OVERWORKING THE PRESUMPTION OF SANITY: *CLARK*'S USE OF MENTAL DISEASE EVIDENCE TO NEGATE MENS REA

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The presumption of sanity is a concept in criminal law used to allocate burdens relating to the insanity defense. In Clark v. Arizona, *the U.S. Supreme Court relied on the presumption to affirm the exclusion of evidence introduced to negate mens rea. This Comment discusses the problems with using the presumption to exclude evidence from mens rea determinations and examines other ways to regulate mental disease evidence, which require modifying Justice Souter's categorization of such evidence in* Clark. *This Comment argues that mental disease evidence should be admissible if it shows a potential mistake of fact that bears directly on statutory intent. This form of defense—showing failure of proof of a statutory element—is conceptually distinct from an affirmative defense of legal insanity. The latter deals with whether a defendant is legally responsible for a crime, rather than whether the defendant committed the offense charged. The presumption of sanity relates solely to the insanity defense; it has no bearing on statutory intent and should not be used to exclude evidence from such a determination.*

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INTRODUCTION

On June 29, 2006, the U.S. Supreme Court upheld the conviction of Eric Michael Clark for the first-degree murder of a police officer.[1] In June 2000, an officer of the Flagstaff Police Department pulled over Clark, who had been circling a residential neighborhood in his pickup truck and playing loud music.[2] Less than a minute after being pulled over, Clark, then seventeen years old, shot the officer and ran away on foot. Arizona charged Clark with intentionally killing a law enforcement officer in the line of duty.[3] The trial court initially found Clark incompetent to stand trial, and thus confined him to a mental institution. Two years later, however, the court found that Clark's competence had been restored and therefore commenced trial.[4]

At trial, Clark waived his right to a jury. Clark claimed that he had paranoid schizophrenia, which had generated his delusional belief that the person he killed was an alien. As a result, he did not have the specific intent of the crime charged: intentionally or knowingly killing a police officer. He also presented mental disease evidence in order to satisfy his burden of proving the affirmative defense of insanity by clear and convincing evidence.[5] This evidence included Clark's comments to friends and family members about aliens impersonating government agents who could only be stopped by bullets.[6] Although there was no dispute that Clark was a paranoid schizophrenic, the court did not find Clark legally insane. The court ruled that Clark had not established by clear and convincing evidence that his schizophrenia "distorted his perception of reality so severely that he did not know his actions were wrong."[7]

While the court allowed the mental disease evidence for the insanity determination, it excluded the evidence from consideration of mens rea and

1. Clark v. Arizona, 126 S. Ct. 2709, 2718 (2006).
2. *Id.* at 2716.
3. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2001) ("A person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").
4. *Clark*, 126 S. Ct. at 2716.
5. *Id.* at 2716–17; *see* ARIZ. REV. STAT. ANN. § 13-502(C) ("The defendant shall prove the defendant's legal insanity by clear and convincing evidence."). The Arizona Criminal Code defines an affirmative defense as "a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable." ARIZ. REV. STAT. ANN. § 13-103(B).
6. *Clark*, 126 S. Ct. at 2711.
7. *Id.* at 2718. Whether Clark could appreciate wrongfulness is, however, a different question from whether or not he knew he was killing a police officer. *See infra* Part I.B.

specific intent.[8] In excluding evidence from the mens rea determination, the court relied on *State v. Mott*,[9] which barred "psychiatric testimony to negate specific intent."[10] In *Mott*, the court refused to allow any "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."[11] Clark appealed his conviction on two grounds. First, he claimed that Arizona's narrow definition of insanity violated due process.[12] Second, he claimed that the *Mott* precedent violated due process by excluding exculpatory evidence relevant to elements of the crime charged.[13] The Supreme Court found no violation of due process on either ground and affirmed the judgment.[14]

Justice Souter, writing for the majority, defended the *Mott* rule's exclusion of mental disease evidence to negate mens rea by insisting that the admission of such evidence would circumvent the state's presumption of sanity.[15] Arizona presumes that all criminal defendants are sane until the defendant presents clear and convincing evidence to the contrary.[16] Souter opined that allowing mental disease evidence to create reasonable doubt as to the mens rea element of the crime would mitigate the defendant's burden to prove his insanity by clear and convincing evidence.[17] Souter interpreted *Mott*'s restrictions not as a complete exclusion of mental disease evidence to negate mens rea, but as a tripartite categorization of such evidence. According to this interpretation, the court would admit everyday observation evidence of Clark's behavior, but would exclude evidence explaining mental disease or capacity for cognition. Souter found no due process violation in excluding

8. *Clark*, 126 S. Ct. at 2717. Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime," such as intent or recklessness. BLACK'S LAW DICTIONARY 1006 (8th ed. 2004). Specific intent is defined as "[t]he intent to accomplish the precise criminal act that one is later charged with." *Id.* at 826. Specific intent is an attenuated mental requirement for certain crimes, such as intent or knowledge of killing a police officer.

9. 931 P.2d 1046 (Ariz. 1997) (en banc).

10. *Clark*, 126 S. Ct. at 2717 (citing *Mott*, 931 P.2d at 1051).

11. *Mott*, 931 P.2d at 1051.

12. Petitioner's Opening Brief at 13, *Clark*, 126 S. Ct. 2709 (No. 05-5966).

13. *Id.* at 21 ("The Mott Rule prohibiting consideration of evidence of mental illness on the issue of *mens rea* unconstitutionally excludes probative exculpatory evidence. Foreclosing Eric from demonstrating factually that he did not . . . possess the mental states which were elements of the crime charged denied him the right to present a defense basic to procedural due process." (capitalization altered)).

14. 126 S. Ct. 2709.

15. *Id.* at 2731.

16. *See* ARIZ. REV. STAT. ANN. § 13-502(C) (2001).

17. *See Clark*, 126 S. Ct. at 2732 ("[A state] must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial.").

these forms of evidence from a mens rea determination; he argued that, if admitted to negate mens rea, any reasonable evidence of an abnormal mental state would necessitate acquittal.[18] However, Souter's rationale ignores how the *Mott* rule lessens the prosecution's burden to prove Clark's intent to kill a police officer beyond a reasonable doubt by excluding potentially exculpatory evidence.

Justice Souter's rationale also adds to the confusion between the government's burden of proof concerning failure of proof defenses and the defendant's burden of proof concerning affirmative defenses. This confusion is further compounded by the inconsistent application of the presumption of sanity, ever since the concept first appeared in *M'Naghten's Case*,[19] to measure and allocate burdens when introducing mental disease evidence. In *M'Naghten's Case*, the House of Lords noted that "every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary [can] be proved to [the jury's] satisfaction."[20] In other words, all criminal defendants are initially presumed sane until at least some evidence is introduced to the contrary.

Legal sanity is not a scientific absence of mental illness, but a social "concept of the morally responsible individual."[21] A recent *New York Times* editorial argued that the concept should be used in a civilized society to designate cognitively unimpaired offenders who justify punishment.[22] In other words, sanity is not an empirical determination, but a normative judgment of which offenders society has a moral obligation to hold culpable for their actions. The presumption of sanity, therefore, is not an initial presumption that every defendant has perfect mental health, but rather that every defendant is morally responsible for his actions.

There are two rationales for the existence of the presumption. The first is based on the premise that the majority of people are morally responsible for their actions, so chances are the defendant is among that majority.[23] The second rationale is procedural efficiency: The presumption "reliev[es] the prosecution of the burden of proving the defendant's sanity until evidence

18. *Id.* at 2731.
19. (1843) 8 Eng. Rep. 718 (H.L.).
20. *Id.* at 722.
21. Morris B. Hoffman & Stephen J. Morse, Op-Ed., *The Insanity Defense Goes Back on Trial*, N.Y. TIMES, July 30, 2006, § 4, at 13.
22. *Id.*
23. *See, e.g.*, Commonwealth v. Rasmusen, 830 N.E.2d 1040, 1046 (Mass. 2005) ("[T]he presumption merely reflects our recognition that jurors should be permitted to infer or presume the defendant's sanity from their common knowledge that a great majority of people are sane, and the probability that any particular person is sane." (internal quotation marks omitted)).

of insanity is admitted."[24] This procedural efficiency for the state is further increased in jurisdictions in which a greater burden is placed on the defendant, making it less likely that the prosecution will be required to respond to evidence of insanity. The U.S. Congress and many states adopted statutes with narrower insanity tests starting in the 1980s,[25] especially after adverse public reaction to a District of Columbia court finding John Hinckley, Jr., not guilty of the attempted assassination of President Ronald Reagan by reason of insanity.[26] Accordingly, the presumption of sanity now more often prevents a defendant from placing insanity at issue before a court.[27]

However, Justice Souter's exclusion of mental disease evidence from mens rea determinations used the presumption for something it was never designed to address: the government's burden to prove all elements of the crime beyond a reasonable doubt. Souter used the presumption, designed as a tool for an affirmative defense, to disallow any mental disease evidence (other than observation evidence) for the purpose of disputing the defendant's mental state. This use, in effect, lessens the government's burden of proof on a key element of the offense. However, Souter's framework could be adjusted to provide a more acceptable means of channeling evidence. If Souter allowed for the admission of both observation evidence and mental disease evidence, rather than observation evidence alone, then many of the concerns about using such evidence in mens rea determinations would be alleviated.[28] The mental disease evidence could provide context for the observation evidence, while the exclusion of capacity evidence would still keep out testimony least likely to be pertinent to mens rea.

This Comment shows that the *Clark* decision takes the presumption of sanity further than any previously established state use. Mental disease evidence disputing proof of mens rea is better viewed as a mistake of fact defense, which can negate specific intent under existing Arizona law. The state must prove every element of a crime, including specific intent, beyond a reasonable doubt. Policy considerations favoring limited mental disease

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24. People v. Hill, 934 P.2d 821, 825 (Colo. 1997) (en banc) ("This requirement that some evidence of insanity be introduced to rebut the presumption of sanity is procedural in nature, and does not affect a defendant's substantive right to raise an insanity defense.").

25. *See, e.g.*, 18 U.S.C. § 17(b) (2000) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."); N.H. REV. STAT. ANN. § 628:2 (2007); S.D. CODIFIED LAWS § 22-5-10 (1998); TENN. CODE ANN. § 39-11-501 (2003).

26. *See* Hoffman & Morse, *supra* note 21, at 13.

27. For example, see Arizona's decision to increase to a clear and convincing standard to prove insanity. ARIZ. REV. STAT. ANN. § 13-502(C) (2001).

28. This idea of admitting evidence from both of Justice Souter's first two categories—instead of just from the first category of observation evidence—comes from conversations with Peter Arenella at the UCLA School of Law.

evidence in mens rea determinations are not adequate to justify the drastic step of using an affirmative defense presumption to relieve the government's constitutional burden to prove all elements of an offense.

Part I of this Comment discusses the current use of the presumption of sanity by states and the problems with stretching the presumption into mens rea determinations. This Part also analyzes how the *Clark* decision uses the presumption to restrict mens rea evidence through Justice Souter's tripartite categorization, as well as the policy arguments supporting this restriction. Part II examines alternative ways to regulate mental disease evidence, including the use of such evidence as a mistake of fact defense (which requires modifying Justice Souter's categorization of the evidence). Part III applies these revised notions to the facts of *Clark* and assesses the implications of this new framework. The Conclusion reflects on the distinction between an affirmative defense presumption and specific intent (or failure of proof) inquiries, ultimately concluding that the two issues must be kept separate in order to keep the burden on the prosecution to prove every element of the crime charged.

I. CURRENT APPROACHES TO THE PRESUMPTION OF SANITY

A. Use of the Presumption by States

In all states, the presumption of sanity serves as a general principle that the state need not introduce evidence of sanity until the defense makes efforts to put insanity at issue.[29] The main distinction between states' use of the presumption turns on whether the presumption disappears after the defendant meets the initial burden of production.[30]

In the first category of states, the presumption of sanity primarily exists to define the point at which the defendant has satisfied his burden of production to put the question of insanity before the judge or the jury.[31] Once that threshold is crossed, the presumption of sanity disappears; at that point, the factfinder can no longer rely on the presumption to assume the

29. Terri M. Couleur, Comment, *The Use of Illegally Obtained Evidence to Rebut the Insanity Defense: A New Exception to the Exclusionary Rule?*, 74 J. CRIM. L. & CRIMINOLOGY 391, 408 (1983).
30. *Id.* at 410.
31. *See* 21 AM. JUR. 2D *Criminal Law* §§ 73–74 (1998); *see, e.g.*, State v. Lockhart, 542 S.E.2d 443, 451 (W. Va. 2000) ("[I]f any evidence introduced by [the defendant] or by the State fairly raises doubt upon the issue of [the defendant's] sanity at that time, the presumption of sanity ceases to exist." (emphasis omitted)); State v. Koon, 440 S.E.2d 442, 448 (W. Va. 1993) (per curiam).

defendant is morally responsible.[32] In other words, the presumption is procedural and has no weight as evidence for the factfinder once insanity becomes an issue.[33] In these jurisdictions, the jury will not even be instructed on the existence of the presumption once the defense satisfies its initial burden of production.[34] The level of evidence required to overcome the presumption varies from state to state;[35] once that level is reached, the presumption no longer exists and cannot assist the judge or the jury in determining the sanity of the defendant.

In the second category of states, the presumption continues to have substantive evidentiary significance for the judge or the jury even after the defendant satisfies his burden of production.[36] The presumption exists throughout trial and carries substantive evidentiary weight in the factfinder's final determination of sanity.[37] That is, even after the defendant has presented sufficient evidence to make insanity an issue at trial, the judge or the jury can still consider the existence of a general presumption of sanity as evidence of sanity weighing for the prosecution.[38]

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32. *See* Bourriague v. State, 820 So. 2d 997, 998 (Fla. Dist. Ct. App. 2002) ("If a defendant introduces evidence sufficient to create a reasonable doubt about sanity, the presumption of sanity vanishes and the state must prove the defendant's sanity beyond a reasonable doubt.").

33. People v. Murphy, 331 N.W.2d 152, 157 (Mich. 1982); *see also* STEVEN I. FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE 732 (2d ed. 2004) (referring to presumptions of this type as "bursting bubbles" that "are simply convenient procedural devices, mandating outcomes only in the absence of evidence to the contrary" and noting that "[o]nce contested, they should disappear").

34. *See* Thompson v. State, 646 N.E.2d 687, 690 (Ind. Ct. App. 1995).

35. *Compare* People v. Hill, 934 P.2d 821, 830 (Colo. 1997) (en banc) ("In Colorado, *any* evidence of insanity is legally sufficient to support an insanity defense and rebut the presumption of sanity." (emphasis added)), *with* State v. DeAngelo, No. CR 970108766S, 2000 WL 264303, at *2 (Conn. Super. Ct. Feb. 24, 2000) (describing the burden of proof as "a fair preponderance of the evidence").

36. *See, e.g.*, Cunningham v. State, 426 So. 2d 484, 490 (Ala. Crim. App. 1982) ("When the accused has offered evidence sufficient to overcome the presumption of sanity, the State is not required to prove his sanity. Insanity is an affirmative defense which must be proven by the defendant to the reasonable satisfaction of the jury. The burden of proving insanity never shifts to the State but remains on the defendant throughout the trial." (internal citation omitted)).

37. *See, e.g.*, Commonwealth v. Keita, 712 N.E.2d 65, 70 (Mass. 1999) ("The evidence that we have recited . . . is sufficient along with the presumption of sanity, not only to warrant the judge's finding of guilt, but also to justify our not ordering a new trial."); State v. Crenshaw, 617 P.2d 1041, 1046 (Wash. Ct. App. 1980), *aff'd*, 659 P.2d 488 (Wash. 1983).

38. However, the extent to which the prosecution can rely on the presumption for evidentiary support varies between states. In some states, the presumption alone is sufficient to rebut all of the defendant's affirmative evidence of insanity; other states find that the jury can use the presumption only as a factor in its deliberations and require the government to produce other evidence once the defendant overcomes the initial presumption. *Compare* State v. Harris, 774 S.W.2d 487, 492 (Mo. Ct. App. 1989) ("[T]he statutory presumption of sanity standing alone, is evidence sufficient to sustain the finding of the trier of fact on this issue." (internal citation omitted)), *with* State v. Mize, 337 S.E.2d 562 (N.C. 1985) ("'[I]n all cases there is a presumption of sanity, and when there is other evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity . . . .'" (quoting State v. Harris, 290 N.C. 718, 726 (1976))).

While the majority in *Clark* correctly noted that states have the right to define the burden of production for insanity as they wish,[39] these burdens have never traditionally been used to exclude evidence bearing on specific intent.[40] Several states have noted this separation between the presumption of sanity and mens rea. In a recent California case, *Stark v. Hickman*,[41] the defendant shot to death the man with whom his wife had absconded. The trial court instructed the jury to conclusively presume the defendant's sanity during the guilt phase of the trial.[42] The Ninth Circuit reversed the defendant's conviction on appeal, finding that the instruction on presumption of sanity may have misled the jury on the state's burden to prove specific intent beyond a reasonable doubt.[43] The Ninth Circuit had previously expressed concern that

> [i]f the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for [the crime], that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant.[44]

The presumption of sanity is meant to allocate the shifting burdens for a defense of insanity; when the presumption is used to exclude evidence relevant to an element of the crime, states have found reversible error for contravening the state's burden to prove all elements beyond a reasonable doubt.

In the New York case of *People v. Kohl*,[45] the state charged the defendant with killing a man with a shotgun. The defendant was convinced that the victim had sexually assaulted the defendant's children; the defendant also

39. Clark v. Arizona, 126 S. Ct. 2709, 2730 (2006) ("[T]he force of the presumption of sanity varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it.").

40. For example, Justice Souter's statement in the preceding footnote relies on *Fisher v. United States*, 328 U.S. 463 (1946), which debates the introduction of evidence for the defense of partial responsibility and makes no mention of the presumption of sanity. *Id.* at 475–76. For a case highlighting the importance of allowing mental disease evidence outside of the parameters of the insanity defense, and therefore not subject to the presumption, see *Finger v. State*, 27 P.3d 66, 85 (Nev. 2001) ("Evidence that does not rise to the level of legal insanity may, of course, be considered in evaluating whether or not the prosecution has proven each element of an offense beyond a reasonable doubt . . . .").

41. 455 F.3d 1070 (9th Cir. 2006).

42. *Id.* at 1074–75.

43. *See id.* ("Petitioner argues that this instruction . . . led the jurors to believe they could not consider whether petitioner's alleged mental disability precluded him from forming the requisite intent to commit murder[, and therefore] the instruction had the effect of lowering the state's burden of proving the requisite intent . . . .").

44. Patterson v. Gomez, 223 F.3d 959, 965 (9th Cir. 2000).

45. 527 N.E.2d 1182 (N.Y. 1988).

claimed that he was from another planet.[46] At trial, the defendant introduced eyewitness testimony of his previous bizarre behavior as well as psychiatric testimony of his paranoid schizophrenia. The trial court found that the presumption of sanity placed the burden of production on the defendant to put the affirmative defense of insanity at issue by a preponderance of the evidence. The court then determined that the defendant failed to meet this burden and that all elements of the crime were satisfied beyond a reasonable doubt. The appellate court upheld the conviction, but noted that the presumption of sanity "has never relieved the People of the burden of establishing beyond a reasonable doubt defendant's pertinent culpable mental state at the time the crime was committed, including those elements that may overlap with the affirmative defense of mental disease or defect."[47] Even while keeping the burden for the affirmative insanity defense on the defendant, the court found it important to note that this burden did not mitigate the prosecution's responsibility to prove all elements of the case.[48]

B. Overuse of the Presumption of Sanity in *Clark*

Despite differing notions of the presumption between states, the concept has traditionally referred to the use of evidence to prove or disprove sanity. Not until *Clark* did the Supreme Court start using the presumption of sanity to exclude certain forms of evidence from mens rea determinations. At the time of Clark's trial in Arizona (and still today), Arizona's statute retained the presumption of sanity's evidentiary significance for the factfinder throughout the trial.[49] The statute also required that the defendant's evidence of insanity reach the high threshold of clear and convincing evidence in order put insanity at issue.[50] In *Clark*, however, the Supreme Court extended the Arizona statute even further, using the presumption of

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46. *Id.* at 1183.

47. *Id.* at 1186.

48. *Id.*; *cf.* People v. Gonzalez, 474 N.Y.S.2d 585 (N.Y. App. Div. 1984). In *Gonzalez*, the defendant killed a deputy sheriff, who he allegedly believed was an agent sent by Fidel Castro as part of a Communist conspiracy. 474 N.Y.S.2d at 586. The court said that the factfinder "could rely on the presumption of sanity as establishing defendant's culpable mental state beyond a reasonable doubt." *Id.* Though the court gave the presumption unprecedented substantive trial value to rebut mens rea, it did not use the presumption to exclude mental disease evidence from the factfinder's consideration (and therefore did not go as far as *Clark*).

49. ARIZ. REV. STAT. ANN. § 13-502(C) (2001); *see* State v. Cameron, 704 P.2d 1355, 1359 (Ariz. Ct. App. 1985) ("Now there is no shift in the burden of proof, rebutting of the presumption of sanity by clear and convincing evidence of insanity is required, and there is therefore no requirement of proof of sanity beyond a reasonable doubt.").

50. ARIZ. REV. STAT. ANN. § 13-502(C).

sanity as a justification to exclude evidence under the *Mott* rule.[51] The *Mott* rule admits testimony from mental health experts about a defendant's diminished capacity due to mental disease or defect in insanity defense determinations, but precludes use of such evidence to negate mens rea.[52] *Mott* itself makes no reference to the presumption of sanity. Nevertheless, Souter's *Clark* opinion ties the *Mott* rule and the presumption together:

> If a State is to have this authority [to create a high burden of persuasion for the insanity evidence] in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial.[53]

Souter opined that a state not only can use the presumption of sanity to define the burden for the insanity defense, but also can exclude certain mental disease evidence from consideration elsewhere in the trial in order to make sure it comports with this burden. Justice Kennedy's dissent expressed concern over allowing the *Mott* rule to conflate the presumption of sanity with "a presumption that the *mens rea* elements were not affected by mental illness."[54] Kennedy argued that channeling mental disease evidence that relates to knowledge or intent solely into an issue for which the defendant bears the burden of proof is an impermissible shift.[55]

In order to alleviate concerns about channeling evidence, Justice Souter devised a new system in *Clark* to differentiate which forms of evidence are admissible for mens rea consideration under *Mott*. Instead of focusing on whether the evidence relates directly to specific intent, Souter instead created a tripartite categorization of the types of evidence.[56] First is observation evidence, including testimony from those who observed the defendant directly and from experts who can explain the defendant's behavioral or cognitive tendencies without resorting to mental disease classifications.[57] Second is mental disease evidence, including opinions of mental health

51. Clark v. Arizona, 126 S. Ct. 2709, 2732–33 (2006).

52. *See* State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc). In *Mott*, the court precluded the defendant from offering expert testimony regarding battered woman syndrome to show that her mental capacity negated specific intent to commit child abuse. *Id.* at 1050–51. The doctor's testimony attempted to establish that the defendant was not capable of forming the requisite mental state of knowledge or intent: "Thus, the evidence of defendant's history of being battered and of her limited intellectual ability was not offered as a defense to excuse her crimes but rather as evidence to negate the *mens rea* element of the crime." *Id.* at 1050.

53. *Clark*, 126 S. Ct. at 2732.

54. *Id.* at 2747 (Kennedy, J., dissenting).

55. *Id.*

56. *Id.* at 2724–25 (majority opinion).

57. *Id.* at 2724.

professionals as to whether the defendant suffered from a specific illness at the time of the crime.[58] Lastly, there is capacity evidence, including testimony as to the defendant's "capacity for cognition and moral judgment (and ultimately also his capacity to form mens rea)."[59] In Souter's conceptualization, Arizona's *Mott* rule restricts only the last two forms of evidence from mens rea determinations. The trial court in *Clark* excluded all three forms of mental disease evidence, including potential observation evidence. However, Souter found that Clark failed to object to the exclusion of observation evidence specifically, even though such a categorization did not exist at the time of the original trial.[60]

A number of policy reasons support restricting the types of mental disease evidence used to negate mens rea and confining certain forms of mental disease evidence to an affirmative defense.[61] For example, some states prefer to first evaluate the mens rea evidence for any defendant before even considering mental disease evidence, so as to create less confusion for the jury.[62] These states find that it is too difficult to ask juries "not only to determine whether a defendant is insane but also to determine, if the defendant is not insane, whether and to what degree his mental illness nevertheless affected his ability to form *mens rea*."[63] Another reason for the exclusion of mental disease or capacity evidence during mens rea determinations is the fear that defendants will introduce all sorts of dubious

58. *Id.* at 2725.

59. *Id.*; *see also* Brief of the American Ass'n on Mental Retardation et al. in Support of Petitioner at 20, *Clark*, 126 S. Ct. 2709 (No. 05-5966) (explaining that this type of evidence "rebuts the prosecution's assertion by showing that the defendant did not harbor that mental state because the mental disability rendered him incapable of forming it" (emphasis omitted)).

60. *Clark*, 126 S. Ct. at 2726 ("Clark's objection to the application of the *Mott* rule does not, however, turn on the distinction between lay and expert witnesses or the kinds of testimony they were competent to present."). Justice Souter, writing for the majority, conceded that the exclusion of observation evidence was a misapplication of Arizona law. *Id.* at 2726. However, Souter found that Clark waived his opportunity to object to the exclusion of the observation evidence, such as the testimony of Clark's mother or the expert witnesses who observed him. *Id.* at 2727–28. The opinion therefore only considers whether the exclusion of mental disease and capacity evidence is a violation of due process. *Id.* at 2727.

61. Arizona proposes, for example, that it may simply wish to "protect the integrity of its bifurcated trial procedure, in which guilt is tried before the issue of insanity." Respondent's Brief on the Merits at 42, *Clark*, 126 S. Ct. 2709 (No. 05-5966).

62. *See, e.g.*, Brief of the States of Massachusetts et al. as Amici Curiae in Support of Respondent at 22, *Clark*, 126 S. Ct. 2709 (No. 05-5966) [hereinafter Brief of the States].

63. Respondent's Brief on the Merits, *supra* note 61, at 41. However, this statement appears primarily concerned with the effect of capacity evidence, rather than other forms of mental disease evidence, on mens rea proceedings. *See, e.g.*, Stamper v. Commonwealth, 324 S.E.2d 682, 688 (Va. 1985).

and questionable psychiatric evidence into the guilt phase of the trial.[64] Some states doubt the accuracy or relevance of many psychiatric theories of mental illness and therefore want to prevent such testimony from permeating additional facets of trial.[65]

These concerns largely stem from the assumption that most evidence of mental disease and capacity are logically irrelevant to mens rea. The insanity defense deals with moral culpability and whether the accused's actions are excused,[66] while mens rea is often defined in terms of basic cognitive functioning common to almost all offenders.[67] The ability to entertain a mental state, such as the ability to intentionally or knowingly kill a police office, has no inherent connection to mental disease. In other words, the most insane offenders will still generally have the ability to form an idea and follow through on a related act, even if they cannot appreciate the wrongfulness of that act.[68] For this reason, many states find mental disease evidence generally irrelevant in mens rea determinations.[69]

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64. *See* Brief of the States, *supra* note 62, at 25; Respondent's Brief on the Merits, *supra* note 61, at 14 (expressing the "wariness" of courts for this type of psychiatric evidence).

65. *See, e.g.*, State v. Fosnow, 240 Wis. 2d 699, 718 n.9 (2000) (upholding the exclusion of psychiatric testimony from consideration on the issue of specific intent because "'[w]hile some courts may have blind faith in all phases of psychiatry, this court does not'" (alteration in original) (quoting Steele v. State, 97 Wis. 2d 72, 97 (1980))).

66. *See* Julian N. Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. REV. 637, 650 (1977).

67. *See, e.g.*, Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 834 (1977) ("As long as the *mens rea* element is defined in terms of the conscious mind's cognitive and affective functions, it is perfectly plausible that the defendant entertained the specific mental state but was still insane." (internal citation omitted)).

68. *See id.* ("[M]ost mentally abnormal offenders are fully capable of thinking about their criminal act . . . and then performing it in accordance with their preconceived plan.").

69. Some states have attempted to define mens rea to completely exclude consideration of mental disease, though Souter did not suggest this approach in *Clark*. The Arizona legislature specifically did not adopt a section of the Model Penal Code allowing evidence of "mental disease or defect" whenever relevant to show the defendant lacked a "state of mind that is an element of the offense." MODEL PENAL CODE § 4.02 (1962). Similar-minded states analogize this exclusion of mental disease evidence to the situation in *Montana v. Egelhoff*, 518 U.S. 37 (1996), in which the U.S. Supreme Court allowed Montana to exclude evidence of voluntary intoxication from mens rea consideration. *Id.* at 50 (stating that the exclusion of evidence of voluntary intoxication "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences"); *see, e.g.*, State v. Sexton, 180 Vt. 34, 55 (2006). However, the comparison to *Egelhoff* is not perfect. Some judges view the exclusion of voluntary intoxication evidence as less of a violation of the defendant's fundamental rights because intoxication is a culpably induced state. *See* Clark v. Arizona, 126 S. Ct. 2709, 2748 (2006) (Kennedy, J., dissenting); State v. Mott, 931 P.2d 1046, 1050 (Ariz. 1997) (en banc).

This concern about irrelevancy relates primarily to evidence found in Souter's category of capacity evidence. Mental disease evidence, however, may be relevant to mens rea by showing the possibility that a defendant did not hold a particular intent at a particular time; for example, an understanding of schizophrenia could show how Clark might not have known he was shooting a cop at the time, even if he had the general ability to know. Regardless, Souter's opinion excluded both types of evidence. As a result, the exclusion of all but observation evidence under the guise of the presumption of sanity creates unnecessary risks of its own.

Justice Souter accepted that there are reasons for admitting certain mental disease evidence to negate intent, but only to the extent of allowing observation evidence.[70] For example, in *Kohl*, Souter's system would allow evidence of the defendant's bizarre behavior but would still exclude from the mens rea determinations any testimony describing schizophrenic behavior. Without explaining that the defendant's unusual behavior is typical in the context of a known mental disease, such eyewitness evidence makes no sense to a judge or a jury. While the defendant would appear bizarre, the limited evidence would not explain how this oddity affects his cognition and would be largely ineffective in rebutting intent. Regardless, Souter would only accept this evidence of aberrant behavior, indicative of a mental disease, for consideration regarding intent. He would then use the presumption of sanity as a gatekeeper to bar any evidence of mental disease or capacity for cognition, granting the presumption power beyond that in any state opinion.

II. SAFEGUARDING THE PRESUMPTION OF SANITY

A. Alternative Approaches to Restrict Mental Disease Evidence in Mens Rea Determinations

To a certain extent, Justice Souter's tripartite categorization does provide a useful manner of parsing the admissibility of mental disease evidence. His third category, capacity evidence, highlights evidence that could justifiably be excluded from mens rea determinations due to its minimal probative value and potential to confuse the jury.[71] Evidence showing

70. *Clark*, 126 S. Ct. at 2724–25 (explaining Souter's tripartite categorization of the admissibility of mental disease evidence to negate mens rea).

71. *See* ARIZ. R. EVID. 403 ("Although 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.").

"diminished capacity to obey the law" must be distinguished from mental disease evidence showing the specific intent was not actually formed.[72] Even the most severely insane defendant can still have the capacity to form specific intent—for instance, to have the ability to know that he shot a police officer. A focus on mental capacity opens the guilt determination to much of the same evidence introduced at insanity determinations, even though there is little connection between legal insanity and the ability to form specific intent.[73] As the United States noted as amicus curiae in *Clark*, if a defendant "was so incapable of forming intent or knowledge that he did not know the wrongfulness of his act," then he would be found legally insane.[74] The close connection of capacity evidence to legal insanity means that there is less of a need to introduce such evidence during the guilt determination, especially when this would require the jury to make impossible distinctions as to exactly what issue is being determined. Because capacity evidence can create such confusion and has limited probative value, Souter's decision to exclude this category of evidence from negating mens rea makes sense.

Souter's category of mental disease evidence, on the other hand, can be valuable in mens rea determinations when showing whether the defendant actually formed the specific intent. Even though a defendant may be capable of entertaining the requisite intent, mental disease evidence could be instrumental to cast reasonable doubt on whether he in fact formed the intent; for example, such evidence may "provide[ ] an alternative explanation for behaviors that might otherwise be interpreted as incriminating by the trier of fact."[75] For example, this approach would have admitted evidence showing that Clark's loud playing of his radio may not have been meant to lure the policeman to the scene, but may have been Clark's attempt to

72. *Clark*, 126 S. Ct. at 2733 (discussing diminished capacity defenses).

73. *See* Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 276–77 (1982) [hereinafter Arenella, *Reflections*] ("Instead of focusing on whether the defendant's mental abnormality prevented him *in fact* from entertaining the requisite intent, this diminished capacity approach authorizes the admission of any evidence suggesting that the defendant's *mental capacity* to entertain the intent was diminished due to mental illness."); Arenella, *supra* note 67, at 834–35 ("[T]he only type of mental abnormality that could establish such incapacity would be a severe mental disability that substantially interfered with the defendant's reality-testing functions. . . . [Such evidence] that he did not realize what he was doing would also establish his insanity . . . .").

74. Brief for the United States as Amicus Curiae Supporting Respondent at 27, *Clark*, 126 S. Ct. 2709 (No. 05-5966).

75. Brief of the American Ass'n on Mental Retardation et al., *supra* note 59, at 20 (emphasis omitted).

drown out the voices in his head from schizophrenia.[76] If a statutory element of the crime includes a specific mental state, such as intent or knowledge,[77] then the opportunity to rebut this element of the crime should not be taken lightly. The presumption of sanity should focus solely on evidence concerning the burden of production or persuasion for the affirmative defense of insanity, and not on evidence regarding the defendant's actual mental state at the time. By keeping these concepts distinct, the jury would be able to better understand the difference between the insanity defense (providing an excuse for the defendant's actions) and a failure of proof defense (showing that the prosecution has not met the statutory requirements), and thus better understand the distinct burdens for each concept.[78]

Justice Souter's tripartite categorization, though useful in differentiating forms of potential mens rea evidence, presents numerous concerns. These concerns include the system's complete lack of precedent and risk of arbitrary line drawing. For example, a psychiatrist would be able to discuss general tendencies in Clark's behavior as observation evidence, but would not be allowed to introduce mental disease evidence to explain that these characteristics are common to schizophrenics or that Clark even has schizophrenia.[79] If Clark is unable to show that his symptoms are part of a recognized mental illness, this exclusion will significantly diminish the credibility and coherence of his observation evidence at trial. A mens rea inquiry should be limited to the question of whether the required intent was actually formed, and should admit any sufficiently probative mental disease evidence that bears on such a finding. In other words, the factfinder should have access to both of Souter's first two categories: the observation evidence and the mental disease evidence that puts the observations in context.[80] Excluding either of these two categories impedes the creation of a full picture of the evidence. Excluding capacity evidence, however,

76. *Clark*, 126 S. Ct. at 2739 (Kennedy, J., dissenting).

77. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2001).

78. *See Clark*, 126 S. Ct. at 2747 (Kennedy, J., dissenting) (noting the problems caused by the Court's view that the Arizona rule creates only a "presumption of sanity" instead of a "presumption that the *mens rea* elements were not affected by mental illness").

79. *See id.* at 2739 ("[T]he opinion that Clark had paranoid schizophrenia . . . bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer. . . . It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible.").

80. *See* Petitioner's Opening Brief, *supra* note 13, at 11 ("If a State makes certain conduct criminal only when it is performed with a specific state of mind, it cannot deny defendants the right to argue to a trier of fact that their mental impairments prevented them from actually, subjectively having the culpable state of mind.").

allows the trial to maintain focus on whether the defendant in fact formed the mens rea in question. By focusing exclusively and attentively on observation and mental disease evidence, and not on the clouding issue of "capacity to entertain the intent,"[81] the court can more clearly hold the state to its burden of proof on every element of the crime.

By only using observation and mental disease evidence to show whether the defendant formed the statutory intent charged, the mens rea evidence will be less likely to appear to collide with the presumption of sanity. This restriction will make clearer that the defendant's general sanity and ability to "know the criminal act was wrong" is not at issue in the determination of guilt;[82] instead, the inquiry can focus exclusively on whether the defendant actually fulfilled the statutory requirements of the crime. The remaining evidence, then, would not be circumventing the clear and convincing standard of the presumption of sanity, but would focus instead on the prosecution's burden to prove specific intent beyond a reasonable doubt. The presumption of sanity is not a presumption that specific intent exists, and therefore should not be used to relieve or reduce the state's burden in this separate determination.

B. Mistake of Fact in Mens Rea Determinations

When admitting evidence of mental disease for the guilt portion of the trial, the evidence is not used to establish legal insanity, but rather is used to determine if the mental state charged existed at the time of the crime. In specific intent cases such as *Clark*, in which the crime charged involves knowledge or intent,[83] evidence that shows a lack of knowledge could constitute a failure of proof defense to the crime charged. When evidence serves in this context, this lack of knowledge comprises a mistake of fact defense.[84] Arizona's version of mistake of fact excuses criminal liability when "[i]gnorance or a mistaken belief as to a matter of fact . . . negates the culpable mental state required for commission of the offense . . . ."[85] If Clark's evidence had shown that he was ignorant as to the fact that he was killing a policeman, such a showing would have fit directly into this established state law defense.

81. Arenella, *Reflections*, *supra* note 73, at 277 (emphasis omitted).
82. ARIZ. REV. STAT. ANN. § 13-502. Even if the defendant cannot know he is killing a police officer, he can still know that the act is wrong.
83. *See id.* § 13-1105(A)(3).
84. This analogy to the mistake of fact defense comes from conversations with Peter Arenella.
85. ARIZ. REV. STAT. ANN. § 13-204(A)(1).

Arizona already has a mistake of fact defense in place;[86] the state would not need to pass any new legislation in order to apply the defense to Clark's circumstances.[87] In light of this existing defense, it makes no sense to distinguish between a sane person making a mistake that negates his mens rea and a mentally ill person who—due to mental illness—makes the same mistake of fact negating the same mens rea. Mental disease evidence should be quite pertinent, largely to the extent that it lends credibility to the defendant's claim of honest belief. For example, Clark's comments to friends and family about aliens existing in his town are more believable when offered with background about symptoms of schizophrenia. The mental disease evidence helps explain the circumstances surrounding the offense in a manner that makes Clark's mistake about the extraterrestrial nature of the officer more likely to seem genuine. Arizona courts have previously held that "lack of knowledge may disprove the existence of specific intent" and that the state holds the burden to prove knowledge and intent in a specific intent crime.[88] Souter's tripartite categorization admits one category of mens rea evidence—observation evidence—largely because of its relevance to illustrate this lack of knowledge.[89] However, Souter's failure to allow mental disease evidence as well prevents the factfinder from receiving a full and believable picture. Because Clark was charged with a specific intent crime, his ability (or inability) to present a thorough lack of knowledge defense could have had a tremendous impact on the state's case.

While many state statutes similarly allow any material mistake of fact as a defense for specific intent crimes,[90] other formulations focus on the

86. *Id.* § 13-204.

87. The mistake of fact defense is available even if the mistake is unreasonable, so long as the mistake is honest and negates the requisite intent. *See id.* § 13-204. In *Clark*, the government had the burden to prove the specific mental state of knowledge or intent; the objective unreasonableness of a mistake would only negate a mens rea of negligence. 126 S. Ct. 2709, 2716 (2006). A standard of reasonableness for mistakes about specific intent would be illogical because it would exclude mistakes that rebut the requisite mental state of knowledge or intent. Evidence of unreasonableness can be introduced, however, to challenge the credibility of the claimed mistake. The more unreasonable the mistake, the less persuasive a defendant will be in arguing that he genuinely believed his mistake. This idea of using evidence of unreasonableness as evidence of credibility comes from conversations with Peter Arenella.

88. State v. Jamison, 517 P.2d 1241, 1244 (Ariz. 1974), *overruled on other grounds by* State v. Mikels, 578 P.2d 174 (Ariz. 1978).

89. *Clark*, 126 S. Ct. at 2724 (noting that observation evidence "is the kind of evidence that can be relevant to show what in fact was on Clark's mind when he fired the gun").

90. *See, e.g.*, DEL. CODE ANN. tit. 11, § 441 (2001) ("[I]t is a defense that the accused engaged in the conduct charged to constitute the offense under ignorance or mistake of fact if . . . [t]he ignorance or mistake negatives the state of mind for the commission of the offense . . . .");

level of culpability required for the crime.[91] Either way, if Clark did not have knowledge that he was shooting a police officer or the intent to do so, then he cannot be convicted of the crime charged. If Arizona tried Clark for a homicide crime that did not require specific intent, then the burden on the state would be notably less. Instead, he was charged with a specific intent crime in a state in which any honest lack of material knowledge is an excuse; therefore, allowing mental disease evidence specifically related to that lack of knowledge should fit well within the confines of Arizona jurisprudence.

As long as the mens rea determination stays focused on the defendant's actual knowledge or intent—or lack thereof—at the time of the offense, and not his capacity for knowledge in general, then jury confusion and overlap with questions of legal insanity will be kept to a minimum. Souter's exclusion of capacity evidence largely alleviates this concern. Souter went too far, however, by restricting mental disease evidence from mens rea consideration as well. Unlike the vague conjectures on cognitive abilities found in capacity evidence, mental disease evidence can include a professional diagnosis of the defendant based on previously understood conditions.[92] This evidence helps explain how a defendant can hold an honest mistaken belief in a manner that may be convincing to a factfinder.[93] Although many mental diseases may not bear on mens rea, this fact does not justify a blanket exclusion of potentially relevant evidence. Without mental disease evidence, the observation evidence has no context and denies the defendant a complete defense. Therefore, Souter's system must be modified to allow mental disease evidence, in addition to observation evidence, to negate mens rea; only then can the evidence provide the

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IND. CODE § 35-41-3-7 (LexisNexis 2004) ("It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense."); LA. REV. STAT. ANN. § 14:16 (2007) ("[R]easonable ignorance of fact or mistake of fact which precludes the presence of any mental element required in that crime is a defense to any prosecution for that crime."); N.M. RULES ANN. § 14-5120 (2007) (uniform jury instructions for criminal cases); TENN. CODE ANN. § 39-11-502 (2003); TEX. PENAL CODE ANN. § 8.02 (Vernon 2003); UTAH CODE ANN. § 76-2-304 (2003).

91. *See, e.g.*, MODEL PENAL CODE § 2.04(1)(a) (1962) (allowing a defense where "the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense").

92. *Clark*, 126 S. Ct. at 2725 ("[T]his evidence characteristically but not always comes from professional psychologists or psychiatrists who testify as expert witnesses and base their opinions in part on examination of a defendant . . . ." (internal citation omitted)).

93. *See id.* at 2739 (Kennedy, J., dissenting) ("The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting.").

factfinder with a more complete understanding of the defendant's mental state at the time of the offense.

This use of mental disease evidence to negate mens rea simply provides the mistake of fact defense, a defense for which there is no affirmative burden on the defendant and no presumption to overcome. The presumption of sanity is a tool to make sure the defendant has satisfied the burden of production or persuasion on the issue of legal insanity; it is not a circumvention of this presumption to state that the defendant did not in fact commit the crime charged. By allowing observation and mental disease evidence under the rubric of a mistake of fact defense, the court will be able to examine evidence of mens rea without implicating the presumption and without denying a full and established defense to defendants.

III. APPLICATION OF REVISED USE OF MENTAL DISEASE EVIDENCE IN *CLARK*

When Clark presented his case before the Arizona courts, he was presumed sane and had the burden to rebut that presumption and prove his insanity with clear and convincing evidence.[94] The state, on the other hand, had the burden to prove beyond a reasonable doubt that Clark knowingly or intentionally caused the death of a law enforcement officer.[95] In order to prevent the same mental disease evidence from being used in both determinations to potentially result in complete acquittal, Justice Souter only allowed observation evidence to negate the proof of specific intent. In Clark's case, this evidence included statements from those who heard Clark say that government agents were aliens and could only be stopped with bullets.[96] This limited category did not include psychiatric evidence that these and other beliefs were typical of schizophrenia or the undisputed notion that Clark had schizophrenia, and, thus, this evidence was not considered in the guilt determination. However, the trial court excluded all evidence, including observation evidence, in its mens rea determination, a fact that Souter did not find significant because Clark failed to make this specific objection.[97]

By viewing Clark's arguments as a mistake of fact defense, one can see why both observation evidence and mental disease evidence should have been admissible to dispute mens rea under Souter's tripartite categorization.

94. *See* ARIZ. REV. STAT. ANN. § 13-502(C) (2001).
95. *See id*. § 13-1105(A)(3).
96. *Clark*, 126 S. Ct. at 2725 n.27.
97. *See id*. at 2726.

When the state has to prove knowledge or intent, as in *Clark*, mental disease evidence could be valuable in two different ways. First, evidence that Clark's behaviors fit the pattern of a known mental illness would have greatly increased the credibility that his belief in aliens was honest. If a mental health expert could have explained that Clark suffers from schizophrenia and how schizophrenia affects cognition, it would have been more persuasive to the factfinder that Clark actually believed what he claimed.[98] Without such evidence, all the factfinder could consider was observation of Clark's aberrant behavior, without any context for why such behavior may have existed.

Second, mental disease evidence could have shown an alternative explanation for Clark's behavior surrounding the offense that might otherwise imply knowledge or intent.[99] For example, the trial court did not consider psychiatric testimony that schizophrenics will play their radios loudly in an attempt to drown out the voices in their heads or that they have difficulty distinguishing their imagination from reality.[100] Such evidence could have been useful to contradict the prosecution's assertion that Clark played his radio loudly in an attempt to lure an officer to the scene. Otherwise, as with the claims about aliens mentioned above, the court was simply admitting evidence of behavior without any context as to why it occurred. If the trial court believed that Clark lured the officer in order to kill him, then certainly there was no lack of specific intent. If the trial court considered evidence that Clark's behavior indicated his confusion of reality with imagination at the time he shot the officer, then the court could have found that a mistake of fact occurred.

The appellate standard of review for the trial court's decision in Clark is abuse of discretion, which allows reversal when discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."[101] The exclusion of all evidence in Souter's mental disease category from the mens rea determination when the evidence bore directly on a statutory element of the crime was manifestly unreasonable and a sufficient basis for reversal. Regardless of the Supreme Court's unprecedented attempt to justify exclusion of evidence through use of the presumption of sanity, Clark was clearly denied a failure of proof

98. *See id.* at 2739 (Kennedy, J., dissenting).
99. Brief of the American Ass'n on Mental Retardation et al., *supra* note 59, at 20.
100. *Clark*, 126 S. Ct. at 2739 (Kennedy, J., dissenting).
101. Torres *ex rel.* Torres v. N. Am. Van Lines, Inc., 658 P.2d 835, 840 (Ariz. Ct. App. 1982).

defense normally available for any criminal defendant. Mistake of fact is established in Arizona law,[102] and the concept is relevant whenever the evidence logically can dispute the required specific intent. Clark may have been acquitted if the court had allowed mental disease evidence to negate mens rea; allowance of this evidence would not be circumventing Clark's affirmative burden to show legal insanity, because it would instead show that he did not in fact commit the specific intent crime charged.

Such a result does not necessarily mean that Clark would go free. Arizona could have charged Clark with a lower-degree homicide offense, one that does not require specific intent, in the hopes of proving all elements of that offense more easily. Arizona also could have instituted independent civil commitment proceedings to make sure that Clark received treatment without branding him a criminal.[103] There are several options for dealing with a defendant in Clark's situation. Convicting him of knowingly or intentionally killing a policeman, while using the presumption of sanity to exclude evidence rebutting knowledge or intent, should not be one of those options.

CONCLUSION

The presumption of sanity has historically been used to allocate the burden of production or persuasion in determinations of legal insanity. However, legal insanity is conceptually distinct from mens rea. While a factfinder may presume sanity exists, he cannot constitutionally presume the required mental state of a crime to exist. To the contrary, there is a burden on the state to prove every element of the offense beyond a reasonable doubt. In specific intent cases, these elements include requisite knowledge or intent. The presumption of sanity should not be used to shift the burden of production on these elements, let alone to relieve the state's burden to persuade the factfinder beyond a reasonable doubt. The presumption solely concerns an affirmative defense dealing with a defendant's legal responsibility for a crime, not a defense that the defendant simply did not commit the crime charged.

In specific intent cases, mens rea determinations must include mental disease evidence, in addition to observation evidence, if such evidence rebuts the existence of that intent by showing a potential mistake of fact. Mistake of fact is established in Arizona, as well as many other states, as a

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102. ARIZ. REV. STAT. ANN. § 13-204(A) (2001).
103. *Clark*, 126 S. Ct. at 2748 (Kennedy, J., dissenting).

failure of proof defense to specific intent crimes. This defense provides an avenue for mental disease evidence channeled for a specific, direct purpose, while still excluding evidence on the defendant's capacity, thus alleviating many of the policy concerns proffered by Arizona to justify exclusion of such evidence. Allowing evidence from Souter's first two categories to negate mens rea will give a factfinder a more complete understanding of the defendant's situation and actual intent at the time of the alleged offense. If mental disease evidence bears directly on disproving statutory intent, then such evidence must not be excluded if the state is to truly prove all elements beyond a reasonable doubt. The prosecution has the burden to prove that that the defendant committed the crime charged, and the presumption of sanity must not be misused in order to alleviate that burden.