C. Due Process

1. Required Scope of Insanity Defense. — Since *M'Naghten's Case*,[1] common law courts have recognized the need to take account of mental illness in assessing criminal responsibility. Precisely how to go about this accounting has long been a matter of debate, and American jurisdictions have adopted a variety of formulations.[2] In a federal system, a question naturally arises: does "fundamental fairness"[3] require states' criminal laws to include some baseline recognition of mental illness to comport with the Due Process Clause? Last Term, in *Clark v. Arizona*,[4] the Supreme Court concluded that Arizona's abbreviated form of the *M'Naghten* test for insanity was consistent with due process.[5] The Court also held that Arizona's rule prohibiting consideration of evidence of mental illness in determining the presence of the requisite mens rea did not violate due process.[6] In doing so, the Court advanced thin countervailing concerns that ultimately are insufficient to outweigh defendants' due process rights, revealing a deep skepticism of contemporary psychiatry.

During the early hours of June 21, 2000, Eric Clark repeatedly drove around a residential block in Flagstaff, Arizona, blaring loud music, which caused residents to alert the police.[7] When Flagstaff police officer Jeffrey Moritz responded and stopped Clark's vehicle, Clark shot and killed him.[8] Clark was subsequently arrested and charged with first-degree murder for intentionally or knowingly killing a law enforcement officer in the line of duty.[9] The court initially found Clark incompetent to stand trial, but, after he was treated for two years at a psychiatric facility, the court deemed his competence restored and his case proceeded to trial.[10]

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[1] (1843) 8 Eng. Rep. 718 (H.L.).

[2] Seventeen states and the federal government follow the test laid out in *M'Naghten's Case*. Clark v. Arizona, 126 S. Ct. 2709, 2720 (2006). Eleven have adopted only one of its two prongs, and eighteen have adopted amalgams of the *M'Naghten* test and other formulations. *See id.* at 2720–21. The remaining four states do not recognize an insanity defense but, along with a number of states that do recognize the defense, consider evidence of mental illness in determining whether a defendant possessed the requisite intent for the crime. *Id.* at 2721–22.

[3] Lisenba v. California, 314 U.S. 219, 236 (1941). *Lisenba* held that "[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Id.*

[4] 126 S. Ct. 2709.

[5] *Id.* at 2716.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (Supp. 2005)). The statutory provision under which Clark was charged required that he "[i]ntend[] or know[] that [his] conduct w[ould] cause death to a law enforcement officer." § 13-1105(A)(3); *Clark*, 126 S. Ct. at 2716.

[10] *Clark*, 126 S. Ct. at 2716.

At trial, Clark did not deny that he had shot and killed Moritz, but instead presented evidence of his paranoid schizophrenia to negate his responsibility for the crime under two theories. First, he relied upon an insanity defense, claiming 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."[11] Second, he claimed that as a result of his mental illness, he lacked the requisite mens rea because he did not act "intentionally or knowingly to kill a law enforcement officer."[12]

Relying on *State v. Mott*,[13] an Arizona Supreme Court decision that disallowed the use of psychiatric testimony to disprove specific intent,[14] the trial court ruled that "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the mens rea element of a crime."[15] The trial court further found that, although Clark clearly suffered from paranoid schizophrenia, his evidence was insufficient to show that the illness "distort[ed] his perception of reality so severely that he did not know his actions were wrong."[16] The court entered a special verdict of first-degree murder and sentenced Clark to life imprisonment with no possibility of parole for twenty-five years.[17]

Clark moved to vacate the judgment and sentence, contending that Arizona's insanity test violated due process because it omitted the first prong of the two-part *M'Naghten* test.[18] Clark also argued that the *Mott* rule's blanket exclusion of expert psychiatric evidence to rebut the prosecution's proof of the requisite mental state denied him the right to present a complete defense and thus violated due process.[19] The trial court denied the motion.[20]

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[11] *Id.* at 2717 (alterations in original) (quoting ARIZ. REV. STAT. ANN. § 13-502(A) (2001)) (internal quotation marks omitted).

[12] *Id.*

[13] 931 P.2d 1046 (Ariz. 1997) (en banc).

[14] *See id.* at 1051.

[15] *Clark*, 126 S. Ct. at 2717 (omission in original) (quoting *Mott*, 931 P.2d at 1051) (internal quotation marks omitted).

[16] *Id.* at 2718 (quoting Joint Appendix, *Clark* (No. 05-5966), 2006 WL 282161, at *334) (internal quotation mark omitted).

[17] *Id.*

[18] *Id.* *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.), held that a defendant attempting to establish a defense of insanity must prove that, at the time of the criminal act, he "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722. The Arizona rule allows an insanity defense if the defendant "was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong," ARIZ. REV. STAT. ANN. § 13-502(A) (2001), and thus omits the "nature and quality of the act" prong of the *M'Naghten* test. *See Clark*, 126 S. Ct. at 2718–19.

[19] *Clark*, 126 S. Ct. at 2718.

[20] *Id.*

The Court of Appeals of Arizona affirmed. As to the insanity test, the court noted that the State had discretion to decide not just the scope of such a test, but even whether to recognize an insanity defense at all.[21] The court also held that *Mott* presented no constitutional problem and upheld its application to Clark's case.[22] The Supreme Court of Arizona denied further review, and Clark petitioned for certiorari.[23]

The Supreme Court affirmed. Justice Souter, writing for the majority,[24] held that due process does not preclude Arizona from framing its insanity test solely in terms of the defendant's capacity to determine whether the alleged criminal act was wrong, nor does it require Arizona to allow the defendant to introduce expert psychiatric testimony regarding his capacity to form the requisite intent. After surveying the multiple formulations of the insanity test currently in effect, the Court concluded that "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses."[25] Further, the majority noted that Arizona's abbreviated test was just as constitutional as the longer *M'Naghten* formulation because, despite the lack of explicit recognition, "evidence going to cognitive incapacity has the same significance under [Arizona's] form as it had under [*M'Naghten*]."[26] Indeed, if a defendant does not perceive the "nature and quality" of an act, then he cannot reasonably perceive that the act is "wrong." A showing of cognitive incapacity is therefore a sufficient, but not necessary, condition for a showing of moral incapacity, and all evidence to that end remains admissible.[27]

In response to Clark's claim that the *Mott* rule disallowing expert psychiatric testimony to rebut mens rea violated due process, the Court articulated three "categories of evidence with a potential bearing on mens rea"[28]: first, "observation evidence," consisting of "testimony from those who observed what Clark did and heard what he said," including "testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics";[29] second, "mental-disease evidence," consisting of "opinion testimony that Clark suffered from a mental disease with features de-

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Justice Souter was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.
[25] *Clark*, 126 S. Ct. at 2719.
[26] *Id.* at 2722.
[27] *See id.*
[28] *Id.* at 2724.
[29] *Id.* (internal quotation marks omitted).

scribed by the witness";[30] and third, "capacity evidence" that speaks to Clark's "capacity for cognition and moral judgment."[31] In the Court's reading, *Mott* restricted only mental-disease evidence and capacity evidence, leaving defendants free to present observation evidence.[32] The majority acknowledged that, in Clark's case, the trial court's restriction may have covered some legitimate observation evidence.[33] However, the Court read Clark's objections as limited to the exclusion of mental-disease and capacity evidence, and therefore the question whether observation evidence was improperly excluded was not before the Court.[34]

In considering whether the *Mott* rule violated due process, the Court concluded that Arizona's "reasons for requiring [mental-disease and capacity evidence] to be channeled and restricted [to the insanity defense inquiry] are good enough to satisfy the standard of fundamental fairness that due process requires."[35] Arizona has the authority to define legal insanity and to place the burden of persuasion on defendants if it so chooses, and a requirement that mental-disease or capacity evidence be admitted on a different issue with a lower burden of persuasion would undermine that authority.[36] In response to the dissent's objection that Arizona's rule blocks the defendant's ability to respond fully to evidence of an element of the crime, the Court highlighted "the controversial character of some categories of mental disease, . . . the potential of mental-disease evidence to mislead, and . . . the danger of according greater certainty to capacity evidence than experts claim for it" as factors that outweigh the potential probative value of mental-disease and capacity evidence in rebutting mens rea and thus justify its exclusion.[37]

Justice Breyer concurred in part and dissented in part. While agreeing with the Court's categorization of the three types of evidence and the constitutionally permissible scope of exclusion for each, he expressed concern that the distinction among the categories would be unclear in some cases and that lower courts had not focused on that distinction.[38] He therefore would have remanded the case to the Arizona courts to determine whether Arizona law was consistent with the

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[30] *Id.* at 2725 (internal quotation marks omitted).
[31] *Id.* (internal quotation marks omitted).
[32] *Id.* at 2726.
[33] *Id.*
[34] *See id.* at 2726–29.
[35] *Id.* at 2732.
[36] *See id.* at 2732–33.
[37] *Id.* at 2734.
[38] *See id.* at 2737–38 (Breyer, J., concurring in part and dissenting in part).

Supreme Court's distinction and whether the trial court properly applied the law.[39]

Justice Kennedy dissented.[40] In his view, "the Court [was] incorrect in holding that Arizona may convict . . . Clark of first-degree murder for the intentional or knowing killing of a police officer when Clark was not permitted to introduce critical and reliable evidence showing he did not have that intent or knowledge."[41] Justice Kennedy objected to the "restructured evidentiary universe" invented by the majority.[42] In his view, the sharp theoretical distinctions the majority drew between "observation evidence," on the one hand, and "mental-disease evidence" and "capacity evidence," on the other, were less determinate in application. In the case of an individual who undeniably had paranoid schizophrenia, "[i]t makes little sense to divorce the observation evidence from the explanation that makes it comprehensible" — namely, expert psychiatric testimony.[43] Even if the Court's evidentiary categorization were feasible, Justice Kennedy argued, the Court was incorrect to narrow Clark's claim "to exclude any concern about observation evidence," for such a construction relied on an excessively narrow interpretation of ambiguities, when in fact Clark had consistently pled broadly.[44]

The dissent also rejected the Court's treatment of mental-illness evidence "as concerning only 'judgment,' rather than fact," because the mens rea of intent or knowledge is a truly factual issue: "Either Clark knew he was killing a police officer or he did not."[45] If he did not, he "need[ed] no excuse, as then he did not commit the crime as Arizona defines it."[46] Justice Kennedy considered Arizona's *Mott* rule problematic because "it excludes evidence no matter how credible and material it may be in disproving an element of the offense."[47] Further, he viewed Arizona's reasons for the rule as "insufficient to support [the] categorical exclusion" of such evidence[48]: the potential unreliability of testimony regarding mental illness is sufficiently addressed through general rules barring unreliable or speculative testimony, and the risk of jury confusion fails to justify the rule given the U.S. system's general trust of juries to sort through complex factual issues.[49] Further,

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[39] *Id.* at 2738.
[40] Justice Kennedy was joined by Justices Stevens and Ginsburg.
[41] *Clark*, 126 S. Ct. at 2738 (Kennedy, J., dissenting).
[42] *Id.*
[43] *Id.* at 2739.
[44] *Id.*
[45] *Id.* at 2743.
[46] *Id.*
[47] *Id.* at 2744.
[48] *Id.*
[49] *See id.* at 2745.

the type of mental illness at issue in this case was well documented, and experts generally agreed on its definition and manifestations, thus lessening the likelihood of jury confusion.[50] "It is striking," Justice Kennedy noted, "that while the Court discusse[d] at length the likelihood of misjudgment from placing too much emphasis on evidence of mental illness, it ignore[d] the risk of misjudging an innocent man guilty from refusing to consider this highly relevant evidence at all."[51]

It is a fundamental principle of American jurisprudence that the prosecution must prove all elements of a crime beyond a reasonable doubt to overcome a defendant's presumed innocence.[52] Such a burden could prove meaningless if the defendant did not have a corresponding right to present evidence to rebut the prosecution's case. This right is not without limits: state and federal rules of evidence strive to ensure that evidence presented to the jury — particularly evidence coming from experts — is reliable and relevant.[53] But exceptions to the general right to present rebuttal evidence must be grounded in a justifiable concern such as "unfair prejudice, confusion of the issues, or potential to mislead the jury" that outweighs the evidence's potential probative value, and they may not be "disproportionate to the ends that they are asserted to promote."[54]

Arizona's first-degree murder statute requires that the accused act with mens rea equivalent to specific intent. Yet *Mott* instituted a per se bar on consideration of expert psychiatric testimony on the question whether a defendant possessed the requisite intent,[55] regardless of such testimony's reliability or materiality.[56] Expert psychiatric evidence was thus relegated to the affirmative defense of insanity.[57] It is insufficient to say, as the *Clark* Court did, that consideration of expert psychiatric testimony is "channeled" to the affirmative insanity defense inquiry; the underlying questions, as well as the burden of proof, in the mens rea and insanity defense inquiries are distinct. Moreover, it is unclear how channeling the testimony to an affirmative defense alleviates the concerns that purportedly underlie Arizona's rule — other than by blocking the evidence through an impermissible shift of the

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50 *See id.* at 2745–46.

51 *Id.* at 2746 (citation omitted).

52 *See 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.").

53 *See, e.g.*, FED. R. EVID. 403, 702–704; ARIZ. R. EVID. 403, 702.

54 Holmes v. South Carolina, 126 S. Ct. 1727, 1732 (2006).

55 *See* State v. Mott, 931 P.2d 1046, 1051, 1054–55 (Ariz. 1997) (en banc).

56 *See id.* at 1067 (Feldman, J., dissenting) ("The majority opinion categorically prohibits competent, credible, and relevant evidence that directly addresses the elements and different degrees of the offense with which Defendant was charged.").

57 *See id.* at 1051 (majority opinion).

burden of proof. Justification for the rule, then, can come only from a weighing of concerns regarding the evidence against its probative value. In *Clark*, the Court identified several factors upon which Arizona could rely to justify its procedural scheme: the "controversial character of some categories of mental disease," the potential for such evidence to "mislead" the jury, and the "danger of according greater certainty" to expert psychiatric evidence than is warranted.[58] Even if these concerns are legitimate, banning all psychiatric evidence concerning mens rea is disproportionate to the ends sought and thus runs counter to due process. Hence, the Court's support of Arizona's ban seems to reflect a concern beyond those stated — namely, a deep and unwarranted skepticism of contemporary psychiatry.

The Court's first concern — that some categories of mental disease are controversial — is insufficient to justify the bar on expert psychiatric evidence on mens rea for two reasons: the concern is not applicable in cases such as *Clark* in which the psychiatric claims at issue are widely accepted, and the rules of evidence adequately cover cases in which the concern is applicable. *Clark* demonstrates that even if concerns regarding the controversial nature of some mental diseases were well founded, wholesale exclusion of psychiatric evidence concerning mens rea is an overinclusive and disproportionate response. Contrary to popular impressions, the bulk of expert psychiatric evidence presented at criminal trials does not concern novel, controversial theories, but is routine testimony on more common and generally accepted mental diseases such as schizophrenia.[59] For example, paranoid schizophrenia, the disease at issue in *Clark*, ranks among the least controversial and best understood of mental diseases,[60] and it was uncontested that Clark suffered from the disease at the time of the killing.[61] To deprive Clark and others like him of the right to present reliable and relevant evidence out of concern for controversy in a minority of cases runs counter to the due process rights of a majority of defendants.

Arizona's overinclusive rule is all the more inappropriate given that the State's existing rules of evidence are sufficient to block testimony concerning particularly controversial categories of mental disease. Some theories of mental disease presented at trial are truly contentious in character.[62] These diseases, such as the "abuse excuse" and "urban survival syndrome," have not achieved general acceptance among the

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[58] *Clark*, 126 S. Ct. at 2734.

[59] *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not To Junk?*, 40 WM. & MARY L. REV. 1, 7 (1998).

[60] *See id.* (describing schizophrenia as a "traditional diagnosis").

[61] *See Clark*, 126 S. Ct. at 2716.

[62] *See* Slobogin, *supra* note 59, at 5–7.

scientific community or among society at large.[63] Reluctance to rely upon novel scientific theories in criminal cases is prudent. The impetus of the concern, however, does not differ between psychiatric evidence and other forms of expert evidence, such as DNA testing techniques, which have been approved for use at trial.[64] Arizona has developed methods of vetting innovative scientific approaches through its general evidentiary scheme, which allows expert testimony only when it will "assist the trier of fact to understand the evidence or to determine a fact in issue."[65] Further, Arizona courts have adopted the rule developed in *Frye v. United States*,[66] which allows the admission of evidence concerning a novel scientific theory or process only if it is "sufficiently established to have gained general acceptance in the particular field in which it belongs."[67]

The Court's second and third concerns regarding psychiatric evidence — its potential to mislead jurors and to create an impression of greater certainty about the defendant's state of mind than is medically possible — are also unwarranted. The most significant reason why these concerns fail to justify the bar on expert psychiatric evidence is that Arizona's solution runs counter to its supposed purpose. Both of these concerns presumably center on ensuring accuracy in jury determinations — undoubtedly a legitimate aim of the criminal justice system. Yet the Court's skepticism of psychiatry has led it to create a regime in which jurors are asked to make factual determinations on matters beyond their experience without the guidance of experts whose knowledge, while imperfect, is still the most accurate our society has to offer.[68] Arizona's regime, as understood and approved by the Court, allows "observation evidence" concerning a defendant's behavioral

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[63] *Id.* at 1–2 (internal quotation marks omitted).

[64] *See* State v. Bible, 858 P.2d 1152, 1184–85 (Ariz. 1993) (en banc) (recognizing DNA match techniques as generally accepted by the scientific community and thus allowing admission of their results at trial).

[65] ARIZ. R. EVID. 702.

[66] 293 F. 1013 (D.C. Cir. 1923). For a discussion of Arizona's adoption of the *Frye* rule, see *Bible*, 858 P.2d at 1181–83. The Arizona Supreme Court has declined to follow the more recent formulation for determining the admissibility of scientific evidence in federal courts outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Bible*, 858 P.2d at 1182–83.

[67] *Frye*, 293 F. at 1014. Although Arizona courts have shown some reluctance to apply the *Frye* test outside of the physical sciences, *see, e.g.*, State *ex rel.* Romley v. Fields, 35 P.3d 82, 86–87 (Ariz. Ct. App. 2001), this reluctance stems from courts' perception that overreliance on expert testimony in other scientific fields is less likely, *see id.* at 86 (citing 1 JOSEPH M. LIVERMORE ET AL., LAW OF EVIDENCE § 702.02, at 279–80 (4th ed. 2000)). To the extent that, in the context of mental-disease and capacity testimony in criminal trials, the Arizona courts are concerned about overreliance on evidence of questionable validity, the *Frye* test would adequately address that concern.

[68] *See* Brief Amicus Curiae for the Am. Psychiatric Ass'n et al. Supporting Petitioner at 15, *Clark* (No. 05-5966), 2006 WL 247277 [hereinafter APA Brief].

tendencies, including observations made by psychiatric experts, yet testimony that explains abnormal behavior through comparison to others with like symptoms — that is, through diagnosis — is impermissible.[69] To forbid the jury from considering such evidence "is to blind the trier of fact to relevant, reliable, non-prejudicial evidence and to produce false factual findings in some cases."[70] Juries' factual conclusions become odd legal fictions insulated from the outside world. Accuracy is lost, not gained.

Furthermore, the Court exaggerated the extent to which psychiatric evidence would have the potential to mislead or inspire overreliance by the jury absent the *Mott* rule. Mechanisms are in place within Arizona's general evidentiary scheme to ensure that misleading evidence or evidence that might inspire overreliance is not admitted. According to Arizona Rule of Evidence 403, 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."[71] In addition, neither Arizona nor the Court has reason to fear that jurors will rely excessively on expert psychiatric opinion. Post-trial surveys of jurors reveal, if anything, greater — or at least more candid — skepticism of expert psychiatric testimony than that exhibited by the *Clark* Court.[72]

Together, the insubstantiality of the Court's professed reasons for allowing the *Mott* rule to stand and comments regarding psychiatry throughout the Court's opinion point to a deep skepticism of expert psychiatric opinion as the true driving force behind the Court's holding. The *Clark* Court implied that there is something inherently tenuous about psychiatry that makes evidence concerning it, as opposed to other scientific disciplines, per se excludable as unreliable. In support of its view, the Court quoted the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*: "[The manual] reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders . . . ."[73] Yet this statement applies to any scientific discipline: it reflects the ongoing search for

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[69] *See Clark*, 126 S. Ct. at 2724–26, 2732; *see also id.* at 2749 (Kennedy, J., dissenting) ("[T]he State seems to exclude the evidence one would think most reliable by allowing unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental illness.").

[70] APA Brief, *supra* note 68, at 13.

[71] ARIZ. R. EVID. 403.

[72] *See, e.g.*, Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123–44 (1997).

[73] *Clark*, 126 S. Ct. at 2734 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxxiii (4th ed. 2000)).

knowledge that is at the core of scientific inquiry. 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."[74]

The *Clark* Court also pointed to disagreement among experts as evidence of psychiatry's unreliable nature. "The limits of the utility of a professional disease diagnosis," the Court observed, "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."[75] Critics of psychiatric evidence often point to this perceived "battle of the experts" as proof of psychiatry's malleability and its uselessness in court.[76] "[B]ut all court proceedings involve contradictory testimony."[77] As psychiatrist Jacques Quen notes in his discussion of determination of responsibility for the insane:

> As for the "battle of experts," I confess that I've never been able to understand why, when psychiatrists disagree, it is proof positive that they don't know what they're talking about and it demeans the profession; while, when our Supreme Court decides the law of the land by a disagreement of 5–4, they are scholars dealing with profound, difficult, and complicated issues and one must respect their differences in judgment.[78]

Disagreement at the margins is inherent in any discipline. If the courts' goal is accurate factfinding, then it is preferable to work through the apparent ambiguities of competing expert psychiatric opinions as revealed in the adversarial process than to rely solely on the unguided interpretations of the lay juror.

Due process requires that defendants be afforded the opportunity to present relevant, reliable evidence to rebut the prosecution's case on all elements of a crime, absent countervailing factors that outweigh the evidence's probative value. The countervailing factors that Arizona asserted are insufficient to warrant per se exclusion of psychiatric evidence on the question of mens rea. Ultimately, Arizona's rule, and the Court's endorsement of it, are understandable only through recognition of the judiciary's deep skepticism of psychiatry. Both to ensure defen-

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[74] Joanmarie Ilaria Davoli, *Psychiatric Evidence on Trial*, 56 SMU L. REV. 2191, 2219 (2003).

[75] *Clark*, 126 S. Ct. at 2735.

[76] *See, e.g.*, Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 939 & n.334 (2005).

[77] Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 44 (1982).

[78] Jacques M. Quen, *Isaac Ray and Charles Doe: Responsibility and Justice*, *in* LAW AND THE MENTAL HEALTH PROFESSIONS 235, 247 (Walter E. Barton & Charlotte J. Sanborn eds., 1978), *quoted in* Robitscher & Haynes, *supra* note 77, at 44.

dants' rights and to ensure accuracy in jury determinations of guilt or innocence, the courts must strive to parse psychiatric evidence more finely, carefully sifting the useful from the misleading without dismissing a scientific discipline wholesale.

2. Tax Sales of Real Property — Notice and Opportunity To Be Heard. — The postman may always ring twice, but that is not enough for the Supreme Court. In recent years, lower courts have reached divergent results in applying the requirements for constitutionally adequate notice set out in the seminal case of *Mullane v. Central Hanover Bank*.[1] Expanding on the line of cases articulating those requirements, last Term in *Jones v. Flowers*,[2] the Supreme Court held that when notice of a tax sale is returned unclaimed, the State must take further reasonable steps to attempt to give notice to the owner before selling the property. Because of the nebulous formulations of what constitutes proper notice, Justices in both the majority and dissent purported to adhere to the same longstanding due process principles while reaching opposite results. Further, while advocates of greater procedural due process protections ostensibly won a victory, it was a small one at best, and possibly a step backward. Most states already meet the standard the Court formulated in *Flowers*, and those that do not may have an incentive to cut back their notice procedures rather than expand them.

For thirty years, while Gary Jones paid the mortgage on his house, the mortgage company paid his property taxes.[3] After Jones paid off the mortgage on the house, in which he no longer resided, he failed to pay his property taxes and Arkansas classified his property as delinquent.[4] The Commissioner of State Lands mailed a certified letter to the property to notify Jones of his tax delinquency; the letter stated that the property would be subject to a public sale if Jones did not pay his taxes within two years.[5] Following three attempts to deliver the letter[6] with nobody answering the door to sign for it, and after the letter had been held for fifteen days at the post office, the postal service returned the letter to the Commissioner marked "unclaimed."[7] Two years later, the State published notice of the public sale in a local newspaper.[8] Having received no bids for months, the State negotiated a private sale with Linda Flowers.[9] Before finalizing the sale, the

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[1] 339 U.S. 306 (1950). *Compare, e.g.*, Madewell v. Downs, 68 F.3d 1030, 1035, 1045–47 (8th Cir. 1995), *with* Plemons v. Gale, 396 F.3d 569, 576 (4th Cir. 2005).

[2] 126 S. Ct. 1708 (2006).

[3] *Id.* at 1712.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1722 (Thomas, J., dissenting).

[7] *Id.* at 1712 (majority opinion).

[8] *Id.*

[9] *Id.* at 1712–13.