

The Mentally Disordered Criminal Defendant at the Supreme Court: A Decade in Review

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INTRODUCTION

The relationship between criminal law and clinical psychology¹ is complex.² Mental states are central to criminal law, so clinical

* Associate Professor, St. Mary's University School of Law. J.D., Vanderbilt University Law School; M.A. (Psychology), University of Pennsylvania; B.A., Swarthmore College. The author thanks Michael Ariens, Geary Reamey, and John Schmolesky for helpful comments on earlier drafts, and Kristine Rodriguez for excellent research assistance.

psychology is, at least to some extent, an indispensable ally. But the ultimate goals of criminal law and clinical psychology are not the same. Clinical psychology aims to understand and to alter mental states, while criminal law usually is more concerned with determining the existence of particular mental states at particular points in time. Clinical psychology wants to know what caused the delusional belief and how to alleviate it, while criminal law wants to know if the delusional belief precluded knowledge of an act's wrongfulness or interfered with understanding the reason for a death sentence. Clinical psychology disclaims moral judgments, while criminal law is fundamentally a moral enterprise.

The necessary—but necessarily imperfect—relationship between criminal law and clinical psychology means that when a person with a mental disorder is charged with or has been convicted of a criminal offense, the legal system should look to clinical psychology for its understanding of mental disorder, but should do so carefully. Overreliance, underreliance, or misplaced reliance on clinical psychology all can lead to results that are inconsistent with the aims of criminal law. In the past decade, at least eight cases involving issues at the intersection of criminal law and clinical psychology have reached the U.S. Supreme Court. This Article considers how carefully the Supreme Court has used clinical psychology's understanding of mental abnormality to answer criminal law's questions.

The cases discussed in this Article concern three general topics: the culpability of juvenile offenders; mental states and the criminal process, including the presentation of mental disorder evidence, competency to stand trial, and competency to be executed; and the preventive detention of convicted sex offenders. Part I examines two cases that adopted categorical exclusions from certain kinds of punishment—the death penalty and life without parole—for juvenile offenders, based on the diminished culpability of juveniles as compared to adult offenders. Both of these cases built on a third recent case, which categorically excluded people with mental

¹ “Clinical psychology” is used in this Article to refer broadly to the study of mental abnormality or disability. Included in this field are not only clinical psychologists but also psychiatrists and neuroscientists, among others.

² See Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 231 (2008) (“When the fields of psychology and criminal law intersect, it generally leads to tension between the two”); Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 143–44 (2009) (“Criminal law and psychology have important, but difficult relations . . .”).

retardation from the death penalty. In all three of these cases, the Court overrelied on the results of psychological studies to justify its legal conclusions. Part II discusses three cases involving questions about mental states. The Court misunderstood the relevant psychology in two of these cases. In one case, the misunderstanding led the Court to uphold a state law prohibiting criminal defendants from presenting mental illness evidence to raise reasonable doubt about mens rea. In the second case, the Court adopted a nearly limitless test for determining when the government may administer involuntary antipsychotic medications for the purpose of rendering a criminal defendant competent to stand trial. The Court demonstrated a more complete understanding of the relevant psychology in the third case, recognizing that delusional beliefs can preclude a convicted prisoner's understanding of the state's reasons for carrying out a death sentence. Part III considers two cases involving the question whether the preventive detention of convicted sex offenders is really civil commitment, as states have claimed, or is instead criminal punishment, as its critics have claimed. Among the issues raised in these cases are the legal primacy of diagnoses recognized by psychiatrists and the moral justification for the civil commitment of people who are dangerous because of a mental disorder.

I

THE CULPABILITY OF JUVENILE OFFENDERS

Two recent cases dramatically altered sentencing for juvenile offenders.³ The first case, *Roper v. Simmons*, held that the death penalty is categorically cruel and unusual punishment for a juvenile offender—that is, an offender who committed his offense before the age of eighteen.⁴ The second case, *Graham v. Florida*, held that life without parole is categorically cruel and unusual punishment for a juvenile offender who committed a non-homicide offense.⁵ Both *Roper* and *Graham* relied on the framework for categorical exclusions established in *Atkins v. Virginia*, which ruled—just a year before

³ The Court recently decided a third juvenile sentencing case, primarily on procedural grounds. *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (ruling that mandatory life without parole sentences for juveniles violate the Eighth Amendment because they deprive sentencing judges of the opportunity to mitigate an offender's sentence based on youth). This case is discussed briefly *infra* note 38.

⁴ *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

Roper—that the death penalty is categorically cruel and unusual punishment for people diagnosed with mental retardation.⁶

A. *Culpability Sufficient for Execution*

The Eighth Amendment prohibits “cruel and unusual punishments.”⁷ Traditionally, courts—led by the Supreme Court—have assessed whether a particular punishment (other than the death penalty) is “cruel and unusual” by conducting a proportionality review—weighing the severity of the offense against the severity of the punishment.⁸ So long as the punishment is not grossly disproportionate to the offense, the punishment is not “cruel and unusual.”⁹ Prior to 2000, the Supreme Court had adopted only one categorical rule regarding proportionality: that the death penalty is a categorically disproportionate punishment for the non-homicide offense of rape when the victim is an adult.¹⁰ In 2008, the Court extended this holding, ruling that the rape of a child also is insufficient to justify a sentence of death.¹¹

The Court has recently expanded the scope of its categorical rules to apply to offenders as well as offenses, ruling that the death penalty is a categorically disproportionate punishment for mentally retarded adult offenders and for all juvenile offenders,¹² and that a sentence of life without parole is a categorically disproportionate punishment for juvenile offenders, at least for those who commit non-homicide offenses.¹³

The first case to find that the death penalty is a categorically disproportionate punishment for a certain kind of offender was *Atkins v. Virginia*, in which the Court ruled that the Eighth Amendment

⁶ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁷ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁸ Until *Graham v. Florida*, it seemed that the Court had developed two separate forms of analysis, one for capital punishment cases and one for noncapital punishment cases. See Alison Siegler and Barry Sullivan, “*Death is Different*” No Longer: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 327 (2010).

⁹ The Supreme Court’s proportionality review cases are few and far between, and only once has the Court ruled that a particular offender’s sentence was disproportionate to the offense. See *Solem v. Helm*, 463 U.S. 277, 284 (1983).

¹⁰ *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

¹¹ *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

¹² *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹³ *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

precludes capital punishment for offenders who are mentally retarded.¹⁴ The Court explained that the deficits of people who are mentally retarded mean that they cannot be among the worst of the worst offenders, for whom the death penalty is reserved.¹⁵ In *Roper v. Simmons*, the Court applied the reasoning of *Atkins* to conclude that the Eighth Amendment precludes the execution of offenders who were under eighteen years old when they committed their crimes.¹⁶

The Court's opinions in both *Atkins* and *Roper* demonstrate an appreciation for the findings of clinical psychologists and other scientists—both opinions, for example, cited research findings to support the conclusions that juveniles and people with mental retardation are less culpable than adults or people without mental retardation.¹⁷ To some extent, this appreciation is welcome; certainly, research findings about the relative emotional and decision-making capabilities of juveniles and people with mental retardation ought to inform decisions about culpability for criminal behavior. On the other hand, the Court's opinions in *Atkins* and *Roper* fail to take adequate account of the limits of this research.¹⁸

The Court's opinion in *Roper* relied heavily on the framework established in *Atkins*, in particular the foundational premise that

¹⁴ 536 U.S. at 319.

¹⁵ *Id.* (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”). The Court also decided that a national consensus exists against executing people who are mentally retarded. *Id.* at 316. That aspect of the Court's decision is beyond the scope of this Article.

¹⁶ *Roper*, 543 U.S. at 571 (“[W]e remarked in *Atkins* that ‘[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.’ The same conclusions follow from the lesser culpability of the juvenile offender.” (citation omitted)).

¹⁷ *See id.* at 569–70; *Atkins*, 536 U.S. at 318–19.

¹⁸ *See infra* notes 24–30 and accompanying text. While those who are pleased with the ultimate decisions in these cases might be tempted to forgive these failures, the misuse of research findings can have undesired consequences. Perhaps the best-known example is the Supreme Court's citing of social science studies in footnote 11 of its opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954); citing these sources arguably detracted from the perceived legitimacy of the Court's decision: “In the eyes of many legal scholars who were otherwise supportive of *Brown*, the Court's citations to social science undermined its integrity.” Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 4 n.5 (2011). On the other hand, ignoring science is not a solution: “The law, by its nature, is inextricably linked with other disciplines. . . . Science and technology permeate every inch of modern society and, consequently, virtually every case before the law. Courts simply no longer have the luxury of ignoring science.” David L. Faigman, *Embracing the Darkness: Loperquist v. McVey and the Doctrine of Ignorance of Science is an Excuse*, 33 ARIZ. ST. L.J. 87, 101 (2001).

psychological characteristics of certain kinds of offenders make them, as a group, appropriate for categorical exclusion from eligibility for the death penalty.¹⁹ To this framework, the *Roper* Court added research findings concerning the psychological differences between juveniles and adults.²⁰ This research demonstrates, according to the Court, that there are “[t]hree general differences between juveniles under 18 and adults,” and that because of these differences, “juvenile offenders cannot with reliability be classified among the worst offenders.”²¹ The three differences are: (1) “the comparative immaturity and irresponsibility of juveniles,” (2) the increased susceptibility of juveniles to peer pressure and other external influences, and (3) the “more transitory, less fixed” nature of juveniles’ personality traits.²² The Court cites just one study in support of each of these differences, but the lack of more extensive citations is not an important flaw—no one, not even the dissenters in this case, would argue with the conclusions the Court reaches about juveniles on the basis of this research.²³ As compared to adults,

¹⁹ See *Roper*, 543 U.S. at 568 (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Atkins*, 536 U.S. at 319)).

²⁰ The Court also found that there is a national consensus against sentencing juveniles to death. *Id.* at 564–67. That issue is beyond the scope of this Article.

²¹ *Id.* at 569 (“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).

²² *Id.* at 569–70.

²³ For example, Justice O’Connor’s dissenting opinion acknowledged, “It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults.” *Id.* at 599 (O’Connor, J., dissenting). Justice Scalia’s dissenting opinion pointed to an inconsistency between the research findings presented in *Roper* and the argument, made in other cases, that juveniles ought to be accorded substantial autonomy in areas such as decision making about abortion. *Id.* at 617–18 (Scalia, J., dissenting). As several commentators have argued, it is possible to reduce some of the inconsistency by focusing on the different contexts. The decision to commit a crime takes place under a different set of circumstances than does the decision to accept or refuse medical treatment. Thus, we might be willing to accept that the same relative psychological immaturity of juveniles should not necessarily result in the same legal rules in different contexts. See Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOLOGIST 583, 593 (2009) (“[T]he seemingly conflicting positions . . . are not contradictory. Rather, they simply emphasize different aspects of maturity, in accordance with the differing nature of the decision-making scenarios involved in each case.”); see also Donald L. Beschle, *Cognitive Dissonance Revisited: Roper v. Simmons and the Issue of Adolescent Decision-Making Competence*, 52 WAYNE L. REV. 1, 28–29 (2006); Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 948–53 (2006). But there is some amount of

juveniles do tend to lack maturity and responsibility, do tend to be more susceptible to external influences, and do tend to have personality traits that are less fixed.

The problem with the Court's use of research is not the particular conclusions it reaches about juveniles as compared to adults. Rather, the problem is the suggestion that these research findings about the general differences of juveniles as compared to adults necessarily compel any particular legal rules regarding juveniles.²⁴ The Court does not claim that the research proves that every juvenile is less responsible than is any adult. Indeed, the opinion explicitly acknowledges that the differences between juveniles and adults are only general tendencies, not absolute or unvarying characteristics.²⁵ But in explaining why the culpability of individual juveniles cannot be assessed in the usual manner—by the jury—the Court asserts that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”²⁶ This reasoning uses research findings about the general differences between juveniles and adults to mask what the court really is saying²⁷—that juries cannot be trusted to make accurate assessments

inconsistency that seems irreducible—if the psychological maturity of juveniles is so different from adults that they cannot be subject to the same legal punishments, then should they not be protected in other areas as well, such as medical treatment decision making? This is a complex normative question about the different purposes of different legal rules, and the Court's implication in *Roper* that there is a straight line from descriptions of research findings about juveniles' relative maturity to a decision about the desirability of a particular punishment is unhelpful at best.

²⁴ The dissenters in *Roper* noted this problem, as have subsequent commentators. See *Roper*, 543 U.S. at 601 (O'Connor, J., dissenting) (“The Court’s proportionality argument . . . fails to establish that the differences in maturity between 17-year-olds and young ‘adults’ are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former.”); Richard A. Posner, *Foreword: A Political Court, in The Supreme Court, 2004 Term.*, 119 HARV. L. REV. 31, 64–65 (2005) (“The studies on which the Court relied acknowledge that their findings that sixteen- or seventeen-year-olds are less likely to make mature judgments than eighteen-year-olds are statistical rather than individual and do not support a categorical exclusion of sixteen- and seventeen-year-olds from the ranks of the mature.”(footnote omitted)).

²⁵ *Roper*, 543 U.S. at 574 (“The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.”).

²⁶ *Id.* at 572–73.

²⁷ See ROBIN FELDMAN, *THE ROLE OF SCIENCE IN LAW* 7 (2009). As Professor Feldman explains,

Relying on science gives us a delightfully convenient way to avoid the problems in front of us. In so many circumstances, we use science to create the Illusion of Reasonable Resolution where the solution is not reasoned nor is the issue

of culpability.²⁸ The opinion fails to adequately support the conclusion that juries are insufficiently capable of determining which juveniles are mature and which are not.²⁹ The Court says that there is an “unacceptable likelihood” that juries will make mistakes, but does not provide any evidence about how great this likelihood is or offer any reason why this particular likelihood is unacceptable.³⁰

That the Court fails to adequately explain its decision does not necessarily mean that the decision cannot be explained. Indeed, since *Roper*, several scholars have offered explanations that are quite compelling.³¹ But these explanations confront what the Court did not:

resolved. Science allows us to ignore the fact that we have failed to resolve anything, or it allows us to mask the preferences embodied in the outcome.

Id.

²⁸ Both dissenting opinions pointed this out. *See id.* at 602–03 (O’Connor, J., dissenting) (arguing that “these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s immaturity, his susceptibility to outside pressures, his cognizance of the consequences of actions, and so forth”); *id.* at 620 (Scalia, J., dissenting) (proposing that the Court’s “startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with ‘mak[ing] the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.’” (quoting *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987))).

²⁹ *Id.* at 603–04 (O’Connor, J., dissenting) (“I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon which we place so much reliance in all capital cases are inadequate in this narrow context.”); *id.* at 620 (Scalia, J., dissenting) (“The Court concludes . . . that juries cannot be trusted with the delicate task of weighing a defendant’s youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system . . .”).

³⁰ *Id.* at 573 (majority opinion) (“An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”).

³¹ Arguably the best of these is Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUP. CT. REV. 51 (2006). *See also* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL’Y & L. 115 (2007); Harry F. Tepker, *Tradition & The Abolition of Capital Punishment for Juvenile Crime*, 59 OKLA. L. REV. 809 (2006). Another possible defense of the decision in *Roper* is that “execution should be reserved for the worst of the worst and no youth under eighteen, regardless of how egregious the killing, fits into that class of individuals.” Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 35 (2009). But the assertion that juveniles cannot be among the worst of the worst is contestable. *See, e.g.*, Donald N. Bersoff, *The Differing Concepts of Culpability in Law and Psychology*, 11 WIDENER L. REV. 83, 90 (2004) (“It is simply untrue that no person under the age of 16 . . . is [capable of carrying out a horrible murder with the requisite intent or foresight.]”).

that juries' inability to accurately assess culpability is not a problem that can be fixed by excluding juveniles from the death penalty. If a jury cannot be trusted to determine which seventeen-year-olds are sufficiently culpable to be sentenced to death and which are not, why should juries be trusted to determine which nineteen-year-olds are sufficiently culpable to be sentenced to death and which are not? Or to determine which seventeen-year-olds are sufficiently culpable to be sentenced to life in prison—or to any other punishment—and which are not?

B. *Culpability Sufficient for Life Without Parole*

If the inability of juries to accurately assess culpability is the problem that *Roper's* categorical exclusion of juveniles from the death penalty solved, the question arises: What about juries' ability to assess culpability in noncapital cases? After *Roper*, the Court might have justified categorically excluding juveniles from the death penalty, while leaving them subject to juries' potentially erroneous assessments of their culpability in noncapital cases, by offering the observation that "death is different."³² But after *Graham v. Florida*, that justification is foreclosed.³³ In *Graham*, the Court ruled that as a group, juveniles are insufficiently culpable to be sentenced to life in prison without the possibility of parole, at least for non-homicide offenses.³⁴ In this case, the Court uses more absolute language than it

³² *Roper*, 543 U.S. at 568 ("[T]he death penalty is the most severe punishment, [and] the Eighth Amendment applies to it with special force."). Before *Graham*, the Supreme Court had considered Eighth Amendment death penalty claims to be altogether different than Eighth Amendment claims in non-death penalty cases. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009); see also *Graham v. Florida*, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting) (observing that the Court's decision "eviscerates [the] distinction" between capital and noncapital cases); *id.* at 2038–39 (Roberts, C.J., concurring) ("Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'") (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)).

³³ The Court might now argue death and life without parole are different. See *Graham*, 130 S. Ct. at 2027 ("It is true that a death sentence is 'unique in its severity and irrevocability,' . . . yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences." (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). But that raises the question what other punishments are also different.

³⁴ The Court in *Graham* says that the difference between homicide offenses and non-homicide offenses is important. See *id.* at 2027 ("[A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."). It is difficult, however, to imagine how the Court would explain a decision allowing juveniles to be sentenced to life

did in *Roper* to describe the differences between juveniles and adults. For example, the *Graham* opinion describes *Roper* as having “established that because juveniles have lessened culpability they are less deserving of the most severe punishments.”³⁵ But *Roper* did not establish that all juveniles are necessarily less culpable, only that juveniles as a group tend to be less culpable, and that any particular juvenile is therefore less likely to be culpable.³⁶ The *Graham* opinion mostly relies on *Roper* for the proposition that juveniles are less culpable, although the Court does cite one additional finding, from “psychology and brain science,” that “parts of the brain involved in behavior control continue to mature through late adolescence.”³⁷ This process of continued maturation would seem to argue against any bright-line rule about punishment, given that “late adolescence” does not end abruptly at age eighteen. But the Court ignores this nuance and continues to offer generalized statements about “juveniles,” “minors,” and “the status of the offenders.”³⁸

As in *Roper*, the real issue in *Graham* was not whether a juvenile is likely to be less culpable than an adult; instead, the real issue was whether the decision-makers—in *Roper*, the jury, and in *Graham*, the sentencing judge—can be trusted to make accurate assessments of culpability.³⁹ In *Graham*, the Court again chose to adopt a categorical rule excluding juveniles from eligibility for a certain punishment, but it could have chosen other solutions. In both *Roper* and *Graham*, then, research findings support the Court’s identified problem—that a

without parole for homicide offenses, given the centrality of juveniles’ categorically diminished culpability to the Court’s decisions in both *Graham* and *Roper*. *See id.* at 2055 (Thomas, J., dissenting) (asserting that distinguishing homicide and non-homicide offenses is evidence that “the Court does not even believe its pronouncements about the juvenile mind”).

³⁵ *Id.* at 2026 (majority opinion).

³⁶ *Roper v. Simmons*, 543 U.S. 551, 567–68 (2005).

³⁷ *Graham*, 130 S. Ct. at 2026.

³⁸ *Id.* at 2027 (“Juveniles are more capable of change than are adults. . . . [I]t would be misguided to equate the failings of a minor with those of an adult These matters relate to the status of the offenders in question”). The Court continues this tendency in *Miller*, which includes no qualifying language at all; instead, the opinion consistently refers to “juveniles” and “children” as being different from adults. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (“[J]uveniles have diminished culpability and greater prospects for reform, . . . children have a ‘lack of maturity and an undeveloped sense of responsibility,’ . . . [and] a child’s character is not as ‘well formed’ as an adult’s” (quoting *Roper*, 543 U.S. at 569–70)).

³⁹ *Graham*, 130 S. Ct. at 2030 (“This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.”).

juvenile is likely to be less culpable than an adult—but not necessarily the Court’s chosen remedy. To the extent that the research findings that the Court relies on in both *Roper* and *Graham* demonstrate that psychological maturation is a variable process, with some people achieving maturity before the age of eighteen and some achieving maturity later, these findings counsel against categorical rules regarding the punishment of juveniles based on general findings about their culpability relative to the culpability of adults.⁴⁰

II

MENTAL STATES AND CRIMINAL PROCESS

Mental states are central to criminal responsibility. In almost every criminal trial, the jury must make a determination about the defendant’s mental state at the time of the offense, as almost all crimes include a mens rea element.⁴¹ The law in most jurisdictions also considers whether, at the time of the offense, a person understood the nature and quality of his acts and appreciated the wrongfulness of those acts. If he did not, then he is not guilty by reason of insanity.⁴² Additionally, criminal prosecution and punishment require certain mental competencies at several points, including at the time of the trial and at the time of the imposition of a death sentence.⁴³ At the time of the trial, due process requires that the law ask whether a

⁴⁰ The Court’s reference to other categorical rules involving juveniles, such as rules about drinking ages and voting ages, is unpersuasive, because practical considerations of time and expense justify such broadly applicable rules. In the case of a juvenile charged with or convicted of a crime, however, an individualized decision maker is already a part of the system. See Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 386 (2011) (explaining that some “age-based categorical rules . . . such as those disqualifying all minors from voting and those minors below a specified age from driving . . . capture enough of the truth to make more fine-tuned distinctions not worthwhile,” but that individualized assessment is already a part of the criminal process: “In the case of sentencing juveniles convicted of serious felonies, however, the judicial system has already incurred a substantial cost in a highly individualized inquiry: this particular defendant has been found guilty beyond a reasonable doubt of committing a certain act; and this particular defendant has been deemed to possess a particular culpability.”).

⁴¹ The Supreme Court has approved certain kinds of strict liability crimes, but they are disfavored. See *Staples v. United States*, 511 U.S. 600, 606 (1994) (observing that “offenses that require no *mens rea* generally are disfavored”).

⁴² All but four states as well as the federal government recognize some form of an insanity defense. Most insanity defenses are some variant of the test set forth in *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718 (H.L.) 719. See *Clark v. Arizona*, 548 U.S. 735, 750–51 (2006).

⁴³ These points account for most cases in which competency is an issue, although it is also an issue at other points, such as at the time of waiving an appeal.

person understands the charges against him and is able to assist his attorney in presenting a defense.⁴⁴ If he does not, then he is incompetent to stand trial.⁴⁵ Similarly, at the time of the imposition of a death sentence, due process requires that the law ask whether a person understands the state's reasons for executing him.⁴⁶ If he does not, then he is unfit to be executed.⁴⁷

Although the legal principles that underlie these connections between criminal law and mental states are based on long-standing precedents, in recent years the Supreme Court has decided cases that involve all of these principles. In *Clark v. Arizona*, the Court considered challenges to an Arizona law that limited the scope of the insanity defense and to an interpretation of Arizona law that prohibited defendants from presenting evidence of mental disorder for the purpose of disproving mens rea.⁴⁸ Although the Court found that neither of Arizona's restrictions violated the federal Constitution, Justice Kennedy submitted a forceful and insightful dissenting opinion arguing that not allowing criminal defendants to present mental disorder evidence for the purpose of disproving mens rea was unconstitutional.⁴⁹ In *Sell v. United States*, the Court set forth the conditions under which the state may administer involuntary medications to a pretrial detainee for the purpose of rendering the detainee competent to stand trial.⁵⁰ This case resolved some of the uncertainty that had plagued the trial courts regarding the question whether the government's interest in adjudicating criminal charges could justify the administration of involuntary medications when the medications were not also justified by the government's interest in

⁴⁴ *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁴⁵ The same standard generally determines related competencies at the time of trial, including competency to waive counsel and competency to plead guilty. *See Godinez v. Moran*, 509 U.S. 389, 397 (1993). *But see Indiana v. Edwards*, 554 U.S. 164, 169–72 (2008) (ruling that the Constitution does not prohibit states from imposing a higher standard for competency for self-representation). Additionally, a waiver of constitutional rights such as the right to counsel must be “knowing[] and intelligent[].” *See Faretta v. California*, 422 U.S. 806, 835 (1975); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁴⁶ *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007); *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

⁴⁷ *See Panetti*, 551 U.S. at 958.

⁴⁸ *Clark v. Arizona*, 548 U.S. 735, 800 (2006).

⁴⁹ *Id.* at 781–800 (Kennedy, J., dissenting).

⁵⁰ *Sell v. United States*, 539 U.S. 166, 169 (2003).

diminishing dangerousness.⁵¹ There are several problems with the *Sell* decision, however, that reflect a lack of understanding about how antipsychotic medications work.⁵² Finally, in *Panetti v. Quarterman*, the Court clarified that a prisoner who has been sentenced to death cannot be executed if he does not “rationally understand” the reasons for the execution.⁵³ This opinion is laudable for the depth of understanding it demonstrates regarding the potential impact of psychotic symptoms on cognitive functioning.⁵⁴

A. *Criminal Defenses: Clark v. Arizona*

Eric Clark was charged with first-degree murder for shooting and killing a police officer.⁵⁵ In defense, Clark argued that when he shot the officer, he believed that the officer was an alien.⁵⁶ At his bench trial, Clark wanted to present evidence of his mental illness, particularly of his delusional beliefs, to support his claim that because he thought the officer was an alien, he did not intentionally or knowingly kill a police officer.⁵⁷ And because he did not knowingly or intentionally kill a police officer, Clark argued, he should be found not guilty either by reason of insanity or because he lacked the requisite mens rea for first-degree murder.⁵⁸ The Arizona trial court allowed Clark to present evidence of his mental illness for the purpose of supporting his insanity defense but not for the purpose of disproving mens rea.⁵⁹ Clark argued on appeal that not allowing him to present evidence for the purpose of disproving mens rea violated

⁵¹ See *infra* note 105.

⁵² See *infra* Part II.B.

⁵³ *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

⁵⁴ See *infra* Part II.C.

⁵⁵ *Clark v. Arizona*, 548 U.S. 735, 743 (2006).

⁵⁶ *Clark*, 548 U.S. at 743–44.

⁵⁷ *Id.* at 743–45.

⁵⁸ *Id.* *Clark* is an unusual case because Clark’s particular delusional beliefs do give rise to both a failure of proof defense (the defense that he lacked the mens rea to commit the charged offense) and an insanity defense. More typically, delusional beliefs might give rise to an insanity defense but not to a failure of proof defense. In the case of Andrea Yates, for example, her delusional belief that if she killed her children they would be saved from eternal damnation might mean that she did not appreciate the wrongfulness of her actions, but the delusional belief does not mean that she lacked the intent to kill the children. See Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL’Y & L. 383, 395 (2003). Clark’s belief that the officer was an alien means both that he did not appreciate the wrongfulness of his actions and also that he lacked the intent to kill a police officer.

⁵⁹ *Clark*, 548 U.S. at 745 (“The trial court ruled that Clark could not rely on evidence bearing on insanity to dispute the mens rea.”).

his due process right to a fundamentally fair trial.⁶⁰ Additionally, Clark challenged the constitutionality of Arizona's insanity defense,⁶¹ which includes only one part of the traditionally two-part *M'Naghten* test for insanity.⁶²

The Supreme Court ruled against Clark on both arguments. The Court held that neither the narrowing of the definition of insanity nor the prohibiting of mental illness evidence for the purpose of disproving mens rea violated Clark's due process rights.⁶³ Justice Kennedy wrote a trenchant dissent, explaining why prohibiting Clark from presenting evidence of his mental illness to disprove mens rea did in fact violate due process.⁶⁴

1. *The Insanity Defense*

The law has long acknowledged that the mental functioning of some people is so disordered that they ought not to be held criminally responsible for their acts.⁶⁵ Someone who is insane is excused from criminal responsibility despite having committed the proscribed act with the requisite mens rea. Today, federal law and the laws of forty-six states recognize some kind of insanity defense, most commonly a form of the test set forth in the case of *M'Naghten*.⁶⁶ Under *M'Naghten*, someone is insane if he lacks knowledge of the nature

⁶⁰ *Id.* at 756.

⁶¹ Although this Article will refer to it as an insanity defense (because the Supreme Court in *Clark* did so), Arizona's "insanity defense" is really a "guilty but mentally ill defense":

If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could have received . . . if the defendant had not been found insane, and the judge shall sentence the defendant to a term of incarceration in the state department of corrections and shall order the defendant to be placed under the jurisdiction of the psychiatric security review board and committed to a state mental health facility under the department of health services . . . for that term.

ARIZ. REV. STAT. ANN. § 13-502(D) (West, Westlaw through 2d Reg. Sess. of the 50th Leg. (2012)).

⁶² *Clark*, 548 U.S. at 747.

⁶³ *Id.* at 756 ("We are satisfied that neither in theory nor in practice did Arizona's 1993 abridgment of the insanity formulation deprive Clark of due process."); *see also id.* at 779 ("Arizona's rule serves to preserve the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors.").

⁶⁴ *See id.* at 781–800 (Kennedy, J., dissenting).

⁶⁵ *See* J.C. Oleson, *The Insanity of Genius: Criminal Culpability and Right-Tail Psychometrics*, 16 GEO. MASON L. REV. 587, 634 (2009) (noting that the insanity defense's "roots extend to Roman law").

⁶⁶ *See Clark*, 548 U.S. at 746–56.

and quality of his act or if he lacks understanding of the wrongfulness of the act.⁶⁷

Arizona's insanity law at one point was essentially the *M'Naghten* test.⁶⁸ In 1993, the Arizona legislature narrowed the definition of insanity to excuse only those who did not know that what they were doing was wrong.⁶⁹ Clark argued that Arizona's narrowing of the definition of insanity violated due process.⁷⁰ The Supreme Court's prior precedents are fairly clear, however, that the Constitution does not require any particular formulation of an insanity defense.⁷¹

Additionally, the Court in *Clark* avoided any particularized analysis of Arizona's insanity law by determining that although the words of one part of the *M'Naghten* test are absent from Arizona law, the law implicitly includes both parts because "[i]n practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime."⁷² The problem is that the Court's example misstates Arizona's law, which provides the excuse of insanity to someone who did not know the criminal act was wrong.⁷³ It is possible that someone did not know what he was doing but did know that the act he was performing was a wrongful act. Clark, for example, believed that he was killing an alien, yet he understood the wrongfulness of the act he was actually performing—killing a police officer.⁷⁴ To encompass both kinds of not knowing, Arizona's law would need to be interpreted wholly subjectively, so that someone is not guilty by

⁶⁷ *M'Naghten's Case* (1843) 8 Eng. Rep. 718 (H.L.) 719 (defining as insane someone who, because of a "disease of the mind," did not "know the nature and quality of the act he was doing" or did not "know that what he was doing was wrong").

⁶⁸ The prior Arizona law stated:

A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

ARIZ. REV. STAT. ANN. § 13-502 (West 1978).

⁶⁹ Arizona now defines insanity to excuse someone who "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) (West, Westlaw through 2d Reg. Sess. of the 50th Leg. (2012)). This law omits the part of the *M'Naghten* test that excuses someone who does not know the nature and quality of his act.

⁷⁰ *Clark*, 548 U.S. at 747.

⁷¹ See *Medina v. California*, 505 U.S. 437, 448–49 (1992); *Powell v. Texas*, 392 U.S. 514, 535–37 (1968); *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952).

⁷² *Clark*, 548 U.S. at 753–54.

⁷³ See *supra* note 69.

⁷⁴ *Clark*, 548 U.S. at 743–45.

reason of insanity if he did not know that the act he thought he was performing was a wrongful act.

2. *Mental Illness Evidence*

Under Arizona law—at least as Arizona courts understood it before the Supreme Court’s decision in *Clark*—criminal defendants cannot present evidence of mental illness for the purpose of proving that they lacked the requisite mens rea to be convicted of the charged offenses; evidence of mental illness is admissible only for the purpose of proving a defense of not guilty by reason of insanity.⁷⁵ In *Clark*, the Court interpreted Arizona law somewhat differently, understanding it to mean that criminal defendants are prohibited from presenting only certain kinds of evidence, which the Court named “mental-disease evidence” and “capacity evidence,” for the purpose of disproving mens rea.⁷⁶ By reconceptualizing Arizona law to exclude only some mental illness evidence, the Court avoided the question that really was raised by the trial court’s decision in *Clark*—the question whether states can prohibit criminal defendants from presenting evidence of mental illness for the purpose of proving that they lacked the requisite intent to be guilty of the charged offense.⁷⁷

In detailing the many flaws in the Court’s reconceptualized evidentiary scheme, Justice Kennedy’s dissenting opinion demonstrates a sophisticated knowledge of the way that mental illness is diagnosed and also of the difficulties a criminal defendant faces in convincing a jury that a mental illness is more than an “abuse

⁷⁵ As the Arizona Supreme Court explained it, “Arizona does not allow evidence of a defendant’s mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime.” *State v. Mott*, 931 P.2d 1046, 1051 (1997) (quoted in *Clark*, 548 U.S. at 745).

⁷⁶ *Clark*, 548 U.S. at 757 (“Understanding *Clark*’s claim requires attention to the categories of evidence with a potential bearing on *mens rea*.”).

⁷⁷ As Justice Kennedy explained:

Seizing upon a theory invented here by the Court itself, the Court narrows *Clark*’s claim so he cannot raise the point everyone else thought was involved in the case. The Court says the only issue before us is whether there is a right to introduce mental-disease evidence or capacity evidence, not a right to introduce observation evidence. This restructured evidentiary universe, with no convincing authority to support it, is unworkable on its own terms. Even were that not so, however, the Court’s tripartite structure is something not addressed by the state trial court, the state appellate court, counsel on either side in those proceedings, or the briefs the parties filed with us. The Court refuses to consider the key part of *Clark*’s claim because his counsel did not predict the Court’s own invention.

Clark, 548 U.S. at 781–82 (Kennedy, J., dissenting) (citation omitted).

excuse.” For example, given that many people likely do not understand how mental disorders are diagnosed, Justice Kennedy quite accurately explains that allowing Clark’s witness to testify about Clark’s schizophrenic symptoms but prohibiting the witness from using the term “schizophrenia” would amount to “forcing the witness to pretend that no one has yet come up with a way to classify the set of symptoms being described.”⁷⁸ And given the deep and wide skepticism regarding mental illness defenses,⁷⁹ Justice Kennedy is surely correct that the witness’s testimony about Clark’s psychotic symptoms “might not be believable without a psychiatrist confirming the story based on his experience with people who have exhibited similar behaviors.”⁸⁰

The Court identified two reasons that Arizona’s rule prohibiting criminal defendants from presenting mental illness evidence did not violate due process. First, the Court reasoned that because Arizona could place on defendants the burden of proving insanity by clear and convincing evidence, Arizona could also prevent defendants from presenting mental illness evidence for the purpose of disproving mens rea. The Court made this connection because allowing defendants to present mental illness evidence to disprove mens rea would weaken the defendant’s burden by allowing a jury to find him not guilty on the basis of reasonable doubt about mens rea. Consequently, a defendant could be found not guilty even though the defendant had not met the burden of proving insanity by clear and convincing evidence.⁸¹

As Justice Kennedy explains in his dissenting opinion, the Court’s analysis places the cart before the horse.⁸² Arizona’s interest in effectuating its designated burden of proof regarding insanity cannot justify depriving a criminal defendant of the right not to be found guilty except upon proof beyond a reasonable doubt of every element of the charged offense. So while it might be correct to say that allowing criminal defendants to present evidence for the purpose of disproving mens rea conflicts with Arizona’s law requiring defendants to prove insanity by clear and convincing evidence, it is

⁷⁸ *Id.* at 783.

⁷⁹ Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 470 (2000) (“Juries are notoriously skeptical of mental illness defenses, even in cases where the illness is clear.”).

⁸⁰ *Clark*, 548 U.S. at 783.

⁸¹ *Id.* at 771 (majority opinion).

⁸² *Id.* at 796–97 (Kennedy, J., dissenting).

certainly more important than prohibiting defendants from presenting evidence for the purpose of disproving mens rea conflicts with the Constitution's guarantee of due process.⁸³

The untrustworthiness of mental illness evidence was the Court's second reason for its conclusion that Arizona's rule prohibiting criminal defendants from presenting mental illness evidence did not violate due process.⁸⁴ The Court suggested several ways that mental illness evidence is untrustworthy, including that experts disagree about psychiatric diagnoses and that experts have the potential to mislead juries.⁸⁵ But as Justice Kennedy points out, evidence about mental illnesses is no less trustworthy than is evidence about most other topics that juries must evaluate, especially given that trials are designed to produce two contradictory accounts.⁸⁶ Moreover, Justice Kennedy astutely observes that prohibiting evidence of mental illness is likely to leave the jury less rather than more enlightened: Arizona's "rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness."⁸⁷ To the extent that mental illness evidence is confusing, it is likely because mental illnesses are confusing. But the cost of reducing complexity by prohibiting juries from considering evidence of mental illness is decreased rather than increased trustworthiness.⁸⁸

B. *Competency to Stand Trial: Sell v. United States*

A criminal defendant must be competent to stand trial; otherwise, the trial violates due process guarantees of fundamental fairness.⁸⁹ To be competent to stand trial, a criminal defendant must possess a

⁸³ *In re Winship*, 397 U.S. 358, 364 (1970). The Court achieves a moment of insight about this, recognizing that "if the same evidence that affirmatively shows he was not guilty by reason of insanity (or 'guilty except insane' under Arizona law . . .) also shows it was at least doubtful that he could form *mens rea*, then he should not be found guilty in the first place." *Clark*, 548 U.S. at 773 (majority opinion). But the Court did not translate this insight into a clear understanding of the difference between a defendant's burden to prove insanity and the prosecution's burden to prove mens rea.

⁸⁴ *Clark*, 548 U.S. at 773–74.

⁸⁵ *Id.* at 774–76.

⁸⁶ *Id.* at 796 (Kennedy, J., dissenting) ("The trial court was capable of evaluating the competing conclusions, as factfinders do in countless cases where there is a dispute among witnesses.").

⁸⁷ *Id.* at 800.

⁸⁸ *Id.* at 796 (noting that "the potential to mislead will be far greater under the Court's new evidentiary system, where jurors will receive observation evidence without the necessary explanation from experts.").

⁸⁹ *Pate v. Robinson*, 383 U.S. 375, 385–87 (1966).

rational understanding of the charges against him and also must be able to cooperate with his attorney in presenting a defense to those charges.⁹⁰ Because this standard is fairly undemanding, relatively few defendants are found incompetent.⁹¹ Of those who are incompetent, some are incompetent for reasons that are likely irremediable—severe mental retardation, for example.⁹² Others, though, are incompetent for reasons that are potentially remediable—symptoms of psychosis, for example.⁹³ A defendant who is incompetent to stand trial because of psychotic symptoms—such as a delusional belief that his attorney and the trial judge are conspiring with the CIA to convict him—might be made competent to stand trial if the psychotic symptoms were alleviated. The most reliable way to alleviate psychotic symptoms is by administering antipsychotic medications.⁹⁴ Some defendants, though, refuse to take such medications voluntarily, raising the question whether the government may compel a defendant to take such medications for the purpose of rendering the defendant competent to stand trial.⁹⁵

⁹⁰ *Dusky v. United States*, 362 U.S. 402, 402 (1960) (stating that the test for competency to stand trial is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”).

⁹¹ See Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 828–29 (2005) (“[A] small percentage of seriously impaired adult defendants are referred for competence evaluations and an even smaller percent are found to be incompetent to stand trial.”).

⁹² To some extent, competence to stand trial can be taught. For a thorough discussion of programs designed to render defendants competent to stand trial, see Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81, 103–08 (2005).

⁹³ See *Sell v. United States*, 539 U.S. 166, 178–79 (2003) (considering whether administering involuntary antipsychotic medications to a defendant who was incompetent to stand trial because of delusions violated due process).

⁹⁴ John M. Kane, *Conventional Neuroleptic Treatment: Current Status, Future Role*, in THE NEW PHARMACOTHERAPY OF SCHIZOPHRENIA 89, 90 (Alan Breier ed., 1996) (describing antipsychotic medications as “the primary modality in the treatment of an acute episode or an acute exacerbation of a schizophrenic illness”); Thomas H. McGlashan, *Rationale and Parameters for Medication-Free Research in Psychosis*, 32 SCHIZOPHRENIA BULL. 300, 301 (2006), available at <http://schizophreniabulletin.oxfordjournals.org/content/32/2/300.full> (noting that antipsychotic medications are “the most rapid, effective, and economical treatment for active psychosis”).

⁹⁵ A related but fundamentally different question is when may the government compel anyone, whether a criminal defendant or not, to take antipsychotic medications for the purpose of diminishing that person’s dangerousness, either to himself or to others. See *Washington v. Harper*, 494 U.S. 210, 227 (1990); see also *Riggins v. Nevada*, 504 U.S. 127, 140 (1992) (Kennedy, J., concurring) (observing that “This is not a case like *Washington v. Harper* in which the purpose of the involuntary medication was to ensure

The Supreme Court has considered this question twice, first in *Riggins v. Nevada*⁹⁶ and most recently in *Sell v. United States*.⁹⁷ In *Riggins*, David Riggins appealed his conviction for robbery and murder on the grounds that Nevada had violated his right to refuse unwanted medical treatment and his right to a fair trial by compelling him to take antipsychotic medications during his trial.⁹⁸ The issue in cases like *Riggins* is whether the state possesses an important enough interest in bringing criminal defendants to trial to justify the involuntary administration of antipsychotic medications, given that these medications can cause side effects that are dangerous and distressing, and also might interfere with the fairness of a criminal trial.⁹⁹ In this particular case, the Court was spared any truly hard question because Nevada had not identified any interests that it hoped to advance by not granting Riggins's request to discontinue the medications.¹⁰⁰ The Court ruled that because the state had not identified any government interests that required involuntary antipsychotic medications, the state was not justified in administering those medications to Riggins.¹⁰¹

The Court's decision in *Riggins* was hardly surprising, given the absence of any findings that would justify involuntary medications. The more interesting and enduringly important opinion in *Riggins* was Justice Kennedy's concurrence, which explored the problems that involuntary antipsychotic medications might cause even in a case in which the state had identified important government interests that required such medications.¹⁰² Justice Kennedy envisioned the case

that the incarcerated person ceased to be a physical danger to himself or others." (citation omitted)).

⁹⁶ 504 U.S. 127 (1992).

⁹⁷ 539 U.S. 166 (2003).

⁹⁸ *Riggins*, 504 U.S. at 130–33.

⁹⁹ The Court presumed, for the sake of argument, the reason the government continued to administer antipsychotic medications was to maintain Riggins's competency to stand trial. *See id.* at 136 ("Were we to divine the District Court's logic from the hearing transcript, we would have to conclude that the court simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the balance in favor of involuntary medication.").

¹⁰⁰ *Id.* at 131 ("The District Court denied Riggins' motion to terminate medication with a one-page order that gave no indication of the court's rationale.").

¹⁰¹ *Id.* at 138 ("Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy . . . we have no basis for saying that the substantial probability of trial prejudice in this case was justified.").

¹⁰² *Id.* at 138–45 (Kennedy, J., concurring).

after *Riggins*—the case in which the government did present an important interest that would be advanced by compelling the defendant to take antipsychotic medications.¹⁰³ Assuming an important government interest, what are the interests of the defendant that would be compromised? There are at least two, although Justice Kennedy’s opinion focuses on only one.¹⁰⁴ The first interest is one that is common to all people, whether charged with a crime or not: the interest in making autonomous decisions about accepting or refusing medical treatment.¹⁰⁵ The second interest, which is unique to criminal defendants and which was the focus of Justice Kennedy’s opinion, is the interest in receiving a fair trial.¹⁰⁶ As Justice Kennedy explained, antipsychotic medications threaten to undermine the fairness of a criminal trial in two ways: by affecting a defendant’s demeanor in the courtroom and by affecting his interactions with counsel.¹⁰⁷ The side effects of antipsychotic medications include drowsiness and agitation,¹⁰⁸ conditions that a jury might misinterpret as a sign of cold-heartedness or of a guilty conscience. And both conditions can diminish motivation and ability to attend to the proceedings and to assist counsel in presenting a defense. Throughout the opinion, Justice Kennedy communicates quite forcefully his skepticism that states can justify administering involuntary antipsychotic medications to incompetent criminal defendants for the purpose of making them competent to stand trial.¹⁰⁹ He even contemplates the implications of

¹⁰³ *Id.* at 138–39.

¹⁰⁴ In addition to the insightful recognition of the problems that defendants might experience because of involuntary antipsychotic medications, Justice Kennedy’s opinion is laudable for not citing as potential problems things that really are not—in particular, the “problems” of “synthetic sanity” and of “mind control.” See Thomas G. Gutheil & Paul S. Appelbaum, “*Mind Control*,” “*Synthetic Sanity*,” “*Artificial Competence*,” and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 79–88 (1983) (discussing some courts’ misunderstandings regarding the effects of antipsychotic medications).

¹⁰⁵ Prior to *Sell*, a few state and federal courts had ruled that this interest in bodily autonomy is so substantial that the government’s interest in rendering a defendant competent to stand trial is not an important enough interest to justify involuntary medications. See *United States v. Brandon*, 158 F.3d 947, 953–54 (6th Cir. 1998); *Woodland v. Angus*, 820 F. Supp 1497, 1504–05 (D. Utah 1993).

¹⁰⁶ *Riggins*, 504 U.S. at 138–39.

¹⁰⁷ *Id.* at 142.

¹⁰⁸ *Id.* at 143.

¹⁰⁹ See *id.* at 138–39 (“I file this separate opinion . . . to express my view that absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial, and to express doubt that the showing can be made in most cases, given our present understanding of the properties of these drugs.”).

his position, concluding that “[i]f the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process.”¹¹⁰

The Supreme Court encountered the case Justice Kennedy’s concurring opinion had envisioned in *Sell v. United States*. In *Sell*, the Court set forth a four-part test for determining when the government’s interest in rendering a defendant competent to stand trial is important enough to justify administering involuntary antipsychotic medications.¹¹¹ This test allows the government to administer these medications if the court finds that they are (1) “medically appropriate,” (2) “substantially unlikely to have side effects that may undermine the fairness of the trial,” (3) approved only after “taking account of less intrusive alternatives,” and (4) “necessary significantly to further important governmental trial-related interests.”¹¹²

The medical appropriateness and least intrusive means factors primarily concern whether a defendant has been properly identified as incompetent to stand trial because of symptoms that are treatable with antipsychotic medications. Antipsychotic medications are not medically appropriate for general behavioral control.¹¹³ If the purpose of administering antipsychotic medication is to manage behavior rather than to treat psychotic symptoms, then the medication is not medically appropriate.¹¹⁴ And if a defendant is incompetent to stand trial because he is experiencing psychotic symptoms, then antipsychotic medications are likely to be the least intrusive means of alleviating those symptoms and rendering him competent to stand trial, given that antipsychotic medications are the only effective treatment for psychotic symptoms.¹¹⁵ On the other hand, if someone

¹¹⁰ *Id.* at 145.

¹¹¹ *Sell v. United States*, 539 U.S. 166, 179 (2003).

¹¹² *Id.*

¹¹³ *See* *Washington v. Harper*, 494 U.S. 210, 226 (1990).

¹¹⁴ *See id.*

¹¹⁵ *See* Brief for the Am. Psychiatric Ass’n and Am. Acad. of Psychiatry and the Law as Amici Curiae Supporting Respondent at 13–14, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) (“Antipsychotic medications are not only an accepted but often essential, irreplaceable treatment for psychotic illnesses, as most firmly established for schizophrenia, because the benefits of antipsychotic medications for patients with psychoses, compared to any other available means of treatment, are so palpably great compared with their generally manageable side effects.”).

is incompetent for other reasons, then antipsychotic medications will not be effective, regardless of what one thinks about their intrusiveness. Thus, both the medical appropriateness and the least intrusive means factors largely ask whether the defendant is incompetent to stand trial because of psychotic symptoms that are treatable with antipsychotic medications.¹¹⁶

The remaining two factors are where the *Sell* test runs into problems. The problem with requiring trial courts to find that involuntary medications are necessary to further important government interests is that the Court failed to explain how trial courts ought to determine whether the government's interests are "important."¹¹⁷ That the importance of the government's interests is a factor to be considered suggests that in some cases, the government's interests will not be important enough to satisfy this factor—and thus the Court is not saying that the government's interest in adjudicating criminal charges is always important. But what distinguishes an important government interest in adjudication from an unimportant interest in adjudication?

Since *Sell*, courts have primarily considered potential punishment in deciding whether a particular charge is serious enough to justify involuntary medications.¹¹⁸ But given that courts have ruled that offenses punishable by a minimum potential sentence of just six months imprisonment are "serious,"¹¹⁹ it is difficult to imagine the offense that could safely be said to be "not serious."¹²⁰

¹¹⁶ Additionally, antipsychotic medications might not be medically appropriate for defendants who have other medical conditions, such as diabetes, that might be exacerbated by antipsychotics.

¹¹⁷ See *Sell*, 539 U.S. at 180.

¹¹⁸ *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1121, 1126 (2008) ("Most courts have judged the importance of bringing a defendant to trial based on the maximum penalty the defendant could face if convicted.").

¹¹⁹ *United States v. Palmer*, 507 F.3d 300, 304 (5th Cir. 2007); *United States v. Evans*, 404 F.3d 227, 237–38 (4th Cir. 2005); *United States v. Algere*, 396 F. Supp. 2d 734, 739 (E.D. La. 2005). These courts borrowed the six months or more standard from the Supreme Court's Sixth Amendment rule regarding the right to a jury trial. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

¹²⁰ One example is *United States v. Kourey*, 276 F. Supp. 2d 580, 585 (S.D. W. Va. 2003) ("Defendant is not facing serious criminal charges upon which he will be tried. Rather, Defendant is charged with violating the terms and conditions of his supervised release imposed for his admitted commission of a Class A misdemeanor."). Misdemeanor offenses, though, are not categorically "not serious." See *United States v. Everage*, No. CRIM.A. 05-11-DLB, 2006 WL 1007274, at *1 (E.D. Ky. Apr. 17, 2006) ("Although Defendant is charged with two misdemeanors, they both allegedly involve threats to

An additional problem with *Sell* is the requirement that the court find that involuntary medications are “substantially unlikely to have side effects that may undermine the fairness of the trial.”¹²¹ While this factor is an appropriate one to consider in theory, it is an impossible one to apply in real life. Antipsychotic medications can cause a myriad of side effects, many of which can interfere with the fairness of a criminal trial, as Justice Kennedy ably explained in his concurring opinion in *Riggins*.¹²² But even though side effects are an important consideration, it is not possible to determine in advance which side effects any particular person will experience. Across individuals, and even within the same individual across time, both the therapeutic effects and the side effects of antipsychotic medications are varied and unpredictable.¹²³ So under *Sell*, defense attorneys will be unable to present evidence that establishes anything more than a statistical probability that antipsychotic medications will cause side effects that will undermine the fairness of a defendant’s trial.¹²⁴ It can be hoped that, if a court allows the government to administer involuntary antipsychotic medications for the purpose of rendering a defendant competent to stand trial, the court would continue to monitor the defendant to see whether the defendant does experience side effects that would undermine the fairness of his trial. However, that issue is separate from the issue *Sell* addresses.

others, one with a firearm. The Court therefore concludes Defendant is charged with serious crimes.”).

¹²¹ *Sell*, 539 U.S. at 179.

¹²² See generally *Riggins v. Nevada*, 504 U.S. 127, 138–45 (1992) (Kennedy, J., concurring).

¹²³ See *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 699 n.10 (9th Cir. 2010) (“The FMC-Butner Evaluation noted that ‘[r]esponse to antipsychotic medication is highly individual,’ and explained that ‘[b]ecause it is difficult to predict an individual’s response to antipsychotic medication, [the APA statistics] have been provided to indicate the likelihood of response if an individual is treated with an antipsychotic medication.’” (alterations in original)).

¹²⁴ The D.C. District Court recognized this problem, although it considered it from the prosecutor’s point of view:

There are many uncertainties regarding the effects that medication will have on [the defendant’s] demeanor and thought processes because the reaction to medication is unique to each patient. However, the Court rejects [the defendant’s] attorneys’ contention that this uncertainty precludes the use of medication in this context at this time. To interpret “clear and convincing” evidence as the defense suggests would effectively preclude involuntary medication in every case, since the government could never establish that a given individual would respond in a predictable manner, no matter how high the statistical probabilities.

United States v. Weston, 134 F. Supp. 2d 115, 136 (D. D.C. 2001).

Yet another problem with *Sell* is the Court's instruction to trial courts to first consider whether an incompetent criminal defendant can be administered involuntary antipsychotic medications on the basis of dangerousness to himself or others before considering whether these medications can be administered for the purpose of rendering the defendant competent to stand trial.¹²⁵ It is odd that the Court would see these rationales as interchangeable—or even odder, would see the dangerousness rationale as preferable—given that the primary concern about administering involuntary antipsychotic medications to pretrial detainees is the potential of these medications to undermine the fairness of a criminal trial. Administering involuntary antipsychotic medications to incompetent pretrial detainees poses the exact same threat to the fairness of their trials regardless of the rationale that justified administering the involuntary medications.

A final oddity of the *Sell* opinion is the Court's expressed expectation that trial courts will only rarely approve administering involuntary antipsychotic medications for the purpose of rendering defendants competent to stand trial.¹²⁶ There is no real limiting factor in the *Sell* test,¹²⁷ and had the Court possessed a better understanding of antipsychotic medications, it might have predicted that courts

¹²⁵ See *Sell*, 539 U.S. at 183 (“[A] court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.”).

¹²⁶ See *id.* at 180 (“This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare.”).

¹²⁷ And perhaps there should not be any limits. Some scholars have argued that involuntary medications are the generally appropriate way to deal with criminal defendants who are incompetent to stand trial. See, e.g., Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 915 (2011) (“What is the point of keeping an incompetent defendant in a hospital to restore competence if restoration is made impossible by treatment refusal? The intrusion of forcible medication is not trivial, to be sure, but neither is it so extensive that it should block the progress of the case.”); Douglas Mossman, *Is Prosecution “Medically Appropriate”?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 77 (2005) (“Defendants are entitled to psychiatric treatment that may permit prosecution, and by providing defendants with such treatment, doctors assure that civil society will fulfill its obligation to respect the rationality and humanity of all persons.”); Lisa Kim Anh Nguyen, *In Defense of Sell: Involuntary Medication and the Permanently Incompetent Criminal Defendant*, 2005 U. CHI. LEGAL F. 597, 598 (2005) (“[F]orcible medication administered to render a defendant competent to stand trial not only protects the government's interest in prosecution, but also the criminal defendant's interest not to be held indefinitely without trial.”). The *Sell* Court, though, arguably viewed its decision as setting forth conditions that would fairly substantially limit involuntary medications.

would—as they now do—routinely find that involuntary medications satisfy *Sell*.¹²⁸

C. *Competency to Be Executed: Panetti v. Quarterman*

The Supreme Court first considered what mental competencies a person must possess in order for the state to carry out a death sentence in the 1986 case *Ford v. Wainwright*.¹²⁹ In *Ford*, the Court ruled that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.”¹³⁰ The decision in *Ford* was only a plurality opinion, though,¹³¹ accompanied by a concurring opinion written by Justice Powell¹³²—that might, but might not, be a narrower and thus controlling opinion¹³³—as well as a dissenting (in part) opinion by Justice O’Connor¹³⁴ and a dissenting opinion by Justice Rehnquist.¹³⁵ Moreover, both the plurality opinion and Justice Powell’s concurring opinion used a host of different terms—perception, knowledge, awareness, comprehension—to describe what mental state was required for someone to be competent to be executed, without offering anything in the way of definition or explanation of these terms.¹³⁶

¹²⁸ The fear that orders allowing the government to administer involuntary medications under *Sell* were becoming routine in part motivated a recent Fourth Circuit opinion ruling that a district court had erred in allowing such medication. *See United States v. White*, 620 F.3d 401, 405 (4th Cir. 2010) (“Because we are persuaded that the district court’s order in this case comes perilously close to a forcible medication regime best described not as ‘limited,’ but as ‘routine,’ we reverse.”); *id.* at 422 (“If we authorize the government to forcibly medicate White, an all-too-common, non-violent, long-detained defendant, in a case in which several factors strongly militate against forced medication, it would risk making ‘routine’ the kind of drastic resort to forced medication for restoring competency that the Supreme Court gave no hint of approving in *Sell*.”).

¹²⁹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹³⁰ *Id.* at 409.

¹³¹ *See id.* at 401–18 (plurality opinion).

¹³² *See id.* at 418–31 (Powell, J., concurring).

¹³³ *Compare* *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (stating that Powell’s opinion is narrower and thus controlling), *with id.* at 969 n.5 (Thomas, J., dissenting) (arguing that Powell’s opinion is not controlling).

¹³⁴ *Ford*, 477 U.S. at 427–31 (O’Connor, J., dissenting in part).

¹³⁵ *Id.* at 431–35 (Rehnquist, J., dissenting).

¹³⁶ *Id.* at 409 (plurality opinion) (“comprehension of why he has been singled out and stripped of his fundamental right to life”); *id.* at 422 (Powell, J., concurring) (“know the fact of [his] impending execution and the reason for it”; “perceives the connection between his crime and his punishment”; and “aware that his death is approaching”).

In 2007, the Court again considered the issue of competency to be executed in *Panetti v. Quarterman*.¹³⁷ Scott Panetti had been sentenced to death for killing his wife's parents, in front of his wife and daughter, and then holding his wife and daughter hostage.¹³⁸ Charged with first-degree murder, Panetti—who had a long and well-documented history of serious mental illness pre-dating the offense—insisted on representing himself.¹³⁹ The trial was a “circus,”¹⁴⁰ with Panetti dressing as a cowboy and issuing subpoenas to such parties as Jesus, the Pope, JFK, and a long list of less notable deceased people.¹⁴¹ Not surprisingly, the jury found Panetti guilty and sentenced him to death.¹⁴²

At the time that the state set an execution date, Panetti was aware that the state offered his criminal conviction for first-degree murder as its reason for planning to execute him.¹⁴³ But he believed that this professed reason was not the state's true reason for the death sentence.¹⁴⁴ Instead, Panetti believed that the state planned to execute him “to stop him from preaching.”¹⁴⁵ Panetti's counsel claimed that this delusion prevented Panetti from understanding why the state planned to execute him, and thus, under *Ford*, Panetti was incompetent to be executed.¹⁴⁶ The state of Texas disagreed, claiming that Panetti's awareness of the state's professed reason satisfied *Ford*

¹³⁷ *Panetti*, 551 U.S. 930. Panetti also concerned several procedural issues. This article, however, focuses on the issue of the substantive standard for competency to be executed.

¹³⁸ *Id.* at 935–36.

¹³⁹ *Id.* at 936. It could be hoped that after *Indiana v. Edwards*, Panetti would be found incompetent to represent himself. 554 U.S. 164 (2008). But *Edwards* only allows—rather than mandates—that states require a higher level of competency to represent oneself as compared to competency to stand trial. *Id.* at 177–78. This Article does not examine *Edwards* because that case turned almost entirely on the Supreme Court's understanding of the Constitutional guarantee of the right of self-representation. The Court's understanding of mental abnormality played little, if any, part in the decision.

¹⁴⁰ Carol S. Steiker, *Panetti v. Quarterman: Is There a “Rational Understanding” of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 287 (2007) (“And the defendant's odd behavior ensured that the capital trial that ensued was a circus: Panetti, who had long suffered from severe mental illness, stopped taking his anti-psychotic medication and insisted on representing himself. During his trial, he engaged in behavior that his appointed standby counsel later described as ‘bizarre,’ ‘scary,’ and ‘trance-like.’”).

¹⁴¹ Brief for Petitioner at 11–14, *Panetti v. Quarterman*, 551 U.S. 930 (2007) (No. 06-6407).

¹⁴² *Panetti*, 551 U.S. at 937.

¹⁴³ *Id.* at 935–38, 940.

¹⁴⁴ *Id.* at 954–55.

¹⁴⁵ *Id.* at 955.

¹⁴⁶ *Id.* at 938.

and that his delusional beliefs did not diminish his competency to be executed.¹⁴⁷

The Supreme Court held that awareness of the reason for execution clouded by delusion might not satisfy *Ford*.¹⁴⁸ The Court clarified that a person is competent to be executed only if he possesses a “rational understanding” of the reason for the execution.¹⁴⁹

The recognition that Panetti might simultaneously be able to acknowledge the state’s professed reason for planning to execute him yet not be able to appreciate that reason because of delusional beliefs is important. Lay people are apt to discount the significance of psychotic symptoms such as delusional beliefs because often people who experience these symptoms demonstrate little or no impairment in areas of their lives that the symptoms do not reach.¹⁵⁰ There are, to be sure, many problems with the *Panetti* decision, including the Court’s failure to explain what “rational understanding” requires. But the Court’s recognition that for someone who is experiencing delusional beliefs, “awareness of the State’s rationale for an execution is not the same as a rational understanding of it”¹⁵¹ demonstrates an admirably deep understanding of the way that delusional beliefs can operate.

III

PREVENTIVE DETENTION OF SEX OFFENDERS

All states and the federal government provide for the civil commitment of someone who because of a mental illness is a danger to himself or to others.¹⁵² Historically, civil commitment has been considered as operating separately from the criminal law—civil commitment has been viewed as a permissible kind of preventive detention precisely because the detention was not a punishment,

¹⁴⁷ *Id.* at 940–41, 950–52.

¹⁴⁸ *Id.* at 959–60.

¹⁴⁹ *Id.*

¹⁵⁰ As Elyn Saks explains, “Psychosis is like an insidious infection that nevertheless leaves some of your faculties intact; in a psychiatric hospital, for example, even the most debilitated schizophrenic patients show up on time for meals, and they evacuate the ward when the fire alarm goes off.” ELYN R. SAKS, *THE CENTER CANNOT HOLD* 98–99 (2007).

¹⁵¹ *Panetti*, 551 U.S. at 959.

¹⁵² Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 70 (1996) (“All states have statutes permitting the indefinite civil commitment of persons who are mentally ill and dangerous to themselves or others.”).

punishment being the domain of the criminal law.¹⁵³ During the 1990s, as public concerns grew about the dangers posed by the release from prison of people who had been convicted of sex offenses, legislatures began to enact¹⁵⁴ special civil commitment statutes that allowed the continued detention of a convicted sex offender if that person was determined to be a danger to others because of a mental disorder.¹⁵⁵

These statutes have been challenged as providing for criminal punishment disguised as civil commitment. The Supreme Court has considered the constitutionality of one state's—Kansas's—statute twice, first in 1997 and then again in 2002, initially upholding the statute without reservation and then suggesting that the statute might not satisfy all constitutional requirements after all.¹⁵⁶ The Court considered the constitutionality of the state of Washington's sexually violent predator civil commitment scheme—which is virtually identical to Kansas's—in 2001.¹⁵⁷

In the course of deciding these cases, the Court necessarily had to think about the particular features of civil commitment that distinguish it from criminal punishment. Two factors have emerged as important in making this determination: the definition of mental illness and the provision of treatment to those who are committed.¹⁵⁸ The definition of mental illness is important because people who are dangerous because of a mental illness have long been considered proper subjects for civil commitment, whereas people who are

¹⁵³ Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 121 (1996) (“The criminal sanction should apply only to those who are blameworthy, and then strictly in proportion to the offender’s desert. Preventive detention of nonresponsible, blameless agents should therefore be solely the province of the civil justice system.”).

¹⁵⁴ Or to re-enact. See ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 22–23 (2006) (describing the Kansas statute at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997), as part of the “second-wave” of legislation providing for the civil commitment of sex offenders).

¹⁵⁵ E.g., CAL. WELF. & INST. CODE § 6600(a)(1) (West 2010); FLA. STAT. § 394.912(10) (2008); MASS. GEN. LAWS ch. 123A, § 1 (West, Westlaw through 2010 Legis. Sess.); N.Y. MENTAL HYG. LAW § 10.03(e) (McKinney 2011); WIS. STAT. § 980.01(7) (West 2007). A charge of a sex offense might also qualify someone for commitment under these statutes, if the person charged were found to be either not competent to stand trial or not guilty by reason of insanity. KAN. STAT. ANN. § 59-29a03(a) (1999).

¹⁵⁶ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *Kansas v. Crane*, 534 U.S. 407, 413–14 (2002).

¹⁵⁷ *Seling v. Young*, 531 U.S. 250, 260–62 (2001).

¹⁵⁸ See *infra* Part III.A.–B.

dangerous for reasons other than a mental illness have not.¹⁵⁹ The provision of treatment is important because providing treatment is evidence that the commitment is civil, while withholding treatment might be evidence that the “civil commitment” really is criminal punishment.¹⁶⁰

A. Mental Abnormality and Volitional Control: Kansas v. Hendricks

Kansas v. Hendricks was the first Supreme Court case to consider whether Kansas’s Sexually Violent Predator Act violated any constitutional guarantees.¹⁶¹ Leroy Hendricks had been convicted of numerous child molestation offenses over the course of thirty years.¹⁶² As Hendricks was set to be released from prison for his latest conviction, Kansas determined that Hendricks satisfied the statute’s definition of a sexually violent predator; that is, he was a “‘person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.’”¹⁶³

Hendricks alleged that Kansas’s statute subjected to detention people who were not proper subjects for civil commitment, and therefore, his detention under this statute violated the Due Process Clause as well as the double jeopardy and *ex post facto* provisions of the Constitution.¹⁶⁴ All of these claims hinged upon whether Kansas’s statute really did provide for civil commitment rather than, as Hendricks alleged, for criminal punishment.¹⁶⁵

The Kansas Supreme Court agreed with Hendricks, ruling that the statute improperly allowed for the civil commitment of people who were not mentally ill.¹⁶⁶ On appeal, Kansas argued that the statute’s definition of “mental abnormality” does identify people who are proper subjects for civil commitment.¹⁶⁷

¹⁵⁹ See *infra* Part III.A.

¹⁶⁰ See *infra* Part III.B.

¹⁶¹ *Hendricks*, 521 U.S. at 360–61.

¹⁶² *Id.* at 354.

¹⁶³ *Id.* at 352, 355 (quoting KAN. STAT. ANN. § 59-29a02(a) (2011)).

¹⁶⁴ *Id.* at 356.

¹⁶⁵ *Id.* at 360–61.

¹⁶⁶ *Id.* at 356.

¹⁶⁷ *Id.* The statute defines “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and

In considering whether those who are “mentally abnormal” as defined by the Kansas statute may properly be civilly committed, the United States Supreme Court observed that “[s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.”¹⁶⁸ The Court thus determined that the key feature of a proper civil commitment statute is that “it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”¹⁶⁹ The Court rejected Hendricks’s argument that only people who are “mentally ill” as defined by psychiatrists may properly be civilly committed.¹⁷⁰

The Court is certainly correct that the law should not invest any particular scheme for defining mental disorder with “talismanic significance.”¹⁷¹ Indeed, while the expertise of psychologists and other mental health professionals should inform the work of the criminal law, the goals of psychology are not necessarily the goals of criminal law, and a diagnostic scheme that works for psychology might not be entirely well-suited for the criminal law.¹⁷² The Court’s opinion looks to psychological experts appropriately; for example, using the inclusion of pedophilia in the current Diagnostic and Statistical Manual of the American Psychiatric Association¹⁷³ as a factor supporting but not compelling the conclusion that the Kansas

safety of others.” KAN. STAT. ANN. § 59-29a02(b) (West, Westlaw through 2012 Reg. Sess.).

¹⁶⁸ *Hendricks*, 521 U.S. at 357.

¹⁶⁹ *Id.* at 358.

¹⁷⁰ *Id.* at 358–59.

¹⁷¹ *Id.* at 359.

¹⁷² See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxxiii (4th ed., text rev. 2000) (“[T]he clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a ‘mental disorder,’ ‘mental disability,’ ‘mental disease,’ or ‘mental defect.’”); *id.* at xxxvii (“The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments. . .”).

¹⁷³ The APA’s Diagnostic and Statistical Manual contains the criteria most commonly used to diagnose mental disorders in this country. See Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87, 90–91 (2005) (“The categories of mental disorders currently commonly used by psychiatrists and psychologists are those found in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), published in 1994, to which text revisions were added in 2000 (DSM-IV-TR).”).

statute identified people who were dangerous because of a mental disorder.¹⁷⁴

The *Hendricks* Court erred with respect to the issue of diagnosis by not explaining clearly why the Constitution requires that a civil commitment statute “narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”¹⁷⁵ The Court’s opinion reads as if the requirement is simply narrowing for the sake of narrowing. But the historical, moral purpose of narrowing is to exclude from eligibility for civil commitment those people who can be held responsible for their actions under the criminal law.¹⁷⁶ Typically, we count on criminal law to prevent people from causing harm. People who are rational actors are expected to be deterred from violating the law by the prospect of punishment—and if they are not deterred, then they are deserving of punishment when they do violate the law.¹⁷⁷ But some people, because of a mental illness, are not rational actors. They cannot be expected to respond to the law’s deterrent effect and they are not morally blameworthy if their behavior does not conform to the requirements of the law. Because their impairments make them unfit for criminal law, they can be preventively detained under civil commitment statutes.¹⁷⁸

Justice Kennedy’s concurring opinion comes closest to recognizing that civil commitment statutes should apply only to people who are not fit subjects for criminal punishment.¹⁷⁹ Although he agrees that the Kansas statute provides for civil commitment rather than criminal punishment, he also cautions that “[i]f, however, civil confinement

¹⁷⁴ *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring) (“In this action, the mental abnormality-pedophilia-is at least described in the DSM-IV.”) (citation omitted).

¹⁷⁵ *Id.* at 358.

¹⁷⁶ Steve C. Lee, Recent Developments, *How Little Control?: Volition and the Civil Confinement of Sexually Violent Predators in Kansas v. Crane*, 122 S. Ct. 867 (2002), 26 HARV. J.L. & PUB. POL’Y 385, 385 (2003) (“Traditionally, civil confinement has been employed for the treatment and incarceration of non-responsible, non-culpable actors such as the severely mentally ill or the legally and criminally insane.”).

¹⁷⁷ Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 141–42 (2011) (“With respect to responsible actors, the State can use the criminal law. It can punish the deserving for the commission of a crime. For a responsible agent, the State should not intervene in any substantial liberty-depriving way prior to his commission of an offense for fear of denying his autonomy.”).

¹⁷⁸ *Id.* at 141 (“If the State denies the agent is a responsible agent, it can detain him. It can treat him as it treats other non-responsible agents, as a threat to be dealt with, without fear of infringing his liberty or autonomy interests.”).

¹⁷⁹ See *Hendricks*, 521 U.S. at 371–73 (Kennedy, J., concurring).

were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”¹⁸⁰

The Court’s failure in *Hendricks* to make clear that the purpose of the narrowing requirement is to ensure that responsible actors are left to the criminal punishment system while only nonresponsible actors are potentially subject to civil commitment invited the challenge presented in *Kansas v. Crane*.¹⁸¹ In *Hendricks*, the petitioner had admitted that he lacked control, and there was abundant evidence to confirm this admission.¹⁸² But what of petitioners who do not so clearly lack control? Michael Crane claimed that the fact that *Hendricks* was unable to control his behavior was critical to the Court’s decision in *Hendricks* to uphold Kansas’s statute.¹⁸³ And because in Crane’s case there had been no finding that he was unable to control his behavior, he argued that the state could not properly subject him to civil commitment under the statute.¹⁸⁴

The Supreme Court agreed with Crane, ruling that a finding of lack of control is required; otherwise, civil commitment might simply be deterrence in disguise.¹⁸⁵ Only Justice Scalia, joined by Justice Thomas, dissented.¹⁸⁶ The point of the dissent was not that lack of control is not a requirement of civil commitment; instead, the dissent argued that Kansas’s “mental abnormality” requirement sufficiently distinguishes those people whose behavior can be deterred from those people whose behavior cannot be deterred.¹⁸⁷ The dissent opposed the Court’s conclusion that a separate finding of lack of control is required but seemed to agree that only those who lack control may properly be civilly committed.¹⁸⁸

Even though all of the justices in *Crane* seemed to acknowledge that lack of ability to control behavior is a required component of a proper civil commitment scheme, neither the majority opinion nor the

¹⁸⁰ *Id.* at 373.

¹⁸¹ *Kansas v. Crane*, 534 U.S. 407 (2002).

¹⁸² *Hendricks*, 521 U.S. at 355.

¹⁸³ *Crane*, 534 U.S. at 411.

¹⁸⁴ *Id.* at 411–13.

¹⁸⁵ *Id.* at 412–13.

¹⁸⁶ *Id.* at 415–25 (Scalia, J., dissenting).

¹⁸⁷ *Id.* at 425.

¹⁸⁸ *Id.* at 422–23.

dissent makes very clear the reason for this requirement.¹⁸⁹ But neither, however, do most civil commitment statutes.¹⁹⁰ Despite the strong force of the moral principle that civil commitment is only justifiable for people whose behavior is so much the result of mental illness that they cannot be held responsible for that behavior under criminal law, it should be acknowledged that for the most part, civil commitment does not work according to that principle in real life. Most civil commitment statutes require only that someone be dangerous to himself or others because of a mental illness.¹⁹¹ Few statutes even mention rationality, and it is highly unlikely that, even in those jurisdictions where rationality is a consideration, civil commitment is limited only to those who are so irrational that they cannot be held responsible under the criminal law.¹⁹² It is surprising,

¹⁸⁹ Both the majority opinion and the dissent explain that lack of ability to control behavior is related to an inability to be deterred by the criminal law, but neither opinion explains that the inability to be deterred by the criminal law makes someone unfit for criminal punishment and therefore properly subject for civil commitment.

¹⁹⁰ See sources cited *infra* note 192. See also *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (implicitly approving civil commitment when someone is mentally ill and dangerous: "In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."); *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."). In neither *Donaldson* nor *Addington* did the Court discuss non-responsibility under the criminal law as a criterion for civil commitment.

¹⁹¹ See John Parry, Summary, Analysis and Commentary, *Life Services Planning for Persons With AIDS-Related Mental Illnesses*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 82, 84 (1989) ("First, almost all the statutes provide that the person to be committed must have a recognizable mental disorder. . . . The second prong of most civil commitment provisions requires that proposed patients be dangerous to themselves or others, gravely disabled or in need of care and treatment." (footnotes omitted)).

¹⁹² Alabama, for example, includes as a criterion in its commitment statute that "the respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable." ALA. CODE § 22-52-10.4(a) (West, Westlaw through 2012 Legis. Sess.). An inability to make a rational decision regarding treatment does not, however, render someone incapable of making any rational decision, and it does not mean that someone would necessarily be found nonresponsible under the criminal law. See also DEL. CODE ANN. tit. 16, § 5001(6) (West, Westlaw through 2011 Legis. Sess.) ("unable to make responsible decisions with respect to the person's hospitalization"); KAN. STAT. ANN. § 59-2946(f) (West, Westlaw through 2012 Reg. Sess.) ("lacks capacity to make an informed decision concerning treatment"). Other states' statutes make no mention of rationality or responsibility. See, e.g., HAW. REV. STAT. § 334-60.2 (West, Westlaw through 2012 Legis. Sess.) ("That the person is mentally ill or suffering from substance abuse; (2) That the person is imminently dangerous to self or others, is gravely disabled or is obviously ill; and (3) That the person is in need of care or

then, that in the outpouring of scholarly criticism of sexually violent predator statutes as not properly limiting civil commitment,¹⁹³ there is a general failure to acknowledge that whatever is wrong with sexually violent predator statutes is in large measure wrong with civil commitment as a whole.

B. *The Role of Treatment Provision: Seling v. Young*

The place of treatment provision in the civil commitment of sexually violent predators is a complex issue. On one hand, the provision of treatment is evidence of the state's intent in enacting civil commitment statutes. It is reasonable to think that civil commitment schemes that are properly nonpunitive will provide treatment to those who have been committed.¹⁹⁴ On the other hand, does a failure to provide treatment prove that the purpose of the commitment is punitive? What about a legislature that admits to mixed motives? What about a legislature that explains its failure to provide treatment by asserting that no effective treatments exist?

The Supreme Court confronted these issues in *Hendricks* and then again in the 2001 case *Seling v. Young*.¹⁹⁵ Together, these cases present two distinct sets of questions about providing treatment to people who have been civilly committed. The first set of questions involves treatment provision as evidence of a legislature's intent in creating a particular civil commitment scheme. *Hendricks*, for

treatment, or both, and there is no suitable alternative available through existing facilities and programs which would be less restrictive than hospitalization.”); IDAHO CODE ANN. § 66-329(11) (West, Westlaw through 2012 2d Reg. Sess.) (“(a) Is mentally ill; and (b) Is, because of such condition, likely to injure himself or others, or is gravely disabled due to mental illness”); KY. REV. STAT. ANN. § 202A.026 (West, Westlaw through 2012 legislation) (allowing civil commitment of “a mentally ill person:(1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.”).

¹⁹³ See e.g., Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 84 (2000) (observing that “the *Hendricks* opinion has generated ample commentary, most of it negative”).

¹⁹⁴ Indeed, the Supreme Court arguably acknowledged at least some sort of a right to treatment in *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982): “respondent’s liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.” See also Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1399–1401 (2008).

¹⁹⁵ See *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250 (2001).

example, argued that because commitment under Kansas's sexually violent predator statute does not ensure the provision of treatment, the purpose of the commitment must be punishment, and thus, detention under the statute must be criminal rather than civil.¹⁹⁶ All of the Justices seem to have agreed that as a practical matter Hendricks did not receive treatment.¹⁹⁷ But the Justices did not agree about the legal conclusions that should be drawn from this fact. The majority opinion evidences confusion about Kansas's position on the treatment issue, considering two possibilities: (1) the possibility that Kansas regarded Hendricks as untreatable and therefore did not intend to provide any treatment; and (2) the possibility that Kansas regarded Hendricks as treatable but had other, more primary goals to focus on and might or might not provide treatment.¹⁹⁸ The majority did not find fault with either position, seeming to accept that providing treatment was not the primary purpose of Kansas's statute, and, thus, failure to provide treatment was not evidence of a punitive purpose.¹⁹⁹ The dissent viewed Kansas's position that Hendricks was treatable combined with Kansas's failure to provide treatment as proof of the legislature's punitive intent.²⁰⁰ It is not clear what the dissent would say about a legislature that was up-front about its lack of intent to provide treatment.

The second set of questions involves treatment as a right of those who have been committed under schemes that are properly civil. Even if the purpose of the commitment is not punitive, does the state nevertheless have a legal obligation to provide treatment? Andre Young, who had been committed under Washington state's sexually violent predator statute, argued that the state's failure to provide treatment demonstrated that its commitment scheme is punitive.²⁰¹ The Court rejected this argument because Washington's scheme had already been determined to properly provide for civil rather than criminal commitment.²⁰² The Court did not dismiss the state's failure to provide treatment as having no legal significance, however.²⁰³

¹⁹⁶ *Hendricks*, 521 U.S. at 361.

¹⁹⁷ *See id.* at 365–66.

¹⁹⁸ *Id.* at 365–68.

¹⁹⁹ *Id.* at 371 (Kennedy, J., concurring) (“If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.”).

²⁰⁰ *Id.* at 373 (Breyer, J., dissenting).

²⁰¹ *Seling v. Young*, 531 U.S. 250, 256, 259–60 (2001).

²⁰² *Id.* at 260–61.

²⁰³ *See id.* at 265–67.

Instead, the Court suggested Young could argue that the state's failure to provide treatment violated either the state's own statutory mandates or the federal Constitution's guarantee of due process, or both.²⁰⁴ But the Court was clear that even if Young succeeded in proving a violation of these guarantees, a ruling that the commitment was criminal rather than civil would not be among the possible remedies.²⁰⁵

One issue that the Court might have been expected to address in these cases but did not is whether our current understanding of people who commit sexually violent offenses allows for accurate predictions of dangerousness. Inability to accurately predict dangerousness is a long-standing criticism of civil commitment generally.²⁰⁶ Does this criticism apply with more or less force to the kind of predictions called for under sexually violent predator statutes? Many people seem to believe that someone who has committed a sexually violent offense in the past is especially likely to commit such an offense in the future.²⁰⁷ Research, however, suggests that this is not necessarily true.²⁰⁸

Another question not considered directly by either *Hendricks* or *Seling* is whether any effective treatments actually exist for the disorders that cause sexually violent predators to be unable to control their behaviors. Whether any effective treatment exists for mental disorders such as pedophilia (*Hendricks*'s disorder) is uncertain. It is more certain—although not absolutely certain—that no effective treatments exist for antisocial personality disorder (*Young*'s

²⁰⁴ *See id.*

²⁰⁵ *Id.* at 265.

²⁰⁶ *See, e.g.,* Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 452 (1974) (“Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness.”).

²⁰⁷ *See* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 897–98 (1995) (noting that “public continues to perceive, as it has for decades, that the threat from sex offenders is greater than it actually is”); Michelle Olson, *Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 NW J. L. & SOC. POL’Y 403, 432 (2010) (noting “the common belief that sex offenders re-offend at an unusually high rate”).

²⁰⁸ *See* Joëlle Anne Moreno, “Whoever Fights Monsters Should See to it that in the Process He Does Not Become a Monster”: *Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—and a Stake through the Heart—Kansas v. Hendricks*, 49 FLA. L. REV. 505, 554–57 (1997) (“There is no reliable empirical evidence that criminal recidivism rates are greater among sex offenders than among any other group of offenders.”).

disorder).²⁰⁹ The importance of this question is undermined, however, by the Court's statements in both *Hendricks* and *Seling* that the existence of an effective treatment is not a requirement of civil commitment: "We acknowledged that not all mental conditions were treatable. For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions."²¹⁰

The Court's position on the place of treatment provision in an assessment of a statute that provides for the civil commitment of sexually violent predators creates an odd set of contradictory incentives for states. On one hand, providing treatment serves as evidence that the state intended the commitment to be civil rather than criminal. On the other hand, proclaiming intent to provide treatment and then not actually providing it might be viewed as evidence that the intent to provide treatment was not sincere. Disclaiming the intent to provide treatment, on the grounds that treatment is ineffective, likely will be regarded neutrally when a court is looking for evidence of the state's intent. These evidentiary conclusions seem to say to states that it is somewhat risky to include treatment provisions as part of a statute authorizing the civil commitment of sexually violent predators. Creating disincentives for treatment provision would be an unfortunate consequence of the Court's decisions in *Hendricks* and *Crane*.

CONCLUSION

The ties between clinical psychology and criminal law are many. Mental states are important to criminal law, in a variety of ways. The trial of a criminal defendant, the determination of criminal responsibility, the imposition of a death penalty—all require the assessment of mental states. And culpability is at least partly a function of such mental states as awareness, understanding, and intention; we consider those who deliberately cause harm to be more

²⁰⁹ See Donna L. Hall et al., *The Increasingly Blurred Line Between "Mad" and "Bad": Treating Personality Disorders in the Prison Setting*, 74 ALB. L. REV. 1277, 1292 (2011) ("Although today's correctional treatment programs are significantly more promising than in past decades, proven, effective treatment for severe antisocial personality disorder remains largely illusive.").

²¹⁰ *Seling v. Young*, 531 U.S. 250, 262 (2001) (citing *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997)).

blameworthy than those who unintentionally cause harm. Moreover, we believe that in general, deterring people from committing crimes is the job of criminal punishments and that only those whose mental impairments make them undeterable may be preventively detained under the civil law. Mental states thus define the dividing line between civil commitment and criminal punishment and also define degrees of culpability within criminal law generally.

In the last decade, the Supreme Court decided cases that involved all of these issues. And the Court seems willing if not eager to decide more cases that involve questions about the proper relationship of clinical psychology to criminal law. The Court's ability to consult psychology appropriately when answering criminal law's questions is important for the actual as well as the perceived integrity of both law and psychology.²¹¹

²¹¹ See *supra* note 18 and accompanying text.

