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Articles

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Introduction

Andrea Yates, a former nurse and high school valedictorian, lived in Houston, Texas with her husband and five children ranging in age from six months to seven years.[1] She suffered from long-term severe depression and tried to commit suicide.[2] In March of 2001 Yates was hospitalized where she

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1. Thomas L. Hafemeister, *Developments in Other State Courts*, 25 DEV. MENTAL HEALTH L. 130, 136 (2006); *Jury Finds Yates Insane, Not Guilty*, HOUSTON CHRONICLE, July 26, 2006, *available at* http://www.chron.com/disp/story.mpl/front/4073570.html.

2. Yates v. Texas, 171 S.W.3d 215, 216-17 (Tex. App. 2005).

was observed to be in a catatonic state and possibly delusional.[3] Upon her discharge doctors advised that she not be left alone.[4]

On June 10, 2001, while left alone with her five children, Yates systematically drowned them one by one. She then called 911.[5] When the police arrived Yates explained that she had to kill her children because she was a bad mother and had damaged them. According to Yates, the only way to protect her children from Satan and ensure their place in Heaven was to kill them.[6]

Yates was charged with capital murder. There was no dispute that Yates had killed her children and she relied on an insanity defense at trial. After her conviction was reversed on appeal,[7] she was found not guilty by reason of insanity following a second trial. Texas statutes provide an affirmative defense to a charged crime if the defendant, "as a result of severe mental disease or defect, did not know that his conduct was wrong."[8] Jury foreman Todd Frank explained: "[w]e understand that she knew it was legally wrong. But in her delusional mind, in her severely mentally ill mind, we believe that she thought what she did was right."[9] Yates was committed to a maximum security state hospital until such time as a court decides that she does not pose a danger to herself or others.[10]

In Flagstaff, Arizona, on June 21, 2000, 17 year-old Eric Clark, in a delusional state, shot and killed Officer Jeffrey Mortiz, believing him to be an alien.[11] It was undisputed that Clark suffered from paranoid schizophrenia. At trial classmates, school officials and family described Clark's increasingly bizarre behavior and paranoid conduct. Lay and expert testimony revealed that Clark believed Flagstaff was populated by aliens

3. *Id.* at 217.

4. *Id.* at 217.

5. *Id.* at 218.

6. Hafemeister, *supra* note 1, at 136.

7. *Yates*, 171 S.W.3d at 222.

8. TEX. PENAL CODE ANN. § 8.01(a) (Vernon 2003).

9. Paul J. Weber, Andrea Yates Ex-Husband Says Prosecutors' Case 'Built On Lies' ASSOCIATED PRESS (Houston), July 28, 2006, *available at* http://abclocal.go.com/kabc/story?section=nation_world&id=4410036.

10. *Jury Finds Yates Insane, Not Guilty, supra* note 1.

11. Clark v. Arizona, 126 S.Ct. 2709, 2717 (2006).

who were trying to kill him and that bullets were the only way to stop them.[12]

Clark was charged with first degree murder. He did not contest the shooting, but argued that he was insane at the time it occurred. Like Texas, Arizona statutes provide an affirmative defense if the accused establishes that he was "afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."[13] Clark waived his right to a jury trial and received a bench trial. The judge issued a special verdict expressly finding that Clark had failed to show that he was insane at the time of the shooting. Although the trial judge concluded that Clark was suffering from paranoid schizophrenia, the court determined that Clark's mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong."[14] Clark was sentenced to life in prison.[15]

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

On February 7, 2000, in Girard, Kansas, Michael Bethel shot and killed his father, step-mother and a home-healthcare nurse. Bethel, who began to experience the onset of mental illness in 1995, had been diagnosed as a paranoid schizophrenic.[16] After five years of continual mental deterioration, Bethel told police that God had commanded the killings and that "all three parties . . . were jointly involved in a 'stage set' in which the three individuals would soon metamorphos[e] [sic] into a new level of existence."[17] According to psychiatric testimony, Bethel

12. *Id.* at 2717.

13. ARIZ. REV. STAT. § 13-502(A) (LexisNexis 2007).

14. *Clark*, 126 S.Ct. at 2718 (quoting Minute Entry from Joint Appendix Vol. II at 334, *Arizona v. Clark*, 126 S. Ct. 2709 (2003) (No. 05-5966)).

15. *Id.*

16. Transcripts of the Record on Appeal Volume IV, State v. Bethel, 66 P.3d 840 (Kan. 2003) (No. 87989).

17. *Bethel*, 66 P.3d at 843.

was mentally impaired and lacked the substantial capacity for judgment at the time of the shootings.[18]

Like Yates and Clark, Bethel did not contest that he shot and killed three people. Like Yates and Clark, there was no dispute that Bethel suffered from a severe mental illness that caused his delusions.[19] In Bethel's case, he believed that God told him to kill those three people in order to rid them of evil and that his father and the other two victims would then be reincarnated as younger, good, versions of themselves.[20] Consequently, like Yates and Clark, Bethel's sole defense was that his conduct was the result of his severe mental illness.[21] Unlike Yates and Clark, however, Bethel was prohibited from raising insanity as an affirmative defense to the crimes charged.[22]

Since Kansas abolished the affirmative defense of insanity in 1996,[23] the sole question for the trier of fact was whether Bethel intended to shoot the three victims.[24] Yet, because Bethel was not contesting his commission of the act, the defense that Bethel's lack of intent was the result of his mental illness was irrelevant. Bethel was charged with capital murder and proceeded to a bench trial on stipulated facts in exchange for the prosecutor's recommendation of a life sentence. At sentencing, the court found that, while Bethel was a dangerous person, he was not an evil person and imposed the recommended sentence of life imprisonment.[25]

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18. Transcripts of the Record on Appeal, Volume XV at 7, *Bethel*, 66 P.3d 840 (No. 87989).

19. *See id.* at vol. XIV.

20. *Id.* at 947.

21. *Id.* at Stipulated Facts.

22. *Id.*

23. *Bethel*, 66 P.3d at 844.

24. The Kansas statute now reads: "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense. The provisions of this section shall be in force and take effect on and after January 1, 1996." Kan. Stat. Ann. § 22-3220 (1996).

25. Transcript of Record on Appeal at 24, *Bethel*, 66 P.3d 840 (No. 87989). Interestingly enough, although Bethel could have been subject to the death penalty for a conviction of capital murder, the fact that insanity is no longer an affirmative defense in Kansas may have prohibited his execution. The United States Supreme Court recently reaffirmed that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Ford v. Wainwright, 477 U.S. 399, 409-10 (1986). "The prohibition applies despite a pris-

Despite significant debate over the appropriate legal and medical standards for insanity,[26] the majority of jurisdictions and even the Supreme Court of the United States seem to accept that legal capacity for criminal responsibility, or moral blameworthiness, in some form, is constitutionally mandated as an affirmative defense to criminal liability.[27] While various jurisdictions have adopted different tests for insanity,[28] the

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oner's earlier competency to be held responsible for committing a crime and tried for it." Panetti v. Quarterman, 127 S.Ct 2842, 2847-48 (2007).

26. *See generally* Stephen Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond* Clark v. Arizona (University of Pennsylvania Law School, Scholarship at Penn Law, Paper 143 (2007), *available at* http://lsr.nellco.org/upenn/wps/papers/143); Clark v. Arizona, 126 S.Ct. 2709 (2006).

27. All states that have evaluated the question held that due process requires some type of avenue for the consideration of mental illness as a factor in assessing criminal reliability. Those states that have abolished the affirmative defense of insanity merely determined, for reasons that will be addressed in Part III, that imbedding consideration of mental illness in a pure elements notion of mens rea comports with due process. *See* State v. Searcy, 798 P.2d 914, 917 (Idaho 1990); State v. Bethel, 66 P.3d 840, 844 (Kan. 2003); State v. Korell, 690 P.2d 992, 999 (Mont. 1984); State v. Herrera, 895 P.2d 359, 364 (Utah 1995). The Supreme Court in *Clark v. Arizona*, 126 S.Ct. 2709 (2006), held that the ability of Clark to present his defense of insanity was provided for. *Id.* at 2722. And while the Court declined to resolve the question of whether the insanity defense was constitutionally required, the Court also declined to hold that such a defense *was not* constitutionally required. *Id.* at 2722 n.20. In *Finger v. State,* the Supreme Court of Nevada specifically held that an affirmative defense of insanity is constitutionally required. Finger v. State, 27 P.3d 66 (Nev. 2001).

28. As many as sixteen states use the *M'Naughten* test, wherein the accused is not responsible for his or her conduct if, as a result of mental illness, the accused did not know the nature and quality of his actions or did not know that what he was doing was wrong. *See Korell,* 690 P.2d at 999. Some states have broadened the scope of the *M'Naughten* rule to include those who knew that their actions were wrong but who, as a result of a "disease of the mind," were unable to exercise control over their actions. This "irresistible impulse" test, or volitional standard, is used to supplement the *M'Naughten* rule in approximately five states. Many states follow a variation of the American Law Institute ("ALI") test which is a combination of the *M'Naughten* test and the "irresistible impulse" test. The ALI standard states that a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law. MODEL PENAL CODE, §4.01. Among those states that follow the Model Penal Code test, some favor the word "wrongfulness" instead of "criminality." Still others remove the word "substantial." New Hampshire is the only state which follows the Durham rule or "product" test. As set forth in *Durham v. United States,* 214 F.2d 862, 874-75 (D.C. Cir. 1954), "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Three other states have adopted unique standards

strength and weaknesses of the varying tests are not at issue here. Rather, it is the complete abolition of insanity as an extrinsic, affirmative defense that is the focus of this article.

Like Kansas,[29] Montana,[30] Idaho,[31] and Utah[32] have replaced their respective insanity defense statutes with what has been termed the Mens Rea Model evidentiary rule.[33] Under this

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drawing in part from the cognitive right-wrong language of the *M'Naughten* rule and the "irresistible impulse" test while adding other considerations, such as "prevailing community standards" and "legal and moral aspects of responsibility." *Searcy*, 798 P.2d at 914. *See also*, *Clark*, 126 S.Ct. at 2720-21. *See generally* I. KEILITZ & J.P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS (Institute on Mental Disability & the Law, National Center for State Courts 1984).

29. *See supra* note 24.

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

31. (1) Mental condition shall not be a defense to any charge of criminal conduct.

(2) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence.

IDAHO CODE § 18-207 (2004).

32. (1) (a) It is a defense to a prosecution under any statute or ordinance that the defendant as a result of mental illness, lacked the mental state required as an element of the offense charged.

(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76-3-207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense under Section 76-5-205.5.

(2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity."

UTAH CODE ANN. § 76-2-305 (2003).

33. State v. Searcy, 798 P.2d 914, 917 (Idaho 1990); State v. Bethel, 66 P.3d 840, 844 (Kan. 2003); State v. Korell, 690 P.2d 992, 999 (Mont. 1984); State v. Herrera, 895 P.2d 359, 364 (Utah 1995).

model, evidence of mental disease or defect is admissible to show that the defendant lacked the mental state required as an element of the offense charged.[34] The Mens Rea Model resembles the diminished capacity doctrine, in that it is focused on the question of whether the defendant's mental state negates an element of the crime.[35] The position taken in this article is that, by replacing the extrinsic defense of insanity with an evidentiary rule intrinsic to offense elements, the Mens Rea Model unconstitutionally abolishes an essential category of mens rea which is concerned with legal capacity as a precondition for criminal responsibility.

In arguing the Mens Rea Model is unconstitutional, Part I of the article examines the history of mens rea and establishes that the legal capacity for criminal responsibility, or moral blameworthiness, is a deeply rooted principle in American jurisprudence. Against the historical backdrop of mens rea and the insanity defense, Part II of the article analyzes the state rulings that have addressed the Mens Rea Model and concludes that the state courts fundamentally misunderstand mens rea by defining it as solely one's intent to act. The state court discussion is followed in Part III by an analysis of the issue in light of the Supreme Court's decision in *Clark v. Arizona*.[36] Although the Court in *Clark* failed to resolve the issue, the majority opinion implicitly acknowledged that an affirmative defense of insanity may be required by the Due Process Clause. Additionally, Justice Kennedy's dissent in *Clark*, which correctly notes the erroneous "conflating [of] the insanity defense and the question of intent,"[37] also reads with an affirmation that evidence of legal incapacity for criminal responsibility must be admitted.[38] By

34. *Searcy*, 798 P.2d at 917; *Bethel*, 66 P.3d at 844; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 364.

35. As is discussed in Part IV, evidence of diminished capacity is relevant to negate the specific intent element of the crime. To this extent, the Mens Rea Model resembles the doctrine of diminished capacity. However, diminished capacity must not be confused with insanity. As elaborated upon in Part IV, capacity to form specific intent, which goes to the elements of the crime, and capacity for criminal responsibility, which is extrinsic to the offense elements, are two different things. *See infra* note 166.

36. Clark v. Arizona, 126 S.Ct. 2709 (2006).

37. *Id.* at 2746.

38. *Id.* ("Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the mens rea elements of the

drawing on such firmly rooted principles and current Supreme Court analysis, Part IV of the article maintains that because mens rea has two categories—"special" mens rea, which is concerned with the mental element of a particular crime, including the intent to act, and "general" mens rea, which is extrinsic to offense elements and is concerned with legal capacity as a precondition for criminal responsibility—both are constitutionally protected by the Due Process Clause. As the Mens Rea Model eliminates the category of general mens rea, it is unconstitutional.

I. History of *Mens Rea*

There is no question that the category of mens rea that addresses offense elements is constitutionally required.[39] The broader question is whether the category of general mens rea that addresses the legal capacity for criminal responsibility is also constitutionally required. In other words, does the Constitution require that an accused, who, because of mental illness, is unable to appreciate his conduct, be able to present that affirmative defense to the trier of fact?

The Constitution provides that states cannot deprive an individual of life, liberty and the pursuit of happiness without due process of law.[40] A legislative enactment violates the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[41] The Supreme Court has consistently held that

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offense. While there may be overlap between the two issues, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." (citing Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring))).

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

40. U.S. CONST. amend. XIV.

41. *Clark*, 126 S.Ct. at 2719 (applies the test to the question of insanity standards); Patterson v. New York, 432 U.S. 197, 201-02 (1977) (power of the states to regulate procedures under which its laws are carried must comport with due process); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (state law denying a defendant the right to a trial before incarceration on a misdemeanor offense violates due process).

history and common law are directive in assessing fundamental rights.[42] Our analysis begins, then, with an examination of the history of the mens rea doctrine.

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.[43] As far back as the Anglo-Saxon period ending around 1100 A.D., moral liability was entrenched in the criminal law.[44] The mens rea term likely originated in 597 A.D. with St. Augustine and his writings of evil motive.[45] St. Augustine discussed the necessity of a "guilty mind" in relation to perjury by stating, "[n]othing makes the tongue guilty, but a guilty mind."[46] Although St. Augustine's sermon focused on perjury, the phrase in Latin, "[r]*eum linguam non facit nisi mens rea*," provided the basis for the evil motive application to all crimes with the mere removal of the word *linguam*.[47]

The basis for the mens rea term originated with church teachings, which for many years remained isolated from secular laws.[48] While the law provided for criminal liability without criminal intent or fault, it was the church that taught that the intent of the person was the most important factor.[49] Penance was determined largely on the moral blameworthiness of the "sinner."[50] Not surprisingly, the early Anglo-Saxon church eventually influenced the laws of the time.[51] Anglo-Saxon judges found difficulty in punishing those who were guilty of

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42. *See* Ford v. Wainwright, 477 U.S. 399 (1986) (based, in part, on the common law rule that execution of an insane person violates the Eighth Amendment).

43. *See* JOSEPH GOLDSTEIN, ALAN M. DERSHOWITZ & RICHARD D. SCHWARTZ, CRIMINAL LAW: THEORY AND PROCESS 767 (1974); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932).

44. *See* Paul E. Raymond, *The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law*, 15 OR. L. REV. 93, 117 (1936).

45. *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 654-55; *see also* Raymond, *supra* note 44, at 110.

46. Raymond, *supra* note 44, at 110 (citing AUGUSTINUS, BEN. SERMONES, no. 180, c. 2).

47. *Id.* at 110-11.

48. *Id.*

49. Bowes Sayre, *supra* note 43, at 983.

50. *Id.*

51. *See* Raymond, *supra* note 44, at 110-11; *see also* Gardner, *supra* note 45, at 642-43.

killing another by accident or in self-defense.[52] Although the laws concerning guilt in these instances did not change at this point in time, the church's influence sparked a procedural solution to problems of blameworthiness: a king's pardon.[53]

By the thirteenth century, the notion of malice as a component of mens rea began to emerge.[54] Henry Bracton, a cleric and judge of that time, influenced the direction of the common law.[55] Bracton's writings displayed not only a strong roman and canonist influence that "a crime is not committed unless the intention to injure exists,"[56] but suggested a blameworthiness component as well:

> [W]e must consider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (*nocendi voluntas*) intervene, nor is a theft committed except with the intent to steal.[57]

In his writings on arson, Bracton relayed the importance of evil designs, or *mala conscienta*.[58] This element of moral blameworthiness was evidenced by the use of the words "premeditated," "madness," "wickedly," "in felony" and "misadventure" in pleas before the crown during the first part of the thirteenth century.[59]

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

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52. Bowes Sayre, *supra* note 43, at 980.

53. *Id.*

54. J. L.L. J. EDWARDS, Mens Rea in Statutory Offences 2 (1955). *See also* Gardner, *supra* note 45, at 641.

55. Gardner, *supra* note 45, at 655. *See also* Bowes Sayre, *supra* note 43, at 984.

56. Gardner, *supra* note 45, at 657 (citing HENRY D. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans., 1968)).

57. . Bowes Sayre, *supra* note 43, at 985 (citing BRACTON DE LEGIBUS ET CONSEUETUDINIBUS ANGLIAE 101b).

58. EDWARDS, *supra* note 54, at 2.

59. Raymond, *supra* note 44, at 117.

nally liable because they lack mental capacity or reason.[60] Similarly, children cannot be held criminally liable because they lack evil designs.[61] According to one legal scholar, Bracton's view of mens rea "constituted a normative judgment of subjective wickedness, requiring not simply that the actor intend to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes."[62] Thus developed the component of moral blameworthiness and insanity as a defense to criminal liability.

After the thirteenth century, moral blameworthiness helped to distinguish between criminal and civil responsibility.[63] In the years following Bracton, there grew a "differentiation between the crime and the tort, for the allowance of damages continued in the main independent of considerations of moral blameworthiness."[64] Moral blameworthiness and "malice aforethought," however, mirrored the general mens rea requirement requiring an evil motive or intent.[65]

During this time, defenses continued to evolve around the concept of mens rea, due in large part to the idea that a "free, voluntary, and rational choice to do evil" was required for criminal liability.[66] Like insanity and infancy, self-defense and compulsion emerged as defenses on the grounds that the accused was not morally blameworthy. "While coerced offenders no doubt intend their criminal acts, they are excused because their capacity to function as free and responsible moral agents has been so compromised by the pressure of the situation that to punish them would be unfair."[67] Consequently, courts began to

60. Bowes Sayre, *supra* note 43, at 98 (citing BRACTON, *supra* note 56, at 136b).

61. *Id.*

62. Gardner, *supra* note 45, at 663.

63. Bowes Sayre, *supra* note 43, at 988.

64. *Id.* at 989-90.

65. Gardner, *supra* note 45, at 668-69.

66. *Id.* at 665.

67. *Id.* at 665 (internal citations omitted). Although defenses such as infancy, insanity and self-defense were recognized, other excuse defenses such as religious obligation, lack of knowledge and euthanasia were punished in the usual manner. *Id.* at 666-67. Additionally, in the seventeenth century, Eduardo Coke expounded upon Bracton's ideas concerning malice and arson, "[i]f it be done by mischance, or negligence, says Coke, it is no felony." EDWARDS, *supra* note 54, at 2 (citation omitted). While Coke repeated Bracton in regards to express malice, he greatly expanded the idea to include malice implied by the law. For example, Coke believed

excuse defendants who committed certain acts under extreme duress. This evolution cemented the notion of moral blameworthiness and that the offender must be in a position to make a free and voluntary choice to commit an evil act.[68] By the eighteenth century, moral blameworthiness as an essential component of mens rea was firmly rooted in English criminal law as evidenced by Blackstone's statement: "So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."[69]

A strict use of evil motive or vicious will did produce some unpredictable and unjust results. When persons who acted with an evil motive but achieved an unexpected result were sometimes declared not guilty of the unintended consequences of the intended act, the judiciary, in an effort to correct this strict application of evil motive, began to struggle with identifying a notion of mens rea that became part of the element of the offense.[70] For the defendant who acted intentionally, mens rea

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that the "killings by robbers while in the commission of their robberies" and a killing that occurs as an accident while in the process of an illegal act were both committed with a type of malice aforethought and the accused should be held accountable. Gardner, *supra* note 45, at 669-70. Consequently, Coke's writings formed the basis for the modern day felony murder rule while greatly expanding the notion of malice at the time.

68. Gardner, *supra* note 45, at 665.

69. Kelly A. Swanson, *Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses- In re* C.R.M., 28 WM. MITCHELL L. REV. 1265, 1266-67 (2002) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 20-21).

70. *See* Gardner, *supra* note 45, at 673-74.

> As courts attempted to clarify the mens rea elements of various offenses, they often specifically rejected the original evil motive approach in favor of describing particular states of mind as essential for criminal liability. Thus, in Regina v. Pembliton, the court quashed Pembliton's conviction for the statutory offense of "unlawfully and maliciously committing damage . . . to the property of another." Pembliton, while drunk, got into a fight with a group of people in a street lined with houses. In the course of the fight, Pembliton picked up a large stone and hurled it at the group. The stone flew over their heads and struck and shattered a plate glass window of one of the homes along the street. The government argued, seemingly correctly under the facts, that Pembliton's motive in throwing the stone (a desire to injure his fellow combatants) was "malicious." The court nevertheless found that because he did not "intend" to break the window, he did not "maliciously commit damage" under the statute. The court intimated, however, that had the jury found that Pembliton recklessly had thrown the stone, in light of

would exist even if the result of the action was not what was intended.[71]

Despite this divergent approach to mens rea, the concept of evil motive—moral blameworthiness—as a prerequisite to criminal responsibility was not abandoned in law. Rather, this aspect of mens rea was preserved in doctrines of excuse. If conduct was intentional, but for reasons of duress, infancy or insanity the defendant did not possess the capacity for moral blameworthiness, a defense existed to the otherwise criminal conduct.[72]

This mens rea duality was ultimately adopted by English common law courts. In 1796 Blackstone explained that lunatics suffered a deficiency in will that rendered them unable to tell right from wrong.[73] It is this lack of free will that prevents a finding of criminal liability. According to Blackstone, it is a person's free will and ability to choose to act that renders their conduct either "praiseworthy or culpable."[74]

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the nearness of the windows, he would have maliciously committed damage under the statute.

Id. (internal citations omitted).

71. It is this theory of guilt that eventually took hold in the Model Penal Code in the form of reckless involuntary manslaughter and in the felony-murder doctrine wherein the defendant is still held accountable for an unintentional killing during the commission of inherently dangerous felony. *See* Gardner, *supra* note 45, at 682-84.

72. *See* PETER BRECHT, AN INQUIRY INTO CRIMINAL GUILT, 41-42 (1963); Gardner, *supra* note 45, at 695.

73. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 24 (1769), *cited with approval in* Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

74. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (1769), *quoted in* Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1, 5 n.16 (2005). See also, Kathleen S. Goddard, *Case of Injustice? The Trial of John Bellingham*, AM. J. LEGAL HIST. 1 (Jan. 2004), wherein the author discusses that Hawkins and Blackstone did not deal with insanity in detail. Hawkins took the view that a person must be able to understand the law and be capable of conforming to it; a person of unsound mind who could not distinguish between good and evil was therefore not culpable. Blackstone also took the view that a lunatic could not be guilty of a crime in that his understanding was defective, and therefore he lacked the necessary mental element. *Id.*

The belief that a person must have moral culpability is further reflected in death penalty jurisprudence. In 1986 the Court held that it is a violation of the Eighth Amendment to execute a prisoner who is insane. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986). After reviewing the values as laid down by Blackstone and Coke, Justice Marshall reasoned that:

Perhaps the most famous English common law case is the 1843 *M'Naughten's Case*. In *M'Naughten's Case*, the English court determined that while the prosecution held the burden of establishing that the conduct of the defendant was intentional, it was a defense if the defendant could prove that he or she did not possess the mental state necessary to appreciate the wrongfulness of his or her conduct.[75] According to the *M'Naughten* test, the accused is not responsible for his or her conduct if, as a result of mental illness, the accused did not know the nature and quality of his actions or did not know that what he was doing was wrong.[76] Since its passage in 1843, the *M'Naughten* test, or variations of it, has been utilized to determine the criminal responsibility, i.e., moral blameworthiness, of persons whose mental illness deprived them of the ability to rationally choose between right and wrong.[77] This dual approach to mens rea thus preserved the historical requirement of moral blameworthiness, while at the same time it remedied the unpredictable results of a strict application of evil motive.[78]

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

477 U.S. at 409-10 (internal citations omitted). And just this term, the Court held such a prohibition applies even if the defendant is deemed competent to stand trial. Panetti v. Quarterman, 127 S.Ct. 2842, 2847-48 (2007).

75. McNaughten's Case, 8 Eng. Rep. 718, 722 (1843). McNaughten believed that there was a conspiracy by the Prime Minister to kill him. However, in his attempt to kill the Prime Minister, he actually killed the secretary to the Prime Minister. McNaughten's defense was that he was suffering from persecutory delusions at the time. *Id.* at 719.

76. *Id.* at 722.

77. *Id.* at 722-23.

78. *Id.* *See also* BRECHT, *supra* note 72, at 41-42; Gardner, *supra* note 45, at 737.

The duality of mens rea that is rooted in long standing common law was clearly adopted by the Supreme Court.[79] It was the absence of free will, which lies at the heart of criminal non-responsibility of insane persons that was acknowledged by the Court over 100 years ago:

> [I]n order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for his criminal acts. . . . Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.[80]

And more recently, the Court reflected in *Morissette v. United States*, that

> a relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to" . . . . Unqualified acceptance of this doctrine by English common law . . . was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'[81]

Unfortunately, the attempts by several courts to address the insanity issue have confused the dual nature of mens rea. Rather than recognize the existence of two necessary but dis-

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79. As Professor Stephen Morse points out, Justice Holmes observed that "[e]ven a dog distinguishes between being stumbled over and being kicked." Morse & Hoffman, *supra* note 26, at 17 (*citing* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Dover Ed., 1991)).

80. Davis v. United States, 160 U.S. 469, 485 (1895) (internal citations omitted). The Court noted in *Davis* that in a prosecution for murder, where the defense is insanity, "and the fact of the killing with a deadly weapon [is] clearly established," a defendant "is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing [the] crime." *Id.* at 484.

81. Morissette v. United States, 342 U.S. 246, 250-51 (1952) (footnotes omitted) (in prosecution under statute providing that whoever embezzles, steals, purloins or knowingly converts government property is punishable by fine and imprisonment, the mere fact that defendant's removal of property was a conscious and intentional act did not give rise to presumption of criminal intent).

tinct categories of mens rea, courts have tended to collapse the two into a single notion of mens rea which focuses solely on the mental element of a particular offense. By failing to understand and give weight to the category of mens rea that addresses legal capacity for criminal responsibility, courts have erroneously abandoned a deeply rooted principle of law that is fundamental to our scheme of criminal justice.[82]

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

The distinction between the affirmative defense of insanity and the Mens Rea Model evidentiary rule "can be complex and somewhat overlapping."[83] This is particularly true as the term 'Mens Rea Model' is really a misnomer. To illustrate the difference the following hypothetical is frequently used: *A* is severely mentally ill. If because of his mental illness, *A* kills *B* thinking he is cutting a grapefruit, *A* is not guilty under either the affirmative defense of insanity or under the Mens Rea Model as *A* did not intend to kill *B*.[84] If, however, *A* shoots *B*, believing in an acute state of mental illness that *B* is an enemy soldier and that he must kill or be killed, evidence of mental illness would be admissible under the affirmative defense doctrine, but would not be an admissible defense under the Mens Rea Model. Under an affirmative insanity defense, *A*'s mental capacity would be taken into account in assessing criminal liability. Under the Mens Rea Model, however, because *A* knew *B* was a human being and clearly intended to kill him, the elements of the offense would be proven and a guilty verdict would follow.

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82. In determining that evil motive remains central to the defenses of infancy, insanity, duress and mistaken claim of right, Professor Gardner examined the theoretical status of these defenses and distinguished them from concepts relating to mens rea requirements for prima facie guilt. Professor Gardner then concluded that the failure to appreciate the offense/defense distinction can result in confusion leading to two doctrinally undesirable manifestations: (1) restricted application or outright rejection of the defenses; and (2) stifling of judicially created "new" defenses. Gardner, *supra* note 45, at 737.

83. Clark v. Arizona, 126 S.Ct. 2709, 2742 (2006) (Kennedy, J., dissenting).

84. Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas,* 8 KAN. J.L. & PUB. POL'Y, 253, 261 (1999). *See also* State v. Herrera, 895 P.2d 359, 362 (Utah 1995).

That the conduct was the result of *A*'s mental illness and a belief that *B* was an enemy soldier would be irrelevant.

Because the vast majority of mentally ill people are capable of forming intent[85] and most mental illness is not so extreme that *A* believes he is cutting a grapefruit when in fact *A* is killing *B*, the Mens Rea Model effectively abolishes a person's ability to argue that he or she lacked the capacity for criminal responsibility.[86] Despite such harsh results, the Mens Rea Model has withstood constitutional challenges in four of the five states that have adopted it.[87]

While the five courts to consider the Mens Rea Model agree that mens rea is constitutionally required,[88] the courts are in disagreement over exactly what the mens rea concept itself requires.[89] Much of the confusion is the result of the courts' failure to appreciate in any meaningful manner the duality of mens rea. Despite the clear historical mandate that mens rea requires not just intent, but moral blameworthiness, courts misunderstand the duality of mens rea and simply conclude that the Mens Rea Model is constitutional.

This confusion resulted in four state supreme courts upholding the Mens Rea Model as constitutional. In finding that the Mens Rea Model was consistent with constitutional due process, these four courts relied on essentially three arguments: 1) the Due Process Clause does not bind the states to any one test for insanity; 2) the Mens Rea Model still requires the existence of mens rea; and 3) the Mens Rea Model is in keeping with the medical field.[90]

The most prevalent argument offered by the state courts is that a test for insanity has not been constitutionally mandated.

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85. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 40-41 (1984) ("Craziness seems to affect impulses, controls, and motivations for actions, but it does not stop persons from intending to do what they do or from narrowly knowing factually what they are doing.").

86. Morse & Hoffman, *supra* note 26, at 20-21. *See also*, Rosen, *supra* note 84.

87. State v. Searcy, 798 P.2d 914, 917 (Idaho 1990); State v. Bethel, 66 P.3d 840, 844 (Kan. 2003); State v. Korell, 690 P.2d 992, 999 (Mont. 1984); *Herrera*, 895 P.2d at 364. Only the Nevada Supreme Court has found the mens rea model a violation of due process. Finger v. State, 27 P.3d 66 (Nev. 2001).

88. *Id.*

89. *Id.*

90. *Searcy*, 798 P.2d at 917; *Bethel*, 66 P.3d at 844; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 364.

First, the state courts pointed to the longstanding precedent that defining criminal conduct and defenses is within the sole province of the state. Relying on *Powell v. Texas*,[91] the state courts concluded that they are free to limit mental illness evidence for the purposes of refuting the elements of the crime charged.[92] In *Powell*, the Supreme Court upheld the state's right to criminalize and punish public drunkenness. Writing for the plurality, Justice Marshall found that the shifting moral views of society gave the states the right to adjust their laws accordingly.[93]

Second, and more specifically, the state courts relied on the Supreme Court's decision in *Leland v. Oregon*[94] wherein the Court declined to adopt any specific insanity test as required by the Due Process Clause.[95] In *Leland*, the Supreme Court upheld an Oregon statute that placed the burden of proving insanity beyond a reasonable doubt on the defendant.[96] The Supreme Court, in refusing to adopt a specific test for insanity, determined a specific test would be unwarranted given the uncertainty in the psychiatric community and the erratic history of the insanity defense.[97] Consequently, the state courts at issue assumed that *Leland* established that no constitutional due process right exists as to any particular insanity test.[98]

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91. Powell v. Texas, 392 U.S. 514 (1968).

92. *Searcy*, 798 P.2d at 917; *Bethel*, 66 P.3d at 844; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 364.

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

94. Leland v. Oregon, 343 U.S. 790 (1952) (adoption of the irresistible impulse test is not implicit in the concept of ordered liberty).

95. *Id.* at 798-99.

96. *Id.*

97. *Id.* at 800.

98. State v. Searcy, 798 P.2d 914, 917 (Idaho 1990); State v. Bethel, 66 P.3d 840, 844 (Kan. 2003); State v. Korell, 690 P.2d 992, 999 (Mont. 1984); State v. Herrera, 895 P.2d 359, 364 (Utah 1995). It is the failure to of the Supreme Court to positively state that an affirmative defense of insanity is constitutionally mandated that led Professors Morse and Hoffman to conclude that a state may constitutionally abolish all forms of an insanity defense. Morse & Hoffman, *supra* note 26, at 58.

Based on the premise that no particular insanity test is required, the state courts used *Leland* and *Powell* as springboards to label the Mens Rea Model as simply another variant of the insanity defense. By claiming that the Mens Rea Model does not altogether abolish a defendant's ability to claim insanity, in that a defendant could still argue to the jury that as a result of a mental disease or defect he did not possess the requisite mental element of the offense, state courts concluded the Mens Rea Model did not offend the Due Process Clause.[99] Implicit in these decisions is a failure to recognize that legal capacity as a precondition for criminal responsibility is a necessary part of mens rea.[100]

Finally, the state courts parsed out the language of several Supreme Court decisions that discuss the history and debate in the psychiatric community over the definitions of insanity and mental illnesses. Again, relying on the failure to adopt a specific test in *Leland*, the state courts focused on "the uncertainty in the psychiatric community" and the "erratic history of the insanity defense."[101] To buttress the claim, the courts often cited to the now familiar passage in *Powell* that the

> doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.[102]

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99. *Searcy*, 798 P.2d at 917; *Bethel*, 66 P.3d at 844; *Korell*, 690 P.2d at 999; *Herrera*, 895 P.2d at 364.

100. *See Korell*, 690 P.2d at 999 ("We reject appellant's contention that from the earliest period of the common law, insanity has been recognized as a defense. What we recognize is that one who lacks the requisite criminal state of mind may not be convicted or punished."). What the court in *Korrell* failed to acknowledge is that simply because the standard for legal insanity has evolved over time does not equate to the lack of firmly rooted principles that some form of affirmative insanity defense be provided.

101. *Herrera*, 895 P.2d at 364. Again, the courts seem to simply accept that because psychiatry and medical standard have evolved, the affirmative defense is not constitutionally required.

102. *Searcy*, 798 P.2d at 918 (citing Powell v. Texas, 392 U.S. 514 (1968)); *Korell*, 690 P.2d at 999 (citing *Powell*, 392 U.S. 514); *Herrera*, 895 P.2d at 364 (citing *Powell*, 392 U.S. 514). *See generally Bethel*, 66 P.3d 840 (Kansas court adopts the *Powell* analysis).

Emphasizing that the *Powell* Court held that casting a particular test would "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold," the state courts concluded that the Mens Rea Model better fit with the psychiatric view.[103]

While one reason for the conflation of the two categories of mens rea is the failure of the Supreme Court to set out a complete definition of mens rea, the state courts are mistaken in assuming that states' authority to define crimes and defenses, and the marshaling of evidence in criminal trials, is unlimited. While it is true that the Supreme Court has held very loose reins on the states' passage and application of their statutes,[104] state law must still comport with the Constitution.[105] Justice Kennedy, in his dissent in *Clark v. Arizona*[106] explained that the Court, as the final arbiter of the Constitution, still retains some control over state laws:

> States have substantial latitude under the Constitution to define rules for the exclusion of evidence and to apply those rules to criminal defendants. This authority, however, has constitutional limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.[107]

Second, the state courts' focus on *Powell's* concern that any given test would "freeze the mold" is antithetical. The basis for the current tension between psychiatric diagnosis and insanity is the need to take psychiatric tests and classify them by a legal

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103. *Herrera*, 895 P.2d at 364 (citing *Powell*, 392 U.S. 514). *See generally Searcy*, 798 P.2d at 918; *Bethel*, 66 P.3d at 851-52.

104. *See generally* Patterson v. New York, 432 U.S. 197 (1977).

105. *See* Holmes v. South Carolina, 547 U.S. 319, 330-31 (2006) (holding that a defendant has the right to present evidence of third party guilt as a defense); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (stating that a defendant has the right to present evidence that his confession, ruled admissible for Fifth Amendment purposes, is unreliable); Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that a state court must not apply hearsay rules in a manner that deprives a defendant of the ability to present his defense).

106. Clark v. Arizona, 126 S.Ct. 2709, 2738 (2006) (Kennedy, J., dissenting).

107. *Id.* at 2743 (citations omitted).

standard that is not concerned with psychology, but with the accused's mental capacity. Such tension is not the result of the insanity defense. In fact, it is just the opposite. An affirmative defense of insanity does not stop the evolution or dialogue between the law and psychiatry, but enhances and encourages further development. As the psychiatric community evolves and changes so will the presentation of evidence to the trier of fact. It is the complete abolition of the defense that prevents the introduction and evolution of mental illness and criminal responsibility. Thus, for the schizophrenic who believes that his next door neighbor is an enemy soldier or for the person who suffers from Alzheimer's and does not remember what he did or why, the punishment is equal to that of the person who, with full understanding of their conduct, made a conscious decision to break the law.[108] By failing to understand the relationship between moral blameworthiness and mens rea the state courts have dismissed as "erratic history" the centuries-old principle of criminal responsibility, which evolved from ancient Judeo-Christian and Anglo-Saxon moral and ethical concepts.[109]

Nevada, the only state to hold the Mens Rea Model unconstitutional, did not dismiss the history of mens rea, it just did not fully appreciate, and therefore clearly articulate, the duality

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108. An example of the injustice of the Utah statute was set out by Judge Stewart's dissenting opinion in *Herrera*. *Herrera*, 895 P.2d at 381 n.20 (Stewart, J., dissenting). Judge John M. Wajert, 51, stepped down from the bench after eight years as a Pennsylvania judge. Two years later, he was arrested for embezzling $125,000 from clients. It was found that the former judge was suffering from Alzheimer's. He wore rumpled clothes, and he no longer shaved. During the seven-day trial, he slumped in a chair and stared vacantly at the floor. His defense counsel claimed that Wajert was unable to assist in his own defense, that Alzheimer's so impaired his client that the only thing the former judge could understand was that he needed money and so he took it, and that he was not able to exercise any kind of rational judgment. Wajert did not know of his degenerated condition, although his wife said: "He has been told repeatedly (about his affliction), and he doesn't remember. Why he said just the other day 'What do you suppose is the matter with me?'" *A Mind Undermined, When Did a Chesco Judge Accused of Embezzlement Become Ill?*, PHILADELPHIA INQUIRER, Apr. 4, 1983, at B01. Because the judge knew that he was taking money, that knowledge was sufficient under Utah law to convict him of a crime, even though he lacked the mental capacity to understand the nature and consequences of his acts. His uninhibited urge to take the money was not unlike that of a child who grabs candy at the store without paying. *Id.*

109. *Herrera*, 895 P.2d at 364.

of the concept.[110] The Nevada Supreme Court in *Finger* aptly noted that for hundreds of years society has recognized that mentally ill individuals may be incapable of understanding the consequences of their conduct, and that when their conduct violated a legal or moral standard, those persons were institutionalized rather than sent to penal institutions.[111] While the *Finger* court acknowledged *Leland* and *Powell* and the significant debate over the definition of legal insanity, *Finger* ultimately determined that the debate only highlighted the right of the states to determine the details of how to implement a legal insanity defense, not that the defense could be abolished.[112]

Once *Finger* concluded that the Supreme Court did not opt for the abolition of insanity, it determined the insanity defense was so rooted in our notions of justice as to be a fundamental right protected by the Constitution.[113] By holding that criminal responsibility has historically been tied to an understanding of right and wrong, the *Finger* court reasoned that the Mens Rea Model made the fatal assumption that crimes simply require the intent to act and ignored that most crimes also require an

110. Finger v. State, 27 P.3d 66 (Nev. 2001).

111. *Id.* at 71. Specifically, the court stated:

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

Id.

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

113. *Id.* at 80 (historical practice overwhelmingly supports the conclusion that legal insanity is a fundamental principle).

element of knowledge or willfulness.[114] In the end the *Finger* court held that legal insanity is a necessary corollary to mens rea and that as the legal defense of insanity consists of a conscious knowledge of right and wrong, its abolition contravened the requirement of mens rea.[115]

The court in *Finger* failed to grasp the duality of mens rea. The focus of the *Finger* court was that, in addition to intent, it was constitutionally required that the defendant know the consequences of his or her conduct or understand the difference between right and wrong.[116] This analysis, however, did nothing more than reaffirm the *M'Naughten* test, thereby defeating any precedential value of the opinion. By failing to clearly acknowledge that legal capacity for criminal responsibility is a component of mens rea external to offense elements, the *Finger* court missed an opportunity to fully consider the due process implications of abolishing the insanity defense.[117]

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114. *Id.* at 79 (the State's assertion that knowledge that one's actions are "wrong" is not generally an element of a crime, even a specific intent crime, and it is not a requirement of murder; therefore, the State's argument must fail).

115. *Id.* at 81. *See also supra*, note 111.

116. *Finger,* 27 F.3d at 84. Ultimately, the court in *Finger* held:

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

Id.

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

III. Constitutional Analysis of Insanity by the United States Supreme Court: *Clark v. Arizona*

Not only did the *Finger* court miss the opportunity to clarify and define the debate as to mens rea and insanity, but so too did the Supreme Court in *Clark v. Arizona*.[118] Despite being given the opportunity to resolve the debate over the constitutionality of the insanity defense, the Court declined to do so and chose to resolve the case by conducting an unnecessarily complicated analysis of moral capacity and the use of evidence. Consequently, the Supreme Court has yet to provide a definitive answer to the question of whether a state court can abolish insanity as an extrinsic, affirmative defense to the crime charged.

Even though the Court in *Clark* failed to provide the hoped for resolution to the debate, the opinions of Justices Souter and Kennedy do provide insight into the Court's predispositions on the issue. What could be termed the boldest statement issued by the Court on this question is found in footnote 20 of the *Clark* opinion: "[W]e have never held that the Constitution mandates an insanity defense, *nor have we held that the Constitution does not so require.* This case does not call upon us to decide the matter."[119]

While it is true that the Court reiterated that it has never held that the Constitution mandates an insanity defense, the Court also seems manifestly unwilling to hold the opposite.

A thorough analysis of what the Court did decide in *Clark* is not necessary for the purpose of this article. However, leaving aside the quibbling over which issue was ripe for review and the categorizing of evidentiary standards that consume much of the Court's attention in *Clark*, the opinions in the case suggest that an extrinsic insanity defense, in some form, is required by the Due Process Clause. Not only does the majority opinion implicitly find that moral blameworthiness is essential to criminal

118. Clark v. Arizona, 126 S.Ct. 2709 (2006).

119. *Id.* at 2722 n.20 (emphasis added). This statement was stated in conjunction with the majority's citation to the four states that abolished the affirmative defense of insanity and replaced it with the Mens Rea Model. One could legitimately argue that, had the majority believed, as do those four states, that an affirmative defense of insanity is not constitutionally required, the statement would have been unnecessary.

responsibility,[120] but Justice Kennedy, in his dissent, expressly states that the category of mens rea which addresses only the offense elements is separate and distinct from the extrinsic issue of insanity. According to Justice Kennedy, to properly analyze the issues of elements mens rea and insanity, courts must understand that each concept addresses very distinct legal questions and that if the two concepts are melded, unworkable and unconstitutional standards are created.[121]

At issue in *Clark* was the standard for insanity adopted in Arizona and how mental illness evidence could be used by a defendant. Prior to 1993, Arizona utilized the *M'Naughten* test for insanity.[122] If the accused did not understand the nature and consequences of his conduct or if the accused did not understand the conduct to be wrong, the accused was not criminally liable.[123] In 1993 the Arizona legislature eliminated the question of cognitive incapacity,[124] or the first prong of *M'Naughten*, and limited the insanity defense to a question of moral incapacity—did the accused know the conduct was wrong.[125] Additionally, under *State v. Mott*,[126] evidence of mental disease or defect could only be used to establish the affirmative defense of insanity; it could not be used to negate the specific intent elements of the crime charged. Clark challenged the limiting of insanity to a question of moral incapacity as well as the prohibition of evidence of mental disease or defect to negate intent as violations of the Due Process Clause.

While the Court ultimately concluded that the Due Process Clause was not violated, the discussion surrounding the holding offers some insight into the leanings of the Court. Justice Sou-

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

121. *Id.* at 2747. *See also* Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) ("the existence or non-existence of legal insanity bears no necessary relationship to the existence or non-existence of the required mental elements of the crime").

122. *Clark*, 126 S.Ct. at 2719.

123. *Id.*

124. *See Id.* at 2722 n.7. The Court defines "capacity" as "the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them." *Id.*

125. ARIZ REV. STAT. §13-502(A) (2007).

126. State v. Mott, 931 P.2d 1046 (Ariz. 1997) (en banc), *cert. denied*, 520 U.S. 1234 (1997).

ter, writing for the majority, accepted that the appropriate standard by which to measure a due process violation is whether the Arizona statute "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[127] In upholding Arizona's abandonment of cognitive capacity as a part of the affirmative defense of insanity, the Court did not state that an affirmative defense of insanity is not constitutionally required. Justice Souter simply accepted the idea that extrinsic evidence of the lack of criminal responsibility was a necessary part of due process, and concluded that in determining moral blameworthiness, evidence of capacity is necessarily evaluated. According to the Court:

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

Since evidence going to both cognitive and moral capacity was admissible under Arizona law, the Court held that the statute did not contravene the Due Process Clause. Although the decision is not dispositive of the issue, it is a significant indicator that the legal capacity for general criminal responsibility, or blameworthiness is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[129]

The larger issue in *Clark* was whether evidence of incapacity could be excluded to negate the elements of the offense. In upholding the *Mott* rule, that evidence of insanity can only be used to establish the affirmative defense of insanity and not to negate the elements of the offense, the majority looked to two main presumptions in any criminal trial: the presumption of in-

127. *Clark*, 126 S.Ct. at 2719 (citing Patterson v. New York, 432 U.S. 197, 202 (1977)). It is significant that the Court adopted the rule of *Patterson*, which is traditionally applied to questions of procedural due process to the question at issue, which is thought to be one of substantive due process. *See also*, Morse & Hoffman, *supra* note 26, at 9 (citing Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 193-96).

128. *Clark*, 126 S.Ct. at 2722.

129. *Patterson*, 432 U.S. at 202 (despite power of the states to regulate procedures under which its laws are carried, laws must comport with due process).

nocence and the presumption of sanity.[130] In finding *Mott* constitutional, the Court created a tripartite structure, breaking down insanity evidence into observation evidence, which is typically presented by lay testimony, and mental disease evidence and mental capacity evidence, both of which are typically presented through expert testimony.[131] After concluding that observation evidence is always admissible to negate offense elements, the majority held that Arizona was justified in funneling mental disease and capacity evidence, or expert testimony, through an affirmative insanity defense.[132]

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

Even the dissent in *Clark* implies that mental disease and capacity evidence should be addressed by an affirmative defense of insanity.[135] What Justice Kennedy takes issue with is the majority's tripartite classification of evidence and its hold-

130. *Clark*, 126 S.Ct. at 2729-30 (whether state regulation of evidence violates the Fourteenth Amendment turns on the application of the presumption of innocence and the presumption of sanity).

131. *Id.* at 2724-25.

132. *See Id.* at 2732 (During the discussion of the three types of evidence, the Court found that Arizona is justified in channeling mental disease and capacity evidence through an affirmative insanity defense. During this discussion, the Court implied that an affirmative defense is the best way to present the evidence.).

133. *See generally Clark*, 126 S.Ct. 2738 (Kennedy, J., dissenting); Peter Westen, *The Supreme Court's Bout with Insanity:* Clark v. Arizona, 4 OHIO ST. J. CRIM. L. 143 (2006).

134. *See Clark*, 126 S.Ct. at 2730 n.38 (The Court rejected the State's argument that mens rea and insanity are distinguishable and evidence of one is not relevant to the other. Specifically, the Court stated that "not only does evidence accepted as showing insanity trump *mens rea*, but evidence of behavior close to the time of the act charged may indicate both the actual state of mind at that time and also an enduring incapacity to form the criminal state of mind necessary to the offense charged.").

135. *Id.* at 2738 (Kennedy, J., dissenting) (while Justice Kennedy finds it unnecessary to address whether the Arizona test violates due process, he clearly delineates between offense elements and an affirmative defense and strongly advocates for the admission of expert testimony).

ing that only observation evidence can be used to negate the offense elements.[136] Justice Kennedy reasoned that expert testimony is essential to lending credibility to observation evidence and the factual determination of whether the offense elements are met.[137]

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

> [Mental illness] evidence addresses different issues in the two instances. Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense. While there may be overlap between the two issues, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."[139]

In light of the trend among states to reevaluate their insanity statutes, the failure of the *Clark* majority to acknowledge the distinction between two distinct categories of mens rea—one relating to the required mental state as an element of an offense, and the other relating to the capacity for criminal responsibility—is unfortunate. After *Clark*, the lack of a workable standard will undoubtedly lead to increased litigation as the issue percolates though the state courts. Eventually, the Court again will be asked to reexamine the issue of insanity, at which time it will be necessary for the Court to resolve the duality of mens rea and the constitutionality of the Mens Rea Model.

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136. *Id.* at 2738-39 (finding the evidentiary framework adopted will be unworkable and that the test was especially inappropriate in this case as the mental disease evidence was so intertwined with the observation evidence as to lend it the needed credibility).

137. *Id.* at 2739 ("The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia.").

138. *Id.* at 2746.

139. *Id.* at 2747 (citing Mullaney v. Wilbur, 412 U.S. 684, 706 (1975) (Rehnquist, J., concurring)).

IV. Due Process and the Duality of Mens Rea

Having established that capacity for criminal responsibility, or moral blameworthiness, is a part of mens rea which is deeply rooted in our system of justice, the question becomes whether the Mens Rea Model violates due process by eliminating an essential category of mens rea. The preceding analyses of both state court opinions and the Supreme Court's decision in *Clark* demonstrate that the courts have failed to bring any meaningful dialogue to the debate. By failing to acknowledge the duality of mens rea, the opinions are of little analytical value. What remains, then, is to analyze the constitutionality of the Mens Rea Model utilizing the proper understanding of mens rea and the affirmative defense of insanity.

The concept of mens rea is rooted in the notion of human free will, which has always been the "chief paradigm" of our criminal law.[140] In other words, individuals are assumed to be autonomous, rational beings who are possessed with a minimum ability to choose whether to violate or abide by the law's

140. PACKER, *supra* note 39. There are those, primarily in the psychiatric and behavioral science communities, who subscribe to the view—known as the "behaviorist" position—that there is no such thing as free will because all human behavior is determined by forces which the individual is powerless to change. Therefore, any notion of moral "blameworthiness" for acts considered by law to be criminal is illusory and, as a product of an outdated emphasis on retribution as punishment for past evil acts, should be abandoned. Instead, the behaviorists argue, criminal law should focus, not on assessing blame for past conduct or on the nature of the offense, but on modifying behavior through treatment, or on confinement, to prevent the commission of such acts in the future. *See id.* at 12-15 (discussing behaviorist position). As Packer notes, because the insanity defense represents a crystallization of the notion of criminal responsibility which "universally characterizes the criminal law," and which the behaviorists flatly reject, the behaviorist position is that the insanity defense should be abolished. *Id.* at 15. The behaviorist position in its most pure form would discard mens rea altogether from the definition of legal accountability, in essence reducing all crimes to strict liability. *See* BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 51-57 (2d ed. 1981) (1963). However, "[u]nless one wishes the law to stop treating persons as persons—as beings deserving of praise and blame—and wishes the law, instead, to treat them as machines that need only be adjusted, criticism of the law's assessment of mental states is misguided." Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 801 (1985).

dictates, and are therefore blameworthy and fully responsible for making the wrong choice.[141]

The Mens Rea Model claims consistency with the principle of mens rea, even though it admits to abolishing the insanity defense and replacing it with an evidentiary rule relating only to the mental element of a particular offense. Historically, early proponents of the Mens Rea Model argued that an insanity acquittal was tantamount to a finding that the defendant lacked the purpose, knowledge, recklessness or negligence requisite to conviction, and thus lacked the mens rea of the crime. The result, these proponents argued, is that the defendant must be discharged because he is not guilty, rather than indefinitely committed to a mental institution because he is insane.[142]

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141. Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 859 (1977).

142. Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"- Why Not?*, 72 YALE L.J. 853, 863-68 (1963); Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 519 (1968).

It seems to be no coincidence that initial proposals to abolish the insanity defense coincided with the 1960s movement to de-institutionalize the mentally ill. *See generally* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 80-108 (1991) (discussing history and consequences of deinstitutionalization of the mentally ill). Of particular concern to these abolitionists was the belief that the insanity defense was little more than a cruel device to indefinitely restrain the mentally ill in state mental hospitals, "mega-asylums" where treatment was inadequate, and which, by linking insanity and violence, stigmatized the mentally ill. *See* Morris, *supra* note 142, at 521-23.

But, whatever the historical merit of deinstitutionalization, and whatever insufficiencies exist in providing institutionalized treatment for mentally ill persons in the context of the insanity defense, it is common knowledge that today America's prisons are filled to the brim with mentally ill persons who are receiving little treatment, if any at all. *See* Report of Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), *available at* http://www.hrw.org/reports/2003/usa1003/ (noting that the current, and growing, number of mentally ill persons incarcerated in the United States is, in part, an unintended consequence of the failure to provide adequate support, funding and direction for community mental health services that were supposed to replace the mental hospitals shut down as part of the deinstitutionalization effort of the 1960s); Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1565 (2002).

> It has become relatively clear that since the mid-1970s, the emphasis on rehabilitation as a central purpose of punishment has fallen into strong disfavor, and has been almost completely replaced by a focus upon retribution. . . . And while most prisons usually have some treatment programs available to offenders, it can hardly be gainsaid that the focus of prisons in

Later proponents took a less benevolent approach, and pushed for abolition of the insanity defense, in part as a matter of "public safety" in the wake of John Hinckley's insanity acquittal following his attempted assassination of President Reagan.[143] They, like the earlier proponents, treated the concept of mens rea as synonymous with the mental state required as an element of a particular crime, and argued that abolishing the insanity defense and replacing it with the Mens Rea Model evidentiary rule would alleviate alleged jury confusion in dealing with instructions on a separate insanity defense.[144] But these arguments expose a fundamental conceptual flaw in the Mens Rea Model, which violates due process and thus renders it unconstitutional. By confusing two different categories of mens rea, the Mens Rea Model completely eliminates that category of mens rea which addresses general criminal responsibility, not at the offense level through elements of the crime, but at the defense level through the affirmative defense of insanity.[145]

Many scholars have noted that the question of insanity is not intrinsic to the mental element required by the definition of a criminal offense.[146] While most crimes do define a particular mens rea element, this is only one category of mens rea, referred to as "positive," or "special," mens rea, which is primarily concerned with offense grading.[147] The other category of mens

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today's society is not on treatment. Therefore, to assert that a mentally ill individual is more likely to receive treatment in a state prison than he would if placed in a state mental health institution, which exists for the very purpose of treatment, is not even minutely logical.

Id.

143. *See* Morse, *supra* note 140, at 779; Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 43 (1997). If "public safety" from insanity acquittals was a primary moving force for these abolitionists, it suggests that they were more interested in increasing criminal convictions of the mentally ill, rather than legal clarity. *See* George M. Platt, *The Proposal to Abolish the Federal Insanity Defense: A Critique*, 10 CAL. W. L. REV. 449, 470 (1974) (noting the proposal to abolish the federal insanity defense was made during Nixon's "law and order" administration, and "[i]f the motivation for abolition of the defense is to achieve greater conviction rates by stripping from unbalanced defendants the opportunity to prove themselves not guilty by reason of insanity, the proposal can only be described as odious.").

144. Platt, *supra* note 143, at 452; Spring, *supra* note 143, at 45.

145. *See* Clark v. Arizona, 126 S.Ct. 2729 (2006) (Kennedy, J., dissenting).

146. PACKER, *supra* note 39, at 103-08; Morse, *supra* note 84, at 8; Gardner, *supra* note 45, at 654-67.

147. PACKER, *supra* note 39, at 105.

rea is legal capacity, termed "negative" or "general" mens rea, which is a precondition for criminal liability, quite apart from the elements of the crime.[148] Since general mens rea is concerned with legal capacity for criminal responsibility, or "blameworthiness," it is not an element of a crime that the prosecution must prove, but rather is addressed through the doctrine of excuses.[149]

The Supreme Court implicitly recognized this mens rea duality when it held in *Leland v. Oregon*[150] that it was constitutionally permissible to require the defendant to prove that he did not have the capacity to be criminally responsible for his acts. The defendant in *Leland* argued that requiring him to prove insanity violated due process because it required him to disprove the elements of the crime.[151] In rejecting the defendant's argument, the Court in *Leland* clearly acknowledged the

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148. *Id.* at 106-07. *See also* State v. Searcy, 798 P.2d 914, 922-35 (Idaho 1990) (McDevitt, J., dissenting) (pointing out this distinction, and concluding that the insanity defense is required by due process); BLACKSTONE, *supra* note 74 (discussing Blackstone's position that "lunatics" cannot be held criminally liable).

149. *See* Morse & Hoffman, *supra* note 26, at 8.

> Courts and commentators consistently fall prey to confusing "special" *mens rea*, the specific mental state element that is part of the definition of the crime and thus part of the prosecution's prima facie case, and "general" *mens rea*, a generic term for lack of responsibility that might be produced in whole or in part by factors such as legal insanity, duress, or partial responsibility. . . . A defendant who lacks special *mens rea* is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks responsibility. The conduct of a defendant who lacks general *mens rea* almost always satisfies the elements of the prima facie case including special *mens rea*, but he is acquitted because he is not considered responsible for his conduct.

Id. See also PACKER, *supra* note 39, at 112 ("[T]he case for excuses in the criminal law rests most securely on claims for the protection of human autonomy that quite transcend the calculus of crime prevention."); Stephen Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 258 (2000) ("[T]he general capacity for rationality is the precondition for liberty and autonomy. A lack of this capacity explains virtually all cases of criminal law excuses and virtually all the mental health laws that treat some people with mental disorders differently from people without disorders."). As Professor Gardner has pointed out, "at the defense level, the evil motive concept provides vital doctrinal footing for theories of excuse that protect against unfair punishment." Gardner, *supra* note 45, at 640-41.

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

151. *Leland*, 343 U.S. at 793.

distinction between the question of guilt or innocence as to the elements of the crime and the question of general criminal responsibility.[152] The Court recognized that there is a difference between evidence that creates a reasonable doubt about the state's proof of offense elements, and evidence that establishes the defendant's lack of criminal responsibility.[153] Indeed, in this context, if there is no evidence that the defendant suffers from a mental abnormality, the defendant's general mens rea is not in question, whether or not the elements of the crime can be proven beyond a reasonable doubt. Likewise, if there is evidence of a mental abnormality, such evidence may negate general mens rea even if it does not create reasonable doubt on the elements of the crime.[154]

Since insanity is addressed in that category of mens rea relating to legal capacity for criminal responsibility, an insane defendant is not criminally responsible, regardless of whether the elements of the offense are otherwise met. In other words, insanity excuses a person from criminal responsibility, not because he did not commit the act in question, but because his general mental condition robbed him of his free will, rendering him incapable of making a meaningful choice when he acted.[155]

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152. This appears to be the same idea the Supreme Court of Nevada was getting at in *Finger v. State*. Finger v. State, 27 P.3d 66, 79-85 (Nev. 2001) (analyzing the issue of criminal responsibility as a person's legal capacity to appreciate the "wrongfulness" of his or her actions, which can only be addressed by an affirmative insanity defense). The court in *Finger* stated:

> Evidence that does not rise to the level of legal insanity may, of course, be considered in evaluating whether or not the prosecution has proven each element of an offense beyond a reasonable doubt, for example in determining whether a killing is first or second-degree murder or manslaughter or some other argument regarding diminished capacity.

Id. at 85.

153. *Leland*, 343 U.S. at 802-07 (Frankfurter, J., dissenting).

154. *See, e.g.*, Martin v. Ohio, 480 U.S. 228, 234 (1987).

> Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established.

Id. Both *Leland* and *Martin* refute the very argument put forward by the proponents of the Mens Rea Model to justify abolition of the insanity defense.

155. In this sense, "free will" does not equate with psychiatric determinism, as the behaviorists would assert. *See* PACKER, *supra* note 39, at 12. As Professor Morse argues, in a causal universe it makes no sense to say that the lack of free

The Mens Rea Model simply casts aside this fundamental category of mens rea, and by doing so turns a basic, founding principle of our criminal justice system on its head: under the Mens Rea Model, an insane person—one who was irrational and compelled by his mental abnormality to act; in short, one who is deprived of his or her free will—is held criminally responsible for that act.[156]

The constitutional infirmity of the Mens Rea Model becomes even clearer when the doctrine of diminished capacity is examined. By limiting evidence of mental impairment to that which negates the mental element of a particular offense, the Mens Rea Model substitutes the insanity defense with what is known as the "mens rea variant"[157] or "mens rea model"[158] of

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will means that the person's behavior is "uncaused." Morse, *supra* note 140, at 789 n.31. But, "[i]f free will means that the person is not compelled, then it is a reasonable synonym for one criterion of responsibility—as long as compulsion is not simply the equivalent of 'caused.'" *Id.* (citing H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 71-81 (1972)). Morse states elsewhere that "free will," if unpacked, "collapses into a theory about rationality and hard choice." Morse, *supra* note 149, at 258. It is the general capacity for rationality, and the absence of compulsion, that are the conditions of responsibility. *Id.* at 256-58.

156. *See* PACKER, *supra* note 39, at 132 ("We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will."). Professor Packer states: "We excuse a man who does not understand not because he does not understand but because his lack of understanding renders him incapable of making a meaningful choice. Cognition is not the complement of volition; it is its precursor." *Id.* at 134. Professor Morse puts it in a slightly different way, but the principle is the same:

> Actors, such as small children, who lack reasonable cognitive or volitional capacity through no fault of their own may be dangerous, but are not considered fully responsible as moral agents. This basic intuition about the way cognitive and volitional capacity relate to responsibility is tracked by the insanity defense tests, which all focus on the actor's irrationality (e.g., lacks substantial capacity to appreciate the criminality of his actions) and/or lack of self-control (e.g., lacks substantial capacity to conform his actions to the requirements of law).

Morse, *supra* note 85, at 20-21. Morse makes an important point here. It is not the purpose of this article to get into a discussion of various insanity tests, and Morse shows why they are not important to the discussion. The well-documented confusion over legal tests and definitions of insanity does not deter from the central underpinning of our understanding of insanity: if an actor is irrational and not in control of his actions because of mental illness, he is not blameworthy, in both the moral and legal sense. It is this core notion of blameworthiness to which the Supreme Court referred in *Davis v. United States*, 160 U.S. 469, 485 (1895). *See supra*, text at note 80.

157. *See* Morse, *supra* note 85.

158. Arenella, *supra* note 141.

diminished capacity doctrine. Proponents of the Mens Rea Model as a substitute for the insanity defense have always claimed that its evidentiary rule addresses the same issue as insanity, but in a way which is less confusing to the jury.[159] But again, this claim is conceptually flawed. The diminished capacity doctrine only addresses the "positive," or elements, category of mens rea discussed earlier, and involves no claim about general mens rea, i.e., criminal responsibility, which transcends the elements of the crime and is only addressed at the defense level through the affirmative defense of insanity.[160]

The mens rea variant of the diminished capacity doctrine was developed to allow a jury to consider whether a *sane* person's mental abnormality at the time of the crime prevented him or her from entertaining the specific mental state required by the statutory elements of the crime.[161] But, as Professor Stephen Morse notes, a person who lacks elements mens rea "is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks responsibility."[162] Thus, the mens rea variant did not create a defense that was not already constitutionally required, as every accused has a due process right to present relevant, competent evidence to refute the prosecution's prima facie case.[163]

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159. *See, e.g.*, Spring, *supra* note 143, at 45.

160. PACKER, *supra* note 39, at 135.

161. Legal analysis of diminished capacity doctrine has often confused the mens rea variant with the concept of partial responsibility. *See* Arenella, *supra* note 141; Morse, *supra* note 85, at 7-8. Unlike partial responsibility, which asks whether the defendant was less capable than an ordinary person of entertaining the relevant mental state and thus deserves a lesser punishment, the mens rea variant asks only whether the defendant in fact possessed the mens rea element of the crime. If the prosecution fails to prove the mens rea element beyond a reasonable doubt, the defendant is acquitted. *See* Arenella, *supra* note 141; Morse, *supra* note 85, at 7-8.

162. Morse, *supra* note 85, at 8.

163. *See, e.g.*, Mott v. Stewart, No. 98-CV-239, 2002 WL 31017646, at *6 (D. Ariz. Aug. 30, 2002) (holding that "[t]he exclusion of evidence of mental disease or defect"—in this case, battered women's syndrome—"offered to negate the specific intent element of an offense," infringed on defendant's ability to present a complete defense and was unconstitutional). *Cf.* State v. Mott, 931 P.2d 1046 (Ariz. 1997) (en banc), *cert. denied*, 520 U.S. 1234 (1997).

In substituting the insanity defense with its version of the Mens Rea Model, the Kansas statute treats this evidentiary rule as a separate defense which excludes criminal responsibility. KAN. STAT. ANN. § 23-3221 (1996). In this way, the Kansas statute confuses elements mens rea with general mens rea, in a manner

Indeed, the mens rea variant was a recognition by courts that evidence of mental disease or defect, though it does not establish insanity and therefore does not negate criminal responsibility, is nevertheless relevant to negate the specific intent element of a crime. Since specific intent crimes require proof of a particular mental state beyond the mere intent to engage in the proscribed conduct, whether such a mental state was present at the time of the conduct necessarily involves a subjective, individualized inquiry into the defendant's actual state of mind. Psychiatric testimony which shows that the defendant, because of mental disease or defect, did not in fact possess the required specific intent is relevant to that inquiry.[164] Because such evidence will revolve around who the defendant is and why he did what he did, the prosecution, in order to prove that the defendant actually possessed the required intent, will necessarily be required to prove that the defendant had the capacity to form the specific intent.[165]

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that Professor Morse calls a "sleight of hand that tries to have it both ways," the result of which is simply confusion. *See* Morse, *supra* note 85, at 18 n.57. This confusion is plainly apparent in the fact that the Kansas statute authorizes automatic commitment of a person found not guilty because of mental disease or defect. KAN STAT. ANN. § 22-3428(a) (1996) ("When a defendant is acquitted and the jury answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221 [that defendant is found not guilty because of mental disease or defect], the defendant shall be committed to the state security hospital for safekeeping and treatment."). This appears to be a due process violation in its own right, since a defendant found not guilty because of mental disease or defect in Kansas is acquitted because the state failed to prove the elements of the crime beyond a reasonable doubt. *See* Aranella, *supra* note 141. *Cf.* State v. Van Hoet, 89 P.3d 606 (Kan. 2004) (though acknowledging abolition of insanity defense in Kansas, court upheld constitutionality of automatic commitment provision after acquittal under substitute Mens Rea Model evidentiary rule).

164. Arenella, *supra* note 141, at 833.

165. To the extent that a mental abnormality which renders a person incapable of forming specific intent may also establish insanity (*see* Arenella, *supra* note 141, at 830-31), elements of mens rea and insanity do intersect each other. However, as Arenella points out, a person may be legally insane and still be capable of forming specific intent. *Id.* at 831 n.20. That is because capacity to form specific intent, which goes to the elements of the crime, and capacity for criminal responsibility, which the prosecution is not required to prove, are two different things. *See* Morse & Hoffman, *supra* note 26, and accompanying text. *See also* PACKER, *supra* note 39, at 135 ("[The diminished capacity] defense bears no relation to the insanity defense, which is not at all addressed to particular elements of the offense but rather to the actor's general mental condition."). It is this distinction that the majority in *Clark v. Arizona* failed to acknowledge.

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

Unlike specific intent crimes, general intent crimes only require proof that the individual voluntarily committed the prohibited act. Because intent may be inferred from the doing of the act, based upon the legal presumption that all persons intend the natural and probable consequences of their actions,[166] the standard of liability for general intent crimes is an objective one. This objective standard only asks what the defendant did, not who he is or why he did what he did.[167] The defendant's capacity to form intent is not a fact necessary to constitute a general intent crime, and thus the prosecution has no burden to prove that fact. On the contrary, once the prosecution proves that the defendant committed the act, his intent will be inferred from the commission of that act. Arguably, then, evidence of mental disease or defect is not even relevant to general intent crimes under the Mens Rea Model, because capacity to form intent is not an issue. But if it is relevant, then the effect of the Mens Rea Model as applied to general intent crimes is to presume the defendant guilty, and to shift the burden to the defendant to disprove the mens rea element of the crime. The defendant must prove that, as a subjective matter, he lacked the capacity to form that element. Such burden shifting is unconstitutional under *Mullaney v. Wilbur*.[168]

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

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

167. Arenella, *supra* note 141, at 833 n.33 (quoting Helen Silving, *Psychoanalysis and the Criminal Law*, 51 J. CRIM. L. C. & P.S. 19, 24 (1960)).

168. Mullaney v. Wilbur, 421 U.S. 684 (1975). *See also*, Patterson v. New York, 432 U.S. 197 (1977).

is most certainly not true with general intent crimes.[169] Indeed, if public safety was a motivating force in abolishing the insanity defense and adopting the Mens Rea Model, then it makes no sense. Under the Mens Rea Model, a potentially dangerous mentally ill person, if that person's mental illness negates the elements mens rea of a crime and there is no lesser-included offense, will be acquitted and entitled to discharge because the prosecution failed to prove the elements of the crime. Under the Mens Rea Model, absence of elements mens rea may well result in the outright discharge of a potentially dangerous mentally ill person, who is unlikely to be treated for his or her illness. With the insanity defense, such a person, even if he or she is found to lack general mens rea and thus cannot be held criminally responsible, will nevertheless be subject to commitment for care and treatment.[170]

On the other side of the equation, constitutional due process does not allow the elimination of a fundamental legal principle of mens rea that is the very foundation of our criminal law system: that those who lack the legal capacity for criminal responsibility lack general mens rea, a precondition for criminal liability. Negation of criminal responsibility can only be captured as an excuse grounded in considerations of general blameworthiness, which are external to the elements of the crime. Because the Mens Rea Model removes any mechanism for negating general mens rea, which is not an element of the crime that the prosecution must prove, it denies a defendant the ability to establish as a defense that, because of mental illness, he or she lacked the legal capacity for criminal responsibility.

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169. Arenella, *supra* note 141, at 832 n.25. Noting that

> successful application of the diminished capacity doctrine to general intent crimes would create the anomalous result of a 'partial defense' leading to outright acquittal . . . because of the absence of a lesser included offense. To avoid this problem, courts have [not only] refused to apply [the diminished capacity doctrine] to general intent crimes . . . [but have also] construed certain crimes to require only a showing of general intent to preclude application of a diminished capacity defense.

Id.

170. *See* Platt, *supra* note 143, at 464-65.

Conclusion

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

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

nal liability, but it should be an intolerable result in a modern civilized society that acknowledges mental illness as a disease that renders its victims incapable of rational choice.

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