

2023

The Insanity Defense Derailed: How Can We Get it Back on Track?

S. Jan Brakel

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>

Recommended Citation

S. Jan Brakel, The Insanity Defense Derailed: How Can We Get it Back on Track?, 57 UIC L. REV. 77 (2023).

<https://repository.law.uic.edu/lawreview/vol57/iss1/3>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact law-reference@uic.edu.

THE INSANITY DEFENSE DERAILED: HOW CAN WE GET IT BACK ON TRACK?

S. JAN BRAKEL*

I.	INTRODUCTION.....	77
II.	SELECTIVE HISTORY OF THE INSANITY DEFENSE.....	79
III.	THE PENULTIMATE CASE: CLARK V. ARIZONA	84
IV.	THE LATEST CASE (TO DATE): KAHLER V. KANSAS.....	87
V.	CONCLUSION	96

I. INTRODUCTION

Two notable United States Supreme Court decisions on the insanity defense in the last two decades are *Clark v. Arizona* in 2006,¹ and *Kahler v. Kansas* in 2020.² These decisions, in an area of law where the Court has historically been reluctant to tread, reveal the extent to which the defense has gone off the rails of its original conceptualizations. Consonant with its hands-off approach to the subject and to the wider area of criminal law—which it has repeatedly articulated as being within “the province” of the states³—the Court in its decisions did not endorse but merely condoned the insanity law approach of the particular states in question (Arizona and Kansas, respectively). It did no more than hold the laws were not unconstitutional. However, in ceding authority to the states, as per tradition, these non-interventions, particularly in their tortuous attempts to articulate the reasons for them and in the categorizations and verbiage employed, have left the “approved” law in serious disrepair. This article does not argue for the Court to play a more aggressive role in “addressing the contours of the insanity defense,”⁴ a characterization that already borders on overstatement of that role. It does not ask the Court to abandon an appropriate federalist deference. Rather, the objective is to influence future law-making in this area in such a way that, if and when the Court is called on to take another pass at the subject, it would be in a position to approve a legal insanity scheme more sensible in its conceptualization than what we currently have. Right now, following *Kahler*, we do not even know what an insanity defense *is*, what constitutes its essence.

What will be presented here is essentially a theoretical argument, or,

* Lecturer in Law, Northwestern University Feinberg School of Medicine; J.D. 1968, University of Chicago; B.A., 1965, Davidson College. The author would like to thank the UIC Law Review editorial staff for overall assistance, specifically for urging him to further document several assertions, the process of which, he believes, led to greater clarification of some basic points sought to be made, and for deferring to his wish to write, at his peril, in the style he tends to prefer.

1. *Clark v. Arizona*, 548 U.S. 735 (2006).

2. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020).

3. *Powell v. Texas*, 392 U.S. 514, 536 (1968).

4. In its most recent pass at the defense, the Court itself used the phrase. This is no small irony as—and this is the central thesis of this article—in following its hands-off policy, the Court’s decision in effect completes the obliteration of those contours. *Kahler*, 140 S. Ct. at 1028.

as it is sometimes immodestly called, a think-piece. It will propose a return to original conceptualizations of the insanity defense and urge the states to legislate—where legislators feel it is needed—in accordance with the original scheme or schemes. Not all change, such as has occurred in this area of law over the last generation or two, is desirable. Progress can be illusory, so that a response that is open to being branded as regressive becomes the correct one.

A later article will supplement the doctrinal material with a case-study or two provided by forensic psychiatrists. Their purpose would be to test the fit of the reconceptualization to “live” cases (as distinct from conclusion-tailored vignettes)—i.e., to see if its application would make a difference, and lead to greater comfort and clarity with what is being done forensically. This might appear to be a relatively modest ambition, but, we believe, a useful one. The pursuit of grander objectives, such as trying to measure whether the re-conceptualizations applied might lead to better outcomes, we are more than willing to leave to others. Better in what way, would be one immediate question: legally? psychiatrically? morally? equitably? who is to say? Prior outcome studies, both recent and more distant,⁵ yield an impression that the presumption inherent in seeking to measure such things, especially in a quantitative way, well outweighs the credibility and utility of the results.

To repeat the limits of what is being attempted here: the challenge is doctrinal, to and on theory. It does not address, let alone hope to fix, the many as-applied complications that affect invocation of the defense—such as jury disregard or even nullification of the law. Studies have shown, with respect to insanity cases but other areas as well, that even in the face of explicit instructions on the law by the court, juries often go their own way. They may not like the choices the law gives them because they trust their gut instincts more than the law’s directives or even because they are distracted by the appearance or behavior of the defendant, not to mention that of the experts or the lawyers.⁶ Some say this is the beauty of the jury system, and why we have it in the first place. We need not take a position on that. The only position we do take is that so long as the theory undergirding the structure as it plays out in the courts—in particular, the trial courts—is defective, we cannot hope to come close to fixing what is wrong at that level.

5. For a couple of modest current efforts and citations to older studies, see, e.g., Jacqueline S. Landess & Brian J. Holoyda, *Kahler v. Kansas and the Constitutionality of the Mens Rea Approach to Insanity*, 49 JAAPL 231 (2021); see also Joseph D. Bloom & Scott E. Kirkorsky, *Mens Rea, Competency to Stand Trial, and Guilty but Mentally Ill*, 49 JAAPL 241 (2021) (The American Academy of Psychiatry and the Law is the publisher of JAAPL. It is a substantial contributor from the forensic-psychiatry side to the literature on mental health and law.).

6. Jury decision making is a highly complex, much studied subject. A useful and comprehensive summary of approaches and findings is Denis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL. & LAW, 622 (2001).

II. SELECTIVE HISTORY OF THE INSANITY DEFENSE

On the assumption that most readers are already familiar with the broader historical outlines of the insanity defense and that descriptions of the same are readily available, including in the opinions of both the *Clark* and *Kahler* cases themselves,⁷ there should be no need to repeat such here. Rather, this article will limit presentation of the historical information to what is needed to make its particular points.

A primary point is that there are essentially only two discrete versions of the insanity defense that have been operative in the U.S. since time immemorial. By that we mean since 1843, when the English *M'Naghten* case⁸ was decided and its reactive, post-decision, House of Lords special inquiry-generated rule articulated.⁹ Within decades the rule was adopted in jurisdictions around this country, and it remained unassailed, if not unassailable, until the 1950s.¹⁰

The *M'Naghten* rule, in its original declaration, posited that a person accused of a crime shall not be legally accountable for it if,

at the time of the committing of the act [he] was laboring 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.¹¹

Minor or more major variations on that wording made during the initial adoption process, later via caselaw or statutory adjustments—including dropping one of either of the alternatives in the formulation (nature and quality versus wrongfulness)¹²—do not obscure one clear, fundamental aspect: the test is *cognitive* in nature, in *both* “prongs.” Did the accused *know*?

The other version of the defense is best identified as the American Law Institute (“ALI”) test, initially proposed in 1955 and finalized in 1962.¹³ The ALI is a body of prominent lawyers and jurists, who, despite their standing do not themselves make law. Rather, they draft model codes, in this case a Model Penal Code, of which its insanity defense is part.¹⁴ It remains up to the state or federal legislatures or, arguably less desirable, their courts to be persuaded of the model code’s merit, its

7. This is especially true of *Kahler*, in which both the majority’s opinion as well as the dissent offer long descriptions of this history (in a way that favors the respective outcomes for which they advocate). 140 S. Ct. 1021, 1028-1031 and 1039-1047. *Clark*’s shorter analysis is at 548 U.S. 735, 749-752.

8. *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

9. Samuel Jan Brakel & Alexander D. Brooks, *LAW AND PSYCHIATRY IN THE CRIMINAL JUSTICE SYSTEM*, 6 (2001).

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

11. *Id.*

12. See *Clark v. Arizona*, 548 U.S. 735, 749, n. 12–21 (2006) (citing and categorizing the various state statutes).

13. MODEL PENAL CODE § 4.01 (1) (1962).

14. See Membership, AM. L. INST., www.ali.org/members [perma.cc/8E9F-F6B5] (last visited June 22, 2023), (providing ALI membership requirements and a membership directory)

rationale, and its workability, and adopt it as law.¹⁵ The rationale in this instance was that *M'Naghten* was “too narrow,” failing to draw within its ambit too many mentally disabled defendants who deserved exoneration.¹⁶ To fix this perceived flaw, the ALI formulation proposed 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 of his conduct or to conform his conduct to the requirements of law.”¹⁷ As with *M'Naghten*, the adoption process—also rapid, though less universal—led to many inter-jurisdictional variations of seemingly greater or lesser significance.¹⁸ The unchallengeable conceptualization of any ALI-based test, however, is that the first part, like *M'Naghten*, is *cognitive* (“appreciate”) but that it offers a second, *volition*-based opportunity for exoneration (“[in]capacity to conform”). Was the accused unable to control his behavior, even if he knew what he did was criminal, wrong, illegal, immoral or however the cognitive inquiry is articulated or interpreted?

Before there was an “ALI test,” some jurisdictions supplemented *M'Naghten* in factually appropriate cases with the so-called irresistible impulse test.¹⁹ Said to have originated in an 1840 English case (*Regina v. Oxford*, pre-dating *M'Naghten*), irresistible impulse as a defense reportedly first materialized in the U.S. in the Alabama case of *Parsons v. State* (1886).²⁰ Other sources trace its acceptance to an 1834 Ohio case, *State v. Thompson*, pre-dating even *Regina v. Oxford*.²¹ In an area of law where few, if any, have done the original historical research and most everyone borrows, with or without attribution, from everyone else, such finer details are often not terribly reliable, nor for our purposes terribly important. What is important to recognize is that the irresistible impulse idea is, like the ALI’s capacity-to-conform, *volitional* in essence—as the ALI’s drafters were undoubtedly aware when they re-formulated it in their model code. It has been said that the ALI’s version is, or was intended to be, a more generous conceptualization—an expansion of sorts—where the former was confined to instantaneous impulses to one that recognized volitional incapacities generated by “brooding and reflection,” as the official commentary to the Code so quaintly put it.²² Or, to look at it another way, the law went from recognizing impulse to including compulsion and thereby perhaps gave its application less of a fact-as-legal-conclusion aspect and greater psychiatric “respectability.” In

15. *Model Penal Code*, AM. L. INST., www.ali.org/publications/show/model-penal-code/ [perma.cc/T5AZ-WXSG] (last visited June 22, 2023).

16. See generally Samuel Jan Brakel & Alexander D. Brooks, *LAW AND PSYCHIATRY IN THE CRIMINAL JUSTICE SYSTEM* 18–23 (2001) (describing the history with specific reference to and partial reproduction of *United States v. Freeman*, 357 F.2d 606, 615–620 (2d. Cir. 1966)).

17. MODEL PENAL CODE § 4.01 (1) (1962).

18. See generally Brakel & Brooks, *supra* note 9, at 6; see also *Clark*, 548 U.S. at 735.

19. *Id.*

20. *Id.* at 44. *Parsons v. State*, 81 Ala. 577, 595–97 (1887).

21. *Regina v. Oxford*, 9 Car. & P. 525, 173 Eng. Rep. 941 (1840).

22. MODEL PENAL CODE § 4.01 (1) (1962), Comments, at 157.

earlier days, the irresistible (or unresisted) impulse had appeared in any number of cases to equate to “temporary insanity,” a less than clinically convincing diagnosis experts had been willing to testify to.²³

There was at one point also a Durham Rule, from *Durham v. U.S.*,²⁴ which was operative in only one jurisdiction, the District of Columbia, or two, if we count New Hampshire (it often isn’t, and the neglect of commentary on the state’s pre-existing law, both before and after Durham, has always been notable), which had worked with a similar formulation of the insanity defense since the late 19th century by virtue of a state court precedent there.²⁵ The *Durham* formulation went as follows: “[a]n accused person is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”²⁶ Period. Short and simple. However, it did not survive long—only eighteen years and only in D.C.²⁷ Within that period, a series of decisions by the same court curtailed the rule’s original breadth—a breadth revolutionary in at least its potential to open the floodgates to insanity acquittals and thus to disposition in the city’s one public mental hospital.²⁸ Even Judge Bazelon himself, the author of the rule, came to see the potential for excess in the original *Durham* formulation and the revolution was nipped in the bud, so to speak. In *McDonald v. U.S.*,²⁹ he defined mental disease or defect as an “abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls,”³⁰ thus essentially writing both ALI’s cognition and volition elements into that part of the rule, one which in all other jurisdictions is only the threshold criterion. Ten years later in *Brawner v. U.S.*,³¹ he approved wholesale adoption of ALI. A year later, Judge Bazelon, never shy of introducing radical concepts into this area of law, proposed in a concurring opinion in *U.S. v. Alexander*³² the defense of rotten social background—not as a sentence mitigator where it has plausibility, but as a form of “insanity” with the dispositional consequences of an acquittal on that ground. (There is today a mental health law research and advocacy center, the Bazelon Center for Mental Health Law, with a decidedly progressive agenda named after the judge).

The *Durham* test came by analysts of various stripes to be called the

23. Brakel & Brooks, *supra* note 9, at 44.

24. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

25. *State v. Jones*, 50 N.H. 369, 9 Am. R. 242 (1871); *State v. Pike*, 49 N.H. 399, 442 (1870).

26. *Durham*, 214 F.2d at 874–75.

27. Brakel & Brooks, *supra* note 9, at 54–60.

28. *Id.*

29. *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (per curiam).

30. *Id.* at 851.

31. See *Brawner v. United States*, 471 F.2d 969, 1010–11 (D.C. Cir. 1972) (finding that *Durham* had “produced little change in practice” because it was undermined by practitioners—experts, lawyers, and judges—and that the question was wide open whether the ALI would be “responsive” to the problems the (mis)application of *Durham* had exposed).

32. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973); Brakel & Brooks, *supra* note 9, at 158.

“product test,”³³ a term that begins to show the conceptual derailment of the law. The test’s critical distinguishing feature was that it required no subsidiary incapacities to be proved, but only mental disease or defect, which, under both *M’Naghten* and ALI, was only the first step in the defense. Both *M’Naghten* and ALI required a link—if not causal relationship—between the offense and the mental disability, articulated in the words “as” or “as the result of,” which is no different than “product of.” The only difference in litigating insanity under *Durham* was that it had only two trenches from which the lawyers could do battle, instead of three. This demonstrably put more of the focus on those two—on the disease or defect verbiage as much as on product. By contrast, under *M’Naghten* and ALI, much (if not most) of the lobbying of forensic ammunition could be (and was) aimed at the subsidiary “(in)capacities.”³⁴

Cognition or volition: that is the primary conceptual divide in insanity defense law. It does not mean there is—or can be—no overlap in terms of results aimed for or achieved, as both judges and commentators have noted.³⁵ Against the argument that a volitional component is necessary to capture a population deserving of the defense’s excusing objective is the rejoinder, theoretical or allegedly fact-based, that it is redundant or superfluous.³⁶ Defendants who fail the cognitive test would almost certainly be deprived of the capacity to conform their behavior to the law. Unknowing that what they were doing was wrong, why would they stop? Alternatively, a psychotic person who does not meet the volitional capacity standard would more likely than not fail a cognitive test as well. Those who are unstopably driven by irrational motives to commit a serious crime are unlikely to have much understanding of what they are doing.

One example comes from the gruesome case of *State v. Crenshaw*³⁷ where the defendant, hospitalized fifteen times in eight years with a diagnosis of schizophrenia, axe murdered his wife of only a few weeks, whom he suspected of unfaithfulness. He claimed his “Moscovite” faith justified his act.³⁸ The case led to a detailed analysis of whether awareness of wrongfulness meant the defendant did not know his act to be unlawful or, alternatively, that it was morally prohibited, with the majority concluding it was the former (thus upholding his conviction) while the dissent opined that interpretation reduced the defense to an “arid formality” and that it must also include the latter.³⁹ There was no dearth of cases or commentary to be cited by either side, the matter having been a point of controversy since the arrival of *M’Naghten* on these shores and even longer (centuries, if one chooses to look that far) before that.⁴⁰

33. *Clark*, 548 U.S. at 749–50.

34. Brakel & Brooks, *supra* note 9, at 13–15.

35. *Id.* at 52–53.

36. *Id.*

37. *State v. Crenshaw*, 27 Wn. App. 326, 617 P. 2d 1041 (1980).

38. *Id.* at 340.

39. *Id.* at 341.

40. For a nice and erudite synopsis, see the opinion by Judge Kaufman in United

The Washington State law in *Crenshaw* did not have a volitional component at the time, but it is doubtful that either the debate among the judges would have been helped by it or the outcome different. A good defense lawyer operating with a volitional option at her disposal might have argued that the defendant's outlandish beliefs did not merely justify his actions, but *required* him to commit them; however, real-world trial outcomes tend not to turn on such clever distinctions.

On the other hand, we have the *Hinckley* case⁴¹ (John Hinckley, for the short of memory, being President Ronald Reagan's would-be assassin) where, without a volition-based defense, there would almost certainly have been no acquittal. The verdict led to a public outcry which, in turn, resulted in withdrawal of that component of the law in many states and in the federal system.⁴² In the latter, this repeal was effectuated by Congress via the Insanity Defense Reform Act of 1984.⁴³ Just prior to Congress' action, however, a 5th Circuit Court of Appeals Judge, in *United States v. Lyons*,⁴⁴ ruled to the same effect, tracing the history of ALI's adoption via case decisions in each of the federal Circuits, which, occurred in 1969 in the 5th.⁴⁵ The judge—in an otherwise well-enough crafted opinion—wrote that his hand was forced because the medical and behavioral science behind adoption of the volitional prong (a mere fifteen years earlier) had not delivered on its promise.⁴⁶ Pinning the need for or desirability of legal change on changes in medical science is not a new tactic in law, but that doesn't make it any more credible—especially where the socio-political forces that drove the change are so evident.⁴⁷

Back and forth, overlap or not, pro or con on whether we should consider volition in addition to cognition, the point is that the two concepts—cognition and volition—are conceptually separate and should be so treated. Clear, rational categorization in law is critical. The law cannot be put together—let alone credibly maintained—with a set of interchangeable conceptual cards. The same could, for that matter, be said about any discipline, or even life. How can we make sense of a world where the basic categories of living are wholly fluid?

States v. Freeman, 357 F. 2d 606 (2d Cir. 1966).

41. Brakel & Brooks, *supra* note 9, at 6. United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981).

42. Brakel & Brooks, *supra* note 9, at 6-8.

43. INSANITY DEFENSE REFORM ACT, 1984, 18 U.S.C. § 17.

44. United States v. Lyons, 731 F.2d 243 (5th Cir. 1984).

45. *Id.* at 248 (citing Blake v. United States, 407 F.2d 908 (5th Cir. 1969)) (en banc).

46. *Id.*

47. Judge Gee himself in the opening of his elegantly written opinion in *Lyons* acknowledged the role of socio-policy forces at least indirectly when he described the status of the insanity defense law in the federal courts as "a congeries of judicially-made rules of decision based on common law concepts...usually appropriate for us to reexamine in the light of new policy considerations." *Lyons*, 731 F.2d at 243.

III. THE PENULTIMATE CASE: CLARK V. ARIZONA

*Clark v. Arizona*⁴⁸ presents a textbook case of the pitfalls and consequences of miscategorization. In *Clark*, where the insanity defense was pled in the context of a deliberate killing of a police officer by an accused who harbored many delusions, the Court confronted two basic issues. The first was whether Arizona's elimination of one of the *M'Naghten* components of its insanity formulation—the nature and quality part, leaving only wrongfulness as a possible exonerator—was constitutional under the 14th Amendment.⁴⁹ The answer to that, given the Court's precedents—scarce and deferential as they were⁵⁰—was easy to predict. In those precedents, the Court had (as noted at the outset of this article)⁵¹ given the states great leeway in formulating their individual definitions and tolerated the wide variations among the various formulae. There was no constitutional mandate for a state's test to include this, that, or the other element. In fact, given the Court's refusal to review challenges to total abolition of the defense in a small number of states,⁵² one would infer that the defense did not have constitutional stature—that a criminal defendant was not even constitutionally entitled to it.

No surprise, then, when the Court upheld Arizona's shrinkage of its defense. What was surprising (although perhaps a closer following of lower court cases, a reading of the lawyers' briefs, or even the testimony or commentary of the forensic experts would have put one on notice) was the way Justice Souter, writing the opinion for the Court's majority, articulated the components of the test at issue—both the one retained and the one eliminated. Justice Souter labeled the discarded nature/quality component a test of cognitive capacity,⁵³ while characterizing the wrongfulness part as a gauge of moral capacity.⁵⁴ This is the opposite of helpful. As mentioned, while each component is susceptible to any number of interpretations—and has and will continue to be variously interpreted, especially in an adversarial legal system—*both* components test cognition. The reader might, as an exercise, try to remember which prong Justice Souter labeled what, without referring back to the opinion's text, and the problem with the categorization becomes clear—at least to this writer. One could as readily—but should *not*—classify the wrongfulness part of the test as cognitive in essence while depicting nature and quality as moral.

48. *Clark*, 548 U.S. at 735.

49. *Id.* at 742.

50. *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952), *Powell v. Texas*, 392 U.S. 514 (1968).

51. *See infra* p. 1 and notes 3 and 4.

52. The states are Idaho, Kansas, Montana, and Utah. It also included Nevada at one point, but the law was ruled unconstitutional by the state's supreme court in *Finger v. State*, 27 P.3d 66 (2001). *See infra* p. 10-12, the discussion of *Kahler v. Kansas* where the United Supreme Court finally took up the issue.

53. *Clark*, 548 U.S. at 747-48.

54. *Id.*

As mentioned with reference to the *Crenshaw* case,⁵⁵ the history of the defense shows recurring debate on whether wrongfulness extends to lack of moral cognition or only knowledge of illegality. In other words, the fight has been over legal versus moral *within* the cognitive test of wrongfulness which Justice Souter categorized as a moral test! So, when did that fight end? With the stroke of Justice Souter's virtual pen? Or take the facts of an old state case, *Commonwealth v. Tempest*,⁵⁶ where "an emotionally disturbed" mother drowned her six-year-old son in the bathtub. She confessed to the police, after being asked specifically, that she knew her act was wrong.⁵⁷ Her behavior immediately after the act—she went downstairs, turned on the TV to watch a movie and a gameshow, ate a banana, and calmly told her husband what she had done when the latter came home⁵⁸—may give pause as to whether she "really" understood its nature and quality. But, in Justice Souter's scheme of things, that concept is reserved for the utterly insane, those bereft of all cognition—the "wild beasts" of an ancient formulation.⁵⁹

It is this sort of obfuscation that may have led a major publication on landmark cases⁶⁰ to grossly misinterpret the *Clark* case as having approved Arizona's elimination of the volitional prong of the defense, which had never been part of the law in that state. The analytic confusion also carries over into the later *Kahler* case and contributes to rendering that decision so opaque.

The second part of *Clark* dealt with the issue of whether the defendant, after failing with his insanity defense claim, could use the mental-state evidence and expert testimony thereto for a *mens rea* challenge.⁶¹ That is, to prove that his mental problems kept him from having (or forming) the criminal intent (specific or general), which is an essential element of all serious criminal charges and must be proved by the prosecution. The Court's answer to that question was essentially, "No." While conceding that ordinary, "everyday" evidence that might be offered by lay folks or any fact witness (what the Court called "observation evidence") might still be relevant and admissible, expert testimony on the critical issues of mental deficiency ("mental disease-evidence") or the subsidiary incapacities ("capacity evidence"), would not be.⁶² The Court gave three reasons for excluding these—pragmatically defensible, but less so in terms of doctrinal consistency.

First, the court held that Arizona should not be obligated to offer a defendant such as Clark a second shot, as it were, at exoneration on the same evidence, especially not at a standard of proof markedly lower than

55. *State v. Crenshaw*, 27 Wn. App. 326, 617 P. 2d 1041 (1980).

56. *Commonwealth v. Tempest*, 496 Pa. 436, 438; 437 A. 2d 952 (1981).

57. *Id.*

58. *Id.* at 438.

59. *Rex v. Arnold*, 16 How. St. Tr. 695 764 (1724).

60. Elizabeth Ford & Merrill Rotter (eds), *LANDMARK CASES IN FORENSIC PSYCHIATRY* 149 (Oxford U. Press 2014).

61. *Clark*, 548 U.S. at 742, 756.

62. *Id.* at 758–59.

the one applied to insanity defense conclusions.⁶³ For example, in Arizona and most states today, the defense must prove its insanity case by clear and convincing evidence⁶⁴ (sometimes quantified as 75% likelihood). The prosecution by contrast must prove *mens rea* beyond a reasonable doubt, as is its burden with respect to all elements of the offense charged. To counter the prosecution's case, all the defense has to do is raise a reasonable doubt, a low standard indeed if one quantifies beyond a reasonable doubt as 90% and up, the inverse of that being 10% or less. To deduce from this that many defendants "get off" on *mens rea* grounds would be decidedly wrong, however. There are any number of interpretations of the *mens rea* concept, as will be discussed *infra*, but it is decidedly not a broadly-construed or construable defense that opens the floodgates to acquittals.

The second reason the Court offered was that evidence provided by experts on mental disease and capacity is unreliable and potentially misleading to the jury given the uncertainties of psychiatric diagnoses if not of the discipline itself.⁶⁵ Of course, that is a charge that can be leveled at forensic psychiatric opinion at any level of law or in any legal context. Justice Souter seemed somewhat at a loss to explain its application here, but other judges have made the case for him more clearly.

In *Steele v. State*, for example, the Wisconsin Supreme Court noted that the potential for jury confusion through error, intra-psychiatric disagreement, and plain partisan bias on the part of experts, was bad enough in insanity defense proceedings,⁶⁶ which the Court characterized as a "gross evaluation" of an accused's conduct and mental state in the effort to show these are "so beyond the limit of accepted norms that to hold [the defendant] criminally responsible would be unjust."⁶⁷ To bring that same gross evaluative process to bear on the issue of specific intent, which presumes a much narrower (one could say specific) inquiry, would, as the Court said, be "intolerable."⁶⁸

Last, the Court offered a "consequentialist" justification: a defendant who succeeds with an insanity claim will in almost all cases be hospitalized whereas the consequence of successful assertion of lack of *mens rea* means the defendant will "walk",⁶⁹ i.e., go free, unless separate civil commitment procedures are initiated and successfully concluded. Being mindful of the consequences of legal decisions is certainly not an indefensible stance, but it must be acknowledged that in this particular context it goes against the law's moral purpose that seeks to divide "the mad from the bad."

All three of these justifications are highly pertinent to resolution of the issues presented in *Kahler*, which we take up now.

63. *Id.* at 771-72.

64. *Id.*

65. *Clark*, 548 U.S. at 774-75.

66. 97 Wis.2d 72, 95 (1980).

67. *Id.* at 96.

68. *Id.* at 97.

69. *Clark*, 548 U.S. at 779.

IV. THE LATEST CASE (TO DATE): KAHLER V. KANSAS

In *Kahler*, the Court was faced with the question it had previously avoided of whether abolition of the insanity defense was a constitutional move.⁷⁰ Such a change in the law would leave only a so-called *mens rea* challenge as a front-end defense option in cases where the defendant's mental state appeared questionable (back-end, post-conviction uses of a defendant's disabilities are and have always been an altogether different matter).⁷¹ Or at least that was the way the case was presented and talked about in the popular press as well as in professional circles—in many of these fora even after the decision was rendered.⁷² This would be altogether different from tinkering with the wording of the insanity defense and hence not subject to the same arguments and precedents regarding the breadth of the states' discretion. The outcome could be seen to be genuinely in doubt.

The Court in *Kahler*, however, did an end-run around this anticipation, claiming that Kansas had not (in fact, in essence, or “not entirely”)⁷³ abolished the insanity defense and hence could do what it had pleased its legislature to do. The precedents about tinkering with the insanity defense being within the “province” of the states did apply after all.

The Court managed to find its way to this unexpected conclusion in part due to the categorical fog left by the *Clark* decision. Kansas's pertinent law, enacted in 1995, provided that “[i]t shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged.”⁷⁴ To be clear, it added that “mental disease or defect is not otherwise a defense.”⁷⁵ In this wording, Kansas joined with greater or lesser replication three or four other states whose legislatures had voted to abolish the insanity defense around that time: Montana, Utah, Idaho⁷⁶ and Nevada (Nevada's Supreme Court subsequently held its version of this law unconstitutional in *Finger v. State*).⁷⁷ This left, as

70. *Kahler*, 140 S. Ct. at 1021 (2020).

71. *See Williams v. New York*, 337 U.S. 241 (1949) (affirming the breadth of the sentencing process and the virtual unlimited discretion of the sentencing judge—unrestricted evidence, no right to participation or confrontation on the part of the defendant, no right to a hearing even—in a capital case no less). Though no longer good law on each and all of these propositions this landmark case signals the fundamental difference between sentencing and the guilt-finding process.

72. Even the *Clark* decision in its summary of the state of the insanity defense law so characterized Kansas' law. *Clark*, 548 U.S. at 752.

73. *Kahler*, 140 S. Ct. at 1035.

74. *Id.* at 1025 (quoting KAN. STAT. ANN. § 21-5209 (2021)).

75. *Kahler*, 140 S. Ct. at 1026; KAN. STAT. ANN. § 21-5209 (2021).

76. IDAHO CODE § 18-207 (2004); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE ANN. § 46-14-102 (2022); MONT. CODE ANN. § 46-14-311 (2005); UTAH CODE ANN. § 76-2-305 (2003).

77. *Finger v. State*, 117 Nev. 548, 27 P. 3d 66 (2001).

mentioned, only what was understood to be the *mens rea* defense as an option. The *Kahler* Court however, using the *Clark* lingo, asserted that Kansas had in fact merely chosen to go with the “cognitive incapacity” test of insanity⁷⁸—the opposite of what Arizona had done when it, lawfully, restricted its insanity defense to moral cognition. Apart from the near incomprehensibility of this comparison (the reader is invited to “try it on for size”), the bigger problem is that it is simply untrue.

There is a world of difference between the insanity defense and *mens rea*, substantively and procedurally, in theory and as applied, in Kansas or elsewhere. Ironically, *Clark* presents some of the best support for that. Findings that the differences pale somewhat (or even a lot) in application—as a study of the Montana and Idaho experiences with *mens rea*-only suggests—do not count for much.⁷⁹ Changes in law on the books are often modulated by real-world adjustments, both initially and longer term.⁸⁰ This is true whether the measure is process (such as the role of experts, testimonial latitude, or the like) or outcome. One could jettison half the criminal law on that sort of reductive reasoning; throw out all degrees of murder or manslaughter, or all kinds of attempts at legal fine-tuning to fit the law to its moral objectives, improve its effectiveness or efficiency, etc., on the argument that it’s all “kind of the same” in the end.

Insanity is an affirmative defense, the burden of proof of which is on the accused. *Mens rea* is not. It has to be proven by the prosecution—beyond a reasonable doubt, no less. However onerous this burden and standard may seem in the abstract, one thing is clear: the Kansas legislators who in 1995 voted to get rid of the insanity defense were *not* seeking to broaden the range of excusing conditions or criteria for mentally unstable offenders or improve the chances for success therewith—no more so than their Arizona counterparts were when they eliminated the nature and quality part of the defense in their state.⁸¹ This

78. *Kahler*, 140 S. Ct. at 1029. As the dissent notes, Kansas’ own Supreme Court recognized that the state “had legislatively abolished the insanity defense,” in *State v. Jorrick*, 269 Kan. 72, 82; 4 P.3d 610, 617 (2000). *Id.* at 1038-39 (Breyer, J., dissenting).

79. See, e.g., Rita D. Buitendorp, Note, *A Statutory Lesson from “Big Sky Country” on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 970 (1996) (concluding that Montana’s abolition legislation “only eliminated the insanity defense from its statutes and not from its courtrooms.”). One might be tempted to cite the late Ralph Slovenko, a brilliant but down-to-earth scholar in the field of mental health law, for an earthy propositions. The sayings are not original to him but the willingness to pepper his scholarly writings with such sayings is. One is the observation that “when the law is reformed in one area, it is deformed in another.” Or, with respect in particular to the findings of quantitatively-oriented studies, Slovenko subscribed emphatically to the view that there are “lies, damn lies and statistics,” except what he in fact wrote involved bikinis. Ralph Slovenko, *PSYCHIATRY IN LAW/LAW IN PSYCHIATRY* 217 (1st ed. 2002).

80. See generally Brakel & Brooks, *supra* note 9, at 15-18 (The Effect of Varying Insanity Defense Standards on Acquittal Rates, citing both empirical and experimental studies to this effect.).

81. The Arizona law, §13-502(A), contains a number of other substantive restrictions to describe those eligible, or rather *not* eligible, for the defense, and includes the highly symbolic renaming of those who are acquitted under it as “guilty except insane,” as opposed to “not guilty by reason of insanity” (NGRI).

was part of a movement to shrink such options, based on the perception that too many offenders who did not merit such were getting away with it.⁸² How could the legislators have thought their action would do the trick?

First, though “culpable mental state” in the Kansas law—the element of the offense charged the prosecution must prove—may sound like a broad concept, the word culpable itself is conclusory. Asserting a defendant is not “culpable” in criminal law is a tautological expression of the end result sought to the particular inquiry conducted. In this case that inquiry is into *mens rea*, not insanity, as per the legislature’s intent to no longer make the insanity defense available. And the result, if culpability is not proved, is a not-guilty verdict, an acquittal; not a not-guilty-by-reason-of-insanity (“NGRI”) verdict; let alone Guilty But Mentally Ill (“GBMI”), which never was an option in Kansas.

And what is *mens rea*? Literally, it means “guilty mind.”⁸³ What it means operationally is less clear, as suggested perhaps by the continued use of the Latin word, even as that practice has generally dwindled in law. It is often equated with criminal intent, but what is intent, or criminal for that matter? Hornbook law says there is general (criminal) intent and specific intent;⁸⁴ common sense does not disagree. That one or the other must be part of the inquiry in any criminal case is equally clear (except for the smallest of offenses, such as traffic infractions). Which of the two is at stake operationally, however, requires further direction. One answer, whose facility may be its prime draw, is that specific intent crimes are those that violate a criminal statute that defines the culpable state of mind via specific terms⁸⁵ such as, that the crime must have been committed intentionally (of course), purposefully, willfully, knowingly, and with deliberation, premeditation, malice aforethought, and so on. Offenses that violate statutes without such specifications—typically those of lesser gravity—require only proof of general intent, which may lend itself to contest on factual grounds but rarely on state-of-mind issues.⁸⁶ The same goes for the “criminal” part of the equation: a violation of an “unspecific”

82. Brian Hauptman, *The Fight Against the Insanity Defense; Examining the Legislative Rationale and the Potential Long-Term Consequences of Its Use*, 46 SETON HALL LEGIS. J. 405 (2022) (documenting this point—that the legislators intended to shrink the morally excusing options—via a study of the *mens rea* concept in the abolitionist states).

83. From Latin. See any dictionary, legal or lay.

84. See generally Brakel & Brooks, *supra* note 9, at 161–166 (Introduction to Diminished Capacity and Diminished Responsibility, distinguishing these broader concepts from *mens rea*).

85. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37 (1996) (illuminating the contours of specific intent in the context of a first-degree murder case on whether evidence of the defendant’s voluntary intoxication ought as a matter of due process to be admitted at trial to challenge it).

86. See generally, Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I know For Sure*, 13 OHIO ST. J. CRIM. L. 521 (2016) (providing an insightful analysis of the criminal intent concept, a key conclusion of which is that general intent is about physical facts, whereas specific intent deals with (mental) state-of-mind issues.).

criminal statute, one that alludes to no state-of-mind issues, self-evidently satisfies the *criminal* intent aspect of *mens rea*.

But even in serious cases, including murder (even capital murder), the trend over the years has been to cut back on the scope if not number of the intent specifications, especially those relating to deliberation, premeditation, or both.⁸⁷ The deliberation need not be a very deliberate or lengthy process, but can be a short-term calculation, if not instantaneous.⁸⁸ Malice aforethought is out altogether in many modern statutes and not just because the term seems dated. In many states today, proof of premeditation in murder cases may not be required at all if the homicide was perpetrated in an especially heinous manner, committed in the course of an “inherently dangerous” felony, or if the victim was a police officer, a child (as in *Clark* and *Kahler* respectively) or member of an otherwise vulnerable class.⁸⁹ What is left for the prosecution to prove and remain as contestable issues are intent (only in its most concrete sense, i.e., “actual”) and a minimal degree of awareness (“knowing”—sometimes conceptualized as no more than “conscious”).⁹⁰

Moreover, and pointedly, the operational reality is that the defense tends to concede these bare intent elements of the crime in the vast majority of insanity cases. Yes, the accused fired the gun at the victim(s), knew he was firing a gun, and meant to do so. Period. However, his *reasons* for doing so may include the demons that allegedly made him do it, his delusions about what would happen if he did not, his alleged inability to fully grasp the nature, quality, criminality, wrongfulness, or the real-life consequences of the act, his alleged inability to refrain from the act—despite knowing all or some of the foregoing. These are all grist for the insanity defense mill and what experts are called on to testify to in insanity cases. The same goes for multiple other particularities or peculiarities regarding the defendant that are even further removed from the issue of intent, such as his medical or psychiatric condition and history, the number of his hospitalizations, suicide attempts, his social and educational background, and alleged abusive behavior of his parents, siblings, etc. In states that have an insanity defense all the foregoing is typically dismissed as of little, if any, relevance when applied to intent or

87. See generally Kimberly Kessner Ferzan, *Adjudicating the Guilty Mind: Plotting Premeditation's Demise*, 75 LAW & CONTEMP. PROB. 83 (2012) (setting the tone on its opening page with the quote from Dan Kahan and Martha Nussbaum that “Premeditation is one of the great fictions of the law.”)

88. *Id.* See also *Commonwealth v. Carroll*, 194 A.2d 911, 915 (1963) (“Whether...the premeditation and the fatal act...were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate and premeditated.”) To the same effect is *Commonwealth v. Scott*, 130 A. 317 (1925), suggesting that this is hardly a new development in law.

89. Ferzan, *supra* note 87.

90. See, e.g., *United States v. Pohlott*, 827 F.2d 889, 907 (3d Cir. 1987). The matter of what constitutes “knowing” behavior, and whether evidence of mere consciousness during the act (however that might be defined or perceived) suffices, is discussed *infra* pp. 18-20.

mens rea.⁹¹ As is the whole business of expert testimony. What do psychiatrists have to contribute on the matter of “actual” intent or conscious behavior (apart from the rare, typically bizarre, and credibility-challenged *actus reus* case) that is not evident or cannot be deduced from the facts by any ordinary person? *Clark* in effect said “nothing,” and precluded the jury from considering it.⁹²

Implicitly acknowledging that the narrow inquiry into intent might not work to the benefit of many, if not most, mentally damaged defendants, the *Kahler* court went on to point out that Kansas’s law explicitly provides that mental state evidence can be introduced as a culpability/punishment mitigator at sentencing and may even lead to hospitalization.⁹³ But where is the comfort in that? What the defense strives for, and would get if successful on *mens rea*/intent, is an acquittal. Moreover, not getting an acquittal hardly puts the Kansas defendant in a better position than a convicted criminal in any state. The rules of evidence at sentencing are essentially unlimited in any and all jurisdictions, but the discretion and authority on the part of criminal court judges to hospitalize convicted offenders has shrunk over the years in most states, in line with other policies and provisions limiting sentencer discretion.⁹⁴ Mental health dispositions by criminal courts today appear to be limited mostly to small, non-violent offender populations dealt with in special “mental health” courts that have sprung up within the criminal court system in many states.⁹⁵ Federal law provides for the option of mental health disposition at the time of conviction, on motion by either side and if supported by a special psychological evaluation.⁹⁶ However, a rough population survey of patients by legal status in federal facilities appears to show it is rarely used, if at all.⁹⁷ In short, the road to such dispositions is unlikely to be paved for the *Kahler*’s of the world, as the outcome in the *Kahler* case itself showed: the jury sentenced him to death irrespective of its state law’s explicit option.⁹⁸ No evidence was presented that it would be different in other cases.

91. *Id.*; see, e.g., *Steele v. State*, 97 Wis. 2d 72, 294 N.W. 2d 2 (1980); see also *Clark v. Arizona*, 548 U.S. 735 (2006), at least so far as expert opinion is concerned.

92. *Clark*, 548 U.S. at 742.

93. *Kahler*, 140 S. Ct. at 1026 (citing KAN. STAT. ANN. §§ 21-6815 (c) (1) (C), 2166-25 (a)).

94. See David M. Zlotnick, *The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 212 (2004) (dealing primarily with restrictions on sentencing discretion in the federal courts but noting trends that are replicated on the state level, such as mandatory incarceration minimums for many crimes and discretion-limiting sentencing guidelines).

95. For a survey of the concept of mental health courts and its various operative programs, see Robert Bernstein and Tammy Seltzer, *Symposium on Mental Health Issues in Correctional Institutions: Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 D.C. L. REV. 143 (2003).

96. 18 U.S.C. § 4244.

97. *Id.* Conclusion reached by author based on personal correspondence with Logan Graddy, Chief Psychiatrist, Federal Medical Center at Butner, N.C., June 1, 2022.

98. *Kahler*, 140 S. Ct. 1021, 1027.

There is some evidence that GBMI verdicts may have increased in “abolitionist” states, or even that competence to stand trial proceedings serve as a substitute for insanity claims.⁹⁹ Whether this is a salutary or even appropriate development is debatable. GBMI verdicts are intended to lead to mental health dispositions, but the practice is something else. The laws are dwindling for other reasons, one being that studies showed the “beneficiaries” of the available verdict were predominantly offenders who would have been found guilty before—*i.e.*, not the targeted group, which was to comprise those “unlawfully” found NGRI absent this compromise defense. Defendants found not competent for trial typically wind up on special forensic units that focus on legal restoration.¹⁰⁰ That is not what we want here.

Lastly, as mentioned earlier, one major purpose of criminal law and criminal trials is to render a moral verdict—a purpose not fulfilled when postponed until sentencing.¹⁰¹ This is a point not to be minimized, especially in insanity cases. It is the very reason we have the insanity defense.

Deciding whether a law, rule or regulation challenged under the Due Process Clause is or remains constitutionally valid requires, in the first place, an historical inquiry. The contested law will be struck down only if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”—as the talismanic words go.¹⁰² Accordingly, both the majority’s opinion and the dissent in *Kahler* devote themselves to an extensive analysis of “ancient” historical presentations of the insanity defense.¹⁰³ One problem with this analysis is that it is only marginally relevant here. It suggests that, and is carried out as if, the “ranking” is among different formulations of the insanity defense, whereas it is not. It is between insanity and *mens rea* only. Another problem with this analysis is that one can make of this history what one wants, as the main opinion and dissent amply confirm. The “story” is far from linear—one where initial, primitive articulations might be perceived to gradually move toward some enlightened consensus. Instead, these formulations were written by judges and commentators through the centuries, all struggling to put into time-bound words and on the basis of time-bound conceptualizations of human life and functionality, the fundamental notion that “really crazy”

99. Bloom & Kirkorsky, *supra* note 5.

100. See, e.g., Margaret W. Smith, *Restore, Revert, Repeat: Examining the Decompensation Cycle and the Due Process Limitations on the Treatment of Incompetent Defendants*, 71 VAND. L. REV. 319, 327 (2018) (focusing on the futile, repetitive parts of restoration efforts that return defendants to jail once restored, but also documenting that the vast majority of such efforts take place in hospital inpatient units and generally include “education in the legal process.”).

101. Justice Breyer’s dissent recognizes this, though for reasons somewhat dissonant from ours. See *Kahler*, 140 S. Ct. at 1049 (2020) (Breyer, J., dissenting) (“... our tradition demands that an insane defendant should not have been found guilty in the first place”).

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

103. *Kahler*, 140 S. Ct. at 1027-36, 1040-46.

people (called “lunatics” at one point), or those so developmentally defective that they were like the smallest of children or even like “wild beasts,”¹⁰⁴ should not be held accountable for their misconduct.

This repeated reference to wild beasts is intentional because in forensic circles the term became the equivalent of the “nature and quality” part of the *M’Naghten* test, a conceptualization the Court (even the dissent) seems to have been persuaded to adopt.¹⁰⁵ I.e., wild beasts as the cognitive part of the cognitive test! This is, if nothing else, an overreading of the historic effort to define and confine the limits of the culpability struggle, a too literal interpretation of one of multiple attempts over centuries to capture the elusive. It hijacks one dated and extreme articulation of the rationale for non-accountability in the service of what traditionally has been a wide-open nature and quality inquiry. One might as readily adopt as immutable law the efforts of another English jurist, William Lambard, also cited in *Kahler*. He wrote that “lunatics” cannot commit “felonious act[s]”—accountable criminal acts—because they have no “understanding will.”¹⁰⁶ This would appear to collapse the one conceptualization that is key to a rational, coherent insanity defense—the divide between cognition and volition. Do we want to follow that? Because the no-doubt honorable Justice Lambard said so in 1581 or ‘82?

A last unhelpful aspect of *Kahler* is the resort to bizarre hypotheticals to ostensibly illuminate the difference not between cognition and volition but between or among different concepts of cognition. The dissent by Justice Breyer, whose dissent is on-point in several other ways, opens with the tale of a defendant who shoots a person thinking it is a dog and another “lunatic” (or maybe the same one) who shoots because the dog ordered him to.¹⁰⁷ According to Justice Breyer, the first shooter could succeed with his insanity defense under the cognitive incapacity test, which he accepts as roughly correspondent to the *mens rea* defense (this writer does not), while the other one would get off for his moral incapacity.¹⁰⁸ Really? Why not further suppose the dog ordered him and he could not resist, to help us understand volition? Back in first-year law school, the criminal law professors might invoke the story of the man who strangled his wife thinking he was strangling a goose.¹⁰⁹ Perhaps, to invoke another classic, he did so even at the

104. The *Kahler* Court cites Henry de Bracton’s thirteenth-century treatise for this terminology, via J. Biggs, *The Guilty Mind* 82 (1955).

105. *Kahler*, 140 S. Ct. at 1038.

106. William Lambard, *EIRENARCHA: OF THE OFFICE OF THE JUSTICES OF PEACE*, ch. 21, p. 218 (1581).

107. *Kahler*, 140 S. Ct. at 1038.

108. *Id.*

109. Though there are probably other sources, this writer owes the goose tale to the late criminal law professor at, and later dean of, the University of Chicago Law School, Norval Morris. New Zealand-born and Australia-educated, Professor Morris had a wonderfully enthusiastic way, to say the least, of communicating his theories and insights on the criminal law to his first-year students. Another case (or fable), this one from Scotland, is of a man who killed his son believing or dreaming he was “struggling”

hypothetical “policeman’s elbow!”¹¹⁰ It is unclear how much first year law students profited from such analogies. What does it say about the state of our insanity defense law when the Supreme Court has to resort to this brand of deep thinking? Have we gotten so derailed? Are we so far off track? There are precious few goose stranglers or dog-ordered dog shooters among our homicidal offenders. If there were any, it is unlikely they would be among the cases contested at trial, let alone have their cases appealed to the supreme court of the land.

A more contemporary case the Court did cite is *U.S. v. Pohlott*.¹¹¹ Though essentially about the continued viability of the concept of diminished capacity or responsibility as an affirmative defense with burden of proof on the defendant (a context the Court missed), it sheds considerable light on the application of the intent/*mens rea* criterion. The case involved what appeared to be a classic example of Battered Woman Syndrome (BWS) in un-classic form in that the recipient of the abuse—which was major and both physical and psychological—was the husband of the woman who did the battering.¹¹² Apart from the abuse the husband suffered in this pathological relationship, from which he seemed unable to extricate himself, he also became aware that the wife knew he had, stashed away in safe deposit boxes, considerable cash that the IRS and others might be interested in.¹¹³ This last threat appeared to be enough to finally get him to act, in the form of trying to hire a hitman who would dispose of the wife in order to keep the secrets secret.¹¹⁴

The scheme fell apart when the hitman ratted to the government and proceeded to wear a wire to collect the incriminating evidence against the husband, causing the latter to be arrested and charged with one count of conspiring to commit murder for hire and a couple of related counts.¹¹⁵ The trial took place in a federal court where a main doctrinal issue was whether the Insanity Reform Act of 1984, which was intended, *inter alia*, to eliminate the diminished capacity concept as a defense, also meant the *mens rea* defense was no longer available for psychiatric-based lack of culpability claims. The key provision in the Act (later borrowed by Kansas) was that “mental disease or defect does not otherwise constitute a defense.”¹¹⁶

with a wild goose. *H.M. Advocate v. Fraser*, 4 Couper 70 (1878).

110. This classic illustration of the volitional issue has been seen by some to pertain to volition of the irresistible impulse kind only, but it need not be so limited. See Slovenko, *supra* note 79, at 221.

111. *United States v. Pohlott*, 827 F.2d 889 (3d Cir. 1987).

112. Brakel & Brooks, *supra* note 9, at 128–133 (discussing Battered Woman Syndrome as part of the chapter on Mental Illnesses That Underlie the Insanity Defense. The section notes that the United States Supreme Court’s recognition of same sex harassment as prohibited by Title VII of the Civil Rights Act of 1964 in *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75 (1998) can be seen to say that neither the social nor legal reality of victimization is determined by gender.).

113. *Pohlott*, 827 F.2d at 891.

114. *Id.*

115. *Id.* at 892.

116. INSANITY DEFENSE REFORM ACT, 1984, 18 U.S.C. § 17.

Pohlot's lawyer wanted a negative answer, i.e., that *mens rea* survived for this purpose, because he had an expert who testified that his client never intended to carry through on the plot to kill his wife, that it was all a cathartic "fantasy," a "weak attempt to fight back,"¹¹⁷ that it provided the psychological release he desperately needed. In what could be seen as the reverse of a Pyrrhic Victory for the defense (they won the war but lost the battle), the court ruled that *mens rea* was indeed still available. However, the expert testimony failed to be of help to the defendant because it spoke to his unconscious motivations, whereas all that the law required to convict under *mens rea* was proof of "conscious," "purposeful activity."¹¹⁸ Since Pohlot had set in motion the whole plot, hired the hitman and even paid him a retainer upfront, that criterion had been amply met, and the expert's testimony was irrelevant. Or as the court put it, Pohlot had offered his mental-state evidence "in support of a legally unacceptable [or better, no longer acceptable] theory."¹¹⁹ Perhaps the expert himself was irrelevant as well because not only was the crux of his testimony not at issue, but also in the sense he had no special expertise on the matter of what is consciously purposeful and what is not. That conclusion, that the expert and expert testimony at this point in the process are redundant, or worse, misleading, is in essence what *Clark* held, in the context of a prosecution in a state, Arizona, that retained its insanity defense. It would be unlikely that a court would be willing to follow (or a legislature to enact) that ultimate logic and come to conclude the same in a state that did not. It might not violate the all-pertinent-evidence principle implicit in the Constitution¹²⁰ in theory, but it would be difficult to sell pragmatically or politically. It would banish psychiatrists and psychiatric testimony from criminal cases altogether, except perhaps for sentencing or alternative dispositional decisions—a bit like "disinvent[ing] the wheel," as a Supreme Court Justice put it in a related but somewhat different context.¹²¹

Pohlot thus shows how narrow, at least in that particular judge's

117. *Pohlot*, 827 F.2d at 893. The court's opinion suggests these were Pohlot's own words.

118. *Id.* at 907.

119. *Id.*

120. See *In re Winship*, 397 U.S. 358, 363 (1970) on the need for the prosecution to prove "the existence of every fact necessary to constitute the crime charged."

121. The quote is from Justice White writing the opinion for the Court in *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). *Barefoot* was a capital case from Texas in which the jury at the sentencing phase was required to address the issue of the offender's "future dangerousness." The defense, aided by *amici* briefs from the American Psychiatric Association, among others, argued that psychiatrists should be banned from opining on this matter because they are incapable of accurately predicting such things. Justice White rejected that argument saying that psychiatrists had long been making such predictions at the invitation of the courts, hence the wheel-disinvention analogy. Regarding the role of psychiatrists in the criminal justice process, see also an old, but far from "dated" piece by Willard M. Gaylin, *Psychiatry and the Law: Partners in Crime*, 8 COLUM. U. FORUM 23 (1965), arguing that sentencing is the *only* juncture of the process at which psychiatric opinions have relevance; that psychiatrists have nothing to offer at the guilt phase.

interpretation, *mens rea* is or can be defined. Diminished capacity was broader in that it permitted testimony to the effect that individuals who suffered from a disability *like* the defendant could not have had, or were unlikely to possess, the requisite intent because they could not even form it.¹²² The *mens rea* focus was constricted to the *actual* intent of the offender, or as the concept came to be referred to, “diminished actuality.”¹²³ That at least became the (ungainly) wording in California, which first jettisoned diminished capacity after being at the forefront of its introduction into this country. Clark and Kahler were both convicted: Clark under the wrongfulness prong of the insanity defense in Arizona; Kahler in Kansas under a law that aimed to abolish the defense.¹²⁴ For that matter, they both would have been convicted under the *Pohlot* interpretation of what constitutes guilty behavior in an unambiguous *mens rea* context as well.

This article does not disagree with, nor takes any position on, these trial outcomes. Nor does it argue that the appellate courts, the Supreme Court included, got it wrong in sustaining the respective statutes that led to these outcomes. Nor does it suggest that either of the “approved” tests of accountability are inherently wanting. The only point is that the tests be recognized for what they are. Relative to *Clark*, this means seeing through and abandoning the misguided assignation of moral dimensions to one part—wrongfulness—of the twin articulation of the cognitive test only. The fact is that historically, in theory and in practice, both parts (nature and quality included) are equally susceptible to morally-oriented interpretation. In the *Kahler* context, it requires we stop operating from the pretense, fostered by the *Clark* obfuscation, that the Kansas law and any others like it, already enacted or being considered, are perfectly acceptable under the Constitution because they do not “really” change anything.

V. CONCLUSION

The main objective here has been to challenge the theoretical articulations in these two major cases—in particular, the flawed rationales given in support of the outcomes. The aspiration is that in doing so, this article may contribute to getting the conceptualization of the insanity defense back on track, to return the law to its doctrinal foundations. The end goal is to better inform legislatures so that, if or when pressed to make new choices about the defense, they will better understand what is being proposed and what they are voting on, and they will be better equipped to present the product to their constituents. Similarly, on the applied level, the aim is to inform trial courts of the reconceptualization for when they are called on to render verdicts in

122. See Brakel & Brooks, *supra* note 9, in the introductory section on Diminished Capacity and Related Defenses, at 161–66, 175–198 (presenting the *Pohlot* case and the above analysis).

123. *Id.* at 163; Cal. Penal Code §28(a) (2011).

124. *Clark*, 548 U.S. at 745–46; *Kahler*, 140 S. Ct. at 1927.

cases brought under the respective laws, operative in their respective jurisdictions. The same goes for reviewing courts to rule on appeals from those cases. This would include any final appeals to the highest court of the land on the matter of whether any new legislative formulation passes “constitutional muster,” to use for once a hoary expression normally best avoided.

The conceptual scheme argued for is essentially the traditional one, the one in place and play before things went awry. One could pinpoint that as somewhere after the Durham case, when recognition of the potential excusing excesses of that “liberal” rule had resulted in its demise, and M’Naghten reigned again, to the introduction and widespread acceptance of the ALI test, to the extent it generated a legally and psychiatrically-merited focus on volition,¹²⁵ whether pro or con. It would extend up to the U.S. Supreme Court’s decision, or better its opinion, in the Clark case which appeared to show the conceptual wheels of the insanity defense to have come off even at the highest levels of judicial review (i.e., roughly 1970–2005), as confirmed in Kahler fifteen years later. The position animating this article is neither political, nor ideological, and it makes no judgments regarding the wisdom or desirability of case outcomes at any levels, under any of the defense’s components. The graphic presentation below strives to clarify the substance of the scheme in a visual way. The graph’s second part, and the three extended notes to it, show the procedural/evidentiary differences between the insanity defense as the article conceptualizes it and the two other generally recognized mental-state criminal-accountability defense alternatives.

125. See *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) (demonstrating the Circuit Court’s varying, back-and -forth takes on the issue of volition).

APPENDIX

THE INSANITY DEFENSE “RECONCEPTUALIZED” IN ACCORDANCE WITH ITS TRADITIONAL CONCEPTIONS (SUBSTANCE)	
Mental disease or defect (the “threshold criterion”), as result of which defendant lacks... (“causal link”)	
<i>COGNITIVE CAPACITY</i>	<i>VOLITIONAL CAPACITY</i>
Interpretation can tend toward <i>moral</i> or <i>legal</i> dimensions	Can be instant or durable
<p><i>Nature-and-quality</i> or <i>wrongfulness</i> verbiage (and any similar wordings, recent or old) is not inherently determinative of whether the inquiry should be into the legal or moral domain, or focus on objective or subjective morality</p> <p>The same goes for the verbiage of “knowing,” “understanding,” “appreciating,” “distinguishing from” or “between.” Other than that they all allude to <i>cognitive</i> capacity, these terms in and of themselves do not determine whether the inquiry should be legally or morally focused, measured via objective or subjective standards</p>	<p>The precise statutory wording of the volitional component—<i>inability to conform conduct to [or within] the requirements of the law</i>, (“control or restrain his acts,” “resist committing the crime,” “incapable of preventing himself from,” etc.)—is not in itself determinative of whether the compulsion problems aimed at are long- or shorter-term</p>
<p>Lawyers and courts can give multiple plausible interpretations, as they historically have, even if some terms appear to facilitate one arguable interpretation more easily than another</p> <p>Neither term, <i>nature-and-quality</i> or <i>wrongfulness</i>, equates and should not be equated with any particular psychiatric diagnoses or forensic articulations of the same (not schizophrenics, wild beasts, lunatics, imbeciles or any such terms in current or past use)</p>	<p>Lawyers and courts are able to manipulate the meaning of any of these various articulations in the service of the result they want, be that their client’s perceived interests or “the ends of justice”</p> <p>None of the statutory articulations equate to particular psychiatric diagnoses or forensic descriptions (whether delusions fixed or not so fixed, hallucinations commanded from within or without, etc.)</p>

INSANITY DEFENSE PROCESS (as compared to mental-state defense alternatives)		
<i>INSANITY</i>	<i>DIMINISHED CAPACITY*</i>	<i>MENS REA/INTENT</i>
<i>(Expert) testimonial latitude</i>		
Anything goes, so long as in the medical realm, within the expert's expertise**	Expert may testify to incapacity to form intent of people <i>like</i> the defendant	Expert may testify to actual intent only
Intent often conceded		No expert testimony at all?
<i>Standard and burden of proof</i>		
Affirmative defense, burden on defendant	In the UK, affirmative defense, burden of proof on defendant; in U.S., jurisdiction-specific, conceptual confusion, but leaning toward prosecution to prove intent and state of mind appropriate to the charges filed, irrespective of defense claims to contrary ***	Prosecution's burden
Standard typically clear and convincing	In the UK, defendant must prove by the balance of probabilities (i.e., preponderance of the evidence); in U.S., jurisdiction-specific, but predominantly articulated as prosecution continuing to have to establish intent element(s) beyond a reasonable doubt, negating mental-state evidence to contrary ***	Must prove intent beyond reasonable doubt
<i>Verdict and consequences if successful for defendant</i>		
NGRI	Conviction on lesser charge	Full acquittal
Hospitalization	Prison if serious enough	Defendant goes free

*This does not include Diminished Capacity as that concept is used today in the federal courts, which is pure (back-end) sentence mitigation, albeit under the guidance of a set of elaborate, detailed Sentencing Guidelines specific to the federal system. The Guidelines explicitly provide for the possibility of special reductions in punishment ("Downward Departure") on proof of "reduced mental capacity." U.S.S.G. § 5K2.13. *See United States v. Roach*, 296 F.3d 565 (2002) (illustrating the concepts in application). Once mandatory and subject to appeal by the prosecution on errors of fact, law and abuse of discretion, the Guidelines are today advisory only (*United States v. Booker*, 543 U.S. 220 (2005)) though still much in use.

**The constraint on psychiatric experts to stay within their (the

medical) field when testifying has resulted in the “medicalization” of any number of cultural, sub-cultural and socio-economic factors as well as defendants’ personal experiences, deprivations or traumas as “syndromes” that might excuse or mitigate criminal behavior—some no doubt more compellingly than others. Psychiatry has been amply complicit with the criminal defense bar in this. Thus, in the last generation or two, we have not only come to hear in criminal courts of Battered Woman Syndrome (*see infra* p. 18 and note 112) but also of Premenstrual Syndrome; of Intermittent Explosive Disorder and of Adjustment Disorders, including Transient Situational Reaction Disorders, that allegedly drive one to kill or “explain” the killing; of Cybernet Addiction and Involuntary Subliminal Television Intoxication for the same; and of Rotten Social Background (*see infra* p. 5) as well as of Urban Psychosis, Urban Survival Syndrome and the Black Rage defense. The last four have been derisively labeled as coming under the rubric of “Welfare Criminology.” (*See* Stephen Morse, *The Twilight of Welfare Criminology: A Reply To Judge Bazelon*, 49 S. Cal. L. Rev. 1269 (1976)). This may be more pejorative than deserved. After all, these socio-economic factors do have effect. One need not be a full-fledged determinist to acknowledge that life-choices are not the same for everyone: the deprivations and, one surmises, the advantages of upbringing—the formative experiences—do matter. And the choices affect behavior, they *are* behavior. The problem lies in shoe-horning all this sociology into medicine. In our particular realm of criminal law, however arbitrary it may be, only medical conditions are relevant. And medical and psychiatric experts may speak only to those conditions. *See* Brakel & Brooks, *supra* note 9, at 67–68, 159–160.

***The reason for leading with a reference to English law is that it is unambiguous both in assigning the burden of proof to the defense and stating the standard as the balance of probabilities (Homicide Act of 1957, 5 & 6 Eliz. 2, c 11 § 2, as amended by the Coroners and Justice act of 2009; digestiblenotes.com/law/criminal/diminished_responsibility.php [perma.cc/HH56-T44G]), whereas in the U.S. these are abundantly unclear. This is so not merely because we have a federalist system in which the states are at liberty to enact laws in this arena as they see fit (within Constitutional limits, of course—*see* *Powell v. Texas*, 392 U.S. 514 (1968)) but because even intra-jurisdictionally the concept of Diminished Capacity, as applied as much as in theory, is highly elusive. *See generally* Peter Arenella, *Diminished Capacity and Diminished Responsibility: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 1977); Stephen Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology, 1 (1984); Harlow M. Huckabee, *Mental Disability: Evidence on Mens Rea Versus Insanity*, 20 W. St. U. L. Rev. 435 (1993). The very terminology used to denote the defense yields only disagreement, some saying Diminished Capacity and Diminished Responsibility are interchangeable, others maintaining they are widely different, one essentially a factual inquiry, the other a moral one with attendant implications for how they can be invoked, at what point in the process and

to what effect. And of course, also with attendant implications for burden and standard of proof, the pleas that can be made, at what point in the proceedings, and even the instructions given to juries. The Huckabee article, above, drawing in part on the Arenella piece, adds Partial Insanity, Partial Responsibility, and Diminished Capacity *Mens Rea* (to distinguish it from Strict *Mens Rea*) to the lexicon, but the notion that this helps clarify anything is an idle one. As said, even within one state there is often no consensus. The case precedents do not add up to a single, identifiable definition of what is being litigated or the direction to it. In *Clark v. Arizona*, 548 U.S. 735 (2006), the defense, after failing with its insanity plea, argued the procedural part of the case as one of evidentiary constraints placed by the State on Diminished Capacity evidence (which is not by law available in Arizona), whereas the Court responded in *mens rea* terms. In a 1975 survey, some twenty-five states were identified as having “adopted” a Diminished Capacity defense (Brakel & Brooks, *supra* note 9, at 164)—most, perhaps all, by court decision. In the wake of the John Hinckley debacle, the federal government and California rid themselves of the defense via legislation, with a popular referendum to boot (California Voter Initiative, Prop. 8, 1982) in the latter (Insanity Defense Reform Act of 1984; Cal. Penal Code, Section 25; but *see* Section 28 passed to preserve “Diminished Actuality” referred to at p.—in text). There is something to be said for both creating and abolishing such rights legislatively. It helps affirm that as a statutory grant, to which there is no inherent or constitutional entitlement (as in the U.S. there isn’t even to an insanity defense), the law of Diminished Whatever can place both the burden and standard of proof where it wants and where it makes logical sense. There should be no argument that one can put burden on the party that profits from the defense’s availability, wants to assert it, and pitch the standard wherever the State wants the risk of error to be allocated. So we will not have this endless confusion and constant litigation resulting therefrom. It appears that most U.S. jurisdictions that retain any form of Diminished Capacity lean toward assigning the burden to the prosecution to establish intent, however “diminished,” beyond a reasonable doubt. State actors who would like to fix what needs fixing might do well to emulate what the British Parliament did.

To end the discussion, it might be instructive to compare *People v. Patterson*, 423 U.S. 197 (1977) with *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In the former, the U.S. Supreme Court held it was perfectly permissible for the state of New York to make Extreme Emotional Disturbance (EED) an affirmative defense with the burden of proof on the defendant. Just as in the post-Hinckley era we had woken up to the logic of explicitly doing the same with the insanity defense. *See also Medina v. California*, 505 U.S. 437 (1992), for permissible shifts in the burden to prove competency to stand trial, traditional presumptions to the contrary notwithstanding. With EED, we are after all talking “medical” conditions, and “medical” arguments being made, with the help of “medical” experts (or so the logic goes). They do not address intent *specifically* (pun intended). By contrast, in *Mullaney*, the defense was “heat of passion”

which, once asserted or inferred from the facts, the prosecution had to disprove as affecting the requisite intent—i.e. the traditional burden and attendant standard remained intact.