MENTAL ILLNESS, LEGAL CULPABILITY, & DUE PROCESS: WHY THE FOURTEENTH AMENDMENT ALLOWS STATES TO CHOOSE A MENS REA INSANITY DEFENSE OVER A *M'NAGHTEN* APPROACH

INTRODUCTION

Does it violate due process to abolish the *M'Naghten* insanity defense[1] while providing in its place a right to introduce evidence of mental illness to negate mens rea?[2] This is an open question under the Federal Constitution.

Consider this hypothetical based on the facts of *Clark v. Arizona*.[3] Eric Clark claims to be a paranoid schizophrenic[4] who believes robots are impersonating government agents and intend to kill him. Clark claims to believe that bullets are the only way to stop them, so he shoots and kills a police officer[5] who (he says) he believes is a robot. He is arrested and charged with murder.[6] As a lawyer for Clark, which of the following would be the best jurisdiction for him?

The first jurisdiction allows Clark to raise a narrow version of the *M'Naghten* insanity defense approved by the United States Supreme Court. He must prove by clear and convincing evidence[7] that, due to his mental illness, he did not know his actions were wrong.

The second jurisdiction does not provide *M'Naghten* as a defense but has instead embraced the Mens Rea Model. Clark may still introduce expert psychiatric evidence of his mental illness to negate mens rea. In this jurisdiction, he only needs to raise a

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[1] Under the M'Naghten insanity defense, a defendant will not be held responsible, if, as a result of his mental illness, (1) he did not understand the "nature and quality" of his acts, or (2) if he did, he did not understand that they were wrong. *See* M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722 (H.L.).

[2] Mens Rea means the mental state of an element of the offense charged, such as the intent to kill a human being. *See infra* note 27 and accompanying text.

[3] 548 U.S. 735 (2006).

[4] *Id.* at 743.

[5] *Id.*

[6] *Id.*

[7] Currently this is the highest burden of proof that states place on defendants to prove their insanity. *See infra* note 180 and accompanying text. States may require defendants to prove their insanity beyond a reasonable doubt.

reasonable doubt[8] that he lacked the intent to kill a police officer (as opposed to a robot) in order to be acquitted.

If there is a dispute over Clark's mental illness and its effect on his understanding of his actions, the second jurisdiction offers a far friendlier forum. Notably, in *Clark*, the Supreme Court upheld the first jurisdiction's less favorable insanity defense as a matter of due process.[9]

Both these hypothetical jurisdictions reflect rules employed by states in the United States today.[10] The insanity defense has gone through many different forms since its introduction in the nineteenth century. The traditional insanity defense, known as *M'Naghten*, is that a defendant will not be held responsible if, as a result of his mental illness, he either (1) did not know the nature and quality of his actions, or (2) did not know what he was doing was wrong.[11] This test represents one of several tests that states can use. Idaho and other states have modified their insanity defense, so that it is no longer an affirmative defense.[12] As a failure of proof defense, evidence of mental illness is admitted to negate mens rea, or state-of-mind, which is an element of the offense.[13] This is known as the Mens Rea Model.

A case involving the constitutionality of the Mens Rea Model was recently petitioned to the United States Supreme Court.[14] The Court denied certiorari, but three justices dissented.[15] The dissenting justices argued the Court should decide whether this modification of the insanity defense violates due process.[16]

This Comment argues that Idaho's modification of the insanity defense does not violate the Due Process Clause of the Fourteenth Amendment and that there is no constitutional right

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[8] This is the lowest burden of proof that a state may require a defendant to overcome.

[9] 548 U.S. at 742.

[10] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-502 (2010) (the jurisdiction that follows the narrower version of *M'Naghten*) and IDAHO CODE ANN. § 18-207 (2004) (the jurisdiction that follows the Mens Rea Model).

[11] *See supra* note 1 and accompanying text. Arizona eliminated the first prong, and only considers evidence of the second prong. ARIZ. REV. STAT. ANN. § 13-502 (2010).

[12] IDAHO CODE ANN. § 18-207 (2004).

[13] *Id.*

[14] Delling v. Idaho, 133 S. Ct. 504 (2012).

[15] *Id.* The three dissenting justices were Breyer, Ginsburg, and Sotomayor. *Id.*

[16] *Id.* at 506 (Breyer, J., dissenting).

to the *M'Naghten* formulation of the insanity defense. Although the proponents of *M'Naghten* as a constitutional right raise valid concerns, they do not provide sufficient support that *M'Naghten* is constitutionally mandated.

History does not embrace one single formulation of the insanity defense. It is not clear that *M'Naghten* is better on average for a defendant than the Mens Rea Model. In fact, the Mens Rea Model, as a variant of diminished capacity, will actually be better for many criminal defendants since they can prevail if they raise a reasonable doubt. The Mens Rea Model clearly meets the constitutional minimum that states must provide to defendants as a matter of due process. Whether to provide *M'Naghten* as an affirmative defense or the Mens Rea Model as a failure of proof defense is a determination best left open for the states to decide. This principle is consistent with the principles of due process and our federal system.

Part I of this Comment recounts the history of mens rea, *M'Naghten*, diminished capacity, the adoption of the Mens Rea Model, and *Clark v. Arizona*. Part II argues that history and tradition do not establish *M'Naghten* as a fundamental right, and that the Mens Rea Model has substantial historical support. Part III argues that the Mens Rea Model, as a variant of diminished capacity, is consistent with fundamental fairness. The Mens Rea Model is better for many defendants, because its definition of mental illness is broader, and defendants need only raise a reasonable doubt to prevail. Part IV argues that the recent Supreme Court case, *Clark v. Arizona*, implicitly establishes that the Mens Rea Model does not violate due process. If a state may restrict psychiatric evidence to negate mens rea and eliminate the first prong of *M'Naghten*, other states may allow any evidence of mental illness to negate mens rea and eliminate the second prong of *M'Naghten* and effectively keep the first.

I. BACKGROUND

A. Terms of the Debate

Most academic commentary asserts that the Mens Rea Model is insufficient and unconstitutional, and that the Constitution requires that a state provide a defendant with the ability to raise

insanity as an affirmative defense.[17] They argue the insanity defense is a fundamental legal principle rooted in this nation's history.[18] This Comment refers to this group as the "*M'Naghten* due process camp." Others argue that while *M'Naghten* itself is not required, some form of an affirmative defense of insanity is.[19] But these groups also make a tradition-based argument, and that leaves no other test but traditional *M'Naghten*.

B. The History and Understanding of Mens Rea

There is no question that criminal liability under the constitution requires a culpable mental state unless an offense falls into the narrow category of public welfare offenses.[20]

> "[A]n act does not make [a person] guilty, unless the mind be guilty," expresses the principle that, except in relatively rare circumstances, a person is not guilty of a criminal offense unless the government not only proves the *actus reus* of the crime . . . but also the defendant's *mens rea* . . . .[21]

Criminal liability requires proof of "an evil-meaning mind with an evil-doing hand."[22]

Beginning in the thirteenth century, English courts required that the state prove the person charged with a criminal offense had the culpable mental state.[23] Seven centuries later, American jurisprudence viewed mens rea as such a fundamental aspect of law that the Supreme Court stated: "[t]he contention that an injury can amount to a crime only when inflicted by [mens rea] is no provincial or transient notion. It is . . . universal and persistent in mature systems of law . . . ."[24]

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[17] *See generally* Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455 (2008).

[18] *Id.*

[19] *See infra* note 203 and accompanying text.

[20] *See* Morissette v. United States, 342 U.S. 246, 250 (1952) (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.").

[21] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 125 (4th ed. 2006).

[22] *See Morissette*, 342 U.S. at 251.

[23] *See* DRESSLER, *supra* note 21, at 125.

[24] *Id.* (quoting *Morissette*, 342 U.S. at 250).

For such an important concept, the term "mens rea" is plagued with ambiguity arising from two distinct understandings of the term.[25] Under the broad definition, mens rea means "a general immorality of motive, vicious will, or an evil-meaning mind"–implying "a general notion of moral blameworthiness" or "culpability."[26]

Under the narrow definition, mens rea means "the particular mental state provided for in the definition of an offense."[27] As it describes an element within the offense itself, "[a] person may possess '*mens rea*' in the *culpability* sense of the term, and yet lack the requisite *elemental* '*mens rea*.'"[28]

Regardless of the ambiguity and the use of the term mens rea in the legal system, for centuries, defendants have introduced mental illness as a defense. These defenses have asserted mental illness as "either a failure of proof defense, or a general defense (insanity) that bars conviction even if all elements of the offense are satisfied."[29]

C. Types of Defenses

1. Failure of Proof Defense & Diminished Capacity

Evidence of mental illness can be used as a failure of proof defense in many jurisdictions.[30] When utilizing this defense,

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[25] DRESSLER, *supra* note 21, at 126. This ambiguity more than likely has led to confusion and disagreement over the sufficiency of the Mens Rea Model. *See* Phillips & Woodman, *supra* note 17, at 461 (arguing 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").

[26] DRESSLER, *supra* note 21, at 126 (internal quotation marks and citations omitted).

[27] *Id.* at 127; *see also* Clark v. Arizona, 548 U.S. 735, 766 (2006) (stating that "the modern tendency has been toward more specific descriptions").

[28] DRESSLER, *supra* note 21, at 127. For example, in a statute that defines murder as "the intentional killing of a human being," the mens rea would be "intentional." *Id.* So a defendant is "guilty of murder if he intentionally kills another human being." *Id.* "However, if [the defendant] kills *un*intentionally . . . [or recklessly], he would *not* be guilty of murder . . . because he lacked the . . . mental state required in the definition of the offense." *Id.* at 127-28.

[29] 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 73 (1984).

[30] *See id.* at 73 n.8 (citing MODEL PENAL CODE § 4.02(1) (1962); IDAHO CODE ANN. § 18-207 (Cum. Supp. 1982); MONT. CODE. ANN. § 46-14-102 (1981)).

defendants are ultimately negating the existence of the requisite mental state of the offense with their mental illness.[31] Diminished capacity is one failure of proof defense with many different variants and treatment by jurisdictions.[32] Some "jurisdictions have adopted the [Model Penal Code]'s approach, which allows diminished capacity evidence . . . where the defendant's mental state is at issue."[33] With endorsement from the American Bar Association,[34] the Model Penal Code approach has become popular "in those states recognizing diminished capacity."[35] Under this approach, as "a failure of proof defense," defendants need only raise a reasonable doubt that, as a result of their mental illness, they did not have the requisite mental state that is an element of the offense.[36]

2. The Affirmative Defense of Insanity

Mental illness evidence can also be used as an affirmative defense in most jurisdictions. Starting in the nineteenth century, courts excused criminal acts through the insanity defense. States have used a number of approaches during different periods in the United States: the *M'Naghten* rule, the irresistible impulse test, the *Durham* product standard, the American Law Institute's (ALI) Model Penal Code definition, and the federal statutory definition.

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[31] *See id.*

[32] *See generally* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984). Like the term "mens rea," the term "diminished capacity" has been riddled with much confusion and has been misused by courts and commentators. *Id.*

[33] Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 49 (2007) (citing COLO. REV. STAT. § 18-1-803 (2006)). Under the Model Penal Code, "'evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.'" *Id.* at 49 n.254 (quoting MODEL PENAL CODE § 4.02(1) (1962)).

[34] ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.2 (1989).

[35] Fradella, *supra* note 33, at 49; *see also* Jennifer Kunk Compton, Note, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 388 (1996) (stating that this use of diminished capacity has the "most jurisdictional support").

[36] Compton, *supra* note 35, at 388.

The English House of Lords first articulated *M'Naghten*.[37] Under *M'Naghten*,

> a person is insane if, at the time of her act, she was laboring under such a defect of reason, arising from a disease of the mind, that she: (1) did not know the nature and quality of the act . . . ; or (2) if she did know it, she did not know what she was doing was wrong.[38]

The *M'Naghten* defense quickly became the prevailing standard in the United States, but it suffered from instant and persistent criticism.[39] To overcome the criticism that the *M'Naghten* rule was too narrow, some courts combined the irresistible impulse test with *M'Naghten*.[40] Then, in 1954, the United States Court of Appeals for the District of Columbia implemented a test based on a late-nineteenth century case, referred to as the *Durham* rule of insanity.[41] Although the court intended to conform insanity law with a more modern approach to psychiatry, other courts never adopted the standard.[42]

By 1972, the court replaced the *Durham* rule with the ALI insanity defense, which "was adopted by ten of the eleven federal circuit courts and by a majority of the states" in a matter of two

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[37] DRESSLER, *supra* note 21, at 371.

[38] *Id.* at 375 (citing M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.)).

[39] *Id.* at 371.

[40] *Id.* at 371-72. States formulated this test as the third prong of *M'Naghten*, "encompass[ing] mental illnesses affecting volitional capacity." *Id.* at 378. Depending on the jurisdiction,

> 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. (citations omitted).

[41] *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). This rule excused a person "if her unlawful act was the product of a mental disease or defect." DRESSLER, *supra* note 21, at 380. Thus, the "jury would determine whether the defendant was suffering from a mental disease or defect at the time of the offense and . . . whether [it] caused the . . . conduct in a but-for sense." *Id.*

[42] *See* DRESSLER, *supra* note 21, at 372.

decades.[43] However, following John Hinckley's acquittal on the grounds of insanity for his assassination attempt on Ronald Reagan, many jurisdictions returned to a more *M'Naghten*-like defense, moving away from permitting insanity as an affirmative defense.[44]

3. Adoption of the Mens Rea Model

Those states that have adopted the Mens Rea Model include Idaho, Montana, Kansas, and Utah.[45] While these states do not provide an affirmative defense of insanity, they do permit a defendant to introduce evidence of her mental disease or defect in order to rebut the prosecution's claim that she possessed the mental state required in the definition of the crime.[46] 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.[47] Their state supreme courts have declared the state laws constitutional.[48]

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[43] *Id.* This test is also known as the Model Penal Code test. It provides 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 law." MODEL PENAL CODE § 4.01(1) (1962).

[44] *See* DRESSLER, *supra* note 21, at 372.

[45] *See* IDAHO CODE ANN. § 18-207 (2004); MONT. CODE ANN. § 46-14-102 (2011); KAN. STAT. ANN. § 22-3219 (2007); UTAH CODE ANN. § 76-2-305(1) (LexisNexis 2008).

[46] *See supra* note 45.

[47] *See supra* notes 30-36 and accompanying text. In *State v. McKenzie*, the Montana Supreme Court characterized their statute as a "codification of the 'diminished capacity' defense." 608 P.2d 428, 452 (Mont. 1980). Jeanne Bender says that state prosecutors have interpreted the statute to mean that mental disease or defect is "an attack on the state's proof of mental state where the defendant can succeed by raising a reasonable doubt, [and not] a separate affirmative defense that must be proven by a preponderance of the evidence." Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 142 (1984). She notes that a "diminished capacity defense will not help a defendant unless he can prove that mental disease or defect prevented him from acting knowingly or purposely." *Id.*

[48] *See, e.g.*, State v. Delling, 267 P.3d 709, 713 (Idaho 2011); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984); State v. Bethel, 66 P.3d 840, 851 (Kan. 2003); State v. Herrera, 895 P.2d 359, 366 (Utah 1995). *But see* Finger v. State, 27 P.3d 66, 68 (Nev. 2001) (holding that Nevada's statutory scheme violates the due process clause). The Nevada Supreme Court, in reviewing historical legal practice, looked for examples of the protection of defendants incapable of understanding that an act is unlawful. *Id.* at

D. Recent Case Law Developments on the Insanity Defense

1. *Clark v. Arizona*

Like Idaho, Kansas, Utah, Montana, and many states before them, Arizona also experimented with the insanity defense. The recent Supreme Court case, *Clark v. Arizona*,[49] more than any other case dealing with insanity, provides significant analysis into the history of the insanity defense and the Court's view on states' authority to define crimes and offenses. The Court concluded that "no . . . formulation [of insanity] has evolved into a baseline for due process."[50]

One early morning, an officer in Flagstaff, Arizona responded to complaints about a pickup truck riding around blaring music.[51] The officer pulled over the driver, seventeen-year-old Eric Clark.[52] Clark shot the police officer and ran away, but the police arrested him later that day and charged him "with first-degree murder . . . for intentionally or knowingly killing a law enforcement officer in the line of duty."[53] Clark admitted to shooting the officer at trial, "but relied on his undisputed paranoid schizophrenia at the time of the incident . . . [to deny] that he had the specific intent to shoot [the] officer or knowledge that he was doing so."[54] Ultimately, the court "denied Clark's motion for judgment of acquittal for failure to prove intent to kill a law enforcement officer or knowledge that [the officer] was a law enforcement officer."[55]

Clark asserted mental illness in his defense for two purposes.[56] Clark first raised insanity as an affirmative defense, "putting the burden on himself to prove by clear and convincing evidence . . . that 'at the time of the commission of the criminal act

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79-80. To this court, wrongfulness is an essential element of the concept of mens rea. *Id.*

[49] 548 U.S. 735 (2006).

[50] *Id.* at 752.

[51] *Id.* at 743.

[52] *Id.*

[53] *Id.* The trial court found Clark "incompetent to stand trial" and "committed [him] to a state hospital." *Id.* However, having "found his competence restored," the court ordered a trial two years later. *Id.*

[54] *Id.*

[55] *Id.* at 744. The prosecution's argument was based on the fact that "Clark acknowledged the symbols of police authority" by stopping his vehicle. *Id.*

[56] *Id.*

[he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.'"[57] In addition, Clark attempted to counter the state's claim "that he had acted intentionally or knowingly to kill a law enforcement officer."[58]

The trial court determined that Clark could not rely on his psychiatric evidence to refute his mens rea.[59] The evidence Clark presented included "testimony from classmates . . . and his family describing his [strange] behavior."[60] The court "issued a special verdict of first-degree murder" and sentenced Clark to life imprisonment.[61] Clark appealed, and the Court of Appeals of Arizona affirmed his conviction.[62] The Supreme Court "granted certiorari to decide whether due process prohibits Arizona from . . . narrowing its insanity test or from excluding evidence of mental illness and incapacity due to mental illness to rebut evidence of the requisite criminal intent."[63]

The United States Supreme Court affirmed the Court of Appeals of Arizona.[64] The Court rejected Clark's argument that the two-prong "*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."[65] The

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[57] *Id.* (citations omitted).

[58] *Id.*

[59] *Id.* at 745. Relying on *State v. Mott*, 931 P.2d 1046 (Ariz. 1997), the trial court "'refused to allow psychiatric testimony to negate specific intent.'" *Id.*

[60] *Clark*, 548 U.S. at 745. Testimony disclosed that Clark's "paranoid delusions led [him] to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders," and that he kept "a bird in his automobile to warn of airborne poison." *Id.* Lay and expert testimony revealed that Clark thought aliens populated the town and impersonated government agents, that the aliens meant to kill him, and that he could only stop them by shooting them. *Id.* Expert testimony included a psychiatrist's assertion "that Clark was suffering from paranoid schizophrenia" and conclusion "that Clark was incapable of luring the officer or understanding right from wrong and that he was thus insane at the time of the killing." *Id.*

[61] *Id.* at 746. The judge found beyond a reasonable doubt that Clark killed the officer and "that Clark had not shown that he was insane at the time." *Id.* The judge held that although there was no dispute of his paranoid schizophrenia, "the mental illness 'did not . . . distort his perception of reality so severely that [Clark] did not know his actions were wrong.'" *Id.* (citation omitted).

[62] *Id.*

[63] *Id.* at 747.

[64] *Id.*

[65] *Id.* at 748.

rejection of the first prong of *M'Naghten*, according to the Court, did not offend a fundamental "principle of justice."[66]

The Court stated, "History shows no deference to *M'Naghten* that could elevate it[] . . . to the level of fundamental principle . . . ."[67] The Court also ruled that by reducing *M'Naghten* to the second prong of right and wrong, Arizona did not "shortchange[]" a "constitutional minimum."[68] The Court held that "cognitive incapacity is itself enough to demonstrate moral incapacity."[69] In other words, "if a defendant did not know what he was doing when he acted, he could not have known that he was performing the . . . crime."[70]

Clark also claimed that Arizona's *Mott* rule violated his due process.[71] *Mott* held that testimony of an expert about a defendant's mental incapacity due to mental illness "was admissible . . . only for its bearing on an insanity defense;" thus expert "evidence could not be considered on the element of *mens rea*."[72]

The Court concluded that the reasons for not permitting expert evidence to negate mens rea were "good enough to satisfy the standard of fundamental fairness that due process require[d]."[73] First, Arizona has the "authority to define its presumption of sanity . . . by choosing an insanity definition . . .

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[66] *Id.*

[67] *Id.* at 749.

[68] *Id.* at 753. The Court agreed with Clark that Arizona's former full *M'Naghten* rule was constitutionally adequate, but that the current abbreviated rule is just as adequate. Cognitive incapacity is relevant both under the short and the full version. *Id.*

[69] *Id.* Cognitive capacity is sufficient for establishing insanity, although not necessary. *Id.* A defendant can "make out moral incapacity by demonstrating cognitive incapacity," and thus "evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible." *Id.*

[70] *Id.* at 753-54. The Court of Appeals of Arizona acknowledged this, and so did Clark at trial. *Id.* at 754-55. Counsel for Clark argued that "'[i]f [Clark] did not know he was shooting at a police officer, or believed he had to shoot or be shot, even though his belief was not based in reality, this would establish that he did not know what he was doing was wrong.'" *Id.* at 755 (citation omitted).

[71] *Id.* at 756.

[72] *Id.* at 756-57.

[73] *Id.* at 770-71.

and by placing the burden of persuasion on defendants who claim incapacity as an excuse."[74]

The Court said it was "obvious that Arizona's *Mott* rule reflects" the State's demonstration of this authority.[75] Arizona declined to adopt a defense of diminished capacity because "the State's choice would be undercut if evidence of incapacity could be considered for whatever a jury might think sufficient to raise a reasonable doubt about *mens rea*, even if it did not show insanity."[76]

In addition, the State's option to deny evidence of mental illness to rebut a claim of missing mens rea permits the state to reduce risks arising from the use of mental disease and capacity evidence.[77] These risks include "the controversial character of some categories of mental disease,"[78] "the potential of mental disease evidence to mislead jurors,"[79] and "the danger of according greater certainty to capacity evidence than experts claim for it."[80] As such, the Court concluded that Arizona had prudent reasons to restrict the application of evidence of mental illness and, therefore, there was no violation of due process.[81]

2. *State v. Delling*

The Supreme Court of the United States recently had an opportunity after *Clark v. Arizona* to examine insanity further

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[74] *Id.* at 771. The Court noted that "if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue [during] trial." *Id.*

[75] *Id.* at 772.

[76] *Id.* at 772-73. Thus, allowing juries to decide the quantity of evidence of incapacity and mental illness necessary to rebut evidence of mens rea would, in turn, allow "jurors to decide upon some degree of diminished capacity to obey the law . . . that would prevail as a stand-alone defense." *Id.* at 773.

[77] *Id.* at 774.

[78] *Id.* The Court was concerned that "the diagnosis may mask vigorous debate . . . about the very contours of the mental disease itself," and that "'[n]ew knowledge [and] . . . understanding of the disorders . . . [may lead] to the removal of some disorders in future classifications.'" *Id.* (citation omitted).

[79] *Id.* at 775. The Court stated that "[b]ecause allowing mental-disease evidence on *mens rea* can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion." *Id.* at 776.

[80] *Id.* at 774.

[81] *See id.* at 778.

and rule on whether a state could eliminate *M'Naghten* entirely. Idaho, Montana, Kansas, and Utah had done so and replaced it with the Mens Rea Model. The Supreme Court has chosen not to address the constitutionality of Idaho's statute, despite having been presented with the opportunity several times.[82] Defendants from other states that have adopted the Mens Rea Model have also appealed over the past few decades, but the Supreme Court denied cert on every single case.[83]

In *State v. Delling*, John Joseph Delling claimed he believed people had the ability to steal his mental powers and were threatening his life.[84] Delling alleged that these beliefs caused him to shoot and kill two university students.[85] Delling was permitted to introduce evidence to negate mens rea, but not that he knew what he was doing was wrong.[86] The Supreme Court of Idaho confirmed Delling's murder conviction, holding that statutory abrogation of the *M'Naghten* insanity defense did not violate Delling's right to due process because he was still afforded an opportunity to relate any mental illness to legal culpability.[87] Delling appealed his conviction, all the way to the United States Supreme Court.[88]

In the dissenting opinion of the denial of certiorari, Justice Breyer expressed his desire to hear the case and decide on the constitutionality of a statute that "permits the conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong."[89] The next section addresses Justice Breyer's questions, and concludes that Idaho's modification is consistent with due process.

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[82] *See* State v. Delling, 267 P.3d 709, 714 (Idaho 2011).

[83] *See, e.g.*, Delling v. Idaho, 133 S. Ct. 504 (2012); Bethel v. Kansas, 540 U.S. 1006 (2003); Nevada v. Finger, 534 U.S. 1127 (2002); Herrera v. Utah, 528 U.S. 1049 (1999). Chief Justice Burdick noted that while the denial of certiorari does not settle the issue, "it reinforces the language found in other U.S. Supreme Court opinions that these types of decisions are left to the states." *Delling*, 267 P.3d at 714.

[84] *See Delling*, 267 P.3d at 720.

[85] *See* Brief of Appellant at 1-2, State v. Delling, 267 P.3d 709 (Idaho 2011) (No. 36920 & 36921).

[86] *See Delling*, 267 P.3d at 717.

[87] *See id.* at 713-16, 721.

[88] *See Delling*, 133 S. Ct. at 504.

[89] *Id.* at 505.

II. DUE PROCESS AND HISTORY

A. Separation of Powers and Federalism

Courts have been reluctant to intrude on the legislature in areas of criminal law. Courts presume the constitutionality of criminal statutes,[90] so the party attacking a statute must show its constitutional invalidity. State governments have the primary authority to define and enforce criminal laws,[91] so "the insanity rule, like the conceptualization of criminal offenses, is substantially [left] open to state choice."[92] Additionally, the federal government cannot force uniformity.[93] The Court has stated "[n]othing could be less fruitful than . . . defining some sort of insanity test in constitutional terms."[94] On the contrary, our federal system embraces "legislative experimentation and interstate diversity."[95] These ideas are reflected in Article I[96] and the Tenth Amendment[97] to the Constitution, and are evident when examining the history and tradition regarding the insanity defense and mens rea.

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[90] *See* United States v. Watson, 423 U.S. 411, 416 (1976).

[91] The Court has argued that "[t]his process of adjustment has always been thought to be the province of the States." Powell v. Texas, 392 U.S. 514, 536 (1968).

[92] Clark v. Arizona, 548 U.S. 735, 752 (2006).

[93] *See* DRESSLER, *supra* note 21, at 38; *see also* Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) ("It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but . . . if such a defense is afforded the burden of proving insanity can be placed on the defendant.").

[94] *Powell*, 392 U.S. at 536.

[95] DRESSLER, *supra* note 21, at 38. Justice Brandeis stated that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Only in rare occasions, such as *In re Winship*, has the Supreme Court demanded uniformity. 397 U.S. 358 (1970). The Court in *Winship* held that proof beyond a reasonable doubt was required by due process in criminal trials, and struck down the New York statute that required the prosecution prove by a preponderance of the evidence. *Id.* at 364.

[96] U.S. CONST. art. I.

[97] U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

B. History and Tradition

The Constitution provides that states cannot "deprive any person of life, liberty, or property, without due process of law."[98] Due process requires states not only to guarantee procedural fairness but also to protect substantive "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[99] The "primary guide in determining whether the principle in question is fundamental is . . . historical practice."[100]

Looking at history, 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.[101] The Supreme Court acknowledged this in *Clark v. Arizona* and listed all the ways that jurisdictions provide insanity as a defense.[102] A quick "examination of the traditional Anglo-American approaches to insanity reveals significant differences among them."[103] This assorted background shows "that no particular formulation has evolved into a baseline for due process."[104]

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[98] U.S. CONST. amend. XIV.

[99] Clark v. Arizona, 548 U.S. 735, 748 (2006) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

[100] Montana v. Egelhoff, 518 U.S. 37, 43 (1996).

[101] *See Clark*, 548 U.S. at 749.

[102] *Id.* at 749-53. The Court specifically mentioned Idaho when it listed the states that have no affirmative insanity defense, but it provided no opinion on the validity or invalidity of Idaho's, or any other state's, statute. *Id.* at 752 n.20. The Court did, however, note the "traditional recognition" that each state has the "capacity to define crimes and defenses." *Id.* at 749.

[103] *Id.* at 749. These include: (1) cognitive incapacity; (2) moral incapacity; (3) volitional incapacity; and (4) product of mental illness tests. *Id.* The Court in *Clark* goes into great detail when discussing the different ways jurisdictions use insanity or mental illness. *Id.* at 749-52. The Court also mentions the four states that provide no affirmative defense, though Utah "provides for a 'guilty and mentally ill' verdict." *Id.* at 752 (citation omitted).

[104] *Id.* at 752. *But see* 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, 1538 (2002) (arguing that "while the insanity defense has not been uniform in its formulation over the years . . . , every jurisdiction throughout the common law and in the history of this country . . . has recognized insanity as an *extrinsic* defense and has used some form of an insanity test or standard that recognizes it as such"); State v. Herrera, 895 P.2d 359, 372 (Utah 1995) (Stewart, J., dissenting) (arguing 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. Historically, the defense has been formulated differently, but . . . the essence

Not only has history not favored one formulation, but also the development of the concept of mens rea preceded the recognition of the *M'Naghten* insanity defense. "The principle of blameworthiness, or *mens rea*, was clearly spelled out in the sixth-century Code of Justinian."[105] "For centuries evidence of mental illness was admitted to show the accused was incapable of forming criminal intent."[106] Courts, however, did not recognize insanity "as an affirmative defense and an independent ground for acquittal until the nineteenth century."[107] In fact, the insanity "defense grew out of the earlier notions of *mens rea*."[108] Indeed, "[c]ommentators generally agree that it was not until the *M'Naghten* case of 1843 that the focus shifted from moral good and evil to an insanity defense and the cognitive ability . . . to know right from wrong."[109]

Although the concept of mens rea preceded *M'Naghten*, the meaning of mens rea has been met with much ambiguity.[110] As a result, the *M'Naghten* due process camp argues that the definition of mens rea used in the Mens Rea Model is not in line with the historical understanding of mens rea.[111] It points out that the older understanding of mens rea is the culpability definition of moral blameworthiness. Even if states have attached the newer meaning to the model, it still does not violate due process.

The modern understanding of mens rea is no less constitutional than the broader meaning. It is an understood and recognized definition of mens rea. Neither the Constitution, nor the Supreme Court, has given preference to one meaning. The Supreme Court "has never articulated a general constitutional doctrine of *mens rea*."[112] Instead, "[t]he doctrines of . . . *mens rea*

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of the defense, however formulated, has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong.").

[105] Raymond L. Spring, *Farewell to Insanity: A Return to* Mens Rea, J. KAN. B. ASS'N, May 1997, at 38, 39.

[106] State v. Bethel, 66 P.3d 840, 847 (Kan. 2003) (quoting State v. Korell, 690 P.2d 992, 999 (Mont. 1984)) (internal quotation marks omitted).

[107] *Id.*

[108] *Korell*, 690 P.2d at 999.

[109] *Bethel*, 66 P.3d at 851.

[110] *See supra* notes 25-29 and accompanying text.

[111] *See* Phillips & Woodman, *supra* note 17, at 483-84.

[112] Powell v. Texas, 392 U.S. 514, 535 (1968). As of 2014, this proposition still stands.

[and] insanity . . . 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."[113]

Another way to look at Idaho's modification is that it is not an elimination of *M'Naghten*, but rather a narrowing to its first prong. By focusing on whether the mental illness prevents the defendant from forming the requisite mental state that is an element of the offense, Idaho is also focusing on whether the defendant understood the nature and quality of his act.

Many authors and states have recognized the similarities between the Mens Rea Model and the first prong of *M'Naghten*. Commentators have pointed out these similarities most notably in Alaska, which has narrowed the definition of insanity only to include the first prong of *M'Naghten*.[114] Practically it may have the same effect, considering that a person who shoots another person believing him to be an alien, robot, or mannequin does not have the requisite intent to kill a human being, and does not understand the nature and quality of his actions.[115] A defendant

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[113] *Id.* at 536.

[114] Spring, *supra* note 105, at 44 ("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. Thus the question is only whether the defendant knew what he or she was doing, and this too sounds very much akin to *mens rea*."); *see also* Andrew P. March, Note, *Insanity in Alaska*, 98 GEO. L.J. 1481, 1509 (2010) ("Alaska is functioning under the same standard as Montana, Idaho, Utah, and Kansas–the states that have abolished the insanity defense altogether.").

[115] March further explains how, in Alaska, presenting the insanity defense after determining the defendant didn't possess the requisite mens rea was "tautological." March, *supra* note 114, at 1508.

> If the prosecution proves beyond a reasonable doubt that the defendant acted with a conscious objective to kill the victim, in what sense can the defendant prove that she did not understand that she was killing another human being? If the intent element of first-degree murder is proved, an inquiry into appreciation of the nature and quality of the act under this standard is nugatory.

Id. at 1508-09. The statute "becomes redundant if the state proves the mens rea for an intentional crime because, as in this case, it appears illogical that someone could have the requisite intent to murder and not appreciate what they were doing." *Id.* at 1509 (quoting Verdict After Court Trial at 16, State v. Lord, No. 3AN-04-02620CR (Alaska Super. Ct. May 14, 2007)).

who does not know the nature and quality of his acts cannot have the requisite mental state that is an element of the offense charged.

Even before the nineteenth century with the adoption of *M'Naghten*, it was commonly understood that a defendant was not responsible for his offense if he did not understand the nature and quality of his acts. Early "articulations of insanity embraced the failure to know or understand one's actions."[116] For example, in the early seventeenth century, an English Lord approved a thirteenth century definition "that focused on whether the person knew the nature of his or her actions: 'A madman is *one who does not know what he is doing*, who lacks in mind and reason . . . .'"[117]

As apparent, 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. Further, the concept of mens rea and its more modern understanding preceded the recognition of the *M'Naghten* insanity defense.

III. DUE PROCESS & FUNDAMENTAL FAIRNESS

Historical practice may be the chief way to determine whether or not the insanity defense is a fundamental right, but it need not be the only consideration.[118] Due process has also been described as prohibiting state actions that "offend those canons of decency and fairness which express the notions . . . of English-speaking peoples . . . toward those charged with the most heinous offenses,"[119] or that deprive the defendant of "that fundamental fairness essential to the very concept of justice."[120] The Supreme Court has described this concept in many different ways, but it is generally known as fundamental fairness.

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[116] Petitioner's Opening Brief at 35, Clark v. Arizona, 548 U.S. 735 (2006) (No. 05-5966).

[117] *Id.* (quoting Beverley's Case, (1603) 76 Eng. Rep. 1118, 1121 (K.B.)) (alteration in original).

[118] In fact, the United States Supreme Court has stated, "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

[119] Malinski v. New York, 324 U.S. 401, 417 (1945).

[120] Lisenba v. California, 314 U.S. 219, 236 (1941).

The Mens Rea Model satisfies the standard of fundamental fairness that due process requires because defendants can introduce mental disease evidence to negate the mental state of the crime. As a variant of diminished capacity, the Mens Rea Model is not only fair but will be more favorable to many defendants than *M'Naghten*, since they will only need to raise a reasonable doubt to prevail.

A. The Mens Rea Model Provides an Effective Defense

Defendants can still present a defense under the Mens Rea Model. Although states have substantial freedom in our federal system to define rules to exclude evidence and to apply those rules to criminal defendants,[121] this authority does have "constitutional limits";[122] "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[123] Idaho does not deny defendants this opportunity under the Mens Rea Model.

Although defendants can no longer raise insanity as an affirmative defense, Idaho and other Mens Rea Model states expressly allow evidence of mental illness or disability to rebut the state's evidence to prove criminal intent or mens rea.[124] These defendants are able to present an insanity defense; it just takes a different form from *M'Naghten*.[125] Defendants may introduce evidence of mental illness to raise a reasonable doubt of the elements of the crime and therefore are provided with a meaningful opportunity to relate any mental illness they may have to the crime committed. If the prosecution is unable to "prove criminal intent beyond a reasonable doubt, a defendant, sane or not, will be found not guilty."[126] The Mens Rea Model is an effective insanity defense.

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[121] *See* United States v. Scheffer, 523 U.S. 303, 308 (1998).

[122] Clark v. Arizona, 548 U.S. 735, 789 (2006) (Kennedy, J., dissenting).

[123] Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (holding that the "exclusion of defense evidence of third-party guilt denied defendant of fair trial").

[124] *See* State v. Delling, 267 P.3d 709, 715, 717 (Idaho 2011); *see also* IDAHO CODE ANN. § 18-207(3) (2004) ("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 . . . .").

[125] *See Delling*, 267 P.3d at 717.

[126] *Id.* at 717. Insanity continues to have relevance in sentencing as well:

For example, "*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 the Mens Rea Model [because he] did not intend to kill *B*."[127] Take another example from a case out of Utah. Here a diagnosed schizophrenic killed his wife because he thought she was a mannequin. The court did not hold him responsible under the mens rea approach.[128]

Despite the fact that mental illness is still introduced to negate the defendant's mental state, challenges to the constitutionality of the Mens Rea Model persist. The *M'Naghten* due process camp argues that defendants rarely lack mens rea because they believe they are cutting grapefruit or shooting a mannequin.[129] They argue the Mens Rea Model is based on a mistaken view of how severe mental disorder affects human beings. Even in severe cases, they argue, mental illness does not negate the required mens rea for the crime charged.[130] A person with a mental disorder may be motivated by his "irrational[]

> Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime. In determining the sentence to be imposed in addition to other criteria provided by law, if the defendant's mental condition is a significant factor, the court shall consider such factors as . . . [t]he capacity of the defendant to appreciate the wrongfulness of his conduct . . . .

IDAHO CODE ANN. § 19-2523(1) (2004). If the court imposes a prison sentence upon a person who "suffers from any mental condition requiring treatment," Idaho law appears to mandate that "the defendant shall receive treatment" in an appropriate facility. *Id.* § 18-207(2). Under the Mens Rea Model, an individual must be competent to stand trial. *See id.* § 18-210. Defendants incapable of forming necessary intent to commit the crime are protected by the mens rea requirements of sections 18-114, 18-115, and 18-207.

127 Phillips & Woodman, *supra* note 17, at 470.

128 *See* Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y, no. 2, 1999, at 253, 261 (discussing that case).

129 The *M'Naghten* due process camp argues "[o]nly in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect. . . . 'Mental illness rarely . . . renders a person incapable of understanding what he or she is doing.'" State v. Herrera, 895 P.2d 359, 374 (Utah 1995) (Stewart, J., dissenting) (quoting United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987)).

130 *See* Morse, *supra* note 32, at 16.

distorted beliefs, perceptions or desires," which then "form the *mens rea* required by the charged offense."[131]

The *M'Naghten* due process camp correctly states that in many cases the mental illness affects the reasons for the defendant's actions, but the Mens Rea Model is not out of line with the medical or legal understanding of mental illness. On the contrary, the American Bar Association and the American Medical Association have recommended the adoption of a mens rea approach.[132]

The *M'Naghten* due process camp also gives the following hypothetical to highlight the impact of not providing insanity as an affirmative defense. In this scenario, "*A* shoots *B*, believing [as a result of his] mental illness that *B* is an enemy soldier and that he must kill or be killed."[133]

> Under an affirmative insanity defense, *A*'s mental capacity would be taken into account . . . . Under the Mens Rea Model, however, because *A* knew *B* was a human being and clearly intended to kill him, the elements of the offense would be proven and a guilty verdict would follow. That the conduct was the result of *A*'s mental illness and a belief that *B* was an enemy solider would be irrelevant.[134]

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

[132] *See* Bd. of Tr., *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 JAMA 2967, 2967 (1984) (stating "the special defense of insanity . . . [should be abolished and replaced] by statutes providing for acquittal when [a criminal] defendant, as a result of mental disease or defect, lacked the state of mind (*mens rea*) required as an element of the offense charged"); *see also* Harlow M. Huckabee, *Avoiding the Insanity Defense Strait Jacket: The* Mens Rea *Route*, 15 PEPP. L. REV. 1, 26-27 (1987).

[133] Phillips & Woodman, *supra* note 17, at 470.

[134] *Id.* at 470-71. The following lemon hypothetical is also used: "[I]f *D* is prosecuted for intentionally killing *V*, *D* may introduce evidence that, due to mental illness, she believed that she was squeezing a lemon rather than strangling *V* and, therefore, that she lacked the intent to kill . . . ." DRESSLER, *supra* note 21, at 390.

> Evidence of *D*'s mental condition would be inadmissible, however, to show that she did not realize that taking a . . . life is morally or legally wrong, that she acted on the basis of an irresistible impulse to kill, or even that she killed *V* because she hallucinated that *V* was about to kill her.

Id.

This scenario is problematic, and raises serious concerns. But it only bolsters the argument that no test for insanity can be constitutionally required. Just like under *M'Naghten* or any other test for insanity, some defendants simply cannot win under their state's model. The *M'Naghten* due process camp assumes that if a defendant is found guilty under the Mens Rea Model that the defendant would be found not guilty under *M'Naghten*. While the defendant may be able to introduce evidence that he did not understand his actions were wrong, that does not mean he would be found not guilty when given the opportunity to do so. In fact, research on jury deliberation and the rate and success of *M'Naghten* offers little support that the *M'Naghten* insanity defense is better on average for a defendant than the Mens Rea insanity defense.

1. Jury Deliberation

Research on jury deliberation shows that jurors make up their own minds about what constitutes insanity.[135] As soon as the defense is raised, they may immediately form biases or prejudices to the defense. "[C]onventional wisdom" holds that jurors determine insanity based more on "the nature of the crime and the defendant than with which test of insanity is used."[136] A jury may not want to acquit defendants like Delling[137] or Clark,[138] if they think the defendant may pose a threat to society. By avoiding *M'Naghten* and focusing solely on the mental state of the defendant, defendants can avoid the prejudice associated with pleading insanity.

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[135] *See* Spring, *supra* note 105, at 45; *see also* DRESSLER, *supra* note 21, at 373 ("[J]urors apply their own sense of justice when determining whether a defendant should be found not guilty by reason of insanity.") (citation and internal quotation marks omitted).

[136] Spring, *supra* note 105, at 46; *see also* DRESSLER, *supra* note 21, at 387 ("As a result of jury antipathy to insanity claims, many criminal defense lawyers view the defense as a plea of last resort.").

[137] *Supra* notes 84-85 and accompanying text.

[138] *Supra* notes 51-54 and accompanying text.

2. Empirical Data

In addition to the complications with jury deliberation, the success of the insanity defense does not show that it offers substantially more protection for defendants than the Mens Rea Model. Proponents of eliminating the insanity defense altogether have argued that the defense is abused, raised too frequently, and too often successful. As the *M'Naghten* due process camp correctly points out, there is little to no empirical support for this argument.[139] Studies show the public perception regarding the frequency of its use and success is exaggerated.[140] The insanity defense is rarely used and raised in only one percent of felony cases.[141]

But the studies also show that defendants who may fail under the Mens Rea Model do not necessarily fare any better under *M'Naghten*. Even when the affirmative insanity defense is raised, "it is unsuccessful three-quarters of the time."[142] Thus, these statistics should not persuade people to believe that defendants fair better when given the opportunity to present an affirmative defense.

B. The Mens Rea Model Is More Favorable to Many Defendants

1. Defendants Need Only Raise a Reasonable Doubt

The most significant aspect of the Mens Rea insanity defense is the low burden of proof it places on defendants. Because the Mens Rea Model is a variant of diminished capacity and a failure

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[139] *See* Fradella, *supra* note 33, at 11-12.

[140] *See id.*

[141] *See id.* at 12. In fact, the insanity defense "is used nearly twice as much for non-homicide offenses as it is for those offenses involving a human death." *Id.*; *see also* Brief of Amici Curiae, *supra* note 131, at 18.

[142] Fradella, *supra* note 33, at 12. Statistics regarding the use of the insanity plea are sketchy. In a New Jersey study, only three out of fifteen successful insanity defenses involved homicide. *See* NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 20-21 (1983). In another survey of thirty-six states from 1970 to 1995, there were on average 33.4 acquittals per state per year in the many hundreds of thousands of felony and misdemeanor prosecutions during that period. *See* Carmen Cirincione & Charles Jacobs, *Identifying Insanity Acquittals: Is It Any Easier?*, 23 LAW & HUM. BEHAV. 487, 490 (1999). There was a modest decline in acquittals beginning in the late 1980s. *See id.* at 494.

of proof defense,[143] a defendant only needs to raise a reasonable doubt that he had the mental state required of an offense in order to be acquitted.[144] This burden of persuasion favors defendants.[145] The burden to prove intent remains with the prosecution when a defendant argues diminished capacity, which "is not only easier to use, but is also much 'more likely to succeed than the insanity defense.'"[146] Research reveals that "the ease with which diminished capacity can be used in most jurisdictions makes it much more appealing than insanity, with the added benefit of what ought to be a much higher likelihood of success."[147]

Under the *M'Naghten* insanity defense, defendants have a double burden. They usually have to produce enough evidence to raise the issue of insanity and then prove it by a preponderance of the evidence (or clear and convincing in Arizona).[148] According to *Leland v. Oregon*, a state may even go so far as to raise the burden of proof on a defendant to beyond a reasonable doubt.[149] If a state does not violate due process by placing "both the burdens of production and persuasion on the defendant who asserts an

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[143] *See supra* notes 30-36 and accompanying text.

[144] Fradella, *supra* note 33, at 48 (citing State v. Phipps, 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994)). Bender argues, "Whether the state has succeeded in proving all facts establishing mental state beyond a reasonable doubt is a question for the jury to decide. If the jury has a reasonable doubt as to the defendant's ability to have the required mental state, the defendant should prevail." Bender, *supra* note 47, at 138-39. Bender also noted that while Montana's amendments "may have narrowed the scope of the insanity defense, they also lessened the burden of proof born by the defendant." *Id.* at 139.

[145] *See* Bender, *supra* note 47, at 142-43 ("It would be a better choice for a defendant who has some evidence of mental disease or defect to make a straightforward attack on mental state, where he would only need to raise a reasonable doubt as to his ability to act knowingly or purposely.").

[146] Fradella, *supra* note 33, at 48 (quoting Lucy Noble Inman, Note, *Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in* State v. Shank *and* State v. Rose, 67 N.C. L. REV. 1293, 1299 (1989)). It is important to note in Fradella's article that he argues for the benefits of the variant of diminished capacity defined as the "type of evidence . . . admitted to rebut the specific intent required to convict the defendant of the crime charged." *Id.* (quoting Chesney E. Falk, Comment, *Criminal Law*–State v. Phipps*: The Tennessee Court of Criminal Appeals Accepts "Diminished Capacity" Evidence to Negate Mens Rea*, 26 U. MEM. L. REV. 373, 383 (1995)). But the same analytical arguments can be made as to the Model Penal Code definition of diminished capacity.

[147] *Id.* at 91; *see also* Inman, *supra* note 146, at 1299.

[148] *See* Bender, *supra* note 47, at 139.

[149] *See infra* note 176 and accompanying text.

affirmative defense,"[150] then a state can narrow the scope of the defense and lower the defendants' burden of proof.

2. Diminished Capacity Encompasses a Wider Range of Defendants

Not only do defendants have a lower burden of proof under the Mens Rea Model, but also diminished capacity typically covers a wider range of defendants and gives a significantly broader definition of what constitutes mental disease or illness. For example, "diminished capacity may result from mental disorder[s] similar to but milder than disorder[s] constituting legal insanity[; therefore,] in particular cases [diminished capacity] may serve as a feasible alternative to a dubious insanity defense."[151]

Also, what constitutes mental illness under diminished capacity is "significantly broader" than for insanity purposes.[152]

> For example, a learning disability generally does not constitute a "mental disease or defect" for insanity purposes. But if a learning disabled person strikes someone but is unable to know that the blow could kill as a result of his or her disability, he or she might be able to assert diminished capacity to negate the mens rea of the intent to kill . . . .[153]

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[150] *See* Bender, *supra* note 47, at 139; *see also* Patterson v. New York, 432 U.S. 197, 202 (1977) (holding that a New York law which required the defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter did not violate the Due Process Clause of the Fourteenth Amendment).

[151] Inman, *supra* note 146, at 1300.

> In jurisdictions that place the burden of persuasion on the prosecution to prove sanity, a prosecution that has carried its burden is perhaps more likely to prevail over a diminished capacity defense. But . . . legally sane people suffering from mental disorders can commit criminal acts without the requisite criminal intent. A more common type of defendant who may be legally sane but lack a criminally defined mental state is a mentally retarded person.

Id. at 1300 n.70.

[152] Fradella, *supra* note 33, at 50.

[153] *Id.*

In some jurisdictions, definitions of diminished capacity are so broad that a "mental disease or defect" does not need to "be recognized by the DSM."[154]

What seems to slip through the cracks of the debate is that there is little difference between the practical effects of the Mens Rea Model and *M'Naghten*. *M'Naghten* is broad in terms of what it allows mental illness to prove, but it places a higher burden of proof on the defendant. The *M'Naghten* due process camp argues that the defendant has an advantage by being able to introduce evidence to show he did not understand his acts were wrong. This seeming advantage, however, is countered by the fact that a state can place a very high burden of proof on the defendant.[155] This makes it very hard to win for defendants competent to stand trial, especially given the fuzzy nature of the standard and expert testimony.

On the other hand, the Mens Rea Model is narrow in terms of what it allows mental illness to prove, but it places a substantially lower burden of proof on the defendant. Most defendants would prefer to only have to raise a reasonable doubt in order to be acquitted.

The Mens Rea Model, as a variant of diminished capacity, offers defendants a lower burden of proof to prevail, and *M'Naghten* does not offer more protection than the Mens Rea Model at the end of the day. When the practical effect of the burden of proof is considered, many defendants who can prevail under the Mens Rea Model will face conviction under *M'Naghten*.

The constitutionality of the Mens Rea Model becomes more apparent when examining the trend among state courts and Supreme Court precedent, specifically in the most recent insanity case, *Clark v. Arizona*.

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[154] *Id.* at 51; *see, e.g.*, State v. Galloway, 628 A.2d 735, 741 (N.J. 1993) ("Forms of psychopathology other than clinically-defined mental diseases or defects may affect the mental process and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense.").

[155] *See infra* notes 176-77 and accompanying text.

IV. DUE PROCESS AND SUPREME COURT PRECEDENT

*A. Pre-*Clark *Precedent*

The Supreme Court and state courts have consistently held that states have the authority to decide how they treat insanity. Unless and until the Supreme Court reverses itself on this issue, state legislatures are not barred by the federal constitution from eliminating *M'Naghten*.

The Supreme Court has never decided whether the *M'Naghten* insanity defense is constitutionally required, even though it has had the chance to on many occasions. The Court in *Powell v. Texas* and in subsequent decisions recognizes the traditional view that states have broad authority to define crimes and defenses.[156] The Court has stated, "Nothing could be less fruitful than . . . defining some sort of insanity test in constitutional terms."[157]

The *M'Naghten* due process camp argues that

> [w]hen 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 . . . . [So] how a state chooses to present the issue of legal insanity is left up to state law.[158]

But Justice Kennedy in *Foucha v. Louisiana* interprets *Powell* to mean that "[s]tates are free to *recognize* and define the insanity defense as they see fit."[159] In the same case, Justice O'Connor also emphasized that states have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior," and that states do not have to make the insanity defense available.[160]

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[156] *See supra* notes 91-92 and accompanying text.

[157] Powell v. Texas, 392 U.S. 514, 536 (1968).

[158] *See* Finger v. State, 27 P.3d 66, 82 (Nev. 2001) ("*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.").

[159] Foucha v. Louisiana, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) (emphasis added).

[160] *Id.* at 88-89 (O'Connor, J., concurring).

The *M'Naghten* due process camp argues that common law actually shows that it is unconstitutional to deny defendants an affirmative defense of insanity. They cite to two state supreme court decisions.[161] But the rationale of these cases does not apply to the Mens Rea Model because the mens rea approach "specifically permits evidence of insanity to be considered in determining intent, something which was not present in the . . . statutes" in the other cases.[162] These cases involved "statutes which precluded any trial testimony of mental condition . . . which would have rebutted the state's evidence of the defendant's state of mind."[163] In contrast to these two cases, five state supreme courts have addressed the Mens Rea Model directly.[164] Four out of five have concluded it is constitutional.[165] Although this does not guarantee the constitutionality of the Mens Rea Model, it does show that at the state level the prevalent understanding is that the *M'Naghten* insanity defense is not constitutionally required.[166]

These cases lead up to the most recent Supreme Court decision dealing with insanity, *Clark v. Arizona*. As in other cases, the Court recognized Arizona's capacity to confine insanity to the second prong of *M'Naghten* and even deny psychiatric testimony evidence to negate mens rea.

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[161] In *State v. Strasburg*, the Washington Supreme Court declared a statute unconstitutional that said insanity was not a defense to a crime and specifically prohibited any evidence on the issue of legal insanity. 110 P. 1020, 1025 (Wash. 1910). Similarly, in *Sinclair v. State*, the Mississippi Supreme Court held that a statute stating that insanity was not a defense to murder was unconstitutional. 132 So. 581, 582 (Miss. 1931).

[162] *Finger*, 27 P.3d at 81.

[163] State v. Herrera, 895 P.2d 359, 366 (Utah 1995) (citation and internal quotation marks omitted).

[164] *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); *Herrera*, 895 P.2d at 364; *Finger*, 27 P.3d at 68.

[165] *See supra* note 164 and accompanying text. The Nevada Supreme Court was the only one to hold the Mens Rea Model unconstitutional. *Finger*, 27 P.3d at 81.

[166] Proponents of the M'Naghten insanity defense recognize this much. Marc Rosen argues that the Mens Rea Model is too narrow and enacted based on political pressure and misinformation, but admits that it is constitutional. Rosen, *supra* note 128, at 255-57. *But see* Phillips & Woodman, *supra* note 17, at 471 (arguing that the states upholding the Mens Rea Model as constitutional misunderstand the "duality of mens rea" and that "mens rea requires not just intent, but moral blameworthiness").

B. Clark v. Arizona *Implicitly Affirms the Constitutionality of the Mens Rea Model*

An Arizona court charged Eric Clark with the murder of a police officer.[167] Under Arizona law the trial court prevented Clark from offering expert evidence to negate his ability to form the requisite intent to kill a police officer.[168] Clark believed that aliens had inhabited the bodies of police officers.[169] Although Clark could introduce psychiatric evidence in support of an insanity defense, he had to prove by clear and convincing evidence that as a result of mental illness at the time of the crime he "did not know [that] the criminal act was wrong."[170]

Clark was convicted at trial.[171] The Arizona Court of Appeals affirmed Clark's conviction, and he appealed to the Supreme Court of the United States.[172] The Supreme Court addressed two issues: (1) whether Arizona's limited standard for insanity where a defendant must prove he did not know his criminal act was wrong violated due process, and (2) whether Arizona's law excluding psychiatric evidence to negate mens rea violated due process.[173] The Court held that neither violated due process.[174]

In the post-*Clark* era states can now confine *M'Naghten* to the second prong, and exclude mental-disease and diminished capacity evidence short of insanity to negate mens rea. Given the law as it stands today, there is little to prevent Idaho and other states from adopting a failure of proof defense to admit mental disease evidence to negate mens rea and lower the burden of proof to a reasonable doubt.

1. *Clark* and History

While the constitutionality of the clear and convincing standard was not at issue in *Clark*, it is relevant for purposes of this Comment. Historically, most states have required that a

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167 *See supra* notes 53-55 and accompanying text.
168 *See supra* note 59 and accompanying text.
169 *See supra* note 60 and accompanying text.
170 *See supra* note 57 and accompanying text.
171 *See supra* note 61 and accompanying text.
172 *See supra* notes 62-63 and accompanying text.
173 *See supra* note 63 and accompanying text.
174 *See supra* note 64 and accompanying text.

defendant prove his insanity by a preponderance of the evidence. Since the 1980s, however, "defendants in federal courts have been required to prove [their] insanity by clear and convincing evidence."[175] In *Leland v. Oregon*, the Supreme Court ruled that states could place the burden on the defendant to prove insanity beyond a reasonable doubt.[176] No state currently requires such a high burden, although such a burden is constitutional.[177] "[A] majority of states and the federal system . . . require the defendant to shoulder the burden of persuasion regarding her insanity claim."[178] Idaho breaks from the majority and places the burden on the prosecution.

The *M'Naghten* due process camp would be hard pressed to argue that Idaho should follow the majority of states and place a higher and less favorable burden of proof on defendants. The burden of proof for defendants under the Mens Rea Model is much more favorable.[179] The clear and convincing burden in *Clark* requires defendants to overcome a much higher standard to prove their insanity and prevail.[180] There are undoubtedly defendants who suffer from mental illness, but they cannot prove by clear and convincing evidence, or even by preponderance, that they did not understand the nature and quality of their acts or that their actions were wrong. If a state can break from the historical burden of proof and raise it, effectively excluding many defendants, then states may adopt a failure of proof defense where defendants only need to raise a reasonable doubt.

The *M'Naghten* due process camp's tradition based argument falls short when considering the Supreme Court's decision in

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175 DRESSLER, *supra* note 21, at 369.

176 343 U.S. 790, 798 (1952).

177 *See* DRESSLER, *supra* note 21, at 369; *Leland*, 343 U.S. at 798-99; *see also* Jones v. United States, 463 U.S. 354, 368 n.17 (1983) ("A defendant could be required to prove his insanity by a higher standard than a preponderance of the evidence.").

178 DRESSLER, *supra* note 21, at 369 ("Until the 1980s, most states and the federal courts required the prosecutor to prove the defendant's sanity beyond a reasonable doubt.").

179 *See supra* notes 144-48 and accompanying text.

180 *But see* Fradella, *supra* note 33, at 27 ("Whether this shift in the burden of proof has had a significant impact on case outcomes is questionable in light of the few studies that have failed to demonstrate 'any consistent relationship between the imposition of the burden of proof and the acquittal rate.'") (quoting Renée Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 297 n.82 (1998)).

Leland v. Oregon. The Court since then has never argued that the procedural aspects of the defense are constitutionally required. If *M'Naghten* is constitutionally required as its proponents suggest, then must one of the burdens of proof be required as well? The Court could chose beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence, or a reasonable doubt. The reasonable doubt standard would be much more favorable, even though a tradition based approach may require a preponderance of the evidence standard.

2. *Clark* and Fundamental Fairness

The Court in *Clark* upheld Arizona's *Mott* rule, that psychiatric evidence of insanity can only be used to establish the affirmative defense of insanity and not to negate the elements of the offense.[181] "It was precisely the exclusion of mental illness evidence from being used to determine whether Clark had acted with the requisite underlying mens rea of purpose or knowledge that formed the basis of his second due process challenge."[182] The main thrust of Clark's defense at trial focused on his diagnosis of paranoid schizophrenia.[183] "If he delusionally thought [the officer] was an alien, and not a police officer, then he did not 'knowingly' shoot another human being, much less knowingly shoot an officer of the law."[184] Therefore, Clark would not be guilty of first-degree murder in Arizona.[185] Despite this, the Court upheld it. An Idaho court arguably would have found Clark not guilty under the Mens Rea Model.

The reasons the Court gave for upholding Arizona's restriction of evidence and declaring it was in line with fundamental fairness are applicable to the reasons for following the Mens Rea insanity defense. While the Court offers a somewhat confusing analysis over the types of evidence that were not at

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[181] Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime. *See* ARIZ. REV. STAT. ANN. § 13-502(A) (2010).

[182] Fradella, *supra* note 33, at 78.

[183] *Id.*

[184] *Id.*

[185] *Id.*

issue in Clark's case, a few reasons can illustrate the importance of allowing states to choose their defense.

The Court first noted that a state might reasonably limit risks associated with the characteristics of mental disease and capacity evidence.[186] These risks include the controversial character of mental disease, misleading jurors, and not enough certainty to capacity evidence that experts claim for it.[187] Although Idaho does not restrict psychiatric testimony evidence to negate mens rea, there are similar justifications for only focusing on the mens rea and excluding *M'Naghten*.

By focusing on mens rea only, this model helps to alleviate jury confusion.[188] Under this model, the judge will describe to the jury the crime and its required mental state and tell them "that any evidence they may hear relating to the mental condition of the defendant is to be considered on that issue alone."[189] In this way, the jury will no longer be asked to distinguish and apply varying definitions necessary for the offense and insanity.[190] Albeit the majority of offenses require a mens rea component, invalidating that component may better comport with a jury's sense of justice than "excus[ing] criminal behavior even when *mens rea* elements are established" as required by the insanity defense.[191]

The Court also noted that "medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and

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[186] *See supra* notes 77-81 and accompanying text.

[187] *See supra* notes 77-81 and accompanying text.

[188] *See* Spring, *supra* note 105, at 45 (stating that "jury confusion should be eliminated or at least reduced substantially").

[189] *Id.* Furthermore, the jury "will be asked to so state if they find that the defendant is not guilty solely because of the mental disease or defect which rendered the defendant incapable of criminal intent." *Id.*

[190] *See id.* Spring further argues that this will eliminate a third definition related to diminished capacity, which "[l]ike insanity . . . disappears as a separate defense." *Id.*

> *Mens rea* simply carries diminished capacity to the logical extreme. With the separate definition of insanity gone, there is no barrier to accepting the idea that if one's capacity can be so diminished by mental disorder as to destroy the capacity to form a special intent, then it may in some circumstances be so diminished as to destroy capacity to form any criminal intent at all.

Id.

[191] Inman, *supra* note 146, at 1300.

disagreement."[192] The Court argued that when considering the interaction between the legal and medical understandings of insanity, it is even "more obvious" that states have a choice in adopting an insanity defense.[193] The American Psychiatric Association's manual of mental disorders admits "that no definition adequately specifies precise boundaries for the concept of 'mental disorder.'"[194] Because there is "reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity."[195]

These inconsistencies between the legal and medical concepts of insanity that justify Arizona's approach also justify Idaho's approach of adopting a Mens Rea insanity defense. Just as other states form their laws in accordance with certain medical and legal understandings, Idaho has crafted a defense in line with a modern understanding of mental illness and that is endorsed by the American Medical Association.[196]

3. The Mens Rea Model as the "Mirror Image" of *Clark*

Arizona law excludes diminished capacity evidence but follows a narrow version of *M'Naghten*. Idaho basically turns this around, and allows diminished capacity evidence, but does not follow *M'Naghten*. In view of the fact that the Constitution does not bar legislatures from discarding the basic requirement of mens rea, it "follow[s] that a state may take the less drastic approach of retaining the element of *mens rea*, while repealing [*M'Naghten* in part], as long as the prosecution is required to prove beyond a reasonable doubt that the defendant had the requisite mental state."[197]

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[192] Clark v. Arizona, 548 U.S. 735, 752 (2006); *see also* Leland v. Oregon, 343 U.S. 790, 800-01 (1952) (finding no due process violation for adopting the *M'Naghten* standard rather than the irresistible impulse test because scientific knowledge does not require otherwise and choice of test is a matter of policy). *See generally* Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995).

[193] *Clark*, 548 U.S. at 752.

[194] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxx (4th ed., text rev. 2000).

[195] *Clark*, 548 U.S. at 753.

[196] *See supra* note 132 and accompanying text.

[197] DRESSLER, *supra* note 21, at 390.

The Court in *Clark* did not address whether *M'Naghten* was constitutionally required: "We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter."[198] The Court did, however, reject the argument that "side-by-side *M'Naghten*" was the constitutional minimum that states must provide defendants.[199] The Court examined all the different ways that states provide mental illness as a defense, including Idaho and Alaska, which confined *M'Naghten* to the first prong.[200] *Clark* offers no opinion on the validity or invalidity of the statutes, but the Court alludes to them as legitimate ways that states can offer mental illness as a defense.

If a state can constitutionally confine *M'Naghten* to only the second prong, then there is no legal barrier under the law today to keep a state from confining *M'Naghten* to the first prong. And if that is what Idaho has effectively done by adopting the Mens Rea Model,[201] they have committed no constitutional violation.

The *M'Naghten* due process camp disagrees with this interpretation.[202] They claim that "*Powell* is consistent with [their] argument that no specific insanity test is required, but [that] the availability of a test, any test, is constitutionally mandated."[203] But to argue that some affirmative defense of insanity is constitutionally required, without clarifying which one, is not that simple.

If the insanity defense is constitutionally required, the question then becomes, which one is it? Is it the traditional *M'Naghten* test adopted in 1883? But as noted earlier, this test does not take into consideration defendants who are unable to control their acts, even if they know the nature and quality of their acts and that they are wrong. The irresistible impulse test gives more protection for these defendants. Further, mandating *M'Naghten* does not solve the answer of what constitutes as "wrong" for purposes of the second prong. Scholars still debate

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198 *Clark*, 548 U.S. at 752, n. 20.

199 *Id.* at 749.

200 *Id.* at 749-52.

201 *See supra* notes 114-15 and accompanying text.

202 *See* State v. Delling, 267 P.3d 709, 716 (Idaho 2011).

203 *Id.*

whether it should refer to legally wrong or morally wrong, and depending on what understanding a state adopts can determine very different outcomes for defendants.

The holding in *Clark* implicitly affirms the approach taken in Idaho and other Mens Rea Model states. *Clark* reaffirms the notion that states have the authority to define crimes and defenses and how they relate mental illness to culpability. Just as the procedural aspects of the insanity defense are not required, neither is one particular formulation. The policy reasons to eliminate jury confusion[204] and the interplay between legal and medical concepts surrounding insanity[205] justify the approach taken in Idaho. If a state may restrict psychiatric evidence to negate mens rea and consider only the second prong of *M'Naghten*, other states may allow any evidence of mental illness to negate mens rea and eliminate the second prong of *M'Naghten* and effectively keep the first.

CONCLUSION

The Mens Rea Model of the insanity defense does not violate due process. History does not embrace one single formulation of the insanity defense, and the concept of mens rea, including its understanding in the Mens Rea Model, is older than *M'Naghten*. Additionally, the Mens Rea Model satisfies the standard of fundamental fairness. Not only does it provide defendants with a complete defense by negating the mental state, but also more importantly it is more favorable for many defendants. As a variant of diminished capacity and failure of proof defense, defendants only need to raise a reasonable doubt that they did not have the requisite mental state of the offense.

Finally, earlier Supreme Court precedent and *Clark v. Arizona* uphold the traditional recognition that each state has the capacity to recognize and define the insanity defense. If a state may restrict psychiatric evidence to negate mens rea and eliminate the first prong of *M'Naghten*, it stands to reason that a state may also allow any evidence of mental illness to negate mens

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[204] *See supra* notes 188-91 and accompanying text.
[205] *See supra* notes 192-95 and accompanying text.

rea and eliminate the second prong of *M'Naghten*, while effectively keeping the first.

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