testimony during the guilt phase of trial.¹²⁰

In doing so, the court overlooked one major issue: Anderson, who withdrew his mental illness defense, had no other opportunity to contest his mental culpability during trial.¹²¹ It was possible for the jury to find Anderson legally sane, yet still mentally incapable of

111. *Anderson*, 789 N.W.2d at 238; *Provost*, 490 N.W.2d at 104.

112. *See State v. Bird*, 734 N.W.2d 664, 679 (Minn. 2007).

113. *Anderson*, 789 N.W.2d at 239.

114. Anderson’s primary care physician in 2002 noted that there were “no current behavioral or emotional concerns.” *Id.* However, Anderson argued that his lack of an Asperger’s diagnosis prior to trial should not be held against him in determining whether the second exception should apply. *Id.*

115. *Id.*

116. *Id.* at 239 n.10.

117. *Id.*; *see* MINN. R. EVID. 402, 403.

118. *Anderson*, 789 N.W.2d at 239.

119. *Id.* at 243.

120. *Id.* at 236–37; *see* cases cited *supra* note 9.

121. A defendant who does not plead insanity does not receive a bifurcated trial. *See supra* text accompanying notes 55–56. Thus, Anderson received only one phase of trial: the guilt phase. *See Anderson*, 789 N.W.2d at 237.

premeditating murder.¹²² The court required the prosecution to prove both the physical and mental elements of a crime, yet at the same time precluded Anderson from presenting evidence that would contest his mental culpability.¹²³ As a result, Anderson did not receive a fair trial.

The analysis that follows argues that denying psychiatric testimony violates a defendant's constitutional right to present a complete defense. The analysis begins by further explaining the *Anderson* court's decision to exclude psychiatric testimony.¹²⁴ The analysis then explains why Anderson did not receive a fair trial,¹²⁵ followed by additional considerations the *Anderson* court should have contemplated in its opinion.¹²⁶ These considerations include: a defendant's due process rights, inconsistencies in Minnesota's rules of evidence, and the consequences this decision has on the public due to the law's refusal to catch up with psychiatry.¹²⁷ Finally, the analysis ends by discussing alternative methods for admitting psychiatric testimony, and suggests an approach that may be more practical for Minnesota courts.¹²⁸

A. *Why Minnesota Courts Exclude Psychiatric Testimony*

Courts know the risk involved in allowing psychiatric testimony during the guilt phase of trial. The risk is that a guilty offender may walk free.¹²⁹ To avoid this, Minnesota courts refuse to recognize the doctrine of diminished capacity.¹³⁰ Consequently,

122. The U.S. Supreme Court has recognized that a jury may have found a defendant to have been mentally incapable of the premeditation required to support a first-degree murder verdict, and yet not have found that same defendant to have been legally insane. See *State v. Brom*, 463 N.W.2d 758, 766 (Minn. 1990) (Wahl, J., dissenting) (citing *Leland v. Oregon*, 343 U.S. 790, 794 (1952)).

123. See *Anderson*, 789 N.W.2d at 237.

124. See *infra* Part IV.A.

125. See *infra* Part IV.B.

126. See *infra* Part IV.C.

127. See *infra* Part IV.C.1–3.

128. See *infra* Part IV.D.

129. If expert testimony convinces the jury that the defendant's mind was not capable of intending or premeditating murder, the defendant must be acquitted. See MINN. R. CRIM. P. 20.02, subdiv. 7(b)(3). Alternatively, if evidence regarding defendant's mental capacity is only introduced after the defendant has been found guilty, the court can commence a proceeding to commit the defendant to a hospital. See *id.* 20.02, subdiv. 8(1). For a discussion on the purpose of the insanity defense, see WAYNE R. LAFAVE, CRIMINAL LAW 371–73 (4th ed. 2003).

130. *State v. Anderson*, 789 N.W.2d 227, 237 (Minn. 2010) (citing *State v. Provost*, 490 N.W.2d 93, 100 (Minn. 1992)).

defendants must take full responsibility for the crime that has been committed regardless of differences in upbringing, mental condition, or environmental background, so long as they understand the nature of their act and that it was wrong.¹³¹ Without the doctrine of diminished capacity, an offender is either wholly sane or wholly insane, and criminal liability cannot be mitigated based on the degree of sanity an offender possesses.¹³²

Quite simply, Minnesota courts find psychiatric testimony to be a waste of time. Psychiatrists do not view mental health in black and white terms (sane or insane).¹³³ Rather, psychiatrists view mental illness as a series of degrees, ranging from the mild psychopath to the extreme psychotic.¹³⁴ Courts are also concerned about the credibility of psychiatric testimony, questioning whether psychiatrists can reliably determine what level of sanity an offender possesses.¹³⁵ This being so, judges fear their courtrooms will flood with uncertain testimony from mental health professionals constantly disputing the degree of sanity an offender possesses.¹³⁶

Minnesota courts also believe that the allowance of psychiatric testimony is overshadowed by the risk of confusing juries when determining the legal elements of intent and premeditation.¹³⁷ When juries determine criminal intent and premeditation, they can only look at physical evidence—what the defendant says and does in the light of all surrounding circumstances.¹³⁸ The jury is then

131. See *Provost*, 490 N.W.2d at 108 (Gardebring, J., dissenting) (discussing why she would not adopt the diminished responsibility doctrine).

132. See *id.* at 104.

133. See *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982) (citing *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945)).

134. *Id.*

135. Courts fear that mental health professionals are not reliable and cannot know a defendant's true state of mind with certainty. *Provost*, 490 N.W.2d at 100. See *infra* note 210 (describing courts' skepticism of psychiatric testimony).

136. "Congress amended Rule 704 to 'eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact.'" *Provost*, 490 N.W.2d at 100–01 (citing *United States v. Alexander*, 805 F.2d 1458, 1463 (11th Cir. 1986)).

137. See *Bouwman*, 328 N.W.2d at 705–06 (reasoning that intent and premeditation are separate from capacity and thus need to be presented accordingly).

138. Courts have noted that it is not easy to prove intent because the jury must examine at a later time the state of a man's mind at that particular moment. *Provost*, 490 N.W.2d at 98 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.5, at 317–18 (2d ed. 1986)). "Naturally, what he does and what foreseeably results from his deeds have a bearing on what he may have had in mind." *Id.*

asked to draw upon its sensory perceptions, life experiences, and common sense to determine whether that act was indeed intentional.¹³⁹

Minnesota believes that the legal definitions of intent and premeditation are outside a psychiatrist's practice.¹⁴⁰ Criminal law is only interested in whether a certain act is legal or illegal, and whether the act is performed out of conscious volition (i.e., intentionally).¹⁴¹ The law is not interested in the reasons explaining why a crime was committed.¹⁴² As psychiatric testimony tends to explain why a defendant committed a crime, courts view it as irrelevant to the legal definitions of intent and premeditation. Accordingly, since psychiatric testimony is irrelevant, a court's decision to bar the testimony does not deny the defendant a fair trial.¹⁴³

B. *Anderson Did Not Receive a Fair Trial*

Although longstanding precedent suggests otherwise, Minnesota's decision to bar psychiatric testimony did deny Anderson a fair trial. When the rules of evidence preclude a

139. *Bouwman*, 328 N.W.2d at 705.

140. *State v. Brom*, 463 N.W.2d 758, 762 (Minn. 1990) ("Because psychiatric evidence 'does not relate to the physical evidence upon which the jury is to determine the issue of intent,' it is irrelevant to that issue and cannot be admitted . . ."). This point is further exemplified in the following hypothetical:

Mr. Fanatic believes that God has ordered him to kill his neighbor because the neighbor is an agent of the devil. Mr. Fanatic buys a gun and ammunition, invites his neighbor over for tea, and calmly blows his brains out, killing him instantly. Psychiatrists testify that Mr. Fanatic was suffering from paranoid schizophrenia Yet the same evidence of mental abnormality would not refute the existence of either the specific intent to kill or premeditation and deliberation. Mr. Fanatic certainly intended to kill and his objective acts clearly evidenced a preconceived design to effectuate that intent in a calm, deliberate manner.

Arenella, *supra* note 49, at 833–34.

141. See BERNARD L. DIAMOND, *THE PSYCHIATRIST IN THE COURTROOM* 107 (Jacques M. Quen ed., 1994).

142. For example:

[I]t is murder in the first degree to kill a man for the purpose of robbing him. It is also murder in the first degree for a physician to kill a patient dying of cancer by administering an overdose of morphine in order to put him out of his pain and suffering. That one act is performed for bad reasons, the other for good, does not alter the identity of the crimes.

Id.

143. See *Bouwman*, 328 N.W.2d at 705 ("[P]sychiatric evidence is of no value at this part of the trial since it does not relate to the physical evidence upon which the jury is to determine the issue of intent.").

defendant from contesting an element of a crime, the prosecution's evidence on that issue becomes uncontestable as a matter of law, and the defendant is deprived of the presumption of innocence.¹⁴⁴ Interestingly, the rules of evidence typically favor the admission of relevant evidence.¹⁴⁵ In this case, however, the rules were used to exclude relevant evidence, raising concerns as to whether the district court abused its discretion by denying psychiatric testimony.

Viewing the evidence in the light most favorable to Anderson, the court asserted that Anderson "may" have Asperger's.¹⁴⁶ Despite this assertion, the court refused to allow any type of psychiatric testimony regarding Asperger's—specifically testimony stating that the disorder prevented Anderson from forming intent or premeditation at the time of Olson's death.¹⁴⁷ Notably, this is not the type of evidence Anderson sought to introduce.¹⁴⁸ Rather, Anderson sought to admit psychiatric testimony that would have explained Asperger's general effects and helped the jury understand the defendant's evidence regarding mens rea.¹⁴⁹ Since the court conceded that Anderson "may" have had Asperger's, this psychiatric evidence should have been admitted because it would have helped the jury understand the mental defect Anderson "may"

144. See *Brom*, 463 N.W.2d at 766 (Wahl, J., dissenting) (citing *Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982)). But cf. *Bouwman*, 328 N.W.2d at 705 (holding expert psychiatric opinion regarding intent to kill, when not used to establish an insanity defense, is inadmissible).

145. The rules favor the admission of relevant evidence by requiring a determination that its probative value be "substantially" outweighed by the dangers listed in the rule before relevant evidence will be excluded. See MINN. R. EVID. 403.

146. "The district court noted that it is disputed whether Anderson has Asperger's, but after examining the evidence in a light most favorable to Anderson, concluded that he 'may' have Asperger's." *State v. Anderson*, 789 N.W.2d 227, 235 n.6 (Minn. 2010).

147. *Id.* at 236.

148. See Appellant's Reply Brief at 8, *Anderson*, 789 N.W.2d 227 (No. A09-1141) (stating that the defendant did not wish to introduce psychiatric testimony regarding the ultimate question on degrees of sanity, diminished capacity, or gradations of sanity).

149. *Id.* Anderson argued that at a minimum, psychiatric evidence was necessary for the jury to understand the following: (1) why he acted the way he did in the courtroom, (2) that Asperger's persons are easily manipulated (even during questioning), (3) those who suffer from Asperger's have a different understanding of what statements are socially appropriate, (4) a general understanding of how Asperger's individuals relate to others socially, and (5) that Asperger's individuals tend to give responses that are not appropriate for the situation. Appellant's Brief and Addendum at 34, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

have had.¹⁵⁰

If Anderson had been allowed to present psychiatric testimony, the expert would have explained how Asperger's affected Anderson's mannerisms in a way that made him seem odd and even scary.¹⁵¹ The expert would have explained that Asperger's impairs an individual's ability to socialize, communicate, empathize, or understand and respond properly to social cues.¹⁵² Ultimately, the jury would have been left with the understanding that individuals with Asperger's may live according to their own set of social standards and behavioral rules; so while they believe that their conduct is appropriate, it is socially unacceptable to others.¹⁵³

Despite the defense's efforts, the *Anderson* court believed this general information was the kind of lay evidence that the jury could determine without the aid of an expert.¹⁵⁴ While most individuals have heard of Asperger's, many do not know its effects because it is a rare and misunderstood developmental disorder.¹⁵⁵ Only an expert could convey to the jury how Asperger's affects an individual's outward appearance and inward perception.¹⁵⁶

Without this testimony, the jury likely perceived Anderson as a cold-blooded killer. The jury was instructed to base their verdict on what they believed Anderson said and did at the time of the crime.¹⁵⁷ Jurors base their opinions on what they see in front of them.¹⁵⁸ The jury assesses the defendant's demeanor, facial

150. See *infra* text accompanying note 191.

151. See Appellant's Brief and Addendum at 25, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

152. See ATTWOOD, *supra* note 10, at 12.

153. See Brian Wauhup, Comment, *Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome*, 27 PENN. ST. INT'L L. REV. 959, 959 (2009).

154. To be admissible, expert testimony must help a juror understand evidence that an inexperienced juror may be unable to form a correct judgment on without the expert's testimony. See *State v. Pirsig*, 670 N.W.2d 610, 616 (Minn. Ct. App. 2003) (holding that expert testimony on data collected by a combine monitor was helpful to the jury and thus the district court did not abuse its discretion in allowing it).

155. While Asperger's was studied and described over sixty years ago, only recently has the diagnosis gained widespread acceptance. See ATTWOOD, *supra* note 10, at 35-36, 38 (describing the background of Asperger's).

156. See Appellant's Brief and Addendum at 32, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

157. See *supra* text accompanying notes 138-39 (detailing what a jury must consider in determining a defendant's guilt).

158. The reality is that jurors consider a defendant's demeanor in their decisions. One commentator explained:

expressions, and any behaviors that seem odd or eccentric.¹⁵⁹ Even the trial judge declared to Anderson: “You have shown no remorse, no empathy, and I have no sympathy for you.”¹⁶⁰ Surely, evidence relaying that Asperger’s impairs an individual’s ability to empathize and respond properly to social cues would have helped the jury perceive Anderson differently.¹⁶¹

Additionally, psychiatric testimony describing Asperger’s would have influenced how the jury would have portrayed Anderson if he had testified. At trial, Anderson did not take the stand because his attorneys feared his answers would not make sense unless Asperger’s had been explained.¹⁶² It would have been easy to manipulate Anderson into incriminating himself on the stand.¹⁶³ Further, if Anderson testified that he did not think Olson

Jurors scrutinize [a defendant’s] every move, attaching deep importance to a quick glance or a passing remark—details a nonjuror might consider insignificant. High-profile criminal trials show that jurors use a defendant’s courtroom demeanor to determine his sincerity and culpability. The impression that the defendant makes on the jury can thus have an enormous impact on the outcome of the trial.

Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 575–76 (2008).

159. *Id.*

160. Abby Simons, *Craigslist Killer Gets Life Without Parole*, STAR TRIB., Apr. 1, 2009, <http://www.startribune.com/local/south/42273197.html>.

161. *See State v. Burr*, 948 A.2d 627, 629, 633 (N.J. 2008) (holding that expert testimony on Asperger’s was necessary to explain to the jury the defendant’s mannerisms and inappropriate behaviors).

162. Appellant’s Brief and Addendum at 27, *State v. Anderson*, 789 N.W.2d 227 (Minn. 2010) (No. A09-1141). Appellant provided the following hypothetical:

If John walks up to Mary, a total stranger, on the street and seriously proposes marriage the expected reaction of an onlooker that observed the situation was that John must have been pulling a prank and could not have in anyway been serious. If John’s friend came up to the onlooker and insisted that John was fully serious, the onlooker would think John’s friend was in on the prank and that neither of them had any credibility. If the onlooker was first told about Asperger’s and how those with Asperger’s don’t understand the same social clues as the average person they will have the specialized knowledge necessary to evaluating the situation fairly. Now if John’s friend walks up to the onlooker and explains that John has Asperger’s and that John was fully serious when he proposed marriage, the onlooker will be in a better position to judge the situation.

Appellant’s Reply Brief at 9–10, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

163. In *State v. Burr*, the expert testimony noted that there are two handicaps with respect to a patient with Asperger’s testifying in court. 921 A.2d 1135, 1146 (N.J. Super. Ct. App. Div. 2007), *aff’d*, 948 A.2d 627 (N.J. 2008). The first is that the jury assesses the person’s odd demeanor and might correlate this with guilt. *Id.* The second is that the person may suffer from sensory overload and become

would come to his home, the jury would have thought Anderson was lying. Proof existed that Anderson had listened to a voicemail left by Olson shortly before she arrived at his home.¹⁶⁴ However, with expert testimony explaining that Asperger's impairs a person's ability to think ahead to the next stage in a process, the jury would certainly be left to question whether Anderson had in fact premeditated Olson's murder at the time of the crime.¹⁶⁵

One may question how admitting psychiatric testimony regarding Asperger's could have hurt the prosecution's case. Little evidence existed to prove Anderson's innocence.¹⁶⁶ Since a jury can either use or disregard expert testimony, why not allow it?¹⁶⁷ Although the court believed the expert testimony would confuse the jury, this is likely untrue. Rather, the most confusing aspect of this case is likely how the defendant could commit such an act.¹⁶⁸ This is reflected in the trial judge's own statements: "And why did you do this? You are the only one who knows. I do not pretend to understand it."¹⁶⁹ Although Minnesota asserts it has no interest in why a defendant commits a crime, it should.¹⁷⁰ Why a crime was committed influences a jury's decision in determining intent.¹⁷¹ In a fair system, a jury should be presented with all relevant information before making the serious decision of sentencing a human being to life in prison.

C. Minnesota Should Not Exclude Psychiatric Testimony

Withholding relevant testimony conflicts with the long-standing philosophy that the legal system has faith in the jury's

confused under cross-examination. *Id.*

164. *Anderson*, 789 N.W.2d at 242.

165. See Appellant's Reply Brief at 17, *Anderson*, 789 N.W.2d 227 (No. A09-1141). "I didn't think about it," is a typical answer from one with Asperger's, which is inconsistent with the pertinent mens rea of intent and premeditation. *Id.*

166. See *supra* note 76 (listing the substantial evidence proving Anderson's guilt).

167. A jury is not bound to expert testimony. *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984).

168. Appellant's Reply Brief at 19, *Anderson*, 789 N.W.2d 227 (No. A09-1141).

169. *Id.*; see also The Associated Press, 'Craigslist Killer' Michael John Anderson Gets Life in Murder of Katherine Olson, N.Y. DAILY NEWS, Apr. 3, 2009, http://www.nydailynews.com/news/national/2009/04/02/2009-04-02_craigslist_killer_michael_john_anderson_.html (directly quoting the judge).

170. See *supra* note 142 and accompanying text (discussing that criminal law does not care why a crime was committed).

171. See *supra* note 138 and accompanying text.

ability to evaluate evidence.¹⁷² Because the law requires proof of subjective intent or premeditation, the jury must determine a defendant's actual state of mind, and relevant evidence regarding that state of mind must be admitted.¹⁷³ Logically, because "psychology" is defined as the science of the mind,¹⁷⁴ one who studies it may have relevant information about the mind that is helpful to the jury.¹⁷⁵

Unlike Minnesota's approach, many jurisdictions hold that the exclusion of psychiatric testimony is a violation of a defendant's due process rights.¹⁷⁶ Their reasoning is derived from the most basic premise of criminal law: without a guilty mind, there can be no criminal liability.¹⁷⁷ Ultimately, these jurisdictions believe that all relevant evidence, which includes psychiatric testimony, should be received so the jury can better assess the case and determine where the truth lies.

1. *Defendant's Right to Present a Complete Defense*

When accused of a crime, a defendant has constitutional rights to present a complete defense.¹⁷⁸ Both the Sixth and Fourteenth Amendments protect these rights.¹⁷⁹ The deep principles

172. See JAMES GOBERT, *JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY*, § 1:1 (2010).

173. See Arenella, *supra* note 49, at 833.

174. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1004 (11th ed. 2003).

175. See Arenella, *supra* note 49, at 833.

176. See Gulbis, *supra* note 68, § 3(a) (listing the following jurisdictions that allow psychiatric testimony: California, Colorado, Connecticut, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Vermont, West Virginia, and Wisconsin).

177. See LAFAYE, *supra* note 129, at 252–56.

178. See generally 8 HENRY W. MCCARR & JACK S. NORDBY, *MINNESOTA PRACTICE SERIES: CRIMINAL LAW & PROCEDURE* § 32.4 (3d ed. 2010) (describing when defense evidence cannot be constitutionally excluded).

179. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI; see also MINN. CONST. art. I, §§ 6–7 (amended 1988) (creating the same constitutional rights). The Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

underlying both the Sixth and Fourteenth Amendments “are the protection of innocence and the pursuit of truth.”¹⁸⁰ Ultimately, these amendments protect citizens from erroneous verdicts and provide a defendant with the chance to be fully heard in court before his liberty is taken.¹⁸¹

The Sixth Amendment ensures that all defendants have the right to a speedy, public, and fair trial.¹⁸² A fair trial ensures that all defendants have notice of the crime they are charged with and an opportunity to be heard.¹⁸³ This includes a right to call witnesses in the defendant’s favor.¹⁸⁴ The Fourteenth Amendment’s Due Process Clause requires a full and fair hearing before an impartial tribunal.¹⁸⁵ The Due Process Clause encourages defendants to put the prosecution’s case to a meaningful, adversarial test, where the defendant can rebut each element of the charged crime with competent and credible evidence.¹⁸⁶ It seems that the Sixth and Fourteenth Amendments closely intertwine, as the right to offer the testimony of witnesses is, in plain terms, the right to present the defendant’s version of the facts.¹⁸⁷

Notably, a defendant’s Sixth and Fourteenth Amendment rights have limits. The legislature is free to restrict these constitutional rights so long as the restrictions are not arbitrary.¹⁸⁸

180. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996).

181. *Id.* (“A defendant will be convicted only if the people of the community (via the jury) believe the criminal accusation . . .”). The right to due process protects one accused of a crime from being denied his liberty without a chance to present his defense. See MCCARR & NORDBY, *supra* note 178 (“[T]he right to present a full defense is a constitutional one, an aspect of due process.”).

182. U.S. CONST. amend. VI; MINN. CONST. art. I, § 6 (amended 1988).

183. See sources cited *supra* note 182.

184. See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

185. See 16C C.J.S. *Constitutional Law* § 1495 (2011).

186. See U.S. CONST. amend. XIV, § 1; *California v. Trombetta*, 467 U.S. 479, 485 (1984); 16C C.J.S. *Constitutional Law* § 1495 (2011).

187. Martin A. Hewett, Note, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 GEO. L.J. 273, 308 (2007) (“Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.” (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967))).

188. *Rock*, 483 U.S. at 55–56. As stated in the MINNESOTA PRACTICE SERIES:

The U.S. Supreme Court has held that defense evidence may not constitutionally be excluded under a number of rules it deemed “arbitrary”: 1) A rule excluding accomplices as defense witnesses, 2) A rule against impeachment of one’s own witness, 3) A rule excluding evidence that confession was coerced, 4) A rule forbidding a defendant’s

At the federal level, a defendant's right to present witnesses has been restricted to exclude expert witnesses from stating whether the defendant had the mental state or condition constituting an element of the crime charged (i.e., intent or premeditation).¹⁸⁹ However, an expert may testify if he or she is only asked to explain a defendant's mental disease or defect.¹⁹⁰

Conversely, Minnesota's rules of evidence do not preclude expert witnesses from testifying.¹⁹¹ "Normally, experts are permitted to express opinions because they are dealing with a field of knowledge unfamiliar to others and particularly to the [jury]."¹⁹² However, Minnesota courts reserve the right to exclude certain testimony.¹⁹³ Typically, the crucial criterion courts use in determining the admissibility of expert testimony is whether the testimony will be helpful to the trier of fact.¹⁹⁴

In *Anderson*, a psychiatrist's testimony would have been helpful to the jury.¹⁹⁵ Although this crime was senseless, the court should not have concluded which evidence was necessary to Anderson's defense. The ultimate question of guilt must be decided by a jury, after it is presented all evidence. To deny the jury from hearing all

hypnotically refreshed testimony, 5) A rule conditioning admissibility of alternate perpetrator evidence on the relative weakness of the prosecution's evidence.

MCCARR & NORDBY, *supra* note 178 (footnotes omitted).

189. See 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 704:2 (6th ed. 2010).

190. For example:

Where lack of mental capacity is asserted, presumably the expert may answer the questions "Was the accused suffering from a mental disease or defect?", "Explain the characteristics of the mental disease and defect.", "Was his act the product of that disease or defect?" and "What is the effect of the disease or defect on the person's mental state?" However the expert may not answer the question "Was the accused able to appreciate the nature and quality of his act?" or "Was the accused able to appreciate the wrongfulness of his acts?"

Id. (footnotes omitted).

191. MINN. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify . . .").

192. *Sanchez v. Waldrup*, 271 Minn. 419, 426, 136 N.W.2d 61, 65 (1965).

193. See MINN. R. EVID. 403. Rule 403 sets forth the appropriate considerations that must be addressed in resolving challenges to the admissibility of relevant evidence. See *id.* The rule creates a balancing test: probative value is balanced against other considerations of policy, fairness, and convenience. *Id.*

194. See *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. Ct. App. 2001) (citing *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997)).

195. See *supra* notes 152–53, 161–65 and accompanying text.

relevant evidence is to deny it an opportunity to make a fair determination of guilt.

2. *Inconsistent Rules of Evidence*

Although not allowed in this case, psychiatric testimony has been allowed by Minnesota courts in both non-criminal¹⁹⁶ and criminal cases in the past.¹⁹⁷ This inconsistency that the courts have created over admissible psychiatric evidence not only causes confusion, but gives the courts too much power. Courts repeatedly allow expert testimony to explain battered women's syndrome,¹⁹⁸ sexual abuse syndrome,¹⁹⁹ and post-traumatic stress disorder.²⁰⁰

196. See *State v. Linder*, 268 N.W.2d 734, 736 (Minn. 1978) (admitting expert psychiatric testimony on issue of whether defendant was capable of knowing, intelligent, and voluntary waiver); *Parrish v. Peoples*, 214 Minn. 589, 595, 9 N.W.2d 225, 229 (1943) (admitting psychiatric testimony to determine mental capacity to make deeds or will); *Lindsey v. Lindsey*, 369 N.W.2d 26, 28, 30 (Minn. Ct. App. 1985) (admitting expert psychiatric testimony to determine whether defendant had capacity to enter into a contract).

197. See *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (determining that a clinical psychologist could testify as to nature of schizoid personality disorder); *State v. Holm*, 322 N.W.2d 353, 354 (Minn. 1982) (admitting expert psychiatric testimony on whether defendant would have difficulty in assessing the nature of her conduct was admissible in prosecution for criminal sexual conduct in the third degree); *State v. Bott*, 310 Minn. 331, 334, 246 N.W.2d 48, 52 (1976) (permitting state-retained psychiatrist to give opinion on whether the defendant accused of attempted second-degree murder knew the nature of his act or that it was wrong was not error).

198. In prosecutions relating to injuries or death of minor children, it is proper to introduce medical testimony relating to "battered child syndrome" and "battering parent syndrome." See *State v. Loss*, 295 Minn. 271, 279, 204 N.W.2d 404, 408 (1973). In one case, the Minnesota Court of Appeals found that the trial court did not abuse its discretion by admitting expert testimony on battered woman syndrome in a prosecution for attempted murder, burglary, kidnapping, and assault. The testimony explained why the victim recanted her prior out-of-court description and helped the jury understand behavior that would have otherwise undermined the victim's credibility. Notably, the court limited the scope of expert testimony to a description of the syndrome and its characteristics. See *State v. Plantin*, 682 N.W.2d 653, 661-62 (Minn. Ct. App. 2004).

199. See *State v. McCoy*, 400 N.W.2d 807, 810 (Minn. Ct. App. 1987) (holding that the district court did not abuse its discretion in admitting expert testimony on "sexual abuse syndrome," the typical behavioral characteristics of child victims of sexual abuse).

200. For example, in *State v. Sanford*, the Minnesota Court of Appeals found it was an error for the trial court to refuse to allow the defendant's expert to testify about the defendant's post-traumatic stress disorder. No. A07-1402, 2008 WL 4776713, at *2-*3 (Minn. Ct. App. Nov. 4, 2008). This refusal was not harmless because the expert's testimony would have provided a reasonable alternative explanation for the defendant's behavior. *Id.* at *3.

Courts have even gone so far as to admit expert testimony on voluntary intoxication to disprove a defendant's mens rea.²⁰¹

Defendants frequently argue that because evidence of voluntary intoxication is admissible to disprove mens rea, evidence of mental illness should be admissible as well.²⁰² Experts are free to testify whether a defendant was intoxicated, yet experts cannot state if a defendant has mental abnormalities.²⁰³ Judges have even expressed their disbelief by stating:

Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.²⁰⁴

It is troubling to imagine that if Anderson was intoxicated, rather than suffering from Asperger's, expert testimony about his intoxication could be admitted for the jury to consider in determining intent and premeditation.²⁰⁵

Additionally, the admissibility of psychiatric testimony in the

201. Although voluntary intoxication is no excuse for crime, "it may in many instances be relevant to the issue of intent." *Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958). Evidence of intoxication may be taken into consideration on whether specific intent has been formed. MINN. STAT. § 609.075 (2010). In Minnesota, voluntary intoxication is a defense if specific intent is an essential element of the crime in question. *See City of Minneapolis v. Altimus*, 306 Minn. 462, 466, 238 N.W.2d 851, 854 (1976) (holding voluntary intoxication is not a defense to traffic offenses because such acts do not require a specific intent).

202. *See State v. Provost*, 490 N.W.2d 93, 102 (Minn. 1992) (citing *United States v. Brawner*, 471 F.2d 969, 999 (D.C. Cir. 1972), *superseded by statute*, Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057, *as recognized in Shannon v. United States*, 512 U.S. 573, 575 (1994)).

203. *See State v. Fratzke*, 354 N.W.2d 402, 408 (Minn. 1984) (allowing defendant to present expert witness stating defendant was intoxicated the night of the crime). However, the expert may not give opinion testimony on how this intoxication may diminish the defendant's capacity to form specific intent. *Id.* at 409.

204. *Brawner*, 471 F.2d at 999. Minnesota courts stated that this contention is invalid because opinion testimony on whether a defendant's intoxication has rendered the defendant incapable of forming the requisite mens rea is not admissible. *See Provost*, 490 N.W.2d at 102.

205. *See supra* note 201 and accompanying text.

second phase of a bifurcated trial is problematic.²⁰⁶ Here, psychiatric testimony is allowed to help the jury determine whether the defendant was “laboring under such a defect of reason . . . as not to know the nature of the act, or that it was wrong.”²⁰⁷ Arguably, psychiatric testimony related to this standard will not be any more helpful, reliable, or relevant than psychiatric testimony would be on the issue of intent or premeditation.²⁰⁸ If psychiatric testimony is allowed under one standard, logic compels the other’s admissibility as well.²⁰⁹

3. *The Law’s Need to Catch Up to Psychiatry*

As an awareness of mental health issues progresses, the law will need to progress with it. Historically, courts did not trust expert psychiatric testimony, either because they did not believe psychiatrists could give credible evidence, or because the courts believed that the psychiatrists had secret hidden agendas.²¹⁰ We no longer live in the days where mental health is regarded as an uncertainty.²¹¹ Psychiatry is a legitimate science that is reliable and credible. Today, we have physical evidence to prove a defendant’s mental state: medical tests, scans, and trained doctors who can diagnose mental diseases. In fact, when assessing patients, psychiatrists look at physical evidence—what the defendant says and does—and match those actions with mental abnormalities that they are trained to diagnose.²¹²

206. See *Provost*, 490 N.W.2d at 107 (Gardebring, J., dissenting).

207. MINN. STAT. § 611.026 (2010).

208. See *Provost*, 490 N.W.2d at 107 (Gardebring, J., dissenting).

209. *Id.*

210. “[A] careful reading of *Bowman* [(which precluded psychiatric testimony)] indicates that [the] real concern about the admissibility of psychiatric evidence . . . was not only its relevance but also its reliability.” *Provost*, 490 N.W.2d at 106 (Gardebring, J., dissenting). Judge David Bazelon once stated: “Psychiatry, I suppose, is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry” Norman G. Poythress, Jr., *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 204 (1977).

211. See *supra* notes 196–200 (listing cases where Minnesota courts have trusted psychiatric testimony to aid the jury in evaluating evidence).

212. Mental health professionals use the Gillberg test to diagnose some Asperger’s individuals. See ATTWOOD, *supra* note 10, at 37. This test considers whether the individual has the following: (1) social impairments, such as difficulties interacting with peers or understanding social cues; (2) narrow interests; (3) compulsive need for introducing routines and interests; (4) speech

The decision in *Anderson* is particularly harmful to society because it creates a blanket holding that denies *all* individuals with Asperger's the possibility of admitting psychiatric testimony to disprove they possessed a guilty mind. Studies show that 1.5 to 2.4% of prisoners have Asperger's.²¹³ This suggests that Asperger's individuals are slipping through the cracks in criminal prosecutions, which may be because they are convicted based on the peculiar effects of their disorder, rather than their legally culpable conduct.²¹⁴

Notably, Asperger's is a developmental disorder, not a mental illness.²¹⁵ Despite the fact that Asperger's patients may not be legally insane, their mental culpability to commit a criminal offense may still be questioned.²¹⁶ People with Asperger's frequently misunderstand social cues and cannot comprehend that other people have different emotional reactions to the same event.²¹⁷ Accordingly, those with Asperger's who have committed an offense quickly confess and justify their actions because they cannot understand what all the fuss is about; to them, their actions were logical, justified, and appropriate.²¹⁸ This is legally significant because it prevents Asperger's individuals from perceiving and understanding the effect their conduct has on others.²¹⁹ If an individual completed the physical element of a crime, but the individual had no idea how his or her conduct might affect others, then the individual did not intend the particular outcome of his or her conduct.²²⁰

and language peculiarities, such as delayed speech development or superficially perfect expressive language; (5) non-verbal communication problems; and (6) motor clumsiness. *Id.*

213. See Wauhop, *supra* note 153, at 960 (citing Barbara G. Haskins & J. Arturo Silva, *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCH. L. 374, 377, 382 (2006)).

214. There are types of crimes that are relatively more common due to the nature of Asperger's. See ATTWOOD, *supra* note 10, at 335–38. One with Asperger's may stew over many years over past bullying or injustices and seek resolution and revenge by illegal means. *Id.* at 335. "The social naivety and immaturity of adolescents with Asperger's syndrome can also make them vulnerable to being 'set up' by peers, who encourage them to commit an offence." *Id.*

215. *Id.* at 332.

216. The *M'Naghten* insanity defense requires that the offender not know the nature of his act or that it was wrong at the time of committing the criminal act. See MINN. STAT. § 611.026 (2010).

217. See ATTWOOD, *supra* note 10, at 339.

218. *Id.*

219. See Wauhop, *supra* note 153, at 963.

220. *Id.* "Intentionally" means that the actor either has a purpose to do the

While Minnesota lags behind, other jurisdictions have acknowledged the importance of admitting psychiatric testimony in cases regarding Asperger's. For example, in *State v. Burr*, the New Jersey Supreme Court held "that the trial court misapplied its discretion in determining that Asperger's Disorder was not relevant to any of the issues in the case."²²¹ The New Jersey court held that testimony regarding Asperger's would help explain the defendant's inappropriate behavior with children and his strange demeanor in the courtroom.²²² More so, had the psychiatric expert been permitted to testify, it might have encouraged the defendant to testify in his own defense, since the jury would be less likely to view his conduct on the witness stand as suggestive of guilt.²²³

As other jurisdictions continue to utilize the advancements in psychiatry and recognize that Asperger's affects the mental element of a crime, Minnesota should note the positive effects of these cases and modify its rules accordingly. After all, current estimates suggest that approximately one in every 250 people suffer from Asperger's.²²⁴ As Asperger's becomes more prevalent, courts may be faced with more cases concerning these individuals' mental culpability and the required mens rea element of a criminal act. It is not fair to hold these individuals to the same standard as those with normal cognition, who truly intend the outcome of their conduct.

D. A New Approach for Minnesota

As discussed, courts in other jurisdictions have found that testimony relating to Asperger's is relevant when determining criminal mens rea.²²⁵ While numerous approaches regarding the

thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result." MINN. STAT. § 609.02, subdiv. 9(3) (2010).

221. See *State v. Burr*, 921 A.2d 1135, 1149 (N.J. 2007), *aff'd*, 948 A.2d 627 (N.J. 2008).

222. See *id.* at 1142, 1150. Burr appeared in court with a bag over his head. *Id.* at 1142 n.5. "When the court questioned his dress and demeanor, defendant answered by quoting from the Book of Deuteronomy." *Id.* Psychiatric testimony regarding Burr's Asperger's should have been admitted to help the jury get a better understanding of the defendant's inappropriate conduct of placing children on his lap while he taught piano lessons. *Id.* at 1149.

223. See *id.* at 1151. The defendant stated, "I always say something that irritates people and gives the wrong impression. . . . I can't trust myself to speak. . . . I always say things that embarrass myself and upset other people." *Id.*

224. ATTWOOD, *supra* note 10, at 46.

225. See, for example, text accompanying *supra* notes 221–22.

admission of psychiatric testimony exist, U.S. jurisdictions typically use one of three alternatives: the mens rea model, the diminished capacity model, or the exclusion of psychiatric testimony altogether (Minnesota's approach).²²⁶ This section describes these alternatives and how each would have affected Anderson's trial. Based on these approaches, this section concludes by offering a solution that is practical and fair.²²⁷

1. *The Mens Rea Model*

The mens rea model asks the jury to consider whether a sane defendant's mental abnormality prevented him from forming the required mental state prescribed by statute.²²⁸ If a mens rea defense is successful, it will reduce the offense to one with a lesser maximum punishment. With this model, evidence of mental abnormality is admissible to the extent that it proves or disproves the defendant's state of mind.²²⁹ The mens rea model is supported by many psychiatrists and an increasing number of state courts because it offers a logical way of relating medical data about the accused's mental state to legal categories of criminal liability.²³⁰

Of course, there are problems with the mens rea model. One major complication is the model's assumption that psychiatric analysis is directly relevant to the criminal law's definition of premeditation or intent.²³¹ This is not the case. Often, expert testimony does not adequately relate to the law's interpretation of intent and premeditation.²³² "In fact, most mentally abnormal offenders are fully capable of thinking about their criminal act before they do it, turning it over in their minds, planning the act, and then performing it in accordance with their preconceived

226. For an exhaustive list citing the states and cases that have adopted either the mens rea model or the diminished capacity model, see Travis H.D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1105–15 (1975).

227. See *infra* Part IV.D.3.

228. Arenella, *supra* note 49, at 828. "In practice, defendants raise this defense most frequently in homicide cases to show that their mental abnormality prevented them from premeditating . . . or possessing an intent to kill." *Id.* at 828–29 (citation omitted).

229. *Id.*

230. *Id.*

231. *Id.* at 833.

232. *Id.*; see *supra* notes 3–4, 138 and accompanying text (discussing the legal definitions of intent and premeditation).

plan.”²³³

In the *Anderson* case, the mens rea model would have allowed Anderson to introduce psychiatric evidence.²³⁴ The jury could have then reduced Anderson’s offense to one with a lesser penalty if they believed his Asperger’s affected his capacity to intend or premeditate murder.²³⁵ However, the prosecution could have easily established that even though Anderson had Asperger’s, he was fully capable of thinking about his criminal act before he did it—as evidenced by Anderson posting a babysitting job online to lure Katherine Olson to his home.²³⁶ Any evidence of how Asperger’s impaired Anderson’s behavioral controls or made it difficult for him to appreciate the wrongfulness of murder does not negate the existence of his intent or premeditation; it merely explains it.

2. *The Diminished Capacity Model*

The diminished capacity model “permits the jury to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act.”²³⁷ The diminished capacity model allows the jury and judge to make more individualized judgments.²³⁸ With this model, psychological testimony regarding the accused’s mental disabilities is allowed because it may prove that the accused was less capable than a “normal” defendant of entertaining the required premeditation or intent.²³⁹

Despite the simplicity of this model, American courts have refused to adopt it for a number of reasons. Some courts believe that the diminished capacity model would force the judiciary to rewrite gradations of offenses, which the legislature has already set forth.²⁴⁰ Another explanation is that the diminished capacity

233. Arenella, *supra* note 49, at 834. “Having Asperger’s . . . does not mean a person is more likely to be involved in criminal activities or commit a serious offence.” ATTWOOD, *supra* note 10, at 335. A person with Asperger’s can intend or premeditate just like any other person. *See id.*

234. *See supra* notes 228–30 and accompanying text.

235. *See supra* notes 228–29 and accompanying text.

236. *See State v. Anderson*, 789 N.W.2d 227, 231 (Minn. 2010).

237. *See Arenella, supra* note 49, at 829; Robert Park Bryant & Corbin Brooke Hume, Note, *Diminished Capacity—Recent Decisions and an Analytical Approach*, 30 VAND. L. REV. 213, 213 (1977).

238. *See Arenella, supra* note 49, at 845.

239. *See id.* at 835.

240. *Id.* at 849 (citing *Stewart v. United States*, 275 F.2d 617 (D.C. Cir. 1960),

model creates a middle ground of partial responsibility that is inconsistent with the view that a defendant is either fully responsible for his act, and thus subject to punishment, or not responsible, and thus entitled to freedom.²⁴¹

If the diminished capacity model had been used in *Anderson*, the jury would have been allowed to find Anderson less culpable than a normal offender.²⁴² The problem with this is it runs the risk of mitigating too much of the offender's criminal responsibility, which other individuals will argue applies to them in future cases. Assuming Anderson did have Asperger's, he was certainly high-functioning and seemed like a typical citizen.²⁴³ This raises two questions for Minnesota courts: (1) whether they are prepared to let every person who commits a criminal act introduce evidence that they may have Asperger's; and (2) whether they are prepared to excuse a large number of offenders who have Asperger's. Minnesota courts would likely respond negatively to both questions. So, the question remains: what can the law do to accommodate offenders with Asperger's?

3. *Suggestion for Minnesota Courts*

The time has come where criminal law must change to accommodate those who are not legally insane, but have mental abnormalities that affect mens rea. But before any recommendations can be made, the policy behind Minnesota's criminal law must be emphasized. Criminal law serves to provide adequate societal controls so that individuals can live in peace and security.²⁴⁴ Furthermore, criminal law strives to match legal liability with moral responsibility in a consistent and fair manner.²⁴⁵ By drawing from both the mens rea and diminished capacity models, it is possible to keep citizens safe, yet truly match legal liability and moral responsibility in a consistent and fair manner.

In order to provide a fair punishment, courts must categorize the offender's level of mental culpability. When an individual is

rev'd on other grounds, 336 U.S. 1 (1961)).

241. *Id.* at 849–50.

242. *See supra* note 238 and accompanying text.

243. Anderson had a job at the Minneapolis airport, and his primary physician never noticed any indication of Asperger's before this trial. *State v. Anderson*, 789 N.W.2d 227, 231, 239 (Minn. 2010).

244. *State v. Provost*, 490 N.W.2d 93, 100 (Minn. 1992).

245. *Id.*

arrested, police officers could employ several procedures to aid the courts in rendering just and speedy verdicts. Although police officers probably cannot identify Asperger's, they could be trained to ask the offenders questions to determine whether mental abnormalities may exist.²⁴⁶ If the officers believe there is a mental abnormality, the offender can be referred to a forensic clinician. This clinician can then diagnose the patient and assess the degree of the offender's culpability to the alleged offense.²⁴⁷ If the offender demonstrates understanding of the basic facts and the consequences of his or her conduct, then that individual should be prosecuted for the crime. If the individual was ignorant as to the consequences of his or her actions, then that individual should receive a lesser punishment. Punishing an individual based on honest ignorance is not an acceptable goal for criminal law.²⁴⁸

At trial, Minnesota courts should always allow an offender to introduce psychiatric testimony to disprove *mens rea*. This would ensure that all relevant evidence is provided to the jury before a decision is rendered. If the accused argues that he or she has Asperger's, or any other mental abnormality, mental health professionals should establish whether the accused does indeed have the disorder.²⁴⁹ Considering that the purpose of criminal law is to match the punishment with the offender's culpability, courts must allow the jury to categorize the offender according to the level of culpability the offender possesses and mitigate punishment accordingly.

Admittedly, this approach may result in unpredictable sentencing, which conflicts with the law's purpose of providing consistent punishment. To avoid this, the legislature could create several categories of criminal liability. Juries would then be free to determine the level of blameworthiness the individual offender possesses and punish the offender accordingly.

Another significant policy of criminal law is to protect society. Accordingly, if the court is faced with an individual who has a mental abnormality, yet is high-functioning—as Anderson was—

246. See ATTWOOD, *supra* note 10, at 338–39.

247. “The assessment will include an expert opinion on the fitness to plead, especially the ability to comprehend relevant legal concepts and court procedures.” *Id.*

248. See Wauhop, *supra* note 153, at 989 (citing VICTOR TADROS, CRIMINAL RESPONSIBILITY 251 (2005)).

249. See ATTWOOD, *supra* note 10, at 37 (describing Gillberg diagnostic criteria for Asperger's).

then it is completely appropriate to put him or her in jail for life. However, if a person with Asperger's requires more care and borders on insanity, then it may be proper to mitigate the punishment or hospitalize the defendant.

Ultimately, there are several issues to consider in altering Minnesota's treatment of this issue. However, presuming that all defendants are either sane or insane is not realistic. Historically, science could not measure the degree of sanity an offender possessed, so defendants were either sane or insane.²⁵⁰ But the advancement of scientific evidence proves this black and white approach is no longer sound. As psychiatric care progresses, the law will need to progress with it. Thus, Minnesota courts should address the proposition of providing alternative forms of punishment in the near future.

V. CONCLUSION

Those of us with "normal" brain function know that Katherine Olson's murder was a senseless, monstrous act. But what was Michael Anderson thinking when he killed her? Did Anderson possess adequate knowledge of wrongdoing, or did Asperger's prevent him from forming mens rea? As a society, we are quick to seek protection from the evils we do not understand. But even the scum of the earth have civil liberties that must not be overlooked. In *Anderson*, although the court had discretion to exclude psychiatric testimony, it disregarded Anderson's constitutional rights in doing so.

Minnesota courts have routinely overlooked situations where an offender does not plead insanity, yet lacks the necessary mens rea to intend or premeditate a criminal offense.²⁵¹ If no crime exists unless there is a guilty mind, defendants must be allowed the opportunity to defend against the mental culpability element of a crime. Quite simply, it is illogical to require proof of a defendant's subjective state of mind, yet deny psychiatric testimony because it is irrelevant to the defendant's mindset.

Many people are affected with mental abnormalities, and criminal law may need to change its procedures to accommodate

250. Arenella, *supra* note 49, at 862 (quoting George E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 CRIM. L.C. & P.S. 313, 333 (1971)).

251. See cases cited *supra* note 9.

them. Years ago, a Minnesota Supreme Court Justice stated the following:

There are imperfections in our system, none of them more troublesome than those in the area where psychiatry meets the law. We must, however, continue to learn from psychiatry and to reflect in the law the best of what is known about the human mind. Difficult as it is, we must try, particularly when we are confronted with a right as basic as the defendant's right to have the state prove beyond a reasonable doubt each element of his alleged crime²⁵²

The seriousness in denying a human his or her freedom is the reason the prosecution must prove its case beyond a reasonable doubt. If the *Anderson* court had allowed psychiatric testimony, Anderson would have been given his full day in court. The jury would have had all relevant information presented to them before making the decision to put a nineteen-year-old in jail for the rest of his life. Arguably, allowing expert testimony in this case would have done nothing more than reconfirm the basic concepts of our judicial system: the presumption of innocence, the due process requirement that the state prove each element of the crime beyond a reasonable doubt, and the defendant's right to present relevant evidence in his defense in order to receive a fair trial.²⁵³

252. State v. Bouwman, 328 N.W.2d 703, 709 (Minn. 1982) (Wahl, J., dissenting).

253. See State v. Brom, 463 N.W.2d 758, 768 (Minn. 1990) (Wahl, J., dissenting).