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Articles

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REHABILITATING MENTAL DISORDER EVIDENCE AFTER CLARK v. ARIZONA: OF BURDENS, PRESUMPTIONS, AND THE RIGHT TO RAISE REASONABLE DOUBT

Introduction

A criminal trial is many things: [1] a quest for truth, [2] a moral drama, [3] a means of averting escalating cycles of private vengeance. [4] At its ***646** procedural core, though, a criminal trial is the defendant's constitutionally prescribed opportunity [5] to "test the prosecution's case"—that is, to evaluate and to challenge the prosecution's evidence against the defendant. [6] At trial, the defendant is presumed innocent, and this presumption is overcome only if the prosecution proves every element of the charged offense beyond a reasonable doubt. [7]

The right not to be found guilty of a crime absent proof beyond a reasonable doubt is a powerful right. [8] It can be undermined, however, ***647** by rules that at first seem to have little to do with reasonable doubt or with burdens of proof. For example, a rule that limits the admissibility of a certain kind of defense evidence might appear only to implicate questions about a state's authority to enact rules governing the presentation of evidence at criminal trials—an authority that the states generally possess. [9] But rules that prohibit criminal defendants from presenting evidence might effectively, even if inadvertently, lessen the prosecution's burden and allow for guilty verdicts on the basis of proof less than beyond a reasonable doubt. [10]

In the recent case of Clark v. Arizona, [11] the Supreme Court considered whether states may enact rules that categorically prohibit criminal defendants from offering mental disorder evidence for the purpose of raising reasonable doubt regarding the mens rea element of a charged offense. [12] Arizona law allows criminal defendants to present mental disorder evidence only for the purpose of proving insanity; it prohibits other uses of such evidence by criminal defendants. [13] A defendant can be found "guilty except insane" (Arizona's version of an insanity verdict [14]) if he establishes, by clear ***648** and convincing proof, that at the time he committed an offense, he did not know that his actions were wrong. [15] Mental disorder evidence is inadmissible for the purpose of disproving mens rea unless a defendant is pleading insanity, and mental disorder evidence that is admissible but insufficient to meet the burden of proving insanity—yet is sufficient to raise reasonable doubt about mens rea—simply has no effect. [16]

That Arizona prohibits defendants from using mental disorder evidence to raise reasonable doubt about mens rea means that the prosecution's burden of proof is effectively lessened. While the jury must still decide whether the prosecution's evidence proves the elements of the charged offense beyond a reasonable doubt, the jury will make this decision on the basis of the prosecution's evidence as presented by the prosecution and not on the basis of the prosecution's evidence

as challenged by the defense's evidence.[17] The Supreme Court in Clark acknowledged that Arizona's rule potentially denies criminal defendants the right to test the prosecution's case.[18] But the ***649** Court seemed determined not to conclude that Arizona's rule is unconstitutional, first characterizing the effect of the rule as the "channeling" of evidence rather than the excluding of evidence,[19] and then finding that this "channeling" did not violate the defendant's right to raise a reasonable doubt because Arizona has "good enough" reasons for limiting the presentation of mental disorder evidence.[20]

Most states do not have special rules regarding criminal defendants' presentation of mental disorder evidence.[21] In these states, defendants may offer mental disorder evidence for either or both of two purposes: to prove insanity and to raise reasonable doubt about mens rea. About a dozen states, however, have rules like Arizona's—rules that prohibit criminal defendants from offering mental disorder evidence to raise reasonable doubt about mens rea.[22] The purpose of this Article is to review the scope of problems that such rules cause. Part I of this Article presents an overview of Clark v. Arizona, including a discussion of the evidence that the defendant sought to present to raise reasonable doubt and of the trial court's decision to exclude that evidence. Part II reviews the principles that ***650** govern a criminal defendant's right to present evidence. As a general rule, in our system of justice more evidence is preferred to less. This preference is reflected in many federal and state rules of evidence and in the constitutional limitations on the power to enact rules of evidence that effectively deny criminal defendants a fair trial. Part III focuses on mental disorder evidence, identifying two generally helpful and trustworthy categories of evidence: evidence that presents factual information about a mental illness and evidence that describes a defendant's pre-offense history of a mental illness. Finally, Part IV examines a defendant's right to raise reasonable doubt in relation to states' rights to adopt a presumption of sanity and to define (or redefine) elements of criminal offenses. The Article concludes that because rules like Arizona's prohibit, for insufficient reasons, criminal defendants from presenting evidence that is helpful and trustworthy, such rules threaten the right to present a meaningful defense.

I. Clark v. Arizona

Eric Clark was charged with first-degree murder for shooting and killing police officer Jeffrey Moritz.[23] Clark conceded that he killed a police officer but argued that he was not guilty of first-degree murder, which requires that the killing of the officer have been intentional or knowing, because at the time he shot Moritz, he believed Moritz was an alien.[24] Witnesses testifying for both the defense and the prosecution agreed that Clark suffered from schizophrenia.[25] Clark's parents and friends reported that in the months preceding the ***651** shooting, Clark talked a great deal about people becoming aliens.[26] They also reported that Clark's behavior had become increasingly bizarre—he had strung wire across his bedroom to catch intruders, for example, and he kept a bird in his car to detect airborne poisons.[27]

At his bench trial, Clark sought to introduce evidence of mental disorder for the purpose of supporting two claims: the claim that because Clark thought Moritz was an alien, he did not know that shooting him was wrong;[28] and the claim that because he thought Moritz was an alien, he did not intentionally or knowingly shoot a police officer.[29] The trial judge allowed the evidence in support of the affirmative defense of insanity but not in support of the second defense,[30] which Arizona regrettably[31] calls the "defense of ***652** diminished capacity."[32] In ruling that Clark could not present mental disorder evidence in support of his claim that he did not intentionally or knowingly kill a police officer, the trial judge determined that Arizona law prohibits criminal defendants from presenting mental disorder evidence for the purpose of disproving mens rea.[33] After ***653** finding that Clark had not proven insanity by clear and convincing evidence, the trial judge ruled that Clark was guilty of first-degree murder for intentionally or knowingly killing a police officer.[34]

Clark is an unusual case because Clark's "diminished capacity defense" overlapped with his insanity defense. [35] If Clark's insanity defense had succeeded, it would have been because the judge, as fact-finder, concluded that Clark did not know that what he was doing was wrong—that is, that Clark believed that he was shooting an alien and not a police officer. It is possible to think that because Clark's insanity defense did not succeed, his "diminished capacity defense" could not have succeeded either. Clark was able to present lay and expert testimony about his mental illness in support of an insanity defense, so whatever evidence Clark was unable to present in support of his "diminished capacity ***654** defense" did not alter the outcome of his trial. [36] Even if the judge had considered the mental disorder evidence in support of Clark's "diminished capacity defense," the result could not have been any different, because for the "diminished capacity defense" to have succeeded, the judge would have had to conclude that Clark did not know that he was shooting a police officer—the very conclusion the judge rejected in deciding that Clark was not insane.

The problem with this analysis is that it overlooks the two defenses' different burdens of proof. In order to be found insane, Clark needed to present clear and convincing evidence that at the time he shot Officer Moritz, he believed the officer was an alien. [37] In order to be found not guilty because the prosecution did not prove the mens rea element of "intentionally or knowingly" beyond a reasonable doubt, Clark needed only to present evidence that was sufficient to raise a reasonable doubt. [38] The trial court's guilty verdict says that Clark did not present clear and convincing evidence, but the verdict does not say anything at all about whether Clark's evidence would have created reasonable doubt had he been allowed to present it for that purpose.

Arizona's law allowing criminal defendants to present mental disorder evidence only for the purpose of proving insanity is contrary to the most basic principles of our system of justice. It prohibits criminal defendants from presenting a whole category of important evidence, while imposing no similar prohibition on the prosecution. And it lessens the prosecution's burden of proof by limiting the defendant's ability to challenge the prosecution's evidence, thereby denying the defendant the right to be found guilty of a crime only upon proof beyond a reasonable doubt.

II. The Right to Raise Reasonable Doubt

A. In re Winship: The Reasonable Doubt Rule

Although the precise origins are unclear, the roots of the rule that criminal convictions require proof beyond a reasonable doubt extend back at least several centuries. [39] Some trace the rule back to 1798 and defense attorneys' success in raising the prosecution's burden of proof in the Irish Treason Cases. [40] Others believe that the rule was ***655** introduced even earlier, for the purpose of lessening the prosecution's burden of proof, when "blood punishments" were common and jurors were hesitant to convict on less than proof beyond all doubt. [41]

In this country, the Supreme Court recognized the reasonable doubt rule as a constitutional requirement in 1970. In re Winship [42] involved a proceeding for determining whether a juvenile was a "delinquent" under a New York law that allowed such a determination to be based on a preponderance of the evidence. [43] Following its earlier decision in In re Gault, [44] which had held that juvenile proceedings must comply with "the essentials of due process and fair treatment," [45] the Supreme Court in Winship ruled that "juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law." [46]

Requiring proof beyond a reasonable doubt in criminal cases promotes several important values of our system of justice. The reasonable doubt rule reflects the determination that convicting someone who is innocent is much worse that not convicting someone who is guilty. [47] The rule also gives meaning to the presumption of innocence [48] and helps to ensure that those who are convicted deserve ***656** to be punished. [49] And because the reasonable doubt rule accords with

our general sense of the protections that should be provided to criminal defendants, the rule enhances the perceived legitimacy of the criminal justice system. [50]

B. A Preference for Admissibility

1. The Rules of Evidence

Juries are our legal system's fact-finders and ultimate decision makers. [51] Of course, juries need evidence to assess facts accurately and to reach just decisions, and if too much evidence is excluded, juries cannot properly do their job. [52] Rules that make evidence inadmissible are inconsistent with our adversarial system's [53] basic ***657** operating principle that the best way to arrive at the truth—or at least at a decision that the participants and the public can accept [54]—is to allow both parties to present their own evidence and to challenge the evidence presented by the opposing party. [55]

The Federal Rules of Evidence—which have influenced most if not all states' rules of evidence [56]—begin with the premise, presented in Rule 402, that all relevant evidence is admissible. [57] Rule 401 defines relevance exceptionally broadly, so that evidence is irrelevant only if it does not have "any tendency" at all to prove or disprove a fact that could make a difference in the jury's decision. [58] The Rules do preclude certain categories of evidence, such as hearsay [59] and ***658** character evidence, [60] as especially untrustworthy. [61] But the Rules also provide for numerous exceptions to these exclusions, for evidence that possesses "particularized guarantees of trustworthiness" despite belonging to an untrustworthy category. [62] Rule 803, for example, lists twenty-three exceptions to the rule that hearsay is inadmissible. [63]

Another rule that embodies the preference for admitting evidence is Rule 403, which embraces the Rules' presumption in favor of admitting relevant evidence [64] and sets a high standard for overcoming that presumption on the basis of such risks as causing unfair prejudice, confusing the jury, or wasting the court's resources. [65] Relevant evidence may be excluded under this rule only if the risk ***659** "substantially outweighs" the evidence's probative value. [66] Thus, ties or close cases are resolved in favor of admitting the evidence; [67] only in very clear cases should the evidence be excluded. [68]

2. The Constitution

In addition to our adversarial system's general preference for more rather than less evidence, rights granted under the Constitution create special preferences for allowing criminal defendants to present evidence. [69] For example, the Sixth Amendment guarantees defendants the right to call witnesses on their own behalf, [70] while the Fifth Amendment implicitly guarantees defendants the right to testify in their own defense. [71]

The Supreme Court has also found that the Due Process Clause implies additional rights. For example, one requirement of due process is that "criminal prosecutions must comport with prevailing notions of fundamental fairness." [72] The Supreme Court has interpreted "fundamental fairness" as requiring that "criminal defendants be afforded a meaningful opportunity to present a complete defense." [73]

***660** In Clark, the Supreme Court acknowledged that the right to raise reasonable doubt is part of the due process guarantee of fundamental fairness: "[I]t violates due process when the State impedes [a defendant] from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form mens rea." [74] Accordingly, a

defendant who has been prohibited from presenting evidence for the purpose of challenging the prosecution's case has at least potentially been denied the right to a fundamentally fair trial. [75]

Of course, like all rights, the right to present evidence for the purpose of raising reasonable doubt is not absolute. [76] On the other hand, due process requires the government to have valid, proportionate, non-arbitrary reasons for excluding a criminal defendant's evidence. [77] For example, the Supreme Court recently ruled in Holmes v. South Carolina [78] that the state violated the defendant's due process right to present a meaningful defense by prohibiting him from introducing evidence for the purpose of proving that someone else had committed the charged offense. [79] The Court ***661** determined that the exclusion of the defendant's evidence was arbitrary because the trial court had reached its decision to exclude by considering only the strength of the prosecution's case, not by considering the strength of the prosecution's case as challenged by the defendant's evidence: "[I]n evaluating the prosecution's forensic evidence and deeming it to be 'strong'—and thereby justifying exclusion of petitioner's third-party guilt evidence—the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence." [80]

Additionally, decisions to exclude a criminal defendant's evidence should generally be made on a case-by-case basis rather than on a categorical basis. [81] In several cases, the Supreme Court has ruled that the "wholesale" exclusion of certain categories of defense evidence is unconstitutional. For example, in Crane v. Kentucky, [82] a case in which the state court prohibited the defendant from presenting evidence for the purpose of proving that his confession was unreliable, [83] the Court found that there was no "rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." [84] Similarly, in Washington v. Texas, [85] a state statute rendered inadmissible the testimony of the defendant's accomplice. [86] The Court ruled that the state had inappropriately "prevent[ed] whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." [87] And in Rock v. Arkansas, [88] the state prohibited the defendant from testifying after she had been hypnotized. [89] The Court held that "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections." [90] The lesson of these cases is that even though some accomplice testimony or hypnotically refreshed testimony (or any other category of evidence) might be untrustworthy, a rule that categorically prohibits ***662** criminal defendants from presenting such evidence is not justified unless the evidence is always untrustworthy. [91]

3. Mentally Ill Criminal Defendants

Rules that exclude criminal defendants' evidence of mental disorder are particularly burdensome because a defendant's mental state is potentially at issue in almost every criminal case. Aside from a few kinds of strict liability crimes, which are generally disfavored, [92] a crime is defined as an actus reus and a mens rea—a guilty act and a guilty mind. [93] In almost every criminal trial, then, the jury must reach a conclusion about the defendant's mental state at the time of the offense. Given the importance of the jury's conclusions about the defendant's mental state, it is not surprising that defendants have called upon psychiatrists and other mental health experts to testify on their behalf. [94]

Criminal defendants' use of mental disorder evidence has generated a large amount of controversy. [95] As courts, commentators, and even psychiatrists themselves have pointed out, psychiatry is an "inexact science." [96] But even assuming that psychiatry is ***663** meaningfully less exact than other medical sciences, [97] the proper way to deal with the inexactness of psychiatry is not to ban all mental disorder evidence. [98] Such a ban not only is contrary to the general preference for evidence, [99] it also can deny criminal defendants the right, as guaranteed under the Constitution, to present

a meaningful defense. [100] Instead, the solution should be to help courts separate the helpful, trustworthy evidence from the unhelpful or untrustworthy evidence. And contrary to the Supreme Court's opinion in Clark v. Arizona, some kinds of mental disorder evidence are indeed generally helpful as well as trustworthy.

III. Mental Disorder Evidence: Identifying the Helpful and the Trustworthy

Mental disorder evidence has been criticized in a variety of ways. Expert psychiatric testimony is subject to the criticisms of expert evidence in general, [101] including the arguments that jurors will place undue weight on the testimony of someone that the court calls an "expert" [102] and that experts are nothing more than "hired guns." [103] ***664** Additionally, critics of mental disorder evidence have alleged that this type of evidence is unnecessary or misleading at best and "junk science" or "psychobabble" at worst. [104]

The Supreme Court put its stamp of approval on such criticisms in Clark v. Arizona. [105] In Clark, the Court upheld Arizona's rule that prohibits defendants from presenting evidence of mental disorder for the purpose of disproving mens rea because the Court agreed with what it supposed were Arizona's reasons for prohibiting this evidence. [106] But the Court gave Arizona's rule too much benefit of the doubt. The constitutional test is not whether some mental disorder evidence is untrustworthy, or even whether mental disorder evidence in general is untrustworthy, but whether all mental disorder evidence is so untrustworthy as to justify a total ban on such evidence, given a criminal defendant's countervailing right to a fundamentally fair trial. [107] Unless all mental disorder evidence is in all cases untrustworthy, categorically prohibiting criminal defendants from presenting this evidence risks violating defendants' due process right to present a meaningful defense— in particular, to raise reasonable doubt about the mens rea element of a charged offense. [108]

A. Reconsidering Clark v. Arizona

1. The Right to Raise Reasonable Doubt Recognized

In Clark, the Supreme Court acknowledged that Clark had a due process right to present mental disorder evidence to raise reasonable doubt about the mens rea element of first-degree murder. [109] The Court further noted, however, that "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that." [110] A key ***665** ruling in Clark, then, is the Court's conclusion that Arizona had "good enough" reasons for prohibiting Clark from presenting mental disorder evidence for the purpose of proving that although he did kill a police officer, he did not do so intentionally or knowingly. [111]

2. The Court's Categories of Evidence

Before evaluating Arizona's reasons for excluding Clark's evidence, the Court divided the world of mental disorder evidence into three categories: observation evidence, mental disease evidence, and diminished capacity evidence. [112] Why the Court did this is a mystery. The Court suggested that it created these divisions because Clark had not objected to the trial court's exclusion of some categories of evidence. [113] But before the Court invented them, these categories did not exist, so why the Court would expect Clark to have objected to each of the categories is, again, a mystery. [114] This Article largely ignores these invented categories because they appear nowhere else in the law, [115] because they do not capture all of the kinds of mental disorder evidence that a criminal defendant might want to present, [116] and because it

is quite clear that the trial judge in Clark interpreted Arizona state law as prohibiting Clark from presenting any kind of mental disorder evidence for the purpose of raising reasonable doubt about mens rea. [117]

***666 3. The Court's Assessment of Mental Disorder Evidence**

The Court offered three reasons that it considered "good enough" to justify Arizona's decision to prohibit a criminal defendant from presenting mental disorder evidence for the purpose of disproving mens rea: some mental disorder diagnoses are not generally accepted; [118] expert testimony about mental disorder can potentially mislead jurors; [119] and diminished capacity evidence is particularly untrustworthy. [120]

Each of these reasons is (to begin with) facially problematic. First, that some mental disorder diagnoses are not generally accepted does not mean that no mental disorder diagnoses are generally accepted. Schizophrenia is such a generally accepted diagnosis. [121] In Clark itself, for example, no one disputed that Clark was properly diagnosed with schizophrenia. [122]

Second, the possibility that expert testimony will mislead jurors is not unique to expert testimony about mental disorders. The Court's analysis is particularly frustrating here: the Court suggested that because jurors might hear testimony of two experts who disagree with each other, expert psychiatric testimony can "easily mislead" jurors. [123] But experts disagree in all kinds of cases. [124] Moreover, the ***667** Court said nothing about why expert psychiatric testimony is too untrustworthy to be admitted by a defendant in a criminal trial, yet is trustworthy enough to be admitted by the prosecution in a criminal trial—or by any other kind of litigant in any other kind of case. [125] The Court did explain that expert testimony about mental disorders can mislead jurors "because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis," [126] but this explanation, if taken to its logical conclusion, would bar all expert testimony except that offered by witnesses who are experts on the law.

Finally, what the Court says about diminished capacity evidence is likely true. This kind of evidence, understood in its proper, narrow sense, [127] probably is particularly untrustworthy. [128] But Arizona's rule goes far beyond excluding evidence of diminished capacity. Arizona's rule bars all evidence (or even in the Court's reclassified world of evidence, nearly all evidence [129]) of mental disorder for the purpose disproving mens rea. [130] Such a rule is overly burdensome, excluding much more evidence than is necessary for achieving the goal of admitting only mental disorder evidence that is helpful and ***668** trustworthy. This Article proposes that two types of evidence—evidence that provides factual, background information about mental disorder and evidence that describes a defendant's pre-offense history of mental disorder—are both generally helpful and trustworthy, and should not be excluded absent a particularized finding of unhelpfulness or untrustworthiness.

B. Identifying Helpful and Trustworthy Mental Disorder Evidence

1. Facts About Mental Disorder

Clark's parents and friends testified Clark thought the people in his town were aliens trying to kill him. These claims might not be believable without a psychiatrist confirming the story based on his experience with people who have exhibited similar behaviors. [131]

Jurors are presumed to be capable of assessing most evidence presented at a trial simply on the basis of their own experiences and their commonsense understanding of the world. [132] There are some kinds of ***669** evidence, though,

that jurors come to a trial unprepared to assess, unless they happen to have had some very uncommon life experiences. [133] Evidence of severe mental illness is one such kind of evidence. [134] In particular, jurors are likely to have misconceptions about the plausibility of a mentally ill defendant's account of his mental state. [135] A defendant's description of his visions of the devil, for example, or of his belief that the people he killed really are not dead, might well sound to jurors as if the description were borrowed from the latest made-for-television movie. Eric Clark claimed that when he shot Officer Moritz, he believed the officer was an alien [136]—a claim that is likely to be incredible to at least some jurors. [137] To someone who is unfamiliar with the symptoms of severe mental illnesses, a defendant's account of such symptoms might well be simply unbelievable. [138]

***670** In these cases, jurors need evidence that educates them that such symptoms are not necessarily fabrications—that people with no motive to lie also report experiencing the same kinds of symptoms. [139] A witness providing such evidence should not be permitted to testify that the defendant is necessarily telling the truth, but the witness should be permitted to present evidence that will enable a jury to conclude that the defendant is not necessarily not telling the truth. [140]

Informing the jury that some people really do see things that do not exist, or do hold beliefs that have no basis in reality, is perhaps the most important objective that mental disorder evidence can accomplish in cases like Clark— cases in which the defendant claims ***671** to have had mental experiences that are so different from the average person's mental experiences that jurors are apt to incorrectly conclude that the defendant's report of such experiences cannot possibly be true. [141] Such evidence will be most helpful and least untrustworthy when it focuses on particularized symptoms rather than more abstract diagnostic categories. For defendants like Clark, what is likely to matter most is not evidence of a diagnostic label but rather evidence of the symptoms that a diagnosis encompasses. [142] So regardless of what the scientific community might think about the acceptability of the diagnostic category of schizophrenia, [143] for example, scientists do not dispute that the symptoms underlying such a diagnosis—in particular, delusions and hallucinations—really do exist. [144] The defendant's primary concern is not whether the jury believes that a particular diagnostic label is the proper one for his symptoms; what is most important to the defendant is that the jury understands his ***672** symptoms. [145] For Clark, it was the delusional belief that Officer Moritz was an alien, not the diagnostic label of schizophrenia, that had the potential to raise reasonable doubt about mens rea. [146]

Allowing defendants to present evidence for the purpose of correcting jurors' misconceptions about the symptoms of mental illnesses mostly avoids the issues that led the Supreme Court to conclude that Arizona had "good enough" reasons for prohibiting defendants from presenting such evidence. [147] This evidence is not about diminished capacity, experts are unlikely to disagree, and it does not depend upon potentially speculative diagnostic categorizations. And it is likely to be helpful as well as trustworthy.

a. Helpfulness

If jurors already know that some people really do hold delusional beliefs about aliens taking over the bodies of human beings, then expert testimony about such beliefs is not helpful because it tells the jurors something that they already know. [148] Some critics of syndrome evidence have suggested that proponents of such evidence overestimate jurors' misconceptions. [149] But while it might be true that some symptoms that defendants might seek to offer evidence about are already generally known to jurors, it is hard to believe that this is true of the symptoms of serious mental illnesses such as schizophrenia. Misconceptions about the insanity defense in ***673** particular are legion. [150] And attitudes toward defendants who raise any claim of mental illness at all are intensely skeptical. [151]

That mental illnesses are diagnosed on the basis of clinical judgment, and not on the basis of such objective measures as a blood test or brain scan, is likely to blame for some of the skepticism. [152] But while mental illnesses are easier to fake than are at least some physical illnesses, they are not nearly as easy to fake as most people believe. [153] It is of course possible that a defendant might be faking the ***674** symptoms of a mental illness, [154] but jurors seem likely to vastly overestimate this possibility.

In some sense, jurors cannot be faulted too much for their skepticism regarding criminal defendants' claims of psychotic symptoms. Many psychotic symptoms do have a ring of unbelievability—hearing voices, receiving special communications, thinking that someone who was a human being yesterday is an alien today. [155] Some jurors will in their everyday lives have encountered someone who really does hear or see things that do not exist, or who really does believe things that cannot possibly be true. For most jurors, though, evidence that people who are not criminal defendants do experience these kinds of psychotic symptoms is likely to be helpful—that is, such evidence is likely to inform the jurors of something they do not already know. [156]

b. Trustworthiness

Not only is factual, background evidence about mental disorder likely to be helpful, it is also likely to be trustworthy. [157] It simply cannot be disputed that some people experience psychotic symptoms, such as the delusional belief that aliens have taken over the bodies of human beings. [158] It is possible to imagine that jurors might be misled ***675** or confused about such evidence, but if we allow juries to render verdicts in cases like Clark, in which the defendant's account of his mental state at the time of the offense is that he believed the police officer that he shot was an alien, [159] we must believe that jurors are capable of thinking properly about evidence of the facts of mental disorder. [160] A criminal defendant has a right to be tried by a jury composed of people who are capable of understanding the issues that matter to the decisions the jury must make. [161] One of the purposes served by the Sixth Amendment's mandate that a defendant be tried by a jury "of the State and district where in the crime shall have been committed" [162] is that members of that jury will be the defendant's peers—people who come from similar circumstances as the defendant and can envision themselves in the defendant's place. [163] Jurors who do not understand a defendant's mental illness cannot fulfill this purpose.

2. Facts About Defendants

A harder question is whether a defendant should be allowed to present evidence for the purpose of proving that he has a history of a certain mental disorder, such as schizophrenia, or of a certain ***676** symptom, such as delusions. On one hand, such evidence presents a greater risk of misuse than does evidence that is not about the defendant in particular. [164] So long as a witness does not say anything about the defendant in particular, the jury cannot simply adopt the witness's assessment of the defendant.

On the other hand, the risk that evidence of a defendant's history of mental disorder will be misused can be minimized by limiting it to evidence about the defendant's history before the offense. This limitation is consistent with the spirit of the Federal Rules of Evidence's exception to the hearsay rule allowing an out-of-court statement to be admitted for the truth of the matter asserted if the statement is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." [165] While evidence of a defendant's mental disorder history would not be hearsay, and thus not governed directly by Rule 801, this exception suggests that evidence that is otherwise at least somewhat untrustworthy—whether hearsay statements or evidence about mental disorder history—ought to be admissible for the purpose of correcting jurors' misconceptions—whether those misconceptions relate to experiences that are significantly outside the realm of the average juror's experiences (and thus likely to be viewed as fabrications) or to a

more direct charge of fabrication. In Tome v. United States, [166] the Supreme Court interpreted Rule 801 to require that the out of court statement have been made before the motive to lie arose. [167] For defendants such as Clark, the motive to lie would have arisen at the time of the offense. [168] Thus, allowing evidence about a defendant's pre-offense history of mental disorder can be appropriate as a means to counter jurors' tendencies to believe—or in some cases, as a means to counter the prosecutor's explicit ***677** argument [169] —that the defendant's account of his mental state at the time of the offense sounds too convenient to possibly be true. Not allowing a criminal defendant to present trustworthy evidence that would equip jurors to assess this possibility according to its merits, rather than according to their misconceptions about mental disorder, lessens the prosecutor's burden of proof and denies the defendant the right to be convicted of a criminal offense only upon proof beyond a reasonable doubt.

IV. The Right to Raise Reasonable Doubt Meets States' Authority over Criminal Law

The authority to define and enforce criminal laws rests, of course, primarily with the states. [170] Just as certainly, however, the Constitution imposes some limits on the states' authority in this area. [171] For example, every legislature has adopted a presumption of sanity, so that prosecutors need not in every case present evidence that the defendant was sane at the time he committed an offense. [172] But this presumption ought not to be enforced by prohibiting criminal defendants from presenting evidence for the purpose of raising reasonable doubt about the mens rea element of a charged offense. Moreover, while legislatures might have the authority to define mental states as either elements of an offense or elements of an affirmative defense, [173] absent clear legislative action courts should not ***678** presume that mental states, which have long been elements of offenses, have suddenly become elements of affirmative defenses.

A. A Presumption of Sanity

The Supreme Court in Clark acknowledged that Arizona's rule that prohibited Clark from presenting mental disorder evidence for the purpose of raising reasonable doubt about the mens rea element of first-degree murder potentially violated Clark's due process rights. [174] Arizona's rule did not actually violate due process, the Court determined, because Arizona had "good enough" reasons for excluding Clark's evidence. [175] But while Arizona might have good enough reasons for excluding some mental disorder evidence, Arizona does not have good enough reasons for excluding all such evidence. [176] In particular, the trial court should not have excluded evidence explaining that some people do experience the types of bizarre delusions [177] that Clark claimed to experience, or evidence of Clark's pre-offense history of symptoms of schizophrenia, without a determination that in this particular case the evidence would have been unhelpful or untrustworthy.

The exclusion of all mental disorder evidence in Clark effectively lessened the prosecution's burden of proof regarding mens rea. Under Winship, the prosecution is required to prove mens rea beyond a reasonable doubt, [178] but under Clark, this burden is lessened because the defendant is prohibited from presenting helpful, trustworthy evidence that might raise reasonable doubt. [179] One of the most frustrating aspects of the Supreme Court's opinion in Clark is that the Court recognized the connection between rules regarding mental disorder evidence and burdens of proof. [180] The Court seems to have ***679** concluded, though, that Arizona's rule excluding mental disorder evidence was justified by Arizona's desire to enforce a presumption of sanity, a presumption that would be threatened if defendants could present mental disorder evidence to disprove mens rea. [181]

A presumption of sanity is unproblematic, as a general matter. [182] But prohibiting criminal defendants from presenting helpful, trustworthy evidence that might raise a reasonable doubt about an element of a charged offense is not just

recognizing a presumption of sanity—it is enforcing a presumption of sanity at the expense of the defendant's right not to be found guilty absent proof beyond a reasonable doubt. [183]

States might, as the Clark Court recognized, have an additional reason for wanting to prohibit criminal defendants from offering mental disorder evidence for the purpose of disproving mens rea. This evidence not only threatens a state's desire to enforce a presumption of sanity but also threatens a state's preference for mentally ill criminal defendants to be found "not guilty by reason of insanity" rather than to be found simply "not guilty" based on reasonable doubt about mens rea. States might prefer "not guilty by reason of insanity" verdicts because a defendant who is found not guilty by reason of insanity is usually thereby subject to more or less automatic civil commitment. [184] Such a preference ought to be accorded little if any ***680** consideration, however, because a defendant who is found not guilty after raising reasonable doubt about mens rea is also subject to civil commitment. [185] In every state, someone who is an imminent danger to himself or others because of a mental disorder is subject to civil commitment. [186] If a state's civil commitment rules are too narrow to allow for the involuntary treatment of a mentally ill criminal defendant who has been found not guilty of criminal charges on the basis of reasonable doubt about mens rea, the solution should be to revise those rules, not to prohibit criminal defendants from presenting evidence for the purpose of raising reasonable doubt about an element of a charged offense. [187] A criminal conviction should not be regarded as a proper substitute for appropriate civil commitment rules.

Moreover, and despite fears to the contrary, [188] rarely will mental disorder evidence negate mens rea for every criminal offense with ***681** which a defendant might be charged. As a general matter, mental disorder usually does not negate mens rea. [189] But even in those exceptional cases in which mental disorder does impair mens rea regarding a specific element of an offense—such as the element of intentionally or knowingly killing a police officer—mental disorder almost never negates mens rea altogether. [190] In Clark, for example, if mental disorder evidence had raised reasonable doubt about whether Clark intentionally or knowingly killed a police officer, Clark likely would still have been guilty of either second-degree murder or manslaughter. [191] Thus, states need not prohibit defendants from presenting evidence of mental disorder out of a fear that if such evidence raises reasonable doubt about a particular mens rea, mentally ill defendants will be released from all state supervision.

B. The Definition of Offense Elements and Affirmative Defenses

It is possible to view the problems that rules like Arizona's create as harmless, because the state's legislature could redefine murder as a strict liability offense and make the absence of mens rea an affirmative defense, [192] in which case the legislature could then place the burden of proving the absence of mens rea, by whatever standard it wanted, on the defendant. [193] Arizona itself made this argument ***682** before the Supreme Court in Clark. [194] But unless and until the Arizona legislature clearly redefines murder in this way, prohibiting defendants from presenting helpful, trustworthy mental disorder evidence for the purpose of disproving mens rea violates due process. [195] Courts should insist that the prosecution prove beyond a reasonable doubt every element of an offense as a legislature has ***683** actually defined it—not as a legislature might have defined it. [196] Moreover, redefining the elements of criminal offenses to overcome constitutional principles is easy to imagine but not especially common. [197] For example, after the Supreme Court in Patterson v. New York [198] upheld a state statute that required the defendant to prove "extreme emotional distress" as a partial affirmative defense to murder, [199] states did not en masse revise their criminal codes to redefine mens rea elements as affirmative defenses. [200] Similarly, after the Supreme Court ruled in Apprendi v. New Jersey that facts other than a prior conviction that increase a sentence above a statutory maximum must be proven beyond a reasonable doubt, [201] there was concern that legislatures would respond by raising maximum sentences and redefining elements of offenses as

sentencing factors or affirmative defenses so that judges could continue to impose sentences based on facts not proven beyond a reasonable doubt. [202] These fears, however, have largely not been realized. [203]

***684** It is also possible to argue that the Supreme Court's decision in Montana v. Egelhoff [204] is inconsistent with a defendant's constitutional right to present mental disorder evidence for the purpose of raising reasonable doubt about the mens rea element of a charged offense. In Egelhoff, the Court ruled that Montana did not violate due process by prohibiting defendants from presenting evidence of voluntary intoxication for the purpose of disproving the mens rea of any criminal offense. [205] In reaching this conclusion, the Court considered whether "a defendant's right to have a jury consider evidence of his voluntary intoxication in determining whether he possesses the requisite mental state is a 'fundamental principle of justice.'" [206] Because the common law historically did not recognize voluntary intoxication as a valid defense to a criminal charge, [207] the Court found that the right to present evidence of voluntary intoxication was not "fundamental." [208]

Additionally, in considering whether Montana's law violated the defendant's right to "a fair opportunity to defend against the State's accusations," [209] the Court found that Montana had "valid" reasons for excluding evidence of voluntary intoxication. [210] Intoxicated people commit many violent crimes. [211] Moreover, prohibiting defendants from presenting evidence of voluntary intoxication for the purpose of raising reasonable doubt about mens rea might deter people from becoming intoxicated, or from committing crimes while intoxicated. [212] And if some people do become intoxicated and commit crimes, prohibiting them from presenting evidence of their voluntary intoxication will help ensure that they are imprisoned and thereby prevented from committing future crimes. [213] Finally, the prohibition accords with the general sense that if someone chooses to become ***685** intoxicated, it is fair to punish her for whatever crimes she then commits while in that condition. [214]

Voluntary intoxication, though, is not schizophrenia. There are several important differences between prohibiting evidence of voluntary intoxication and prohibiting evidence of a mental illness such as schizophrenia. First, while the common law might not have recognized voluntary intoxication as a defense, the common law certainly recognized a defense arising out of severe mental disorder. [215] Additionally, Arizona does not have valid reasons for excluding all mental disorder evidence. People with even severe mental illnesses are unlikely to commit violent crimes. [216] And those who because of a mental illness are a danger to themselves or others may be detained and treated under civil commitment laws, [217] lessening the need to rely on criminal convictions to deter or incapacitate. [218] Finally, while people often choose to become intoxicated, people do not choose to develop schizophrenia. Neither the same practical considerations nor the same moral considerations that might warrant excluding evidence of voluntary intoxication similarly warrant excluding evidence of a mental illness such as schizophrenia. [219]

Conclusion

This Article has argued that at a minimum, criminal defendants should be allowed to present two specific types of mental disorder ***686** evidence. First, defendants should be allowed to present evidence to educate jurors about the facts of mental disorder—evidence explaining that people who have not been charged with any crime and therefore have little or no incentive to lie about such things do experience symptoms that might seem too strange to be believed. Second, defendants should be allowed to present evidence of their own pre-offense mental disorder histories. Both of these kinds of evidence will in most cases be helpful and trustworthy. In cases where the evidence is not, trial judges should be counted on to exclude it, just as they are counted on to exclude any other evidence that is not helpful or trustworthy.

That at least some mental disorder evidence is consistently helpful and trustworthy means that, contrary to the Supreme Court's assessment of such evidence in Clark, the untrustworthiness of mental disorder evidence cannot justify rules that categorically prohibit criminal defendants from presenting mental disorder evidence to disprove mens rea. Criminal defendants do not have an absolute right to present all relevant evidence, but they do have a right to rules that do not exclude more evidence than is warranted by the state interest the exclusion is intended to advance. Arizona's rule excludes far more evidence than is warranted. This rule therefore threatens criminal defendants' due process right to present evidence for the purpose of raising reasonable doubt. And as with all rules that risk violations of trial rights, the harmful consequences of Arizona's rule extend beyond individual defendants to include the state and the public, both of which also have an interest in the ability of juries to reach fair, accurate verdicts in criminal trials.

Footnotes

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1 See David P. Leonard, Rules of Evidence and Substantive Policy, 25 LOY. L.A. L. REV. 797, 797 (1992) (noting that “the modern trial serves a complex blend of functions”).

2 See Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (“[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . .”); Nix v. Whiteside, 475 U.S. 157, 166 (1986) (describing “the very nature of a trial as a search for truth”).

3 See David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 1, 41 (1986-87) (noting “the important cultural meaning of the trial—a social (even moral) drama calculated to reach acceptable conclusions”); Michael Mello, The Non-Trial of the Century: Representations of the Unabomber, 24 VT. L. REV. 417, 495 (2000) (“[C]ertain criminal trials are about more than guilt or innocence. One function of trials is to expose, identify, and condemn evil.” (footnote omitted)).

4 See Amanda C. Pustilnik, Violence on the Brain: A Critique of Neuroscience in Criminal Law, 44 WAKE FOREST L. REV. 183, 191 (2009) (“The criminal law takes as its object the definition, deterrence, and punishment of proscribed violent behavior; indeed, the regulation of interpersonal violence (and the arrogation to the state of the prerogative to inflict violence) arguably is a primary focus of criminal lawmaking and theory.” (citing DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 74-81 (1990); Martha Minow, Institutions and Emotions: Redressing Mass Violence, in THE PASSIONS OF THE LAW 265, 265 (Susan A. Bandes ed., 1999); James Q. Whitman, Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence, 39 TULSA L. REV. 901, 922-23 (2004)).

5 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”). Of course, the prevalence of plea bargaining in our current system makes it costly for defendants to exercise this opportunity. See Rachel E. Barkow, Originalists, Politics, and Criminal Law on the Rehnquist Court, 74 GEO. WASH. L. REV. 1043, 1051 (2006) (“Although jury trials remain an option even under a system dominated by plea bargaining because a defendant can reject a plea and go to trial, the existence of plea bargaining undermines the jury's power because it allows prosecutors to penalize defendants who exercise their jury trial right.”).

6 See John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 MICH. L. REV. 1047, 1048 (1994) (noting that modern criminal trials are “an opportunity for the defendant's lawyer to test the prosecution case”); see also Dwight Aarons, Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum, 76 TENN. L. REV. 511, 514 (2009) (“At trial, the defendant traditionally puts the State to its proof, most commonly by pleading not guilty and invoking the presumption of innocence.”).

7 See Herrera v. Collins, 506 U.S. 390, 398 (1993) ("A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt."); In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); United States v. Stevens, 935 F.2d 1380, 1406 (3d Cir. 1991) ("To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt.").

8 See Kate Stith, Crime and Punishment Under the Constitution, 2004 SUP. CT. REV. 221, 227 (noting that "[t]he most powerful procedural protection [the Constitution provides to those accused of a crime] is the requirement that the government prove the defendant's guilt beyond a reasonable doubt"). In a recent series of Sixth Amendment cases, the Supreme Court reaffirmed this commitment to a constitutional requirement that criminal sanctions be based on proof beyond a reasonable doubt of every element of an offense. In Apprendi v. New Jersey, the Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Then, in Blakely v. Washington, the Court ruled that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. 296, 303 (2004). Finally, in United States v. Booker the Court said that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. 220, 244 (2005).

9 See United States v. Scheffer, 523 U.S. 303, 308 (1998) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."); cf. Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (explaining that "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

10 See infra notes 17-18 and accompanying text.

11 548 U.S. 735 (2006).

12 See id. at 742. The Court framed the issue as
whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the mens rea, or guilty mind).
Id.

13 See id. at 756-57 (explaining the Arizona Supreme Court's rule that mental disorder evidence "could be considered, [but] only for its bearing on an insanity defense; such evidence could not be considered on the element of mens rea"); State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc) ("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.").

14 ARIZ. REV. STAT. ANN. § 13-502(D) (2001 & Supp. 2009). Under Arizona law, a "guilty except insane" verdict means that the defendant is subject to civil commitment for the amount of time that he would have been subject to incarceration if he had simply been found guilty:
If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could have received if the defendant had not been found insane, and the judge shall sentence the defendant to a term of incarceration in the state department of corrections and shall order the defendant to be placed under the jurisdiction of the psychiatric security review board and committed to a state mental health facility under the department of health services for that term.
Id.

15 Arizona's definition of insanity is purely cognitive, requiring a defendant to prove that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Clark, 548 U.S. at 744 (alterations in original) (quoting ARIZ. REV. STAT. ANN. §13-502(A) (2001)).

16 See id. at 756-57 ("The state court held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense; such evidence could not be considered on the element of mens rea . . . .").

17 As the Supreme Court of Colorado has explained, "A rule precluding the defendant from contesting the culpability element of the charge would render the prosecution's evidence on that issue uncontestable as a matter of law, in derogation of the presumption of innocence and the constitutional requirement of prosecutorial proof of guilt beyond a reasonable doubt." Hendershott v. People, 653 P.2d 385, 391 (Colo. 1982). In several cases, the United States Supreme Court also has acknowledged that excluding a criminal defendant's evidence means that jurors cannot properly evaluate the prosecution's evidence. See, e.g., Holmes v. South Carolina, 547 U.S. 319, 331 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."); Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.").

18 See Clark, 548 U.S. at 773-74 ("[I]t violates due process when the State impedes [a criminal defendant] from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form mens rea.").

19 See id. at 770.

20 See id. at 770-71 ("[T]he question is whether reasons for requiring [mental disorder evidence] to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires. We think they are.").

21 See SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 907 (8th ed. 2007) ("Most states do not impose special restrictions on the use of mental health evidence to rebut a required mens rea.").

22 According to the U.S. Government's amicus brief in Clark, "At present, at least 14 jurisdictions and the federal government impose significant restrictions on the use of mental health evidence in assessing mens rea." Brief for the United States as Amicus Curiae Supporting Respondent at 22, Clark, 126 S. Ct. 2709 (No. 05-5966), 2006 WL 542415. As the government recognized, though, some of these states prohibit only capacity evidence: "Some jurisdictions prohibit the use of mental health evidence to negate the capacity to form the necessary mental state but admit the evidence on the issue whether the defendant in fact formed the required mental state." Id. at 23. Michigan law, for example, prohibits "evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." People v. Carpenter, 627 N.W.2d 276, 282 (Mich. 2001). As in Arizona, however, courts in Michigan have failed to distinguish between evidence offered to prove diminished capacity and evidence offered to prove actual lack of mens rea. As a consequence, a defendant who wants to argue that the government has failed to prove mens rea beyond a reasonable doubt cannot use evidence of mental disorder to support this argument. "Rather, the insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation." Id. at 285. Capacity evidence is discussed in more detail infra note 31.

Four states no longer provide for a defense of insanity, effectively adopting the opposite of Arizona's rule and allowing mental disorder evidence only for the purpose of disproving mens rea. IDAHO CODE ANN. § 18-207(3) (2004); KAN. STAT. ANN. § 22-3220 (2001); MONT. CODE ANN. § 46-14-102 (2009); UTAH CODE ANN. § 76-2-305(1) (2003). No state prohibits criminal defendants from presenting mental disorder evidence for both purposes (proving insanity and disproving mens rea).

23 Clark, 548 U.S. at 743. The objective pieces of Clark are fairly simple:

In the early hours of June 21, 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died soon after but not before calling the police dispatcher for help. Clark ran away on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.

Id. It is the subjective piece—what was in Clark's mind at the time of the shooting—that is difficult to ascertain.

24 See id. ("At trial, Clark did not contest the shooting and death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute.").

25 See id. (referring to Clark's "undisputed schizophrenia"); id. at 776 (noting that "the two testifying experts in this case agree[d] that Clark was schizophrenic").

26 See id. at 745 ("There was lay and expert testimony that Clark thought Flagstaff was populated with 'aliens' (some impersonating government agents), the 'aliens' were trying to kill him, and bullets were the only way to stop them."); Petitioner's Opening Brief at 5, Clark, 126 S. Ct. 2709 (No. 05-5966), 2006 WL 282168 (discussing Clark's "belief that the Earth had been invaded by aliens, that Flagstaff was populated by aliens, that the aliens were trying to capture and kill him, and that even his parents were aliens").

27 Clark, 126 S. Ct. at 745 ("Witnesses testified, for example, that paranoid delusions led Clark to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders, and to keep a bird in his automobile to warn of airborne poison."); Petitioner's Opening Brief at 5, Clark, 126 S. Ct. 2709 (No. 05-5966), 2006 WL 282168 ("He would not sleep in his bedroom but retreated into the small computer room in his home, where he tied up a fishing line with beads and wind chimes to alert him to intrusion by invaders. He later returned to his room but equipped it with the same alarm apparatus." (footnote omitted)).

28 Clark, 548 U.S. at 744 ("[Clark] raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence that 'at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.'" (alterations in original) (citation omitted) (quoting ARIZ. REV. STAT. ANN. § 13-502(A) (2001))).

29 Id. ("Second, he aimed to rebut the prosecution's evidence of the requisite mens rea, that he had acted intentionally or knowingly to kill a law enforcement officer.").

30 See Clark, 548 U.S. at 745 ("The trial court ruled that Clark could not rely on evidence bearing on insanity to dispute the mens rea."); see also 1 Joint Appendix at 9, Clark, 548 U.S. 735 (No. 05-5966) ("[R]ight now I'm bound by the [Arizona] supreme court decision in Mott and we will be focusing, as far as I'm concerned, strictly on the insanity defense." (quoting statement of trial judge)). An Arizona appellate court agreed with the trial judge's decision to admit mental disorder evidence only for the purpose of proving insanity, stating that "the trial court was bound by the [Arizona] supreme court's decision in Mott, which held that '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.'" Arizona Court of Appeals Memorandum Decision ¶ 44, 2 Joint Appendix at 352, Clark, 548 U.S. 735 (No. 05-5966) (quoting State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc)).

31 Arizona seems to characterize any defense other than insanity that relates to mental disorder as a "diminished capacity defense." But what Arizona calls "diminished capacity" is best understood as a kind of evidence that might support two very different defenses: diminished responsibility, and what sometimes is called a failure of proof defense that really is not an affirmative defense at all.

Diminished responsibility defense is a sort of imperfect insanity defense. See Richard A. Bierschbach & Alex Stein, Mediating Rules in Criminal Law, 93 VA. L. REV. 1197, 1250 n.183 (2007) ("The defense of diminished responsibility covers mental or emotional disturbances that neither amount to insanity nor negate the defendant's mens rea [I]t often functions as a 'partial' defense, much like provocation, mitigating punishment or allowing conviction for a lesser-included offense."). A defendant who presents evidence for the purpose of proving that a mental disorder impaired his ability to understand, or live up to, his legal obligations is arguing that he is less culpable for his offense than would be someone who does not have a mental disorder. See Jonas Robitscher & Andrew Ky Haynes, In Defense of the Insanity Defense, 31 EMORY L.J. 9, 27 (1982) ("When a defendant offers a plea based on insanity, the issue is whether he can be held criminally responsible for his acts. With diminished responsibility, the issue is to what degree a person found guilty of such criminal act should be held responsible."). This is how the Supreme Court in Clark seems to have understood Arizona's rule: "The [Arizona] Supreme Court pointed out that the State had declined to adopt a defense of diminished capacity (allowing a jury to decide when to excuse a defendant because of greater than normal difficulty in conforming to the law)." Clark, 548 U.S. at 772.

A completely different argument, which Arizona also calls a diminished capacity defense, is a defendant's claim that the prosecution has failed to prove the mens rea element of the charged offense beyond a reasonable doubt. This claim does not present an affirmative defense like diminished responsibility. See United States v. Jumah, 493 F.3d 868, 873 (7th Cir. 2007)

("Failure of proof 'defenses' do not provide an independent basis for escaping criminal liability, but arise when a defendant introduces evidence that tends to show that the prosecution has failed to prove some element of the charged offense beyond a reasonable doubt, such as intent."); Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984) ("[T]he mens rea variant of diminished capacity is not a separate defense that deserves to be called 'diminished capacity' or any other name connoting that it is some sort of special, affirmative defense."). It is instead simply the straightforward proposition that the defendant is entitled to be found not guilty because the prosecution has failed to meet its burden of proof. See Note, Feasibility and Admissibility of Mob Mentality Defenses, 108 HARV. L. REV. 1111, 1115-16 (1995) ("Unlike an excuse defense, which concedes that the offense has been proven but argues that the defendant should be acquitted nonetheless, a failure-of-proof defense argues that the prosecution cannot prove some essential element of the crime.").

32 Clark, 548 U.S. at 772 (noting that "[t]he State Supreme Court pointed out that the State had declined to adopt a defense of diminished capacity").

33 The source of this rule is the Arizona Supreme Court's decision in State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc). See Clark, 548 U.S. at 745 ("The [trial] court cited State v. Mott, which 'refused to allow psychiatric testimony to negate specific intent,' and held that 'Arizona does not allow evidence of a defendant's mental disorder short of insanity to negate the mens rea element of a crime.'" (omission in original) (citations omitted)). In Mott, a jury found Shelly Mott guilty of felony child abuse and first-degree felony murder after she failed to obtain medical care for her two-year-old daughter, who had received a fatal head injury while in the care of Mott's boyfriend. See Mott, 931 P.2d at 1048-49. At trial, Mott sought to present expert testimony about battered women's syndrome as a part of her defense. Id. at 1049. The trial court ruled that such evidence was inadmissible because it was "an attempt to prove defendant's diminished capacity." Id. at 1048. Mott's purpose seeking to present battered women's syndrome evidence was not entirely clear. When the Arizona Supreme Court considered the case, the majority firmly believed that Mott's purpose was to prove that she lacked the capacity to intentionally or knowingly fail to obtain medical care for her child. See id. at 1049. The dissent, though, was equally convinced that Mott's purpose was not to argue diminished capacity—that is, to argue that she lacked the capacity to act with a certain mens rea—but instead to argue that she in fact lacked the specified mens rea. See id. at 1061 (Feldman, J., dissenting) ("[T]he majority takes the inconsistent position that use of psychiatric evidence to negate mens rea is the same as an attempt to prove diminished capacity."). A federal district court eventually agreed with the dissent and granted habeas relief to Mott, ruling that Mott had offered evidence of battered women's syndrome "to (1) provide an alternative explanation for her conduct and (2) negate the state's evidence that she acted intentionally or knowingly in failing to protect her child." Mott v. Stewart, No. 98-CV-239, 2002 WL 31017646, at *6 (D. Ariz. Aug. 30, 2002).

Despite the federal court's grant of habeas relief, Arizona courts continue to cite Mott as the source of the rule that Arizona does not allow defendants to present mental disorder evidence in support of a "diminished capacity" defense—that is, in support of any defense that is not insanity. See, e.g., Moormann v. Schriro, No. CV-91-1121-PHX-ROS, 2008 WL 2705146, at *11 (D. Ariz. Jul. 8, 2008); West v. Schriro, No. CV-98-218-TUC-DCB, 2007 WL 4240859, at *7 (D. Ariz. Nov. 29, 2007); Runningeagle v. Schriro, No. CV-98-1903-PHX-PGR, 2007 WL 4200743, at *11 (D. Ariz. Nov. 27, 2007); Schurz v. Schriro, No. CV-97-580-PHX-EHC, 2007 WL 2808220, at *10 (D. Ariz. Sept. 25, 2007); Stanley v. Schriro, No. CV-98-0430-PHX-MHM, 2006 WL 2816541, at *24 (D. Ariz. Sept. 27, 2006), aff'd in part & rev'd in part, No. 06-99009, 2010 WL 816940 (9th Cir. Mar. 11, 2010).

34 See Clark, 548 U.S. at 746 ("The judge issued a special verdict of first-degree murder, expressly finding that Clark shot and caused the death of Officer Moritz beyond a reasonable doubt and that Clark had not shown that he was insane at the time.").

35 See Stephen J. Morse & Morris B. Hoffman, The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1120 (2007) ("Note that if Clark were believed, he would be the rarest of the rare, a defendant whose severe mental disorder both produced a belief entirely inconsistent with a subjective mens rea on that occasion and undermined his general capacity for rationality.").

36 Peter Westen, for example, has suggested that Arizona did not prohibit Clark from presenting any evidence. See Peter Westen, The Supreme Court's Bout with Insanity: Clark v. Arizona, 4 OHIO ST. J. CRIM. L. 143, 151 (2006) ("If the judge had concluded that Clark had shown, by clear and convincing evidence that he thought he was shooting an alien rather than a human being, the judge would have acquitted Clark on the grounds, inter alia, that, despite his having killed a policeman, Clark did not 'know' he was killing a policeman."). In addition, the United States argued in an amicus brief that Clark would have met the requirement for insanity if he were "so incapable of forming intent or knowledge that he did not know the

wrongfulness of his act." Brief for the United States as Amicus Curiae Supporting Respondent at 27, Clark, 548 U.S. 735 (No. 05-5966), 2006 WL 542415.

37 See supra note 28 and accompanying text (presenting Arizona's definition of insanity).

38 See Clark, 548 U.S. at 773 (observing that "if the evidence shows it was at least doubtful that [the defendant] could form mens rea, then he should not be found guilty in the first place").

39 See Langbein, supra note 6, at 1070 ("[T]owards the end of the eighteenth century the presumption of innocence—the beyond-reasonable-doubt standard of proof—was formulated.").

40 See, e.g., Robert J. Gregory, Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process, 24 AM. CRIM. L. REV. 911, 913 (1987) ("It is generally believed that the reasonable doubt standard, as such, first surfaced in 1798 in the Irish Treason cases, wherein defense counsel argued that 'if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue they are bound' to acquit." (omission in original) (footnote omitted)); Jon O. Newman, Beyond "Reasonable Doubt," 68 N.Y.U. L. REV. 979, 981-82 (1993) ("Most believe that the 'reasonable doubt' standard was first urged upon courts in the Irish Treason Cases in 1798 by defense lawyers who were endeavoring to raise the prosecution's burden of persuasion." (footnote omitted)).

41 See, e.g., Newman, supra note 40, at 982 ("[T]here is a competing view that the [beyond a reasonable doubt] standard was urged by prosecutors who were trying to lower their burden of persuasion from an often unattainable task of having to persuade the jury beyond all doubt."); Anthony A. Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U. L. REV. 507, 511 (1975) (proposing that before adoption of the reasonable doubt rule, the prosecution's burden of proof "closely approximated absolute certainty—jurors were to acquit if they had any doubts"). See also generally JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008).

42 397 U.S. 358 (1970).

43 Id. at 359-60.

44 387 U.S. 1 (1967).

45 Id. at 30.

46 Winship, 397 U.S. at 365.

47 See id. at 372 (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

48 See id. at 363 (majority opinion) ("The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))); see also Scott E. Sundby, The Reasonable Doubt Rule and the Meaning of Innocence, 40 HASTINGS L.J. 457, 458 (1989) [hereinafter Sundby, The Reasonable Doubt Rule] ("In the criminal trial setting, the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant's guilt beyond a reasonable doubt.").

49 See Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 YALE L.J. 1299, 1339 (1977) ("Because the criminal sanction is an especially serious matter for both the defendant and the community, it is especially important to ensure that it is imposed only on a defendant who has forfeited his right to be free from punishment.").

50 See Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187, 1195 (1979) ("The strategy of the system is to seek the observers' acceptance of the jury as a surrogate decisionmaker, trusted because it is understood to be an impartial, responsible, and representative body, operating in a fair and structured system and deciding according to an exceedingly strict standard of guilt."); see also Winship, 397 U.S. at 364 ("It is important in our

free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."); Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting) ("It is the duty of the Government to establish [a defendant's] guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'").

51 See United States v. Valadez-Gallegos, 162 F.3d 1256, 1262 (10th Cir. 1998) ("The jury, as fact finder, has discretion to resolve all conflicting testimony, weigh the evidence, and draw inferences from the basic facts to the ultimate facts.").

52 See Rosen v. United States, 245 U.S. 467, 471 (1918) ("[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ."); 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 490 (Garland Publ'g, Inc. 1978) (1827) ("Evidence is the basis of justice: to exclude evidence is to exclude justice."); Lawrence Solum & Stephen Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence, 36 EMORY L.J. 1085, 1138 (1987) ("Our legal system presupposes that accuracy of fact-finding is usually proportionate to the amount of relevant evidence considered . . . .").

53 The adversarial system itself, with its skewed allocation of resources between the defendant and the government, is another reason to allow defendants to present evidence that might establish a reasonable doubt regarding an element of the charged offense. See Morse, supra note 31, at 16 ("Prohibiting the defendant from offering probative evidence to defeat the prosecution's prima facie case for any crime seems grossly unjust in an adversary system in which the state has such powerful resources compared to most defendants."); Amy Sinden, In Defense of Absolutes: Combating the Politics of Power in Environmental Law, 90 IOWA L. REV. 1405, 1463 (2005) ("The power imbalance between the individual and the state is perhaps nowhere more vividly and palpably on display than in a criminal proceeding, where 'the awesome power' and 'virtually limitless resources' of the state are pitted against the individual criminal defendant." (quoting Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring))).

54 See Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. CAL. L. REV. 1019, 1037-40 (1987) (discussing the goals served by criminal trials, including both truth and "fair play").

55 See sources cited supra note 52; see also Dale A. Nance, Reliability and the Admissibility of Experts, 34 SETON HALL L. REV. 191, 195 (2003) ("[A] justificatory premise of the adversary system is that the clash of opposing, relevant evidence will yield accurate results, at least frequently enough to render that system superior to the alternatives."); id. at 195 ("[T]he system encourages parties to present all relevant evidence that is reasonably available and not too weak to be of practical use, each side in the dispute having an incentive to present that which is significant and favorable.").

56 See GEORGE FISHER, EVIDENCE 2-3 (2d ed. 2008) ("At last count, forty-two states and Puerto Rico have adopted the Federal Rules in whole or in great part. Even those eight states that have adopted distinct evidence codes or have not codified their evidence law—California, Georgia, Illinois, Kansas, Massachusetts, New York and Virginia—adhere to similar evidence principles."); Michael E. Solimine, The Future of Parity, 46 WM. & MARY L. REV. 1457, 1488 (2005) ("As of 2004, forty-one states have adopted various versions of the Federal Rules of Evidence."). The desire to create uniformity among federal and state rules of evidence was one of the driving forces behind the development of the Federal Rules. See Michael Ariens, Progress Is Our Only Product: Legal Reform and the Codification of Evidence, 17 LAW & SOC. INQUIRY 213, 245-47 (1992).

57 FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."). Arizona's rule is nearly identical to the federal rule: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Arizona or by applicable statutes or rules." ARIZ. R. EVID. 402. The federal rules take a similar approach regarding the admissibility of opinion testimony. See Fed. R. EVID. 704 advisory committee's note ("The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact.").

58 See FED. R. EVID. 401 (defining relevant evidence to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

59 See FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

60 See FED. R. EVID. 404(a) (providing that, with three narrow exceptions, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"); FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

61 This Article uses the term "untrustworthy" to refer to evidence that is likely to lead a jury to render an unsound verdict. In large part, our rules of evidence are intended to systematically restrict untrustworthy evidence—the rule against hearsay and the rule against character evidence, for example, both have been explained as minimizing the risk that jurors will make decisions on the basis of evidence that is false or misleading. See Fleming James, Jr. & John J. Dickinson, Accident Proneness and Accident Law, 63 HARV. L. REV. 769, 792 n.103 (1950) ("In the eyes of the law, the inferences which might be drawn from evidence of character or reputation of the parties are too vague, uncertain and unreliable to be worthy of consideration in determining the merits, however just and reasonable such inferences may seem to the lay mind." (quoting 1 JONES, EVIDENCE IN CIVIL CASES § 148 (4th ed. 1938)); Laurence H. Tribe, Triangulating Hearsay, 87 HARV. L. REV. 957, 958 (1974) ("The basic hearsay problem is that of forging a reliable chain of inferences, from an act or utterance of a person not subject to contemporaneous in-court cross-examination about that act or utterance, to an event that the act or utterance is supposed to reflect."). Most legal commentators use the term "reliable" to mean what this Article means by trustworthy. See Joëlle Anne Moreno, Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and the Law with Justice Breyer at the Helm, 81 B.U. L. REV. 1033, 1067 n.192 (2001) ("Evidence is reliable if it has sufficient indicia of trustworthiness to be presented to the jury for its consideration."). "Reliable" is an unfortunate legal term because it carries a different meaning in the realm of science. In particular, "reliable" as a legal term means what both "reliable" and "valid" mean as scientific terms. See infra note 143 (discussing validity and reliability of psychiatric diagnoses).

62 FED. R. EVID. art. VIII advisory committee's note ("The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness.").

63 FED. R. EVID. 803; see also FED. R. EVID. 804 (listing five exceptions to the hearsay rule); FED. R. EVID. 807 (providing a residual exception for "[a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness").

64 See 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 241 (7th ed. 1998) ("[T]here is a presumption in favor of admitting relevant evidence.").

65 Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

66 Id.

67 See United States v. Rivera, 83 F.3d 542, 545 (1st Cir. 1996) ("[W]here the reviewing court finds the balancing close, Rule 403 tilts the balance in favor of admission."); 1 SALTZBURG ET AL., supra note 64, at 241 ("[T]he policy of [Rule 403] is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence.").

68 See United States v. Tan, 254 F.3d 1204, 1211 (10th Cir. 2001) (stating that "exclusion of evidence under Rule 403 that is otherwise admissible under the other rules 'is an extraordinary remedy and should be used sparingly.'" (quoting United States v. Rodriguez, 192 F.3d 946, 949 (10th Cir. 1999))).

69 There are several reasons for these preferences. One important reason is that the government has vastly more resources than do virtually all defendants. See sources cited supra note 53.

70 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor . . . .").

71 See Rock v. Arkansas, 483 U.S. 44, 52 (1987) (noting that "[t]he opportunity to testify is a necessary corollary to the Fifth Amendment's guarantee against compelled testimony").

72 California v. Trombetta, 467 U.S. 479, 485 (1984); see also Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (recognizing "the Fourteenth Amendment's due process guarantee of fundamental fairness"); Lisenba v. California, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").

73 Trombetta, 467 U.S. at 485; see also Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986))); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); Washington v. Texas, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

74 Clark v. Arizona, 548 U.S. 735, 773-74 (2006). The Court further explained:
An insanity rule gives a defendant already found guilty the opportunity to excuse his conduct by showing he was insane when he acted, that is, that he did not have the mental capacity for conventional guilt and criminal responsibility. But, as the dissent argues, if the same evidence that affirmatively shows he was not guilty by reason of insanity also shows it was at least doubtful that he could form mens rea, then he should not be found guilty in the first place; it thus violates due process when the State impedes him from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form mens rea.
Id.

75 See United States v. Pohlot, 827 F.2d 889, 901 (3d Cir. 1987) ("[A] rule barring evidence on the issue of mens rea may be unconstitutional so long as we determine criminal liability in part through subjective states of mind.").

76 See Erwin Chemerinsky, The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution, 103 HARV. L. REV. 43, 90 (1989) ("Because no constitutional rights are absolute, virtually every constitutional case involves the question whether the government's action is justified by a sufficient purpose.").

77 See United States v. Scheffer, 523 U.S. 303, 308 (1998) ("[R]ules excluding evidence from criminal trials do not abridge an accused's right to present a defense so long as they are not 'arbitrary or disproportionate to the purposes they are designed to serve.'" (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987))); Montana v. Egelhoff, 518 U.S. 37, 53 (1996) (plurality opinion) (stating that "the principle [is] that the introduction of relevant evidence can be limited by the State for a 'valid' reason"); id. at 63 (O'Connor, J., dissenting) ("[W]hile States have the power to exclude evidence through evidentiary rules that serve the interests of fairness and reliability, limitations on evidence may exceed the bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a valid state justification.").

78 547 U.S. 319 (2006).

79 Id. at 330-31.

80 Id. at 329.

81 See Washington v. Texas, 388 U.S. 14, 22 (1967) (finding that the trial court improperly excluded the defendant's evidence, in part because the exclusion was based on "a priori categories that presume [certain kinds of evidence] unworthy of belief"); see also Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (ruling that the trial court erred in "mechanistically" excluding the defendant's evidence under the rule against hearsay).

82 476 U.S. 683 (1986).

83 Id. at 684.

84 Id. at 691.

85 388 U.S. 14.

86 See id. at 16-17.

87 Id. at 22.

88 483 U.S. 44 (1987).

89 See id. at 46-47.

90 Id. at 61.

91 See id. (ruling that evidence should not be categorically excluded unless it "is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial").

92 See Staples v. United States, 511 U.S. 600, 606 (1994) (observing that "offenses that require no mens rea generally are disfavored"); Liparota v. United States, 471 U.S. 419, 426 (1985) ("[C]riminal offenses requiring no mens rea have a 'generally disfavored status.'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978))); Gypsum, 438 U.S. at 436 (noting the "familiar proposition that '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (quoting Dennis v. United States, 341 U.S. 494, 500 (1951) (plurality opinion))).

93 See Gerald S. Reamey, The Growing Role of Fortuity in Texas Criminal Law, 47 S. TEX. L. REV. 59, 59-60 (2005) ("Criminal responsibility usually attaches only when mens rea combines with volitional conduct—or the withholding of some required act—to produce a public harm. These component parts of criminal responsibility are widely accepted and utilized to define what is a 'crime.'" (footnote omitted)).

94 See Ake v. Oklahoma, 470 U.S. 68, 80 (1985) ("[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."); Peter R. Dahl, Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials, 73 CAL. L. REV. 411, 414 (1985) ("To the extent that the law is concerned with the mental state and the motivations of the wrongdoer, it makes sense to use psychiatry to advance the inquiry.").

95 See JAY ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 37 (5th ed. 1995) ("Forensic psychiatry is a field that is long on controversy and short on data." (internal quotation marks omitted)), quoted in Deirdre M. Smith, The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation, 31 CARDOZO L. REV. 749, 766 n.85 (2010).

96 See Ake, 470 U.S. at 81 ("Psychiatry is not, however, an exact science . . . ."); Rael Jean Isaac & Samuel Jan Brakel, Subverting Good Intentions: A Brief History of Mental Health "Reform," 2 CORNELL J.L & PUB. POL'Y 89, 105 (1992) ("Organized psychiatry endorsed its critics' claim that psychiatrists were unable to predict violence and advised its members to avoid such predictions.").

97 Some commentators disagree that psychiatry should be singled out as an especially inexact medical science. See Joanmarie Ilaria Davoli, Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?, 69 TENN. L. REV. 987, 993 (2002) ("The description of psychiatry as an inexact science is a meaningless distinction; none of the medical sciences are 'exact' in the same manner as mathematics.").

98 See Morse & Hoffman, supra note 35, at 1084 ("Healthy skepticism about mental disorder and the potential relation between it and criminal responsibility, especially in marginal cases, is warranted; outright rejection is not.").

99 See source cited supra note 64 and accompanying text.

100 See discussion supra Part II.B.2.

101 See Scott E. Sundby, The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony, 83 VA. L. REV. 1109, 1110 (1997) [hereinafter Sundby, The Jury as Critic] ("If one wants to spark a debate, few flints are as effective as the issue of expert witnesses and their proper role.").

102 See John W. Osborne, Note, Judicial/Technical Assessment of Novel Scientific Evidence, 1990 U. ILL. L. REV. 497, 501 (noting some courts' concerns that juries "may be overly impressed by experts with seemingly impressive credentials" and "may give too much weight to expert opinions because, by being designated 'scientific,' the opinions may take on a mystical aura of infallibility" (footnote omitted)).

103 Daniel C. Murrie et al., Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?, 32 LAW & HUM. BEHAV. 352, 360 (2008) ("[T]he lay public has expressed concern that at least some forensic psychologists tend to be 'hired guns' who predictably reach only opinions that support the party who retained their services." (citation omitted)); cf. Steven K. Erickson, Mind over Morality, 54 BUFF. L. REV. 1555, 1561 (2007) (reviewing CHARLES PATRICK EWING & JOSEPH T. MCCANN, MINDS ON TRIAL (2006)) (discussing the Patty Hearst case—including "an expert whose own published works directly contradicted his testimony"—and suggesting that "[i]n this case, experts seem to deserve their reputation as 'hired guns'").

104 See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994); CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER (1992); JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997).

105 548 U.S. 735, 778 (2006) (calling Arizona's reasons for prohibiting criminal defendants from presenting mental disorder evidence except in support of an insanity defense "sensible"); id. at 770 ("good enough").

106 See id. at 774 (finding that there are "characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion").

107 See discussion supra Part II.B.2 (discussing constitutional limits on states' authority to enact rules excluding criminal defendants' evidence).

108 See sources cited supra note 77 (establishing the rule that exclusions of defense evidence must not be disproportionate to the purpose served by exclusion).

109 See supra note 74 and accompanying text.

110 Clark, 548 U.S. at 770; see also supra notes 77-91 and accompanying text (discussing the constitutional standard for allowing exclusion of defendant's evidence).

111 See Clark, 548 U.S. at 770-71 ("[T]he question is whether reasons for requiring [mental-disease and capacity evidence] to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires. We think they are.").

112 See id. at 757-58. The Court observed that "[u]nderstanding Clark's claim requires attention to the [three] categories of evidence with a potential bearing on mens rea." Id. at 757.

113 See id. at 762 (noting that Clark did not "apprise the Arizona courts that he believed the trial judge had erroneously limited the consideration of observation evidence").

114 See id. at 781 (Kennedy, J., dissenting) ("Seizing upon a theory invented here by the Court itself, the Court narrows Clark's claim so he cannot raise the point everyone else thought was involved in the case."); see also 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, 82 (2007) ("Having unnecessarily created these three confusing and misleading categories of behavioral evidence, the Court construed Clark's due process challenge to Mott as being one limited to its prohibition on mental disease evidence from being

used to establish diminished capacity."); Westen, supra note 36, at 162 ("The Court not only fashioned this constitutional distinction out of whole cloth, but also failed to explain what motivated it.").

115 See Morse & Hoffman, supra note 35, at 1103 ("This classification was not part of Arizona law (or any state law we know about) and cannot be found in any Supreme Court precedent.").

116 See Clark, 548 U.S.at 781-82 (Kennedy, J., dissenting) ("This restructured evidentiary universe, with no convincing authority to support it, is unworkable on its own terms These categories break down quickly when it is understood how the testimony would apply to the question of intent and knowledge at issue here.").

117 See supra note 30 and accompanying text.

118 Clark, 548 U.S. at 774-75 (discussing "professional ferment" regarding diagnoses).

119 Id. at 775 (discussing "the potential of mental-disease evidence to mislead jurors").

120 Id. at 776 (discussing the "particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity").

121 Schizophrenia, the mental disorder at issue in Clark, is among the most generally accepted of mental disorder diagnoses. See MARVIN I. HERZ & STEPHEN R. MARDER, SCHIZOPHRENIA: COMPREHENSIVE TREATMENT AND MANAGEMENT 17 (2002) ("The recent discoveries in schizophrenia have not uncovered the cause of this illness. However, they have reinforced a consistent view of the disorder."); see also Heather M. Conklin & William G. Iacono, Assessment of Schizophrenia: Getting Closer to the Cause, 29 SCHIZOPHRENIA BULL. 405, 409 (2003) ("When we talk of the changing face of schizophrenia we are referring to its packaging rather than its core, which has changed little over the past century.").

122 See supra note 25 and accompanying text; see also Clark, 548 U.S. at 746 ("The [trial] judge noted that Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting . . . ."); Petitioner's Opening Brief at 3-4, Clark, 548 U.S. 735 (No. 05-5966), 2006 WL 282168 ("There was also no dispute that at the time of the episode Eric was suffering from chronic paranoid schizophrenia and was actively psychotic. The prosecution conceded these facts; and the prosecution's expert forensic psychologist diagnosed it independently of, but in conformity with, the defense expert psychiatrist.").

123 Clark, 548 U.S. at 776. The Court reasoned:
The limits of the utility of a professional disease diagnosis are evident in the dispute between the two testifying experts in this case; they agree that Clark was schizophrenic, but they come to opposite conclusions on whether the mental disease in his particular case left him bereft of cognitive or moral capacity. Evidence of mental disease, then, can easily mislead . . . .
Id.

124 See United States v. McBride, 786 F.2d 45, 51 (2d Cir. 1986) ("The mere fact that there may be conflicting testimony by experts is not a sufficient basis to exclude such evidence. Indeed, not uncommonly, there is conflict among experts on most any subject."); Robitscher & Haynes, supra note 31, at 44 ("[A]ll court proceedings involve contradictory testimony.").

125 See Morse, supra note 31, at 10 ("Although I am generally in sympathy with claims about the inexactness of mental health testimony, its exclusion on the issue of mens rea is insupportable given the present law of evidence. Mental health testimony is broadly admissible everywhere to help assess mental states in many criminal and civil law contexts." (footnote omitted)); Morse & Hoffman, supra note 35, at 1108 ("[T]here is no reason a state's skepticism about psychiatric evidence should begin and end with the criminal law.").
Indeed, when the question was whether juries could properly consider expert psychiatric evidence presented by the government, the Supreme Court reached the opposite conclusion and found that juries are capable of making sense of this evidence: "We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." Barefoot v. Estelle, 463 U.S. 880, 899 (1983), superseded by statute on other grounds, 28 U.S.C. § 2253(c) (2006), as recognized in Slack v. McDaniel, 529 U.S. 473, 483 (2000). Richard Nagareda has argued persuasively that evidentiary rules that are "unequal"—that exclude defendants' evidence but allow prosecutors' evidence—are unconstitutional. See generally Richard A. Nagareda, Reconceiving the Right to Present Witnesses, 97 MICH. L. REV. 1063 (1999).

126 Clark, 548 U.S. at 775.

127 Diminished capacity evidence is evidence that a defendant was incapable of acting with a particular mens rea. See supra note 31 (discussing diminished capacity evidence).

128 See Morse, supra note 31, at 44 ("Except in utterly rare cases mental health professionals cannot determine if a person lacks the ability to form a mens rea, especially if the determination involves a judgment about the person's past capacities. There is simply no way to know this, no scientific test or technique that can provide the answer.").

129 See supra note 112 and accompanying text (discussing the classification system that the Supreme Court imposed on mental disorder evidence in Clark).

130 See supra note 33 (discussing Arizona's Mott rule, which Arizona courts have interpreted as imposing an absolute prohibition on non-insanity mental disorder evidence).

131 Clark v. Arizona, 548 U.S. 735, 783 (2006) (Kennedy, J., dissenting).

132 See Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility, 40 CASE W. RES. L. REV. 165, 166 (1989) ("Jurors are expected to make credibility decisions based on their common sense, which is also termed intuition or experience." (footnote omitted)); Robert P. Mosteller, Syndromes and Politics in Criminal Trials and Evidence Law, 46 DUKE L.J. 461, 464 n.10 (1996) [hereinafter Mosteller, Syndromes and Politics] ("Courts typically assume that the life experiences of jurors allow them to make proper judgments about general human reactions."); cf. Ronald J. Allen, Unexplored Aspects of the Theory of the Right to Trial by Jury, 66 WASH. U. L.Q. 33, 37 (1988) ("[J]urors' experiences and perspectives are crucial variables in determining the effect of the words that a witness speaks at trial . . . .").

133 As one scholar who is otherwise rather critical of mental disorder evidence explains,

> Both jurors and judges (indeed, all people) come to fact determination processes with a set of life experiences that shape their evaluation of evidence. These experiences are often simplified into convenient devices, sometimes called heuristics, that allow humans to categorize observations quickly and thereby make decisions in a complicated world. When these devices are inaccurate, expert testimony usefully serves to correct them.

Mosteller, Syndromes and Politics, supra note 132, at 464 (footnotes omitted). This point has been recognized by some courts in cases involving women who have remained in abusive relationships. See, e.g., United States v. Hines, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) ("The jury, for example, may fault the victim for not leaving an abusive spouse, believing that they are fully capable of putting themselves in the shoes of the defendant."); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (noting that for some jurors, "the fact that the battered wife stays on unquestionably suggests that the 'beatings' could not have been too bad for if they had been, she certainly would have left").

134 See United States v. Finley, 301 F.3d 1000, 1013 (9th Cir. 2002) ("We must be cautious not to overstate the scope of the average juror's common understanding and knowledge. As the Seventh Circuit has recognized, it is 'precisely because juries are unlikely to know that social scientists and psychologists have identified [personality disorders] that the testimony would have assisted the jury in making its decision.'" (omission in original) (quoting United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996))). A similar point has been recognized regarding jurors' need for factual background information in order to properly assess the evidence in some sexual assault cases. See Wheat v. State, 527 A.2d 269, 273 (Del. 1987) ("[W]here a complainant's behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its emotional antecedents, expert testimony can assist a jury in this regard."); State v. Jensen, 432 N.W.2d 913, 918 (Wis. 1988) ("[A]n expert opinion is useful for disabusing the jury of common misconceptions about the behavior of sexual assault victims."). See also generally Neil Vidmar & Regina A. Schuller, Juries and Expert Evidence: Social Framework Testimony, 52 LAW & CONTEMP. PROBS., 133 (1989) (evaluating juries' use of social framework evidence).

135 See Richard J. Bonnie & Christopher Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 VA. L. REV. 427, 485 (1980) ("Because laymen do not deal with abnormal behavior on a day-to-day basis, their intuitions are skewed in the direction of normal behavior, and they favor commonsense explanations for departures from the norm."); Don J. DeBenedictis, Criminal Minds: PET Scans Used to Prove Accused Killers' Brain Abnormalities,

A.B.A. J., Jan. 1990, at 30, 30 ("Most juries feel that most mental patients are really faking." (quoting Dr. Bernard Diamond, Professor Emeritus of Law and Medicine, University of California at Berkeley)).

136 Clark, 548 U.S. at 745.

137 See supra note 133 and accompanying text. Additionally, jurors may be skeptical not only about a particular defendant's impaired mental state but about whether any defendant's impaired mental state ought to be at all exculpatory. See Morris B. Hoffman, The Myth of Factual Innocence, 82 CHI.-KENT L. REV. 663, 675 (2007) (observing that mens rea "seems to be one of a handful of legal precepts that simply does not resonate with the general public").

138 Consider, for example, the reaction of Harvard Professor George Mackey upon learning of the delusional beliefs of his friend John Nash, a brilliant mathematician who was diagnosed with schizophrenia:
"How could you," began Mackey, "how could you, a mathematician, a man devoted to reason and logical proof how could you believe that extraterrestrials are sending you messages? How could you believe that you are being recruited by aliens from outer space to save the world? How could you ?"
SYLVIA NASAR, A BEAUTIFUL MIND 11 (1998), quoted in Joanmarie Ilaria Davoli, Psychiatric Evidence on Trial, 56 SMU L. REV. 2191, 2214 (2003).

139 Many examples of such people can be found in civil commitment cases (which are useful because a person facing civil commitment usually has no incentive to fabricate the experience of psychotic symptoms; in fact, such a person usually has the opposite incentive—to deny the experience of symptoms that they really are experiencing). See, e.g., Purdy v. United States, No. 04-3529-CV-S-DW, 2006 WL 2990501, at *2 (W.D. Mo. Oct. 19, 2006) (noting that plaintiff, who was then subject to civil commitment and not facing any present criminal charges, "suffered from delusional beliefs that his wife and other family members had been replaced by imposters" and "believed that the FBI replaced his wife in an attempt to spy on him and gather information about his past criminal activity"); State v. Sea, 904 P.2d 182, 184 (Or. Ct. App. 1995) (noting that appellant, who was challenging a civil commitment order, "believe[d] that objects in her home ha[d] been removed or rearranged by unidentifiable people or forces" and "hear[d] loud sounds emanating from shelves of merchandise at grocery stores and believe[d] that unseen forces [were] communicating with her through the labels of packaged goods"). The DSM provides additional examples:
Persecutory delusions are most common; the person believes he or she is being tormented, followed, tricked, spied on, or ridiculed. Referential delusions are also common; the person believes that certain gestures, comments, passages from books, newspapers, song lyrics, or other environmental cues are specifically directed at him or her . . .
...An example of a bizarre delusion is a person's belief that a stranger has removed his or her internal organs and has replaced them with someone else's organs without leaving any wounds or scars. An example of a nonbizarre delusion is a person's false belief that he or she is under surveillance by the police. Delusions that express a loss of control over mind or body are generally considered to be bizarre; these include a person's belief that his or her thoughts have been taken away by some outside forces ("thought withdrawal"), that alien thoughts have been put into his or her mind ("thought insertion"), or that his or her body or actions are being acted on or manipulated by some outside force ("delusions of control").
AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 299 (4th ed. 2000) [hereinafter DSM-IV-TR].

140 Some courts have adopted a similar approach in dealing with other types of syndrome evidence. For example, expert testimony that provides factual background information about child abuse can enable jurors to not automatically discount the credibility of a child who reports abuse but who does not act in ways that jurors would expect. See, e.g., Commonwealth v. Deloney, 794 N.E.2d 613, 623 (Mass. App. Ct. 2003) (endorsing admission of expert testimony "to educate the jury to understand that child abuse victims may act in counter-intuitive ways, and that excessive weight should not be given to factors such as failure to disclose when the child victim's credibility is weighed").

141 See supra note 133 and accompanying text.

142 Psychiatric diagnoses are attempts to impose a taxonomic system upon the world of experienced symptoms. These diagnoses are intended primarily to further research:
Medicine, like science as a whole, began with a descriptive phase, in which phenomena of interest were categorized and classified on the basis of common observed elements. Without this taxonomic data base, further research would have been

impossible because such research requires comparable populations of subjects so that findings can be reproduced by different investigators.
Robert D. Miller, History of Psychiatric Diagnosis: A Guidebook for Nonclinicians, COLO. LAW., Jan. 1994, at 39, 39.

143 The acceptability of a psychiatric diagnosis is a function of two things: validity and reliability. The validity of a psychiatric diagnosis depends upon how well the diagnostic criteria map onto a real phenomenon in the world. Validity is exceptionally hard to assess. "[D]emonstrating how the validity of the diagnosis has improved would be difficult. In fact, such a demonstration would necessitate a preconceived notion (or theory) of schizophrenia." Conklin & Iacono, supra note 121, at 407. The reliability of a psychiatric diagnosis depends upon how often different clinicians assign the same diagnostic label to the same set of symptoms. Commentators disagree about the reliability of psychiatric diagnoses. Compare Christopher Slobogin, The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to Daubert to Voice, 5 PSYCHOL. PUB. POL'Y & L. 100, 105-06 (1999) (claiming that "error rates" are "well above 50% for diagnoses such as antisocial personality and schizoid personality, and not much better for schizophrenia and organic disorder"), with The Supreme Court, 2005 Term: Leading Cases, 120 HARV. L. REV. 125, 232 (2006) ("Although psychiatry may have begun on more questionable scientific footing than some other disciplines, recent advances in psychiatric research have brought many common psychiatric diagnoses to a level of reliability on par with that of 'radiologists' interpretations of mammograms[] and the assessment of spasticity in patients with spinal cord injury.'" (alteration in original) (quoting Davoli, supra note 138, at 2219)).

144 Not even the most extreme skeptics of psychiatry and its diagnostic enterprise doubt that the symptoms that underlie psychiatric diagnoses are real. Thomas Szasz, for example, argues stridently that "mental illness is a myth," but his objection is to the labeling of certain mental experiences as signs of an illness; he does not suggest that those mental experiences themselves are myths. See generally THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (1961).

145 See Morse, supra note 31, at 53 ("Judges and juries need behavioral facts about the defendant's functioning, not labels that have been developed for nonlegal purposes.").

146 This is not to say that testimony about schizophrenia would not be additionally helpful; the point is only that disagreement about diagnostic labels should not be any reason to prohibit defendants from presenting evidence about the symptoms that define a psychiatric diagnosis.

147 Cf. Mosteller, Syndromes and Politics, supra note 132, at 464 (noting that when admitted for the "limited purpose of supporting the credibility of a witness after that credibility has been attacked, the evidence is far more likely to be scientifically valid and sufficiently valuable to justify admission").

148 At least one state has adopted a rule that makes helpfulness in correcting jurors' false beliefs a requirement for admitting expert testimony. Under the Ohio Rules of Evidence, one requirement for the admission of expert testimony is that "[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons." OHIO R. EVID. 702(A).

149 See, e.g., David L. Faigman & Amy J. Wright, The Battered Woman Syndrome in the Age of Science, 39 ARIZ. L. REV. 67, 82 (1997) ("C]ourts do little more than cite the recurring fear that juries hold [certain] 'common myths' about battered women."); Robert P. Mosteller, Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence, LAW & CONTEMP. PROBS., Autumn 1989, at 85, 125 ("It is hardly obvious that jurors would have great difficulty understanding why, for example, a child would retract a valid allegation of sexual abuse in the face of the prospect that 'daddy' would otherwise be jailed.").

150 See NAT'L COMM'N ON THE INSANITY DEF., MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 14 (1983) (noting that "mentally ill people in our society are shrouded in myth, preventing us as a society from seeing this vulnerable segment of society objectively, equitably, and with sensitivity"); Eric Silver et al., Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 LAW & HUM. BEHAV. 63, 68 (1994) ("[T]he public overestimates the extent to which insanity acquittees are released upon acquittal and underestimates the extent to which they are hospitalized as well as the length of confinement of insanity acquittees who are sent to mental hospitals.").

151 See Fradella, supra note 114, at 12-13 (observing "much public concern about defendants who fake their mental illnesses in order to escape a conviction and who simply hire clinicians to engage in an expert battle with the prosecution at trial"); Mello, supra note 3, at 470 ("Juries are notoriously skeptical of mental illness defenses, even in cases where the illness is clear.").

152 See U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 44 (1999), available at http:// www.surgeongeneral.gov/library/mentalhealth/chapter2/sec2.html#diagnosis ("The diagnosis of mental disorders is often believed to be more difficult than diagnosis of somatic, or general medical, disorders, since there is no definitive lesion, laboratory test, or abnormality in brain tissue that can identify the illness."); Elyn R. Saks, Multiple Personality Disorder and Criminal Responsibility, 10 S. CAL. INTERDISC. L.J. 185, 201 (2001) ("No mental illness, other than some organic mental disorders, can be diagnosed as reliably as cancer or bacterial infections. There is no blood test for mental disorders.").

153 See Fradella, supra note 114, at 13 ("In practice, modern diagnostic instruments and procedures allow clinicians to distinguish correctly those who are truly mentally ill and those who are faking between 92% and 95% of the time."); Edward J. Imwinkelried, The Case Against Abandoning the Search for Substantive Accuracy, 38 SETON HALL L. REV. 1031, 1033-42 (2008) (discussing numerous methods for identifying malingerers); Susan F. Mandiberg, Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses, 53 FORDHAM L. REV. 221, 239 (1984) ("One must first ask how easy it is to feign the type of mental abnormality and intoxication that will preclude the existence of a subjectively defined mental state. It seems unlikely that a great number of defendants would be able to fake such conditions convincingly."); cf. Jamie Fellner, A Corrections Quandary: Mental Illness and Prison Rules, 41 HARV. C.R.-C.L. L. REV. 391, 398 n.32 (2006) ("Concern about malingering, prisoners faking mental illness or symptoms for different purposes, is pervasive among prison officials, even though serious mental illness is in fact difficult to fake.").
The reason that psychosis is not easy to fake is that genuine psychotic symptoms do conform to certain patterns, which are unlikely to be known by most people who might wish to fake such symptoms. For example, "[t]he pattern of memory impairment in genuine cases of schizophrenia is similar to that seen in organic brain conditions, particularly traumatic brain injury, and thus feigned memory impairment in cases of malingered psychosis can be readily distinguished." L. Paul Chesterman et al., Malingered Psychosis, 19 J. FORENSIC PSYCHIATRY & PSYCHOL. 275, 289 (2008). Additionally, "feigned hallucinations tend to be visual, [and] feigned delusions lack the logical inconsistencies of true delusions." Id. at 277-78.

154 It is also possible that a defendant (or any other witness) might be lying about any number of other things, such as whether he was in another state at the time a crime was committed or whether the police coerced his confession. This possibility does not mean, of course, that witnesses are prohibited from presenting evidence for the purpose of proving that they were out of the state or that they were coerced into confessing.

155 See supra note 139 (presenting examples of delusional beliefs).

156 Even with expert testimony confirming the possibility that the defendant is not fabricating his account, jurors are likely to remain skeptical:
In sum, experts' explanations of human behavior that run contrary to notions of free will are hard to sell to the jury. Jurors drew heavily upon their own experiences and outlooks on personal responsibility and concluded that most experts were looking at the world through the perspective of a textbook rather than that of real life. Not unexpectedly, this skepticism about clinical testimony had the greatest impact on the defense experts, because they were the ones generally espousing theories in conflict with the jurors' notions of human behavior and responsibility.
Sundby, The Jury as Critic, supra note 101, at 1139 (footnote omitted).

157 See Mosteller, Syndromes and Politics, supra note 132, at 468 ("[W]hen the group character evidence is being used for credibility purposes— to correct human misunderstandings of the apparently unusual and therefore suspicious reactions of a trial participant—the requirements of validity are much less exacting from a scientific perspective, and the dangers of jury misuse of the evidence, while real, are typically less grave.").

158 For example, Capgras syndrome, characterized by delusions of substitution, is not uncommon among people diagnosed with schizophrenia. See United States v. Rix, 574 F. Supp. 2d 726, 732 (S.D. Tex. 2008) ("There are various types of bizarre delusions, such as 'Capgras Syndrome,' which is the belief that a close relative or friend has been replaced by an impostor who is an exact double (or doppelganger).").

159 Clark v. Arizona, 548 U.S. 735, 743 (2006).

160 As the Supreme Court explained in Barefoot v. Estelle,
All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.
463 U.S. 880, 901 n.7 (1983), superseded by statute on other grounds, 28 U.S.C. § 2253(c) (2006), as recognized in Slack v. McDaniel, 529 U.S. 473, 483 (2000). Since Clark, at least one court has similarly concluded that jurors are capable of properly considering mental disorder evidence: "We, like the dissenting justices in Clark, have confidence that our Texas judges and juries are sufficiently sophisticated to evaluate expert mental-disease testimony in the context of rebutting mens rea just as they are in evaluating an insanity or mental-retardation claim." Ruffin v. State, 270 S.W.3d 586, 595 (Tex. Crim. App. 2008).

161 Cf. Christopher Slobogin, Experts, Mental States, and Acts, 38 SETON HALL L. REV. 1009, 1017 (2008) ("Depriving a defendant of a qualified expert on past mental state issues trenches on the right to have one's charges considered by a (fully informed) jury."); Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (referring to the defendant's "right of having a fully informed jury determine his sentence").

162 U.S. CONST. amend. VI.

163 See Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. REV. 501, 518 (1986) ("The jury represents the defendant's hope of a hearing by others of common experience."); see also Taylor v. Louisiana, 419 U.S. 522, 536 n.19 (1975) ("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds . . . ." (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879))); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

164 Cf. State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989) (holding that "in future cases expert testimony regarding battered woman syndrome will be limited to a description of the general syndrome and the characteristics which are present in an individual suffering from the syndrome. The expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman syndrome.").

165 FED. R. EVID 801(d)(1)(B) (providing for the admission of a statement that is otherwise excluded as hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive").

166 513 U.S. 150 (1995).

167 See id. at 167 ("The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.").

168 Cf. People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949) ("'Recently fabricated' means the same thing as fabricated to meet the exigencies of the case.").

169 See Richard G. Dudley, Jr. & Pamela Blume Leonard, Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment, 36 HOFSTRA L. REV. 963, 979 (2008) ("A common tactic of the state is to attack defense mental health issues as fabricated excuses for the client's criminal behavior. Therefore, mental health conditions that pre-existed his crime are more credible than newly diagnosed conditions."). Even when the prosecutor does not directly assert that a defendant is fabricating a claim of mental disorder, the prosecution's theory of the case often is that the defendant is fabricating the effect of mental disorder on his thought process at the time of the offense. The state's expert witness in Clark, for example, did not challenge Clark's claim of mental disorder but instead argued that even though Clark experienced symptoms of schizophrenia, he nevertheless knew what he was doing when he shot a police officer. See Clark v. Arizona, 548 U.S. 735,

745 (2006) (reporting that "[i]n rebuttal, a psychiatrist for the State gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct").

170 Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

171 See supra notes 69-91 and accompanying text (discussing constitutional limits on excluding defense evidence).

172 See Clark, 548 U.S. at 766-67 ("The presumption of sanity is universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the mens rea necessary for a verdict of guilt and the consequent criminal responsibility. This presumption dispenses with a requirement on the government's part to include as an element of every criminal charge an allegation that the defendant had such a capacity." (citations omitted)).

173 See discussion infra note 193.

174 See supra note 74 and accompanying text.

175 See supra note 105 and accompanying text.

176 See supra Part III.B (discussing categories of mental disorder evidence that are generally helpful and trustworthy).

177 "Bizarre delusion" is a psychiatric term of art, referring to a delusion that cannot possibly be true, such as a person's belief that she is being sent special messages through the headlines of the newspaper. A "nonbizarre delusion" is a delusion that might possibly be true, such as a person's belief that he is being followed by the CIA. See DSM-IV-TR, supra note 139, at 299 ("Delusions are deemed bizarre if they are clearly implausible and not understandable and do not derive from ordinary life experiences.").

178 See supra note 7 and accompanying text.

179 See supra note 17 and accompanying text.

180 The Court explained:
In jurisdictions that allow mental-disease and capacity evidence to be considered on par with any other relevant evidence when deciding whether the prosecution has proven mens rea beyond a reasonable doubt, the evidence of mental disease or incapacity need only support what the factfinder regards as a reasonable doubt about the capacity to form (or the actual formation of) the mens rea, in order to require acquittal of the charge.
Clark, 548 U.S. at 768.

181 The Court explained:
The presumption of sanity would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about mens rea for the crime charged; once reasonable doubt was found, acquittal would be required, and the standards established for the defense of insanity would go by the boards.
Id. at 771-72.

182 See Ronald J. Allen, Clark v. Arizona: Much (Confused) Ado About Nothing, 4 OHIO ST. J. CRIM. L. 135, 137 (2006) ("Since sanity is not a constitutionally necessary component of a state's case, a state can allocate the burdens of pleading, production, and persuasion more or less how it likes.").

183 See Westen, supra note 36, at 159 ("[I]n order to effectuate its legislative decision to place the burden of persuasion on defendants with respect to the mens rea consequences of insanity, Arizona implicitly abolished any requirement that the prosecution bear the burden of proving 'knowledge' beyond a reasonable doubt in cases in which defendants allege that they lacked such knowledge because of mental illness.").

184 The Court explained:
If an acquitted defendant suffers from a mental disease or defect that makes him dangerous, he will neither be confined nor treated psychiatrically unless a judge so orders after some independent commitment proceeding. But if a defendant succeeds in showing himself insane, Arizona law (and presumably that of every other State with an insanity rule) will require commitment and treatment as a consequence of that finding without more. It makes sense, then, to channel capacity evidence to the issue structured to deal with mental incapacity when such a claim is raised successfully.

Clark, 548 U.S. at 778 n.45.

185 Samuel Jan Brakel, After the Verdict: Dispositional Decisions Regarding Criminal Defendants Acquitted by Reason of Insanity, 37 DEPAUL L. REV. 181, 187 (1988) ("[C]ommitting insanity acquittees in a civil commitment proceeding is always available. The law does not say that insanity acquitees or any other group of persons shall not be civilly committed.").

186 "Every state allows involuntary hospitalization when someone, because of a mental illness, is dangerous to himself or to other people." Dora W. Klein, Autonomy and Acute Psychosis: When Choices Collide, 15 VA. J. SOC. POL'Y & L. 355, 375 (2008) (citing Alexander Scherr, Daubert & Danger: The "Fit" of Expert Predictions in Civil Commitments, 55 HASTINGS L.J. 1, 29 (2003) ("Every state has enacted a form of civil commitment law.")); Christopher Slobogin, An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases, 86 VA. L. REV. 1199, 1246 n.172 (2000) (noting that "[e]very state allows commitment of those who are mentally ill and dangerous")).

187 As the Supreme Court of California explained:
The solution to this problem [of the mentally ill criminal defendant who might be released from confinement if found not guilty] thus does not lie in barring the defense of diminished capacity when the charged crime lacks a lesser included offense, but in providing for the confinement and treatment of defendants with diminished capacity arising from mental disease or defect. People v. Wetmore, 583 P.2d 1308, 1315 (1978), superseded by statute, 1981 Cal. Stat. 1592 (codified as amended at CAL. PENAL CODE § 28(a) (West 2008)).

188 See Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir. 1978) ("The State fear[s] that admitting psychiatric testimony to disprove specific intent may cause judges and juries to find legally sane defendants not guilty and, consequently, 'guilty' persons will be absolved of criminal responsibility for mental abnormalities not amounting to insanity." (footnote omitted)); State v. Mott, 931 P.2d 1046, 1055 ("[I]f we adopted the defendant's position and allowed expert testimony such as this to negate specific intent, the result would be, as we said in Schantz, to compel juries to 'release[] upon society many dangerous criminals who obviously should be placed under confinement.'" (second alteration in original)); see also Morse, supra note 31, at 13 (discussing the fear that "[i]f defendants are permitted to defeat the prosecution's case using evidence of mental abnormality, dangerous offenders will be freed").

189 Peter Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 COLUM. L. REV. 827, 834 (1977) ("[M]ost mentally abnormal offenders are fully capable of thinking about their criminal act and then performing it in accordance with their preconceived plan.").

190 Morse, supra note 31, at 17 ("Even the craziest defendants are unlikely to produce credible evidence that they lacked any mens rea.").

191 See Christopher Slobogin, The Supreme Court's Recent Mental Health Cases, CRIM. JUST., Fall 2007, at 8, 13 ("[I]t is hard to see why states should be able to keep from the jury psychiatric testimony on mens rea that, in those rare situations where it is persuasive, will usually at most result in reduction of the charge (in Clark's case, probably to second degree murder).").

192 Peter Westen has suggested that Arizona's law can be characterized as defining murder as including "a mens rea requirement of 'intent' or 'knowledge,' but only in those who are sane" and including "no mens rea requirements at all for persons who are insane," yet providing that "[i]t is nonetheless a defense to murder to show by clear and convincing evidence that, because of mental illness, a person did not 'know' that he was in fact killing a human being." Westen, supra note 36, at 160-61 (emphasis omitted).

193 At least it might be possible that the state could make murder a strict liability offense (that is, one not requiring any mens rea) and then establish lack of mens rea as an affirmative defense. The Supreme Court has provided inconsistent signals about the extent to which states may redefine elements as affirmative defenses. Compare Mullaney v. Wilbur, 421 U.S. 684 (1975) (suggesting that there are limits to states' ability to redefine elements as defenses), and Robinson v. California, 370 U.S. 660 (1962) (same), and Lambert v. California, 355 U.S. 225 (1957) (same), with Patterson v. New York, 432 U.S. 197 (1977) (suggesting that states are free to redefine elements as defenses), and Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion) (same).
Morissette v. United States is an interesting and inconclusive precedent. 342 U.S. 246 (1952). On one hand, Morissette stresses the fundamental nature of mens rea. Id. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention 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."). On the other hand, in Morissette the Court was interpreting a statute that was silent on the issue of men rea, not one that had clearly intended to omit the mens rea element from a serious offense. Id. at 263 ("The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." (footnote omitted)). Not surprisingly, commentators disagree whether the state could redefine murder as a strict liability offense. Compare Clark v. Arizona, 548 U.S. 735, 797-98 (2006) (Kennedy, J., dissenting) ("Under the State's logic, a person would be guilty of first-degree murder if he knowingly or intentionally killed a police officer or committed the killing under circumstances that would show knowledge or intent but for the defendant's mental illness. To begin with, Arizona law does not say this. And if it did, it would be impermissible."), with Westen, supra note 36, at 161 ("Contrary to the dissent, Arizona clearly has authority to characterize its law in this way (the characterization being consistent with the law's substance)." (footnote omitted)). For further discussion, see generally Nancy J. King & Susan R. Klein, Essential Elements, 54 VAND. L. REV. 1467 (2001), and Sundby, The Reasonable Doubt Rule, supra note 48.

194 See Respondent's Brief on the Merits at 36, Clark, 548 U.S. 735 (No. 05-5966), 2006 WL 565617 ("The Arizona Legislature's rejection of the Model Penal Code provision means that the mens rea elements of criminal offenses are defined without regard to mental disease or defect. Thus, when determining whether a defendant has intentionally or knowingly committed a criminal act, any mental disease or defect is statutorily irrelevant to the factual question."); see also Westen, supra note 36, at 160 (noting that "Arizona, in its brief, endeavored to recharacterize what constitutes the 'elements' of and 'defenses' to murder under its law"). An amicus brief submitted by the United States similarly argued that a state may either "effectively redefine the elements of its offenses by declaring mental illness evidence irrelevant to the mens rea determination, or it can establish an evidentiary rule treating that evidence as inadmissible," and suggested that "Arizona appears to have chosen the redefinition approach." Brief for the United States as Amicus Curiae Supporting Respondent at 16-17, Clark, 548 U.S. 735 (No. 05-5966), 2006 WL 542415.

195 Addressing a somewhat different question—whether the state could, without violating due process, altogether abolish the insanity defense—the Supreme Court of Nevada argued:

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

Finger v. State, 27 P.3d 66, 84 (Nev. 2001).

196 Ronald J. Allen, Foreward: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority, 87 J. CRIM. L. & CRIMINOLOGY 633, 660 (1997) ("Evidence rules should be rational. The process of proof should have integrity, regardless of what is being proved. Substantive changes in the elements of crimes should be made by changes in the substantive law, not by manipulating the rules of proof in ways that undercut their rationality." (quoting Charles Nesson's response to the article)).

197 See, e.g., Morse & Hoffman, supra note 35, at 1111 ("[N]o legislature, to our knowledge, has ever been so bold as to purport to convert a serious common law crime into a strict liability crime."). For discussion, see generally Allen, supra note 196; Ronald J. Allen, The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York, 76 MICH. L. REV. 30 (1977); John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325 (1979); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1 (1997); William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES 1 (1996); William J. Stuntz, The Substantive Origins of Criminal Procedure, 105 YALE L.J. 393 (1995).

198 432 U.S. 197 (1977).

199 Id. at 209-11.

200 See Joseph L. Hoffmann, Apprendi v. New Jersey: Back to the Future?, 38 AM. CRIM. L. REV. 255, 272 (2001) (noting that after Patterson, "many feared the worst—that legislatures would seize the opportunity to shift many factors from the

category of 'elements of the crime' to the category of 'affirmative defenses,' thus shifting the burden of proof and tipping the scales of justice against defendants. But the worst never actually occurred." (footnote omitted)); Stith, supra note 8, at 267 ("[T]here was little change in the statutory structure of 'elements' and 'defenses' in response to Patterson."); id. at 267 n.243 ("[A] total of nine states amended their homicide statutes as allowed by Patterson v New York, 432 US 197 (1977)" (citing King & Klein, supra note 193, app. A at 1546 (2001))).

201 530 U.S. 466 (2000).

202 See generally Kyron Huigens, Solving the Apprendi Puzzle, 90 GEO. L.J. 387 (2002) (discussing constitutional limits on definitions of offense elements, affirmative defenses, and sentencing factors); King & Klein, supra note 193, at 1488-96 (discussing the "opportunities for legislators to respond to Apprendi by modifying their criminal codes").

203 See, e.g., Stith, supra note 8, at 267 ("[A]s it happens, there is no evidence that state legislatures or Congress responded to Apprendi by restructuring statutory aggravating and mitigating factors . . . ." (footnote omitted)).

204 518 U.S. 37 (1996) (plurality opinion).

205 See id. at 49-51.

206 Id. at 43.

207 Id. at 49 (referring to "the common-law rule prohibiting consideration of voluntary intoxication in the determination of mens rea").

208 Id.

209 Id. at 53.

210 Id. ("[T]he introduction of relevant evidence can be limited by the State for a 'valid' reason, as it has been by Montana."). The Court also observed that "the common-law rule prohibiting consideration of voluntary intoxication in the determination of mens rea" is a rule that "has considerable justification." Id. at 49.

211 Id. ("A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example.").

212 Id. at 49-50 ("Disallowing consideration of voluntary intoxication has the effect of increasing the punishment for all unlawful acts committed in that state, and thereby deters drunkenness or irresponsible behavior while drunk.").

213 Id. at 50 ("The rule also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison.").

214 Id. ("[T]he rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences.").

215 See Penry v. Lynaugh, 492 U.S. 302, 331 (1989) ("It was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities."), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 321 (2002).

216 See Ken Kress, An Argument for Assisted Outpatient Treatment for Persons with Serious Mental Illness Illustrated with Reference to a Proposed Statute for Iowa, 85 IOWA L. REV. 1269, 1284 (2000) ("Recent research demonstrates that most individuals with mental illness are slightly less dangerous than the general public.").

217 See supra note 186 and accompanying text.

218 Moreover, civil commitment is preferable to criminal sanctions to the extent that civil commitment aims to prevent dangerous or violent behaviors, while criminal sanctions are imposed after the harmful behavior has already occurred.

219 As Stephen Garvey explains,

> Treating a voluntarily intoxicated actor as if he possessed a mental state he did not in fact possess is one thing: A voluntarily intoxicated actor is at least responsible for becoming intoxicated. Treating a mentally ill actor as if he possessed a mental state he did not in fact possess is another: A mentally ill actor is ordinarily responsible neither for becoming mentally ill nor for the behavioral manifestations of his illness.
> Stephen P. Garvey, Self-Defense and the Mistaken Racist, 11 NEW CRIM. L. REV. 119, 137 n.51 (2008).

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