

**M'NAGHTEN IS A FUNDAMENTAL RIGHT:
WHY ABOLISHING THE TRADITIONAL
INSANITY DEFENSE VIOLATES DUE
PROCESS**

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INTRODUCTION

“The law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong.”¹

In *Delling v. Idaho*, three Justices, in a rare and intriguing action, joined in dissenting from the Supreme Court’s denial of certiorari in a case that would have heard the constitutionality of Idaho’s controversial abolishment of the insanity defense.² Idaho’s current statutory scheme dictates that mental condition is not a defense to any crime.³ Under this system, criminal defendants are barred from raising an affirmative insanity defense premised on their lack of moral culpability.⁴ Instead, any evidence pertaining to mental condition is relevant only in regard to establishing diminished capacity.⁵

According to the dissenters, there is a “traditional insanity defense” defined by the defendant’s ability to distinguish right from wrong.⁶ This principle of moral culpability is present in nearly every state’s insanity defense,⁷ and the *Delling* dissent indicates that at least three members currently sitting on the Supreme Court would find that a state’s failure to recognize a traditional insanity defense violates the due process guarantee of the Fourteenth Amendment.

The difference in protection offered by the traditional insanity defense and diminished capacity is profound.⁸ Consider the hypothetical case of Roy, a thirty-year-old man who has been diagnosed with paranoid schizophrenia. One day Roy is walking down the street when he suffers an unexpected schizophrenic episode. He sees a man approaching him with a gun in his hand.

¹ *Delling v. Idaho*, 133 S. Ct. 504, 504 (2012) (denial of certiorari) (Breyer, J., dissenting). Breyer was joined by Justices Ginsburg and Sotomayor in his dissent from the denial of certiorari.

² *Id.* at 504-06.

³ IDAHO CODE ANN. § 18-207 (2014).

⁴ *Delling*, 133 S. Ct. at 504.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *infra* Part I for a brief overview of the insanity defense and Part I.C. for an introduction to diminished capacity.

Roy shouts at the man to “put the gun away,” but the man stands his ground. The man begins to raise his weapon towards Roy, and Roy draws his firearm and shoots the man, killing him instantly. It turns out that Roy was under a delusion at the time he shot the man. In reality, the man had nothing in his hand and was simply raising his arms to show Roy he was not a threat.

In a jurisdiction that allows criminal defendants to argue a traditional insanity defense, Roy will be able to demonstrate that as a result of his schizophrenic episode and insane delusion, he felt as if he were acting in self-defense.⁹ Had the events been as Roy perceived them, then Roy would have been legally justified in shooting the man raising a gun to him. The jury would receive an instruction regarding the state’s formulation of the insanity defense, and Roy will have an opportunity to be found not guilty by reason of insanity.

However, in a diminished capacity jurisdiction that does not permit a traditional insanity defense, Roy will only be allowed to introduce evidence of his mental condition to disprove his requisite intent, also known as mens rea.¹⁰ Roy’s schizophrenic delusion will not be an affirmative defense to his actions and would only be considered insofar as it related to his ability to form the intent to shoot the deceased individual. While this evidence might help Roy escape a higher charge, it will not be enough to adjudge him not guilty.

This failure of proof “defense” negatively impacts the mentally ill, for it affords little protection to the criminal defendant who suffers from a serious mental illness.¹¹ It was Roy’s failure to understand that the act was wrong, rather than his failure to understand the act itself, that led him to commit the crime. Thus, the state’s rejection of the traditional insanity defense has prevented the defendant from being able to properly defend himself in accordance with the due process guarantee of the Fourteenth Amendment.

⁹ See *infra* Part I.B for a discussion of the traditional insanity defense.

¹⁰ See *infra* Part I.C for a discussion of diminished capacity.

¹¹ See Jenny Williams, Comment, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M’Naghten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense*, 44 WASHBURN L.J. 213, 242-43, 245 (2004).

At present, five states have eliminated or effectively eliminated the traditional insanity defense, thus preventing a criminal defendant from using his mental condition as an affirmative defense for the crime with which he is charged.¹² Though other states have limited the defense and had such limitations held as constitutionally permissible, none except Idaho, Utah, Montana, Kansas, and Alaska have abolished the insanity defense altogether.¹³

While other articles have explored the constitutionality of constrictions on the insanity defense,¹⁴ this Comment is the first to systematically examine the Court's substantive due process jurisprudence from recent cases. The Court's substantive due process analyses in the seminal cases *Washington v. Glucksberg*¹⁵ and, more recently, *Lawrence v. Texas*¹⁶ indicate that there is a fundamental, constitutionally guaranteed right to a traditional insanity defense.

Though states have the authority to define and determine their criminal laws as they see fit, they must do so within the confines of the Fourteenth Amendment.¹⁷ A state that bars a criminal defendant from using the traditional insanity defense has deprived that defendant of a constitutionally guaranteed right. For this reason, the state must be able to demonstrate a compelling state interest for its eliminating the traditional insanity defense and establish that this elimination is necessary

¹² MONT. CODE ANN. § 46-14-102 (2014); ALASKA STAT. § 12.47.010 (2014); IDAHO CODE ANN. § 18-207 (2014); UTAH CODE ANN. § 76-2-305 (LexisNexis 2014); KAN. STAT. ANN. § 22-3219 (2014).

¹³ See *supra* note 12.

¹⁴ See generally Williams, *supra* note 11; Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151 (1994); Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281 (2007); 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 (2002); Jean K. Gilles Phillips and Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455 (2008).

¹⁵ See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁶ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷ See *infra* Part II.A for a discussion of due process and the insanity defense. See *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (stating that "the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice").

to achieve the proffered interest. The actions of Alaska, Idaho, Utah, Montana, and Kansas fail to meet these strict scrutiny requirements.

Part I of this Comment provides a brief overview of the inception, evolution, and current status of the traditional insanity defense. Part II outlines the Supreme Court's substantive due process jurisprudence and touches on the Supreme Court's recent insanity jurisprudence. Part III defines the traditional insanity defense, arguing that the Supreme Court's substantive due process cases, *Glucksberg* and *Lawrence*, indicate that history, tradition, and current awareness make the traditional insanity defense a fundamental right inherent in the Fourteenth Amendment's guarantee of due process. Part IV looks at protections provided in the various traditional and non-traditional insanity test formulations used by the states, arguing that no particular formulation of the defense is required as long as due process is satisfied. Part V addresses the unconstitutionality of diminished capacity as a substitute for a traditional insanity defense. Finally, Part VI addresses some of the ways in which states may narrow their insanity defense consistent with due process.

I. INSANITY DEFENSE OVERVIEW

A. *History of the Insanity Defense*

The insanity defense has long been a fixture of law. It has roots in ancient Hebrew, Greek, and Roman doctrines.¹⁸ In early English common law, insanity was recognized not as a defense, but rather a "tool for pardon"¹⁹ that was used to protect those who lacked "full reasoning powers and were deprived of moral responsibility."²⁰

Insanity did not have a formal place in the courtroom until the thirteenth century when it emerged as a mitigating factor in criminal trials.²¹ Henry de Bracton, a leading legal scholar and religious figure, is credited with introducing "moral intent" into

¹⁸ RUDOLPH JOSEPH GERBER, *THE INSANITY DEFENSE* 8 (1984).

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.*

the law of the courts during this time.²² By the sixteenth century, tests relying on an ability to distinguish “good and evil” were being used by the English courts.²³

In 1843, the *M'Naghten* test cemented the importance of moral culpability in criminal law.²⁴ The modern test for insanity, the *M'Naghten* test focuses on the defendant's ability to distinguish right from wrong.²⁵

B. The Traditional Insanity Defense

There have been many formulations of the insanity defense since *M'Naghten*, and three tests for legal insanity are currently in existence in the United States legal system.²⁶ Each of these tests expressly include, or in practice protect, the right of the defendant to raise an affirmative and complete defense of insanity based on an absence of moral culpability.²⁷ At present, forty-five states and the District of Columbia use one of these three tests.²⁸

²² *Id.*

²³ *Id.* at 10.

²⁴ *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.). See *infra* notes 29-39 for a discussion of the history of the *M'Naghten* test.

²⁵ *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.).

²⁶ See *Clark v. Arizona*, 548 U.S. 735, 749-52 (2006); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 350-56 (5th ed. 2009). For the purposes of this paper, the “irresistible impulse” test is not considered to be a stand-alone test for legal insanity, but rather an add-on to the *M'Naghten* test. See *infra* note 39.

²⁷ See *supra* note 26.

²⁸ See *Clark*, 548 U.S. at 750-51. The Supreme Court conducted an exhaustive fifty-state survey into the insanity defense among the states. *Id.* While some of the jurisdictions listed in the survey may have adopted different insanity legislation since *Clark*, the numbers are still indicative of the overwhelming recognition of the traditional insanity defense:

Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components. One State has adopted only *M'Naghten's* cognitive incapacity test, and 10 . . . have adopted the moral incapacity test alone. Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either . . . being enough to excuse. Three States combine a full *M'Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test.

Id. (footnotes omitted).

1. Variations of the Traditional Insanity Defense

a. M’Naghten: *The Traditional Formulation of the Traditional Insanity Defense*

The heart of the *M’Naghten* test²⁹ is the recognition that individuals should not be punished for acts for which they are not morally culpable.³⁰ *M’Naghten* provides an affirmative and complete defense to insanity that dictates,

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.³¹

Simply put, if a defendant’s mental illness prevents him from knowing what he is doing, or if it prevents him from knowing that what he is doing is wrong, he cannot be held criminally liable for his actions.³²

²⁹ The *M’Naghten* test is the oldest articulation of the traditional insanity defense. Cynthia G. Hawkins-León, “Literature as Law”: *The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 390-91 (1999) (discussing *M’Naghten’s Case*). The common law test for insanity, the *M’Naghten* test was pronounced in 1843 by a panel of English judges presided over by Sir Nicolas Conyngham Tindal, Chief Justice of the Common Pleas. *Id.* at 391-92. Prior to its articulation, Daniel M’Naghten attempted to assassinate the Prime Minister of England, Sir Robert Peel. *Id.* at 390-91. M’Naghten mistakenly killed Edward Drummond, Peel’s secretary. *Id.* When he was tried for murder, M’Naghten argued that he was suffering from delusions that people, including the Prime Minister, were persecuting him. *Id.* M’Naghten was found not guilty by reason of insanity. *Id.* at 391. A public outcry resulted from the verdict, and Queen Victoria instructed the House of Lords to question the common law judges about the defense of insanity. *Id.* The answers returned by the judges became known as the *M’Naghten* Rule. *Id.* at 391-92.

³⁰ M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.); see also DRESSLER, *supra* note 26, at 350. Some scholars have criticized *M’Naghten* for its defining insanity solely in terms of cognitive capacity. *Id.* at 352. Despite the criticisms, the test serves as an adequate baseline for recognizing the relationship between moral culpability and guilt. *Id.* The criticisms regarding *M’Naghten* are about improving the defense, not removing it altogether. *Id.*

³¹ M’Naghten’s Case, (1843) 8 Eng. Rep. 718 (H.L.).

³² See GRANT H. MORRIS, THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM 11 (1975); DRESSLER, *supra* note 26, at 350.

The *M'Naghten* test is extremely flexible in terms of its application and definition. This flexibility is present as a result of the ambiguities in the definitions of “know”³³ and “wrong”³⁴ in the test’s formulation. So long as the principle for moral culpability is combined with an affirmative defense, the protection of *M'Naghten* is the same, regardless of the precise definition and formulation.

The *M'Naghten* test was formally articulated in England in 1843,³⁵ and was adopted throughout the United States shortly thereafter.³⁶ At present, seventeen states and the federal government use the *M'Naghten* formulation in its entirety,³⁷ ten states use its second prong,³⁸ and three states use *M'Naghten* coupled with a volitional capacity prong.³⁹

³³ DRESSLER, *supra* note 26, at 350. Many have noted that the word “know” is defined both narrowly and broadly, and courts’ decisions regarding the interpretation of the *M'Naghten* test have varied in which definition applies. *Id.* Under the narrow definition, the jury is charged with evaluating the defendant’s “formal cognitive knowledge.” *Id.* Using this narrow definition of “know,” “[a] person may be found sane if she can describe what she is doing (I was strangling her) and can acknowledge the forbidden nature of her conduct (I knew I was doing something wrong).” *Id.* However, the broad definition of “know” requires only that defendants have “affective knowledge” of their actions. *Id.* Affective knowledge “is absent unless the actor can evaluate her conduct in terms of its impact on others and appreciate the total setting in which she acts, i.e., can internalize the enormity of the[ir] criminal act and, thus, emotionally appreciate its wrongfulness.” *Id.* (internal quotation marks omitted).

³⁴ *Id.* at 351. Commenters have regularly inquired as to whether the “wrong” in *M'Naghten* refers to legal wrong or moral wrong. *Id.* Indeed, Lord Tindal’s statement that “the question is whether M'Naghten knew that his act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable” supports both interpretations of “wrong.” *Id.* (internal quotation marks omitted). In the United States, jurisdictions using the *M'Naghten* test regularly deliver the instruction to the jury without defining “wrong,” leaving it to the jurors to apply the test as they see fit. *See* MORRIS, *supra* note 32, at 13; *see also* State v. Singleton, 48 A.3d 285, 295 (N.J. 2012) (noting that “a majority of states following the *M'Naghten* test have interpreted ‘wrong’ as encompassing legal as well as moral wrong”). The English courts, however, have defined “wrong” as legal wrong. DRESSLER, *supra* note 26, at 351.

³⁵ *See supra* note 29.

³⁶ DRESSLER, *supra* note 26, at 347.

³⁷ Clark v. Arizona, 548 U.S. 735, 750 & n.12 (2006) (noting the states that have adopted the *M'Naghten* test).

³⁸ *Id.* at 751 & n.14 (noting the states who “have adopted the moral incapacity test alone”).

³⁹ *Id.* at 751 & n.17 (noting the states who added a volitional incapacity prong). This has been titled the “irresistible impulse” test. DRESSLER, *supra* note 26, at 353. The irresistible impulse test came about in response to criticisms concerning

b. The American Law Institute (ALI) Model Penal Code Test

The ALI test recognizes both cognitive and volitional capacity, simultaneously tweaking the language found in *M'Naghten* to incorporate the idea of substantial rather than complete impairment.⁴⁰ Thus, the ALI test broadens the *M'Naghten* test.⁴¹ The effect has been praised for “permit[ing] a reasonable three-way dialogue between the law-trained judges and lawyers, the medical-trained experts, and the jury.”⁴²

The ALI test dictates that individuals cannot be criminally liable for their actions if they lacked “substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of law.”⁴³ Some jurisdictions use the language “appreciate the moral wrongfulness” rather than “appreciate the criminality” in describing the individual’s conduct.⁴⁴

Initially incredibly popular, the ALI test stalled for the very reasons it was originally supported. Following the assassination attempt of Ronald Reagan and subsequent acquittal of John Hinckley, some states began to reconsider their “friendly” insanity

M'Naghten's perceived over-reliance on cognitive capacity. *See id.* Therefore, under the irresistible impulse test, the jury is instructed to consider both the cognitive and volitional capacity of the defendant. *Id.* The exact definition of the test varies, but in essence, the test provides that defendants are insane if, at the time of the offense, they did not have the power to control their conduct. *Id.* Dressler cites three different definitions from various jurisdictions:

Generally speaking, a person is insane if, at the time of the offense: (1) she acted from an irresistible and uncontrollable impulse; (2) she lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that [her] free agency was at the time destroyed; or (3) the [defendant's] will . . . has been otherwise than voluntarily so completely destroyed that [her] actions are not subject to it, but are beyond [her] control.

Id. (footnotes and internal quotation marks omitted).

⁴⁰ DRESSLER, *supra* note 26, at 354. The ALI test was created in 1962 and became widely used shortly thereafter: “In less than two decades, it was adopted by ten of the eleven federal circuit courts and by a majority of the states.” *Id.* at 347.

⁴¹ *Id.* at 354.

⁴² State v. Johnson, 399 A.2d 469, 476 (R.I. 1979).

⁴³ MODEL PENAL CODE § 4.01; *see also* DRESSLER, *supra* note 26, at 354.

⁴⁴ DRESSLER, *supra* note 26, at 354.

defenses, and the ALI test's momentum ceased.⁴⁵ Despite this, the ALI test is currently in use in fourteen states.⁴⁶

2. Non-Traditional Variation with Traditional Protection: The *Durham* Product Test

The product test attempted to modernize the insanity defense by allowing expert testimony to break free of the outdated cognitive or volitional parameters.⁴⁷ Under the product test, individuals cannot be liable for their criminal actions if these actions were the product of a mental disease or defect.⁴⁸ The defendant is permitted to introduce evidence regarding mental disease or defect, and the court considers this evidence in determining (1) whether the defendant was suffering from the alleged disease or defect at the time of the criminal action and, if so, (2) whether the disease was a but-for cause of the criminal action.⁴⁹

The *Durham* product test was first used in 1870 in New Hampshire.⁵⁰ In 1954, the test was recognized in the District of Columbia.⁵¹ Ultimately, the product test fell out of favor⁵² and now is recognized in only one state, New Hampshire.⁵³

C. States that Have Abolished the Traditional Insanity Defense: An Introduction to Diminished Capacity

Only Idaho, Utah, Montana, Kansas, and Alaska have abolished or effectively abolished their traditional insanity

⁴⁵ *Id.* at 347.

⁴⁶ *Clark v. Arizona*, 548 U.S. 735, 751 & n.15 (2006).

⁴⁷ DRESSLER, *supra* note 26, at 355.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)). The *Brawner* Court scrapped the product test for its overreliance on expert testimony concerning which mental conditions constituted "mental disease[s] or defect[s]." *Id.* The Court in *Brawner* cited the case of *In re Rosenfield*, in which a psychiatrist changed his mind "on whether a particular condition was a mental illness." *Id.* (citing *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957)).

⁵³ *Clark v. Arizona* 548 U.S. 735, 751 (2006); DRESSLER, *supra* note 26, at 355.

defense models.⁵⁴ These states no longer allow criminal defendants to introduce evidence regarding moral culpability.⁵⁵

Idaho, Utah, Montana, and Kansas have replaced the traditional insanity defense with a diminished capacity failure of proof “defense.”⁵⁶ Using diminished capacity, criminal defendants are permitted to introduce evidence relating to mental disease or defect only insofar as it relates to negating the specific intent of the charged crime.⁵⁷ Successfully establishing diminished capacity does not excuse the conduct of the defendant, as is the case with the traditional insanity defense.⁵⁸

Alaska, on the other hand, uses only *M’Naghten’s* first prong.⁵⁹ By limiting evidence of insanity to *M’Naghten’s* first prong, Alaska has effectively eliminated the traditional insanity defense.⁶⁰

II. DUE PROCESS AND THE INSANITY DEFENSE

A. Substantive Due Process Overview

The Fourteenth Amendment to the United States Constitution dictates that “[n]o State shall make or enforce any law which shall abridge . . . any person of life, liberty, or property,

⁵⁴ MONT. CODE ANN. § 46-14-102 (2014); ALASKA STAT. § 12.47.010 (2014); IDAHO CODE ANN. § 18-207 (2014); UTAH CODE ANN. § 76-2-305 (LexisNexis 2014); KAN. STAT. ANN. § 22-3219 (2014).

⁵⁵ See *supra* note 54.

⁵⁶ See *supra* note 54. See *infra* Part V.A for a discussion of how the diminished capacity failure of proof “defense,” in practice, is not a defense at all.

⁵⁷ DRESSLER, *supra* note 26, at 367.

⁵⁸ *Id.*

⁵⁹ ALASKA STAT. § 12.47.010 (2014).

⁶⁰ Alaska’s statute, though premised on *M’Naghten*, runs afoul of the Fourteenth Amendment’s Due Process Clause:

Alaska has adopted what might be called a “half-*M’Naghten*” standard: A defense of insanity is available if the defendant, because of mental disease or defect was at the time of the act unable to appreciate the nature and quality of the act. Neither inability to appreciate wrongfulness nor to control conduct is part of the Alaska defense.

Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, J. KAN. B. ASS’N, May 1997, at 38, 44 (footnote omitted); see also Andrew P. March, Note, *Insanity in Alaska*, 98 GEO. L.J. 1481, 1509 (2010) (noting that “Alaska is functioning under the same standard as Montana, Idaho, Utah, and Kansas—the states that have abolished the insanity defense altogether”).

without due process of law.”⁶¹ The Supreme Court has interpreted this Due Process Clause as granting citizens with substantive protections from arbitrary government interference over those rights which are “deemed fundamental.”⁶² The Court has employed multiple methodologies in its determining which rights are considered fundamental.

1. *Washington v. Glucksberg*: Careful Descriptions and Historical Focus

The Supreme Court, in 1997, took a narrow view on fundamental rights when a group comprised of both physicians and terminally ill patients challenged the constitutionality of Washington’s ban on assisted suicide.⁶³ The group asserted that there was a fundamental right to dignity in death.⁶⁴ The Supreme Court’s conservative substantive due process analysis found that no such fundamental right existed and upheld Washington’s ban.⁶⁵

The Supreme Court in *Glucksberg* described its substantive due process methodology as a two-part analysis.⁶⁶ According to *Glucksberg*, the Supreme Court requires a “careful description” of the fundamental liberty interest that is “deeply rooted” in the “history and tradition” of the United States.⁶⁷

The *Glucksberg* majority refused to recognize the classification of the fundamental right being asserted by the group challenging Washington’s ban on physician-assisted suicide and

⁶¹ U.S. CONST. amend. XIV, § 1.

⁶² *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁶³ *Washington v. Glucksberg*, 521 U.S. 702 (1997). The ban in question was a provision in Washington’s Natural Death Act of 1979 that dictated “[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” *Id.* at 707 (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).

⁶⁴ *Id.* at 723-24.

⁶⁵ *Id.* at 728.

⁶⁶ *Id.* at 720-21.

⁶⁷ *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Moore v. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). In an often-quoted string of substantive due process tenants, Chief Justice Rehnquist once again reaffirmed that the Court has “regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty.” *Id.* (citations and internal quotation marks omitted).

replaced it with one it felt was more appropriate.⁶⁸ Whereas the challengers to Washington's ban on assisted suicide defined their liberty interest as "the right to choose a humane, dignified death,"⁶⁹ the majority of the Court redefined it as a "liberty interest . . . by a mentally competent, terminally ill adult to commit physician-assisted suicide."⁷⁰

Having carefully described the asserted fundamental right, the Supreme Court underwent an exhaustive history-focused investigation into the existence of a tradition regarding assisted suicide.⁷¹ The Court referenced Anglo-American common-law tradition,⁷² thirteenth-century legal scholars,⁷³ the legal practices of the colonies,⁷⁴ and early American statutes,⁷⁵ finding that there was no longstanding tradition recognizing assisted suicide.⁷⁶ Thus, the Court dictated that there was not a fundamental right to physician-assisted suicide.⁷⁷

Once the Court refused to recognize a fundamental right to assisted suicide, Washington's statutory ban only needed to pass a rational basis review test in order to be upheld.⁷⁸ A unanimous Supreme Court ultimately held that Washington's ban was valid.⁷⁹

⁶⁸ *Id.* at 708.

⁶⁹ *Id.* at 722.

⁷⁰ *Id.* at 708 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).

⁷¹ *Id.* at 708-19.

⁷² *Id.* at 711.

⁷³ *Id.*

⁷⁴ *Id.* at 712-14.

⁷⁵ *Id.* at 714.

⁷⁶ *Id.* at 728.

⁷⁷ *Id.* Evident in the historical analysis by the majority was the nonexistence of any legal recognition to assisted suicide. *Id.* at 208-19. On the contrary,

[t]he history of the law's treatment of assisted suicide . . . has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the . . . "right" to assistance in committing suicide is not a fundamental liberty interest . . .

Id. at 728.

⁷⁸ *Id.* at 728 ("The Constitution also requires . . . that Washington's assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here.") (citation omitted).

⁷⁹ *Id.*

2. *Lawrence v. Texas*: Broad Statements and Emerging Awareness

The Supreme Court completely changed direction in its substantive due process methodology just six years after issuing its opinion in *Glucksberg* when it handed down *Lawrence v. Texas*.⁸⁰ In *Lawrence*, the Supreme Court heard a challenge to an anti-sodomy statute for the second time in less than twenty years and overturned its previous decision, *Bowers v. Hardwick*.⁸¹ The *Lawrence* Court recognized that there was a fundamental right to private intimate sexual conduct between consenting adults that was protected by the Fourteenth Amendment.⁸²

Whereas the substantive due process analysis in *Glucksberg* had focused on carefully defining asserted fundamental rights, the analysis in *Lawrence* was characterized by its emphasis on defining fundamental rights based upon “broad statements.”⁸³ In *Bowers*, the Supreme Court defined the fundamental right being asserted in a manner akin to what would later be done in *Glucksberg*, carefully defining the right as one to engage in homosexual sodomy.⁸⁴ However, using its new, broader characterization, the *Lawrence* Court found that there was a fundamental right for individuals to engage in private intimate sexual conduct.⁸⁵

The *Lawrence* Court also shied away from its extreme emphasis on history and longstanding traditions that was present in *Glucksberg*, placing added importance on more recent trends

⁸⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸¹ *Id.* at 563; *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Lawrence* was charged with committing “deviate sexual intercourse with another individual of the same sex.” *Lawrence*, 539 U.S. at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).

⁸² *Lawrence*, 539 U.S. at 578.

The case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id.

⁸³ *Id.* at 564 (“There are broad statements of the substantive reach of liberty under the Due Process Clause . . .”).

⁸⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁸⁵ *Lawrence*, 539 U.S. at 578.

and “emerging awareness.”⁸⁶ The majority in *Lawrence* went as far as to state that the “laws and traditions in the past half century are of most relevance.”⁸⁷ Accordingly, the Supreme Court found that there was “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁸⁸

Not surprisingly, given these findings, the Supreme Court struck down Texas’ anti-sodomy statute.⁸⁹ In the eyes of the Court, the statute in question failed to further even a legitimate state interest, let alone a compelling one.⁹⁰

B. Recent Insanity Jurisprudence

1. *Clark v. Arizona*: Recognition that the Right May Exist

The Supreme Court in *Clark v. Arizona* recognized that there may be a fundamental right to a traditional insanity defense.⁹¹ Arizona’s legal insanity model is formulated only in terms of a criminal defendant’s ability to distinguish right from wrong,⁹² and

⁸⁶ *Id.* at 571-72.

⁸⁷ *Id.*

⁸⁸ *Id.* at 572.

⁸⁹ *Id.* at 579.

⁹⁰ *Id.* at 578. The Court found that there was no interest that could “justify [the state’s] intrusion into the personal and private life of an individual.” *Id.*

⁹¹ See *Clark v. Arizona*, 548 U.S. 735 (2006). Seventeen-year-old Eric Michael Clark shot and killed a police officer and was charged with first-degree murder “for intentionally or knowingly killing a law enforcement officer in the line of duty.” *Id.* at 743. Clark was subsequently “found incompetent to stand trial and was committed to a state hospital for treatment” for two years. *Id.* Following a determination of competency, Clark waived his right to a jury trial. *Id.* At trial, Clark did not at any point deny that he shot and killed the police officer, “but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute.” *Id.* The judge issued a verdict of first-degree murder. *Id.* at 746. “Clark moved to vacate the judgment and sentence [of the court], arguing . . . that Arizona’s insanity test and its *Mott* rule each violate[d] due process.” *Id.* The motion was denied, and the Court of Appeals of Arizona affirmed the conviction. *Id.* The Supreme Court ultimately granted certiorari to hear Clark’s challenges to Arizona’s insanity test and *Mott* Rule. *Id.* at 747.

⁹² *Id.* at 748. “Under current Arizona law, a defendant will not be adjudged insane unless he demonstrates that ‘at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.’” *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-502(A) (2001)).

Arizona confines the admissibility of evidence relating to criminal defendants' mental state to the issue of proving insanity.⁹³ Thus, testimony regarding a defendant's mental state is not admissible for the purpose of negating the specific intent of the charged offense.⁹⁴

Clark challenged Arizona's formulation for two reasons. First, Clark argued that the state's refusal to recognize a "side-by-side *M'Naghten* test" denied him due process.⁹⁵ The Supreme Court disagreed, finding Arizona's formulation of the insanity defense to be constitutionally permissible.⁹⁶ The majority went out of its way to state that although it had "never [before] held that the Constitution mandates an insanity defense," it similarly had not "held that the Constitution does not so require."⁹⁷ The majority felt that this case did "not call upon [them] to decide the matter"⁹⁸ because there was no shortchanging of a constitutional minimum in Arizona's abbreviated *M'Naghten*.⁹⁹

The Court's leaving open the question of whether or not the insanity defense is constitutionally required is quite telling. It stands to reason that if the majority felt that there was not a right to an insanity defense, it would have dictated as much. Perhaps the Court's finding that no constitutional minimum had been "shortchanged" indicates that the Court believed a constitutional minimum does exist. Indeed, the Court's recognition of an insanity

⁹³ *Id.* at 770. According to the Arizona Supreme Court's decision in *State v. Mott*, "expert psychological testimony [concerning] . . . the requisite mental state necessary for the commission of the charged offenses . . . [is] inadmissible as an attempt to prove defendant's diminished capacity." *State v. Mott*, 931 P.2d 1046, 1048 (Ariz. 1997). This is known in Arizona as the "*Mott* Rule." *Clark*, 548 U.S. at 760.

⁹⁴ *Mott*, 931 P.2d at 1048.

⁹⁵ *Clark*, 548 U.S. at 748. "[Clark] insists that the side-by-side *M'Naghten* test represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect . . ." *Id.*

⁹⁶ *Id.* at 756. "[N]either in theory nor in practice did Arizona's . . . abridgment of the insanity formulation deprive Clark of due process." *Id.*

⁹⁷ *Id.* at 752 n.20.

⁹⁸ *Id.*

⁹⁹ *Id.* at 753 ("Nor does Arizona's abbreviation of the *M'Naghten* statement raise a proper claim that some constitutional minimum has been shortchanged."). It is undisputed that Clark was able to introduce all of the evidence relating to his mental capacity, both cognitive and moral, in order to prove insanity, and according to the Court, "the cognitively incapacitated are a subset of the morally incapacitated within the meaning of the standard *M'Naghten* rule." *Id.* at 754-56.

defense premised solely in terms of moral culpability lends credence to the presumption that it meets the level of a constitutional minimum, or is, itself, the minimum.¹⁰⁰ Regardless of the inferences that may be drawn from *Clark*, one thing is certain: the Court recognized that the right may exist.

2. *Delling v. Idaho*: A Cautioning Dissent

Presumably there are three current Justices who would find there is a fundamental right to a traditional insanity defense premised on the defendant's ability to tell right from wrong.¹⁰¹ In a rare display of dissatisfaction, three Justices dissented from the *Delling v. Idaho* denial of certiorari.¹⁰² The dissenters dictated, among other things, that "[t]he law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong."¹⁰³ According to these Justices, "[t]he insanity defense in nearly every State incorporates this [moral culpability] principle."¹⁰⁴

At issue in *Delling* was Idaho's complete abolition of the insanity defense.¹⁰⁵ In its place the Idaho legislature installed a statutory scheme which dictated that "[m]ental condition shall not be a defense to any charge of criminal conduct."¹⁰⁶ Instead of allowing criminal defendants to raise an affirmative and complete defense of insanity premised on their ability to tell right from

¹⁰⁰ See Phillips & Woodman, *supra* note 14, at 480. According to Phillips and Woodman,

[s]ince 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."

Id. (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

¹⁰¹ See *State v. Delling*, 267 P.3d 709 (Idaho 2011), *cert. denied*, 133 S. Ct. 504 (2012).

¹⁰² *Delling v. Idaho*, 133 S. Ct. 504 (2012) (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg and Sotomayor.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 504-06.

¹⁰⁶ IDAHO CODE ANN. § 18-207(1) (2014).

wrong, Idaho allows for the introduction of evidence relating to diminished capacity.¹⁰⁷

The dissenters were understandably upset with the Court's decision to deny certiorari in a case such as this, for a select few states were abandoning centuries-old legal practice. While states have great latitude in crafting definitions of criminal actions and punishments,¹⁰⁸ Idaho is one of the few states that have abandoned the principle of moral culpability.¹⁰⁹

The dissenters recognized that Idaho's abolition was indeed "significant"¹¹⁰ in its refusal to embrace this principle. In its concluding remarks, the dissent indicated that Idaho's elimination of the traditional insanity defense may have run afoul of the Fourteenth Amendment's Due Process Clause.¹¹¹ Based on their dissent, it is safe to presume that the three Justices would have deemed the traditional insanity defense to be a fundamental right worthy of protection from state interference.

III. THE TRADITIONAL INSANITY DEFENSE IS A FUNDAMENTAL RIGHT

A. Traditional Insanity Defense Defined

A traditional insanity defense is an affirmative and complete defense that gives a criminal defendant the opportunity to argue that he was unable to distinguish right from wrong at the time he committed the charged offense.¹¹² This principle of moral

¹⁰⁷ See *supra* Part I.C for an introduction to the diminished capacity doctrine and the states that have abolished their insanity defenses.

¹⁰⁸ *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (noting that "the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice").

¹⁰⁹ IDAHO CODE ANN. § 18-207(1) (2014).

¹¹⁰ *Delling*, 133 S. Ct. at 505. "[T]he difference between the traditional insanity defense and Idaho's standard is that the latter permits the conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong." *Id.*

¹¹¹ *Id.* at 506 ("I would grant the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause.").

¹¹² See *id.* at 505; Nusbaum, *supra* note 14, at 1517-18 (discussing the typical view of the insanity defense as an affirmative defense used by the defendant to "exculpate despite the state's ability to prove all elements of the offense charged"); see also *Finger v. State*, 27 P.3d 66, 80 (Nev. 2001) (stating that "the essence of the defense . . . has been that a defendant must have the mental capacity to know the nature of his act and

culpability, found in nearly every state's insanity defense,¹¹³ has been legally recognized for over one hundred seventy years.¹¹⁴

B. Substantive Due Process Analysis

The Court will undertake an exhaustive substantive due process analysis should it hear a challenge to a state's statutory abolition of the insanity defense. The analysis will be guided by the approaches dictated in either *Glucksberg* or *Lawrence*, or perhaps even an amalgamation of the two. Regardless of the methodology employed, the outcome will remain the same. The Court would necessarily find a fundamental right to a traditional insanity defense exists.

1. *Glucksberg* Analysis

The Court in *Glucksberg* articulated a substantive due process analysis for determining what rights were fundamental and thus deserving of special protection from government interference.¹¹⁵ The two-part analysis required a "careful description' of the asserted fundamental liberty interest"¹¹⁶ that was "deeply rooted in th[e] . . . history and tradition" of the United States.¹¹⁷ According to the Court, this emphasis on history and tradition "provide[s] the crucial 'guideposts for responsible decision making'"¹¹⁸ in its due process analysis.

that it was wrong" (quoting *State v. Herrera*, 895 P.2d 359, 372 (Utah 1995) (Stewart, J., dissenting)).

¹¹³ *Delling*, 133 S. Ct. at 504.

¹¹⁴ *See supra* Part I.A.

¹¹⁵ *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court acknowledges that this is a "restrained methodology" that is used to "rein in the subjective elements . . . by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action," thus avoiding "the need for complex balancing of competing interests in every case." *Id.* at 721-22.

¹¹⁶ *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

¹¹⁷ *Id.* (quoting *Moore v. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted). The Court used a myriad of selected phrases to convey its notion of fundamentality: "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (citations and internal quotation marks omitted).

¹¹⁸ *Id.* at 721 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

a. "Careful Description" of the Fundamental Right Being Asserted: The Right to Affirmative Defense Demonstrating an Inability to Distinguish Right from Wrong

A criminal defendant who challenges a state's statutory abolition of the insanity defense asserts a fundamental right to a traditional insanity defense as defined in Part III.A.¹¹⁹ The defendant seeks the right to raise the affirmative and complete defense of insanity to demonstrate his inability to tell right from wrong at the time of the charged offense.¹²⁰

The Court requires a "careful description," in part, to "rein in the subjective elements that are necessarily present in due-process judicial review."¹²¹ In *Glucksberg*, the Court refused to recognize the respondent's asserted fundamental right and instead redefined it in accordance with its "careful description" method.¹²² Whereas the petitioners in *Glucksberg* asserted a fundamental right to "choose how to die"¹²³ and "control . . . one's final days,"¹²⁴ the Court defined the right being asserted as the right "to commit suicide which itself includes a right to assistance in doing so."¹²⁵ Though the Court redefined the fundamental right asserted by the respondents in *Glucksberg*, it would be unlikely to do so in the case of a criminal defendant asserting a fundamental right to a traditional insanity defense.

Unlike the respondents in *Glucksberg*, who used abstract notions in defining the asserted fundamental right, challengers to

¹¹⁹ See *Finger v. State*, 27 P.3d 66, 68 (Nev. 2001) (striking down Nevada's statutory scheme, which abolished the traditional insanity defense). In *Finger*, a criminal defendant challenged Nevada's abolition of the insanity defense, in part, alleging that "the ability of an accused to pursue a defense of legal insanity is a fundamental right under the due process clauses of the United States and Nevada Constitutions." *Id.* at 70; see also *Sinclair v. State*, 132 So. 581, 581-82 (Miss. 1931) (en banc) (holding as unconstitutional a Mississippi statute which prevented the insanity defense in murder trials); *State v. Strasburg*, 110 P. 1020, 1025 (Wash. 1910) (holding as unconstitutional a Washington statute that abolished the insanity defense). The term "fundamental right" was not yet commonplace when *Sinclair* and *Strasburg* were decided; however, in both cases the defendants raised due process challenges akin to those in *Finger*.

¹²⁰ See *supra* note 119.

¹²¹ *Glucksberg*, 521 U.S. at 722.

¹²² *Id.* at 723-24.

¹²³ *Id.* at 722.

¹²⁴ *Id.* The respondents also "describe[d] the asserted liberty [interest] as 'the right to choose a humane, dignified death.'" *Id.*

¹²⁵ *Id.* at 723.

state laws abolishing the insanity defense have already carefully described the fundamental right being denied in concrete terms.¹²⁶ Thus, future potential challengers can assert a tangible fundamental right to a traditional insanity defense premised on moral culpability without having to worry about judicial redefinition of the asserted liberty interest.

b. "Deeply Rooted" Fundamental Right

The right of a criminal defendant to raise a traditional insanity defense, defined by his ability to demonstrate an absence of moral culpability,¹²⁷ is deeply rooted in "our Nation's history, legal traditions, and practices."¹²⁸ Indeed, the traditional insanity defense has long been recognized both in the practices of other civilized nations in the distant past¹²⁹ and in the current United States legal system.¹³⁰

The concept of moral culpability is found in "the Latin maxim *actus non facit reum nisi mens sit rea*: an act does not make one guilty unless his mind is guilty."¹³¹ This concept is incorporated in the traditional insanity defense and has been a fixture in the law since as early as 1100 A.D.¹³² "[B]y the 16th century [the insanity defense itself] was well-established in the criminal law."¹³³ In 1843, the *M'Naghten* test was articulated, and "[i]t quickly became the . . . standard" in the United States.¹³⁴ Until recently, every state had an insanity defense that incorporated principles of

¹²⁶ See *supra* note 119 and accompanying text.

¹²⁷ See *supra* Part III.A.

¹²⁸ *Glucksberg*, 521 U.S. at 710, 721.

¹²⁹ *Finger v. State*, 27 P.3d 66, 80 (Nev. 2001) (stating that "recognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another." (quoting *State v. Herrera*, 895 P.2d 359, 372 (Utah 1995) (Stewart, J., dissenting))). The court in *Finger* also recognized that the "essence of the defense . . . has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong." *Id.* (quoting *Herrera*, 895 P.2d at 372 (Stewart, J., dissenting)).

¹³⁰ See *supra* note 28.

¹³¹ See Phillips & Woodman, *supra* note 14, at 463.

¹³² *Id.* (citing Paul E. Raymond, *The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law*, 15 OR. L. REV. 93, 117 (1936)).

¹³³ Sheila Hafter Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 562 (1972).

¹³⁴ DRESSLER, *supra* note 26, at 347.

moral culpability.¹³⁵ At present, all but five states continue to honor the fundamental right to a traditional insanity defense.¹³⁶ With this lengthy history, it stands to reason that the traditional insanity defense is deeply rooted.

The historical foothold of the asserted fundamental right in *Glucksberg* stands as an inverse to the fundamental right asserted by potential challengers to the statutory abolition of the traditional insanity defense. Whereas the respondents in *Glucksberg* asserted a right to something that had not been recognized in “our Nation’s history, legal traditions, and practices,”¹³⁷ the challengers to the abolition of the traditional insanity defense have a very strong case regarding the defense’s deep roots. The Court noted in *Glucksberg* that a lengthy practice by “common consent . . . will need a strong case for the Fourteenth Amendment to affect it.”¹³⁸ This necessarily implies that the Fourteenth Amendment protects rights which have been historically recognized by the states.

Though the substantive due process analysis in *Glucksberg* focused primarily on historical practice, the Court briefly mentioned the status of the asserted fundamental right among the states.¹³⁹ According to the Court, “[t]hough deeply rooted, the States’ assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.”¹⁴⁰ To this point, states similarly reexamined their insanity defense practices following the acquittal of Hinckley.¹⁴¹ Out of this reexamination, the recognition of a traditional insanity defense remained intact in all but five states.¹⁴² These five states are clearly breaking from both historical and modern practice.

¹³⁵ See *supra* Part I.C.

¹³⁶ See *supra* note 12 and accompanying text.

¹³⁷ *Washington v. Glucksberg*, 521 U.S. 702, 710, 721, 723 (1997).

¹³⁸ *Id.* at 723 (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). The Court was discussing statutory bans on assisted suicide, asserting that invalidation of these bans would run contrary to “centuries of legal . . . practice.” *Id.*

¹³⁹ *Id.* (“To hold for respondents, we would have to . . . strike down the considered policy choice of almost every State.”).

¹⁴⁰ *Id.* at 716.

¹⁴¹ DRESSLER, *supra* note 26, at 347-48.

¹⁴² See *supra* note 12 and accompanying text.

2. *Lawrence* Analysis

a. “Broad Statement” of the Fundamental Right Being Asserted: *Meaningful Opportunity to Have Mental Illness Relate to Culpability*

The “broad statement” of the fundamental right asserted by those challenging the abolition of the traditional insanity defense can be defined as the right to a meaningful opportunity to have mental illness relate to culpability. The absence of the traditional insanity defense denies a criminal defendant an opportunity to demonstrate a lack of moral culpability despite the state’s proving every element of crime.¹⁴³

In the eyes of the *Lawrence* Court, the careful description requirement of asserted fundamental rights can lead to a “failure to appreciate the extent of the liberty at stake.”¹⁴⁴ Presumably, those who do not recognize a fundamental right to refute moral culpability would be more sympathetic to an asserted fundamental right based on presenting a complete defense.

b. “Emerging Awareness” of the Fundamental Right

The *Lawrence* Court shied away from the extreme emphasis on historical practice and traditions that was present in *Glucksberg*.¹⁴⁵ The Court changed course, proclaiming that “laws and traditions in the past half century are of most relevance.”¹⁴⁶ If this is true, then it follows that the traditional insanity defense has a strong case for categorization as a fundamental right.

There has been, and continues to be, a widespread recognition of the traditional insanity defense. At present, all but five states have in place a traditional insanity defense or an equally protective alternative.¹⁴⁷ The traditional insanity defense

¹⁴³ See *infra* Part V.A.

¹⁴⁴ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹⁴⁵ See *supra* Part II.A.1.

¹⁴⁶ *Lawrence*, 539 U.S. at 571-72 (noting that “[t]hese references show an emerging awareness that liberty gives substantial protection”). The Court further dictated that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

¹⁴⁷ See *supra* note 28.

is alive and well, and the scholarly commentary regarding abolition of the traditional insanity defense is overwhelmingly negative.¹⁴⁸

Widespread recognition of the traditional insanity defense continues to thrive not only throughout the majority of the states, but also throughout the rest of the world.¹⁴⁹ The *Lawrence* Court spoke to the importance of world-wide recognition when it discussed the “values we share with a wider civilization.”¹⁵⁰ Indeed, the traditional insanity defense currently practiced throughout the world continues to be a method for detracting from criminal liability.¹⁵¹

C. Application of Strict Scrutiny

A state may only abridge a constitutionally guaranteed fundamental right when the abridgment is necessary to further a “compelling state interest.”¹⁵² Furthermore, the state action must

¹⁴⁸ See generally Phillips & Woodman, *supra* note 14; Williams, *supra* note 11; Nusbaum, *supra* note 14.

¹⁴⁹ See generally RITA J. SIMON & HEATHER AHN-REDDING, *THE INSANITY DEFENSE, THE WORLD OVER* (2006). Canada recognizes the traditional insanity defense, providing that individuals are not “criminally responsible” if they are “incapable of appreciating the nature and quality of an act or omission or of knowing that it was wrong.” *Id.* at 15. Brazil also recognizes a traditional insanity defense based on the *M'Naghten* test. *Id.* at 56. France’s insanity defense is, in essence, a combination of the product and *M'Naghten* tests with the irresistible impulse attachment, stating that individuals are not criminally liable if they were “suffering from a psychic or neuropsychic disorder which destroyed [their] discernment or [their] ability to control [their] actions.” *Id.* at 65. Germany’s traditional insanity defense dictates that individuals are not criminally liable for their actions if “because of a psychotic or similar serious mental disorder, or because of a profound interruption of consciousness or because of feeble-mindedness or any other type of serious mental abnormality, [they are] incapable of understanding the wrongfulness of [their] conduct or of action in accordance with [their] understanding.” *Id.* at 73. Germany’s test, therefore, is the *M'Naghten* test. Great Britain uses the *M'Naghten* test and also “the rule of diminished responsibility.” *Id.* at 83. Israel uses a combination of the *M'Naghten* and irresistible impulse tests, providing that persons are not liable if they are unable “(1) to understand what [they are] doing or the wrongness of the act or (2) to refrain from doing the act.” *Id.* at 148. India’s insanity defense provides that in order to be convicted, a defendant “must not know the nature of the act, or not know that it was wrong or illegal, due to unsoundness of the mind.” *Id.* at 184.

¹⁵⁰ *Lawrence*, 539 U.S. at 576 (mentioning the rejection of same-sex abolitions by the European Court of Human Rights and other nations).

¹⁵¹ See *supra* note 149.

¹⁵² See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

be narrowly tailored to achieve its purpose.¹⁵³ While states certainly have a compelling interest in protecting their citizens from dangerous individuals, statutory abolition of the traditional insanity defense is not necessary to further this interest, thus it fails the narrow tailoring requirement, and denies citizens due process.

IV. NO PARTICULAR FORMULATION OF THE TRADITIONAL INSANITY DEFENSE IS CONSTITUTIONALLY REQUIRED SO LONG AS IT MEETS THE CONSTITUTIONAL MINIMUM

The Fourteenth Amendment's Due Process Clause ensures every criminal defendant an affirmative and complete defense of insanity premised on the defendant's inability to distinguish right from wrong. This is the constitutional minimum that must be provided to every criminal defendant. How states elect to craft this defense is within their discretion.¹⁵⁴

There are many formulations and variations of the traditional insanity defense that offer sufficient protection to criminal defendants and are within the scope of the fundamental right. Returning to the various insanity tests detailed in Part I.B., it is evident that each meet the requisite level of protection to satisfy due process.

A. *M'Naghten and Traditional Variations Satisfy Due Process*

1. The *M'Naghten* Test

As an affirmative and complete defense that defines insanity in terms of a defendant's capacity to distinguish right from wrong, the *M'Naghten* test¹⁵⁵ satisfies due process. Despite being the most restrictive of the traditional insanity defenses,¹⁵⁶ the *M'Naghten* test meets the constitutionally required minimum level of protection.

¹⁵³ *Id.* (“[L]egislative enactments must be narrowly drawn . . .”).

¹⁵⁴ *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (noting that “the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice”).

¹⁵⁵ *See supra* note 29.

¹⁵⁶ *See supra* note 30.

The most restrictive variation of *M'Naghten* defines wrong according to legality rather than morality.¹⁵⁷ Due process is satisfied even under this definition.¹⁵⁸ Except in extreme and rare circumstances, moral wrong and legal wrong will be “coextensive.”¹⁵⁹

States that use the broad variation, recognizing wrong to encompass moral wrong, define moral wrong “from a societal” rather than “personal[] standard.”¹⁶⁰ That is, they require that the defendant was incapable of determining whether or not his actions were contrary to “accepted objective societal notions of morality.”¹⁶¹ This definition certainly satisfies due process, for the defendant is given a meaningful opportunity to demonstrate a lack of moral culpability.

2. The American Law Institute’s (ALI) Model Penal Code Test

The ALI test, built on much of what *M'Naghten* had articulated, replaces *M'Naghten*’s “knowing” requirement with “appreciating.”¹⁶² Furthermore, the ALI test requires only “substantial” incapacity rather than complete incapacity as is understood in other traditional insanity defenses.¹⁶³ As a version of the insanity defense that is broader than the *M'Naghten* test, the ALI definition of insanity satisfies due process.

B. Equally Protective Alternative that Satisfies Due Process: The Durham Product Test

The product test is ostensibly the broadest insanity defense available to criminal defendants.¹⁶⁴ An affirmative defense, the product test dictates that criminal defendants are not liable for

¹⁵⁷ DRESSLER, *supra* note 26, at 351.

¹⁵⁸ *Id.* (“The distinction between legal and moral right-and-wrong will rarely affect the outcome of a trial.”).

¹⁵⁹ *State v. Singleton*, 48 A.3d 285, 296 (N.J. 2012).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See supra* Part I.B.1.b.

¹⁶³ *See supra* note 40 and accompanying text.

¹⁶⁴ Depending on how “mental illness” is defined, the test can be broad or narrow. In any event, the defendant is given a meaningful opportunity to relate his mental illness to culpability and demonstrate an absence in the ability to distinguish right from wrong.

actions if the actions are the result of mental disease or defect, provided that their defect is the but-for cause of the action.¹⁶⁵ For this reason, the product test satisfies due process.

V. DIMINISHED CAPACITY IS NOT AN EQUALLY PROTECTIVE ALTERNATIVE AND DOES NOT SATISFY DUE PROCESS

As shown in Part IV, states may implement a variety of insanity defense formulations that meet the level of protection found in the traditional insanity defense, but diminished capacity is not a constitutionally permissive alternative.

A. Diminished Capacity Is Not a True Defense

Unlike the traditional insanity defense, the doctrine of diminished capacity is not an affirmative defense. Rather than be labeled as a defense, diminished capacity should be called what it truly is: “merely a rule of evidence.”¹⁶⁶ The diminished capacity rule of evidence fails to provide an avenue for acquittal that isn’t housed in the definition of the charged crime.¹⁶⁷ The State’s willingness to accept evidence on an element of a crime, rather than excluding such evidence, is not a substitute for an actual affirmative defense.

Diminished capacity restricts the defendant’s introduction of evidence relating to mental illness or defect.¹⁶⁸ Defendants are only able to introduce this evidence for the purpose of negating the specific intent of the charged crime.¹⁶⁹ The diminished capacity doctrine, concerned only with specific criminal intent, thus breaks from the traditional insanity defense’s recognition of moral culpability.

As a failure of proof “defense,” diminished capacity fails to protect mentally ill criminal defendants. Diminished capacity does not account for the mentally ill criminal defendant who knowingly commits a crime while failing to understand that the act was

¹⁶⁵ See *supra* text accompanying notes 47-49.

¹⁶⁶ DRESSLER, *supra* note 26, at 368 (quoting *United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987)).

¹⁶⁷ *Id.*

¹⁶⁸ See Williams, *supra* note 11, at 242-43, 245.

¹⁶⁹ *Id.*

wrong.¹⁷⁰ Furthermore, it mistakes the nature of serious mental illness as it relates to culpability.¹⁷¹

Consider again the case of Roy.¹⁷² In an overwhelming majority of jurisdictions in the United States, Roy would have the opportunity to demonstrate that as a result of his schizophrenic episode and insane delusion, he felt as if he were acting in self-defense. The jury would receive an instruction regarding the state's formulation of the insanity defense, and should the jury believe Roy acted justifiably given his delusion, he would be found not guilty by reason of insanity.

However, in a diminished capacity jurisdiction that does not permit a traditional insanity defense, Roy would only be allowed to introduce evidence of his mental condition to disprove his requisite intent. Roy's schizophrenic delusion would not be an affirmative defense to his actions and would only be considered insofar as it related to his ability to form the intent to shoot the deceased individual. While this evidence might help Roy escape a higher charge, it would not be enough to adjudge him not guilty.

It cannot be said that this man was morally culpable for killing another under these circumstances, for in his schizophrenic state he was incapable of distinguishing right from wrong. To prevent him from presenting a defense based on his moral culpability would go against the principles of punishment and the longstanding tradition of considering the moral culpability of criminal defendants.¹⁷³

B. A Favorable Burden Is Not a Substitute for an Unfavorable "Defense"

Some scholars have argued that diminished capacity is an acceptable substitute for a traditional insanity defense because of the more favorable burden of proof on the defendant.¹⁷⁴ According

¹⁷⁰ *Id.*

¹⁷¹ Brief of *Amici Curiae* 52 Criminal Law and Mental Health Law Professors in Support of Petitioner at 6-7, 10, *Delling v. Idaho*, 133 S. Ct. 504 (2012) (No. 11-1515).

¹⁷² *See supra* Introduction.

¹⁷³ *See* DRESSLER, *supra* note 26, at 345-46, for a discussion of the rationale of the insanity defense in regard to the principles of punishment.

¹⁷⁴ *See, e.g.*, Tyler Ellis, Comment, *Mental Illness, Legal Culpability, & Due Process: Why the Fourteenth Amendment Allows States to Choose a Mens Rea Insanity Defense*

to these individuals, providing defendants this lower burden of proof allows the state to narrow the insanity defense consistent with due process.¹⁷⁵ This argument is flawed in that it fails to recognize the constitutional minimum that exists.

The same scholars opine that because the Supreme Court in *Clark* found that no particular insanity test was fundamental, states may abolish the defense and craft whatever criminal laws they see fit.¹⁷⁶ While it may be true that no particular formulation is constitutionally required, there is a substantive level of protection that must be met.

This level of protection is defined by an affirmative and complete defense premised on right and wrong. The insanity formulation, in whatever form that satisfies due process, must be delivered to the jury. A more favorable burden without the substantive protection fails to adequately protect criminal defendants.

VI. NARROWING THE INSANITY DEFENSE CONSISTENT WITH DUE PROCESS

There are ways in which states may narrow their insanity defense that are consistent with due process. These various measures do not result in a “shortchang[ing]”¹⁷⁷ of a fundamental right. Moreover, these measures achieve the compelling interests cited by states which have abolished the traditional insanity defense and are narrowly tailored.¹⁷⁸

over a M’Naghten Approach, 84 MISS. L.J. 215, 238-39 (2014) (dictating that under the diminished capacity doctrine “a defendant only needs to raise a reasonable doubt”).

¹⁷⁵ *Id.* at 239-40.

¹⁷⁶ *Id.* at 230 (claiming that “no one formulation of the insanity defense is deeply rooted enough in history and tradition to raise it to the level of a fundamental right”); see also *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (stating that with its “varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice”).

¹⁷⁷ *Clark*, 548 U.S. at 753.

¹⁷⁸ Presumably, the most compelling state interest would be protection of citizenry from dangerous individuals. Interestingly, there has for some time been a misconception that criminal defendants abuse the insanity defense in order to escape serving jail time and are sometimes successful in doing so. See DRESSLER, *supra* note 26, at 360 (“Abolitionists assert that the insanity defense results in abuse of the criminal justice system. They claim that the defense is frequently asserted and too often successful. Implicit in this argument is that insanity claims, *including successful*

A. States May Implement the More Restrictive Formulations of the Traditional Insanity Defense

A state may provide a narrow test for determining insanity in order to advance a compelling state interest in preventing unmerited acquittals. Statutory confinement of the insanity defense to *M'Naghten's* stricter “knowing” and legal “wrong” definitions¹⁷⁹ is perhaps the most restrictive test available that satisfies due process.

Under this test, criminal defendants would be required to prove that as a result of their mental illness they lacked formal cognitive knowledge that their actions were “legally wrong.”¹⁸⁰ Despite the defendant’s lack of knowledge that the act was morally wrong, he would not be found legally insane unless he could demonstrate that he also did not know that the act was criminal at the time he committed it.¹⁸¹

Criminal defendants subject to this test would be found sane under circumstances in which they hid bodies, destroyed evidence, or lied to police officers in order to cover up their crime.¹⁸² Also, using this restrictive formulation of *M'Naghten*, states could avoid instances in which juries might acquit out of moral beliefs.

B. States May Raise the Burden of Proof on Establishing Insanity

Apart from adopting restrictive formulations of the traditional insanity defense, states could simply raise the burden

ones, are often fraudulent in nature. As a result, wrongdoers ‘walk free’”) (emphasis added) (footnote omitted). Contrary to this belief, the insanity defense is rarely used and is rarely used successfully. *Id.* at 360-61 (“[T]he defense is rarely invoked . . . and the success rate for the insanity plea, although variable, is usually extremely low.”).

¹⁷⁹ See *supra* Part I.B.1.a for a discussion of the *M'Naghten* test.

¹⁸⁰ See *supra* note 34 and accompanying text.

¹⁸¹ Lord Tindal, in articulating the *M'Naghten* test, advised that “the question is whether M'Naghten knew that his act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable.” DRESSLER, *supra* note 26, at 351 (internal quotation marks omitted).

¹⁸² See *State v. Monaghan*, 270 P.3d 616, 622 (Wash. Ct. App. 2012) (holding that the defendant “showed an awareness that his acts were criminal” by “[i]nying] to the 911 dispatcher,” burning an apartment to destroy evidence, fleeing from the scene, and attempting to escape from the hospital).

of proof on establishing insanity consistent with due process.¹⁸³ In *Leland v. Oregon*, the Supreme Court upheld an Oregon statute that required criminal defendants to establish insanity beyond a reasonable doubt.¹⁸⁴ States truly concerned with an abuse of the insanity plea could do the same.¹⁸⁵

By raising the burden of proof on criminal defendants seeking to plead insanity, the states could very effectively discourage false pleas, and only the most meritorious insanity pleas would be litigated. This measure is consistent with due process and does not deny any individual a fundamental right to a traditional insanity defense.

CONCLUSION

A fundamental right to a traditional insanity defense exists premised on the defendant's ability to distinguish right from wrong. This affirmative and complete defense embraces the principle of moral culpability that is well established in criminal justice systems around the world.

Examining this issue through the lens of the narrow *Glucksberg* approach to fundamental rights, it is evident that the traditional insanity defense is deeply rooted in this nation's history and traditions. Taking the broader *Lawrence* approach to fundamental rights, there is still an overwhelming recognition of the traditional insanity defense in the last fifty years. This past and present embracing of the traditional insanity defense bolsters its argument for its being placed among those rights deemed to be fundamental.

The actions of the five states that have abandoned their traditional insanity defenses is constitutionally suspect and for good reason. These states are breaking away from what has been the general practice for over 200 years while simultaneously

¹⁸³ See *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952).

¹⁸⁴ *Id.*

¹⁸⁵ Interestingly, *Leland* failed to address just how far states could go in raising the burden of proof on criminal defendants for various charges. While it is beyond the scope of this Comment, it is important to note that there is room for debate concerning the extent to which states can narrow the insanity defense consistent with due process by raising the burden of proof on the defendant. *Id.*

abandoning a practice still recognized and respected by an overwhelming majority of the states.

Numerous insanity models provide the base level of protection found in the traditional insanity defense; however, the diminished capacity doctrine is not one of them. The states that have substituted the diminished capacity failure of proof “defense” for their traditional insanity models have failed to recognize that such an act results in a shortchanging of a constitutional minimum. Diminished capacity does not give the defendant an affirmative and complete defense to the crime with which he is charged, and it fails to adequately protect mentally ill criminal defendants. Furthermore, diminished capacity does not give the defendant a meaningful opportunity to relate mental illness to moral culpability because it prevents the defendant from arguing that he was unable to tell right from wrong at the time he committed the charged crime.

There are a number of ways in which states may narrow their insanity models that are consistent with due process. First, states may opt to embrace more restrictive definitions in the existing traditional insanity defense models. Second, states may raise the burden of proving insanity. These acts succeed in achieving the interests of the states seeking to prevent any potential abuses of the legal system. More importantly, though, is the fact that these measures do not deny criminal defendants the substantive level of protection that is guaranteed by the Fourteenth Amendment’s Due Process Clause.

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