Posttraumatic Stress Disorder ("PTSD") Effect on a Defendant's Action and State of Mind: The Future of Criminal Culpability

Amin R. Yacoub[1] and Becky Briggs[2]

"The difficulty that has not yet been fully resolved, however, is where to draw the line between incompetency and insanity on one hand, and competency and sanity on the other."[3]

ABSTRACT

Understanding human behavior has been a primary concern in psychology, criminology, and penology. The psychology research on criminals' state of mind has significantly developed in the last two decades. Psychologists have identified new mental disorders that affect the human ability to make decisions by altering their perception of reality. One of the most relevant mental disorders in criminal cases is the posttraumatic stress disorder ("PTSD"). The PTSD also encompasses the Battered Woman Syndrome ("BWS"). Since criminal culpability primarily concerns a defendant's state of mind at the time they committed the crime, the recent findings in the PTSD and BWS research in psychology become significantly relevant. Carefully analyzing the PTSD effect on the *actus reus* and *mens rea* (the criminal state of mind) becomes substantially important in deciding what criminal culpability is ought to be considered in the future. Yet, while the PTSD became widely acceptable in both the psychology and neuroscience spheres, the statutory criminal culpability structure of the *mens rea* remains the same. In this article, we examine the PTSD effect on the *mens rea*. We attempt to answer two notable questions.

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[1]● International Lawyer admitted to practice in New York and Egypt; Prosecutor at the Egyptian Public Prosecution (on leave); Doctor of Juridical Science (SJD/PhD) Candidate at University of Virginia School of Law; Former Research Scholar at New York University ("NYU") School of Law (2018); LLM in International Law, NYU School of Law, MAHS Scholar (2018); LLM in Public Law, Faculty of Law, Cairo University (2017); Former Associate at the Arbitration department at Matouk Bassiouny Law Firm (2015-2016); LLB with High Distinction and Honors, Cairo University, Faculty of Law English Section (2015).

[2]● Criminal Defense Attorney licensed in Colorado, Virginia, and Federal District Courts. J.D. Villanova, 2008; B.A. Bryn Mawr College, 2004; DSW University of Southern California, 2019; L.L.M., University of San Diego School of Law, 2022.

[3] Nicholas Westbrook, Psycho-Philosophical Issues Facing the Mens Rea Requirement for Legal Culpability, The Alexandrian VIII, No. 1 (2019).

First, does the PTSD diminish criminal culpability or eliminate it? Second, where should we place the PTSD in the spectrum of criminal culpability? Finally, we suggest the position of mental illness such as PTSD in the spectrum of *mens rea* in light of the psychological findings and this research's findings.

INTRODUCTION

On September 23rd, 2021, in Colorado, Ms. Spinuzzi pled guilty to one count of an accessory after the fact to a first-degree murder committed by her abusive boyfriend.[4] She was initially charged with child abuse and accessory after the fact to a first-degree murder committed by her boyfriend who murdered an 18-month-old foster child in her care.[5] Her plea agreement dismissed the child abuse charge.[6] She obtained this plea agreement after she confessed that she hid information in an attempt to protect her boyfriend after he caused the death of the foster child.[7] In the past, her boyfriend was arrested for domestic violence against her, leading to a court immediate protective order for Ms. Spinuzzi.[8] Nonetheless, her boyfriend disobeyed the court order and returned home – eventually leading to both the first-degree murder of the foster child and having his girlfriend charged with two felonies.[9] The relevant question here is: how can a victim to domestic violence – who suffers from PTSD in the form of Battered Woman Syndrome ("BWS") – have the requisite *mens rea* for the child abuse murder count and the accessory after the fact to the first-degree murder committed by her abusive boyfriend? In a domestic violence relationship where the woman is abused, the room for her choice is so narrow.

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[4] Andrew McMillan, Dan Beedie, Foster parent pleads guilty in connection with child's death in Pueblo, KRDO, https://krdo.com/news/top-stories/2021/09/23/foster-parent-pleads-guilty-in-connection-with-childs-death-in-pueblo/

[5] *Id.*

[6] *Id.*

[7] *Id.* The Codefendant in Ms. Spinuzzi's case has pleaded not guilty and, at submission time, is set for jury trial.

[8] *Id.*

[9] *Id.*

For criminal culpability, criminal law requires a voluntary act ("actus reus") and a state of mind ("mens rea").[10] *Mens Rea* presupposes the existence of sound mind with free autonomy to make a choice before determining the criminal culpability of the defendant.[11] Where is Ms. Spinuzzi's autonomy or choice – as a battered woman who is subject to domestic violence – in the story to hold her culpable? She suffered from a mental health condition as a result of domestic violence that deprived her of the ability to make autonomous choices, yet she is about to serve many years in prison.[12]

In another case decided by the federal court, the defendant – who was charged with cocaine-related offenses – contended that she was diagnosed with PTSD as a result to her frequent abuse by her spouse who was a cocaine dealer.[13] The defendant argued that her PTSD impeded her ability to meet the requirements of the requisite *mens rea* for the charged crime.[14] Although the court admitted expert witness testimony to support the defendant's argument, the jury found her guilty.[15] The same question we posed above is repeatedly asked here: where is the defendant's choice – as a PTSD patient – in the cocaine-related offenses for which she was charged ? Did she have a sufficient *mens rea* to hold her criminally culpable?

In a third case decided by the Washington Court of Appeals, a woman-defendant was charged with premeditated murder of an elderly man.[16] She introduced expert testimony on her PTSD condition to argue for diminished capacity.[17] After she was convicted at trial court as a result of excluding such evidence, the appellate court reversed by holding that the exclusion of the PTSD evidence was an error.[18] The appellate court held that: "[W]ashington case law acknowledges that PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in

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[10] Melissa Hamilton, Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with PostTraumatic Stress Disorder, 16 Berk. J. of Crim. L. 2, 340 (2011).
[11] *Id.*
[12] McMillan, *supra* note 2.
[13] *United States v. Cebian*, 774 F.2d 446 (11th Cir. 1985).
[14] *Id.*
[15] *Id.*
[16] State v. Bottrell, 14 P.3d 164 (Wash. Ct. App. 2000).
[17] *Id.*
[18] *Id.*

diminished capacity."[19] In this case, the appellate court adequately accepted the effect of PTSD on the defendant's *mens rea* (state of mind) by reversing the trial court's conviction.[20] But is not it unjust to acquit a defendant in a state and hold another defendant criminally culpable in another despite them both lacking the requisite state of mind (*mens rea)* due to PTSD? The discrepancy in courts' decisions regarding the effect of PTSD on *mens rea* and criminal culpability had influenced us to write this article.[21] This discrepancy exists due to the rigidity of the Model Penal Code, which has not been updated to reflect the recent psychological findings.[22]

Under the Model Penal Code – the highest authority and the model for most states' penal codes—criminal culpability can be divided into four categories:[23] 1. *Intentional/Purpose*, the state of wanting or intending a proscribed action or result; 2. *Knowledge*, the state of understanding that a proscribed action or result will occur or is highly likely to occur but still performing the action, regardless of intent; 3. *Recklessness*, the state of performing an action while disregarding any known, substantial, and unjustifiable risk associated with performing that action; and 4. *Negligence*, the state of performing an action while being unaware of any substantial and unjustifiable risk of which any reasonable, law-abiding person would be expected to be aware.[24]

In this article, we first review the recent psychological findings regarding the PTSD effect on the human's state of mind in **part I**. Further, we analyze courts' decisions in an attempt to find a gap in courts' reasoning regarding the effect of PTSD on *mens rea*. Moreover, we will compare the effect of PTSD on *mens rea* with the heat of passion and involuntary intoxication, and insanity to understand whether PTSD diminishes the criminal culpability or eliminates it in **part II**. Finally, in **part III**, we suggest a new

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[19] State v. Bottrell, 14 P.3d 164 (Wash. Ct. App. 2000); (Ref. 46, p 715).
[20] *Id.*
[21] For the contrary court decisions of PTSD on criminal responsibility, see generally Omri Berger, Dale E. McNiel, and Rene´e L. Binder, PTSD as a Criminal Defense: A Review of Case Law, J Am Acad Psychiatry Law 40:509–21, 2012, 517.
[22] *See* Nicholas Westbrook, *Psycho-Philosophical Issues Facing the Mens Rea Requirement for Legal Culpability*, The Alexandrian VIII, No. 1, 1 (2019).
[23] Penal Code, TITLE 2. GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY CHAPTER 6. CULPABILITY GENERALLY. Sec. 6.02.d; Westbrook, supra note 16.
[24] *Id.*

spectrum of criminal culpability that takes into account recent psychological findings and this research's legal findings regarding the PTSD effect on *mens rea.*

I. A Brief of the Most Recent Findings of the Psychological Research Regarding PTSD and BWS:

Before we engage in the latest psychological findings regarding PTSD, we would like to note that the Battered Women Syndrome ("BWS") falls under the PTSD.[25] Thus, all the legal arguments we develop in this research regarding the PTSD is also applicable to the BWS defense before courts.

A) The PTSD as A Mental Disorder in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"):

The PTSD is included as a mental disorder in the third edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM").[26] Each edition of the DSM incorporates the latest psychological findings regarding the PTSD.[27] The latest edition (DSM-5) categorizes PTSD as a mental disorder, which necessitates a diagnostic evaluation by a psychiatrist or a psychologist in accordance with the manual through determining the presence of eight specific symptoms.[28] These eight specific symptoms can be summarized as follows: a qualified exposure to an external and specific traumatic event that threatens life or limb, intrusion symptoms, avoidance of trauma-related stimuli after the trauma, negative alterations in cognition and mood, trauma-related arousal and reactivity, the duration of symptoms, distress or functional impairment, and the absence of any other

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[25] *Infra* note 48.

[26] North, Carol S., et al. "PTSD: A systematic approach to diagnosis and treatment: Accurate diagnosis and management depends on proper application of DSM-5 criteria." Current Psychiatry, vol. 17, no. 4, Apr. 2018, pp. 35+. Gale OneFile: Health and Medicine, link.gale.com/apps/doc/A539324403/HRCA?u=anon~63f766d2&sid=googleScholar&xid=c527a16e. Accessed 8 Oct. 2021.

[27] For a comparison and the evolution of the criteria of PTSD from DSM III to DSM V, see generally Carol S. North, Alina M. Surís, Rebecca P. Smith, Richard V. King, The evolution of PTSD criteria across editions of DSM, ANNALS OF CLINICAL PSYCHIATRY Vol 28:3, 197-208 (2016).

[28] Alexandria Patterson Tipton, PTSD Is a Limited Defense in Federal Court: Defendants with PTSD Generally Fail in Asserting the Affirmative Insanity Defense, and the Diminished Capacity Failure of Proof Defense Is Only Applicable in Limited Instances, 8 LINCOLN MEM'l U. L. REV. 82, 84 (2021)., 91.

causes.[29] There is also a temporal dimension to diagnosing PTSD: the examined individual must experience each of these symptoms for at least one month.[30] Furthermore, the individual must have at least one re-experiencing symptom, one avoidance symptom, two arousal and reactivity symptoms, and two cognition and mood symptoms in the shape of flashbacks, bad dreams, and frightening thoughts that cause issues in the person's daily routine.[31]

A prerequisite for a PTSD diagnosis is the individual's exposure to trauma.[32] The traumatic event must be specific and external.[33] Nonetheless, the frequent misapplication of this prerequisite among clinicians and researchers have led to misdiagnosis and inaccurate high estimates of PTSD.[34] An accurate definition of a traumatic event is as follows: "actual or threatened death, serious injury, or sexual violence."[35]

Thus, the DSM-5 does not accept any stressful event to constitute a trauma other than a threat to life, serious bodily injury, or sexual violence.[36] Moreover, the DSM-5 requires a qualifying in-person exposure to a traumatic event by enlisting four types of such exposure as follows: 1) direct experience of immediate serious physical danger; 2) eyewitness of trauma to others; 3) indirect exposure via violent or accidental trauma experienced by a close family member or close friend; 4) repeated or extreme exposure to aversive details of trauma, such as first responders collecting human remains or law enforcement officers being repeatedly exposed to horrific details of child abuse.[37] The exposure to trauma cannot be through social media, it must be in person to meet the standards of the DSM-5.[38] Thus, as a requisite, a psychiatrist or a psychologist must *objectively* determine that a traumatic event has occurred and a qualifying exposure is

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] North et al, supra note 24.
[33] *Id.*
[34] *Id.*
[35] Exhibit 1.3-4: DSM-5 Diagnostic Criteria for PTSD (A), available at https://www.ncbi.nlm.nih.gov/books/NBK207191/box/part1_ch3.box16/?report=objectonly.
[36] *Id;* North et al, supra note 23.
[37] *Id.*
[38] *Id.*

established.[39] Moreover, a psychiatrist/psychologist has to assess the subjective distress of the individual.[40] If both objective and subjective requisites were not established, no amount of distress suffered by the individual may constitute a PTSD.[41]

Neuroscientists have pointed to the limitations of psychology in understanding all the effects of PTSD.[42] They found that sensory input automatically affects the individual's hormonal secretions and activation of brain regions responsible for memory and attention.[43]

These noteworthy findings undermine the argument that individuals with PTSD may have some conscious control over their actions and emotions.[44] Neuroscientists also argue that individuals suffering from PTSD have exaggerated responses such as becoming extremely agitated in reaction to minor provocations, freezing upon frustration, or feeling helpless in the face of trivial challenges.[45] The authors conducted the study through exposing individuals with PTSD to traumatic reminders under imaging. [46] They found that subjects had "cerebral blood flow increases in the right medial orbitofrontal cortex, insula, amygdala, and anterior temporal pole, and in a relative deactivation in the left anterior prefrontal cortex, specifically in Broca's area, the expressive speech center in the brain, the area necessary to communicate what one is thinking and feeling. This, and subsequent research supporting those findings 2–4 demonstrated that when people are reminded of a personal trauma they activate brain regions that support intense emotions, while decreasing activity of brain structures involved in the inhibition of emotions and the translation of experience into communicable language."[47]

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] BESSEL A. VAN DER KOLK, *Clinical Implications of Neuroscience Research in PTSD*, ANNALS NYAS Journal, 1-2 (2006).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id*; The author provides that: "[p]eople who suffer from PTSD seem to lose their way in the world. Since at least 1889 it has been noted that traumatized individuals are prone to respond to reminders of the past

Thus, PTSD's effects on an individual's decision-making abilities have become almost a non-disputable scientific fact in the twenty-first century. It forces traumatized individuals to automatically respond to reminders of the past traumatic event by exerting physical actions that they thought must have been appropriate at the time but was no longer appropriate in the present.[48] Van Der Kolk provides that: "[m]ost traumas occur in the context of interpersonal relationships, which involve boundary violations, loss of autonomous action, and loss of self-regulation. When people lack sources of support and sustenance, as is common with abused children, women trapped in domestic violence, and incarcerated men, they are likely to learn to respond to abuse and threat with mechanistic compliance or resigned submission. Particularly if the brutalization has been repetitive and unrelenting, they are vulnerable to continue to become physiologically dysregulated and go into states of extreme hypo- and hyperarousal, accompanied by physical immobilization. Often, these responses become habitual, and, as a result, many victims develop chronic problems initiating effective, independent action, even in situations where, rationally, they could be expected to be able to stand up for themselves and take care of things."[49]

B) Battered Woman Syndrome ("BWS") as a Subcategory of the PTSD:

The battered woman syndrome ("BWS") is considered a subcategory of PTSD since it has the same effects on the battered woman.[50] For any woman to be classified as battered, she must pass through the battering cycle at least twice and then remain in the abusive relationship.[51] The battered cycle consists of three phases that may vary in

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by automatically engaging in physical actions that must have been appropriate at the time of the trauma, but that are no longer relevant.19 In "the Traumatic Neuroses of War" Kardiner20 described how WWI veterans riding on the New York subway were prone to duck in fear and behave as if they were back in the trenches when the train entered a tunnel. As Pierre Janet noticed: "traumatized patients are continuing the action, or rather the attempt at action, which began when the thing happened and they exhaust themselves in these everlasting recommencements."21 Neuropsychology and neuroimaging research demonstrate that traumatized individuals have problems with sustained attention and working memory, which causes difficulty performing with focused concentration, and hence, with being fully engaged in the present."

[48] *Id.* at 4.

[49] *Id,* at 7.

[50] Battered Woman Syndrome, Health-Line, https://www.healthline.com/health/battered-woman-syndrome#signs.

[51] Katherine O'Donovan, *Defences for Battered Women Who Kill,* Journal of Law and Society

duration and intensity.[52] Stage one is the "tension-building stage," in which the battering man engages in violent verbal abuse while the woman stays passive to avoid further violence.[53] Phase two includes an "acute battering incident", in which the man inflicts serious violence in the shape of beating on the woman.[54] Finally, phase three is characterized by an apology and promises for future change by the abuser.[55]

According to the criteria we outlined above, a battered woman may or may not fall under the PTSD DSM-5 criteria. If the batterer man had not inflicted or threatened serious bodily harm, death, or sexual violence the battered woman will not qualify for the PTSD defenses under DSM-5.

Yet, it is worth discussing one argument often adopted by the prosecution against battered women: why did not she leave the violent relationship?[56] This argument is noteworthy in its contradiction, as it is generally the prosecution who calls domestic violence experts as witnesses when their victim has exhibited some counterintuitive of non-sensical behavior related to the abuse. When the woman is a criminal defendant, however, many of the "cycle of violence" arguments and domestic violence dynamics on which the prosecution relies to advance a guilty verdict disappear when those same explanations are used to exonerate a defendant who is accused of a crime resulting or

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Vol. 18, No. 2 (Summer, 1991), 231.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *State v. Kelly*, 478 A. 2d 364 - NJ: Supreme Court 1984; the Court analyzed this question as follows: "[t]he crucial issue of fact on which this expert's testimony would bear is why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent. Whether raised by the prosecutor as a factual issue or not, our own common knowledge tells us that most of us, including the ordinary juror, would ask himself or herself just such a question. And our knowledge is bolstered by the experts' knowledge, for the experts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this misconception is followed by the observation that the battered wife is masochistic, proven by her refusal to leave despite the severe beatings; to others, however, the fact that the battered wife stays on unquestionably suggests that the "beatings" could not have been too bad for if they had been, she certainly would have left. The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her inability to leave despite such constant beatings; her "learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways."

related to their victim status. Thus, it is beneficial to analyze why battered women do not leave the relationship.

Many battered women do not leave the abusive relationship because of three correlated factors. First, feeling the learned helplessness – that she cannot do anything about their partners and that they cannot leave.[57] Second, social and economic factors such as the lack of sufficient financial resources to be able to leave her partner.[58] Third, feeling guilty and accepting responsibility for the batterer's actions.[59] Furthermore, research has shown that there is a strong relationship between shame and making the decision to leave.[60] Shame in itself is a byproduct of the BWS and is part of the PTSD experience.[61] Nevertheless, shame reinforces the circle of battering rather than cutting it.[62] Thus, not leaving the abusive relationship may in itself be a sign of the existence of the battered woman syndrome.

Finally, some psychologists have studied the connection between Stockholm Syndrome and PTSD developed in women in the shape of a BWS.[63] They studied this connection because Stockholm syndrome has common symptoms of avoidance and coping present in battered women syndrome.[64] After studying Italian kidnap victims, the psychologists concluded that there was no connection between Stockholm syndrome and PTSD.[65]

II. The PTSD effect on *Actus Reus* and *Mens Rea*: Does it Diminish or Eliminate Criminal Culpability?

[57] Ola W. Barnett, *Why Battered Women Do Not Leave*, Part I, Pepperdine University, 344.
[58] *Id.*
[59] *Id.*
[60] Laura A. Taylor, The relationship between shame and leave-taking behavior duration of violent relationship social support -seeking attributions emotional abuse sexual assault and PTSD symptoms in battered women, the University of Montana, 3 (2003).
[61] *Id.*
[62] *Id.*
[63] Demarest, R. A. (2009). "The Relationship Between Stockholm Syndrome and Post-Traumatic Stress Disorderin Battered Women." 3 Inquiries Journal/Student Pulse, 1(11). Retrieved from http://www.inquiriesjournal.com/a?id=35
[64] *Id.*
[65] *Id.*

At first, there seems to be a strong connection between PTSD and *mens rea*, since the latter concept concerns making a criminal choice that is worthy of punishment. Yet PTSD may also affect *actus reus* if it deprived the individual from having any control over their physical actions – the same as crimes committed during an epilepsy episode or sleep-walking state.[66]

Thus, the PTSD impact on the defendant may substantially vary. It may range from an extreme case of dissociation whereby a defendant is having a physiological automatic reaction to an event that they cannot control to a trauma that only influence one's choice. This calls our attention to examine courts' attitudes towards PTSD defenses when invoked as a basis for insanity, unconsciousness, and diminished capacity. Analyzing the courts' different attitudes towards different defenses based on PTSD will allow us to build a new criminal culpability spectrum of PTSD in the last part of this research.

Thus, we will review the impact of PTSD on *actus reus* by comparing its effect to involuntary acts. Further, we will analyze PTSD impact on *mens rea* including: first, using the PTSD defense to eliminate the *mens rea* through Not Guilty by Reason of Insanity ("NGRI"); second, the PTSD defense on diminishing criminal culpability. To better understand the impact of PTSD on the individual's criminal culpability and choice, we will compare it to other criminal defenses that diminish criminal culpability. This includes a comparison between PTSD to involuntary intoxication and the heat of passion.

A) PTSD Effect on *Actus Reus*:

The PTSD effect on *actus reus* is rarely discussed by both courts and legal scholars.[67] Most courts rather analyze the PTSD defense impact on *mens rea*.[68] Nonetheless, some legal scholars such as Hamilton thoroughly examined the impact of PTSD on *Actus Reus*.

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[66] Model Penal Code [[hereinafter MPC]] § 2.01.

[67] Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 Berkeley J. Crim. L. 340, 351 (2011). Available at: http://scholarship.law.berkeley.edu/bjcl/vol16/iss2/2; see e.g., State v. Simpson, 53 P.3d 165, 169 (Alaska Ct. App. 2002) ("Although the voluntariness of a defendant's conduct is rarely disputed, it remains an implicit element of all crimes.")

[68] *Id.*

[69] She assessed that impact by analyzing PTSD-afflicted veterans' automatic behavior or dissociative state that deprives them from committing a voluntary act.[70]

Hamilton argued – in light of criminal law notions on *actus reus* – that if the act is involuntary, it cannot be blameworthy.[71] As the Model Penal Code ("MPC") drafters opined: "the sense of personal security would be undermined in a society where [involuntary] movement **[]** could lead to formal social condemnation of the sort that a conviction necessarily entails. People whose involuntary movements threaten harm to others may present a health or safety problem, calling for therapy or even custodial commitment; they do not present a problem of correction."[72]

The MPC does not define involuntary actions but rather provides examples of such acts as follows: "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."[73] Some courts' decisions conceptualized an involuntary act as: "the individual's conscious mind has ceased to operate and his actions are controlled by the subconscious or subjective mind."[74] Another conceptualization is that it is "behavior performed in a state of mental unconsciousness."
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Some scholars such as Holmes conceptualized involuntary actions as non-acts by arguing that: ""[a]n act is always a voluntary muscular contraction, and nothing else,"[76] while "[a]n act . . . imports intention. . . . A spasm is not an act. The contraction of muscles must be willed."[77]

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[69] *Id.* at 341-2.
[70] *Id.*
[71] *Id.*
[72] Model Penal Code 2.01 cmt. at 214-15.
[73] MPC § 2.01.
[74] Hamilton, *supra* note 65, at 346.
[75] *Id.*
[76] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881), 81
[77] *Id*. at 54.

Although criminal law theorists have not reached consensus on the basic principles underlying criminal acts, automatic actions are accepted as a form of involuntary acts for the purpose of abrogating criminal culpability, at least under the MPC examples.[78] One problem associated with automatic actions is the appearance that the individual is acting in a deliberate way by performing complex tasks.[79] This makes it difficult for the jury to truly understand the effect of PTSD on forcing an individual to act involuntarily.[80] Nonetheless, it is worth questioning: what component in the PTSD spectrum is extreme enough to render the individual's acts as involuntary?

Dissociation represents the most extreme aspect of PTSD. This is because it impacts consciousness, memory, identity, or perception of the environment that translate into automatic responses concurrent with the perceptual alterations and memory impairment.[81] Thus, defendants who suffer from dissociative disorder as part of their PTSD often share the following characteristics: 1) emotional numbing or detachment; 2) reduced awareness of one's surroundings and limited encoding of events; 3) a distorted perception of reality such as time distortion or seeing events as if they are dreaming; 4) the experience of self as fragmented (perceiving the self from a third-person point of view); 5) dissociative amnesia.[82] Since individuals with dissociative disorder often lack awareness of surroundings and suffer from detachment, 85% of these individuals report derealization.[83] Psychologists often characterize dissociative disorders by focusing on three clinical

[78] Douglas Husak, *Rethinking the Act Requirement*, 28 Card. L. Rev. 2437, 2458 (2007) (concluding that theorists on criminal responsibility are not in agreement on basic principles underlying the voluntary act requirement); see generally Kevin W. Saunders, Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition, 49 U. PITT. L. REv. 443, 455-460 (1988) (discussing debates among the philosophers John Austin and Oliver Wendell Holmes on the intricacies of the voluntary act requirement); MPC § 2.01.

[79] Hamilton, *supra* note 65, at 347.

[80] *See e.g., People v. Nihell,* 77 P. 916, 917 (Cal. 1904)*; State v. Weatherford,* 416 N.W.2d 47, 55 (S.D. 1987)*; State v. Jones,* 527 S.E.2d 700, 707 (N.C. Ct. App. 2000).

[81] Richard A. Bryant, *Does dissociation further our understanding of PTSD?,* Journal of Anxiety Disorders 21 (2007) 183–191 ElSevier (2007), 183; American Psychiatric Association, at 766 (1994).

[82] *Id.*

[83] *Id.*

entities: 1) alterations in memory; 2) identity disengagement (between self and the environment); 3) consciousness and emotional numbing.[84]

Taking these psychological findings into consideration, we argue that only a defendant with dissociative PTSD may challenge the *actus reus* as an element necessary for criminal culpability. Both the MPC and the US Supreme Court dismiss the *actus reus* of a crime if it was committed by an involuntary act of the defendant. Since the dissociative PTSD affect the defendant in a way that amounts to an involuntary act, the dissociative aspect of PTSD's automatization becomes the only defense that may dismantle the *actus reus* of a crime. That is because dissociative PTSD symptoms perfectly fall under the examples provided by the MPC drafters of involuntary acts. As psychologists point out, dissociative PTSD symptoms often amount to convulsion, a bodily movement during unconsciousness, and an act that is not resulting from the determination of the individual.[85] This is also supported by neuroscience.[86] A recent neuroscience study concluded that the brain gray matter changes significantly – during a dissociative episode – for a person who suffers from PTSD.[87] Both psychology and neuroscience evidence point to the ultimate fact that PTSD dissociative behavior is involuntary. This may challenge courts' consideration regarding the PTSD impact on criminal culpability by directing them towards considering its impact on *actus reus* rather than *mens rea* in the presence of dissociative PTSD symptoms.

As one scholar points out – after analyzing courts' decisions regarding PTSD dissociative aspect – the dissociative aspect of PTSD defense garnered the most success in an insanity defense.[88] Other scholars observed that the dissociative PTSD was the sole

[84] Norah C. Feeny,1;2 Lori A. Zoellner,1 Lee A. Fitzgibbons,1 and Edna B. Foa1, Exploring the Roles of Emotional Numbing, Depression, and Dissociation in PTSD, Journal of Traumatic Stress, Vol. 13, No. 3, 2000 Exploring, 491
[85] *Id.*
[86] VAN DER KOLK, *supra* note 40.
[87] *Id*.
[88] *See* Berger, McNiel, and Binder, *supra* note 19, at 514-5.

PTSD phenomenon that could meet the strict insanity standards by clear and convincing evidence under the M'Naughten standard.[89]

Yet we agree with Hamilton and argue that this is a common mischaracterization by courts resulting from their primary occupation with PTSD impact on *mens rea,* while completely neglecting its impact on *actus reus*.[90] The distinction is important because there is extreme variation in consequences between a successful insanity defense and dismantling the *actus reus* of the crime. While the former requires the court to acquit the defendant and place them in a mental institution, the latter does not.[91] Although an individual with dissociative PTSD may fall under the M'Naughten rule of being legally insane, dissociative PTSD is completely different from insanity. While the defendant must meet the highest burden of proof in making an affirmative insanity defense through proving their dissociative PTSD symptoms by clear and convincing evidence to satisfy the M'Naughten standard, the prosecution has the burden of proof when it comes to the elements of the crime (*actus reus* and *mens rea*).[92] Thus, the prosecution must meet the burden of proving the *actus reus* of the crime beyond a reasonable doubt.[93]

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[89] Jordan HW, Howe GL, Gelsomino J, et al: *Post-traumatic stress disorder: a psychiatric defense*. J Natl Med Assoc 78:119 –26, 1986; Sparr LF, Atkinson RM: Posttraumatic stress disorder as an insanity defense: medicolegal quicksand. Am J Psychiatry 143:608 –13, 1986; Sparr LF: Mental defenses and posttraumatic stress disorder: assessment of criminal intent. J Trauma Stress 9:405–25, 1996.

[90] *See People v. Higgins*, 159 N.E.2d 179, 179, 180 (Ct. App. NY 1959) (referring to defense counsel arguing that the defendant's epileptic attack negated mens rea); *State v. Mercer*, 165 S.E.2d 328, 335 (N.C. 1969).

[91] *Fulcher v. State*, 633 P.2d 142, 146 (Wyo. 1981); see also *McClain v. State*, 678 N.E.2d 104, 109 (Ind. 1997) (noting that merging automatism and insanity would unnecessarily result in depriving one's liberty interest despite being sane and without a mental disorder); Janet Hoover Bassitt, Automatism: An Involuntary Act Defense, 68 ILL. BARJ. 740, 743 (1990) (noting that it is "unthinkable" to punish automatistic acts the defendant cannot resist or to declare him insane for what may be an organic defect). The *Fulcher* court opined that: "[u]nless the plea of automatism, separate and apart from the plea of mental illness or deficiency is allowed, certain anomalies will result. For example, if the court determines that the automatistic defendant is sane, but refuses to recognize automatism, the defendant has no defense to the crime with which he is charged. If found guilty, he faces a prison term. The rehabilitative value of imprisonment for the automatistic defendant who has committed the offense unconsciously is nonexistent. The cause of the act was an uncontrollable physical disorder that may never recur and is not a moral deficiency. If, however, the court treats automatism as insanity and then determines the defendant is insane, he will be found not guilty. He then will be committed to a mental institution for an indefinite period. The commitment value of an automatistic individual to a mental institution for rehabilitation has absolutely no value."; Peter Fenwick, Automatism, *Medicine and the Law*, 17 PSYCHOL. MED. (Mongr. Supp.) 1, 9 (1990).

[92] Hamilton, *supra* note 65, at 349.

[93] *Id.*

Accordingly, we conclude that courts should assess the impact of dissociative PTSD on the defendant while considering the existence of *actus reus* as a cornerstone of criminal culpability. Further, we conclude that only dissociative PTSD may impact the existence of *actus reus* since it amounts to an involuntary act according to psychology and neuroscience findings. It also resembles most, if not all, of the examples listed by the MPC of involuntary acts that dismantle the *actus reus* of the crime. Nonetheless, the rest of the PTSD spectrum of symptoms (referred to hereinafter as "PTSD", "general PTSD" or "non-dissociative PTSD" rather than "dissociative PTSD") have an impact on the *mens rea* of the crime rather than the *actus reus*. Accordingly, we will analyze the non-dissociative PTSD impact on the *mens rea* of the crime in the next part.

B) The PTSD Effect on *Mens Rea:*

It is well-established under the MPC and US Supreme Court decisions that the *mens rea* requires a general criminal intent with regards to most crimes and a specific intent with regards to specific crimes such as first-degree murder.[94] In the following paragraphs, we analyze the PTSD impact of eliminating *mens rea* through an insanity defense (NGRI). Moreover, we examine if the PTSD defense might diminish the general intent of *mens rea*. In the second subsection, we assess the PTSD effect on specific intent under *mens rea* by comparing it to intoxication and the heat of passion defenses.

1. PTSD and the Insanity Defense: When Does it Work?

The Insanity Defense Reform Act ("the Act") was signed into law on October 12, 1984.[95] The Act constituted the most comprehensive federal legislation governing the effect of insanity, mental diseases, and mental defects on criminal culpability of defendants.[96] Further, it modified the standard of insanity in place at the time and placed the burden of proof on the defendant rather than the prosecution.[97] Moreover, the Act required a higher burden of proof for an insanity defense: by adopting the clear and

[94] Specific & General Intent Crimes: What's the Difference?, Bixon Law (2019), https://bixonlaw.com/specific-general-intent-crimes-whats-the-difference/.
[95] 634. INSANITY DEFENSE REFORM ACT OF 1984, the United States Department of Justice Archives.
[96] *Id.*
[97] *Id.*

convincing evidence standard.[98] It eliminated the defense of diminished capacity and limited the scope of expert testimony to very few ultimate legal issues.[99] Finally, the Act established a special verdict: "not guilty by reason of insanity" that triggers a commitment proceeding to a mental institution.[100] Historically, the Act was enacted as a reaction to widespread criticism regarding the existing insanity standard in the aftermath of the assassination attempt of President Ronald Reagan and the verdict of the defendant John W. Hinckley Jr. as not guilty by reason of insanity.[101] The insanity standard at the time placed the burden of proof on the prosecution to establish – beyond a reasonable doubt – that the defendant was not legally insane at the time of the commission of the crime.[102] Thus, it is understandable – within this historical context – why Congress issued a restrictive reform of the Insanity Defense.

The NGRI standard is generally assessed in light of the M'Naghten rule: "[t]o establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."[103]

Yet it is worth asking: what are the characteristics surrounding a successful PTSD insanity defense? In order to answer this question, we will review case law in which PTSD was successful as an insanity defense.

Before PTSD was included in the DSM, attorneys employed traumatic stress disorders to argue for an insanity defense.[104] In *Houston v. State* (1979), Mr. Houston – an army sergeant defendant before the Alaska Supreme Court – murdered a man by a gun shot after he thought the latter was reaching for a weapon.[105] At trial, Mr. Houston's

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[98] *Id.*
[99] *Id.*
[100] Id.
[101] Insanity Defense Reform Act, Psychology, http://psychology.iresearchnet.com/forensic-psychology/criminal-responsibility/insanity-defense-reform-act/
[102] *Id.*
[103] E.g., In re Ramon M., 584 P. 2d 524.
[104] Berger, McNeil, and Renee, *supra* note 19, at 509.
[105] *Houston v. State*, 602 P.2d 784 (Alaska 1979).

attorney argued for an insanity defense by calling an expert to the stand who testified that Mr. Houston suffered from traumatic neurosis of war and at the time he shot his gun, he was at a dissociative state.[106] Although the trial court denied the defense, the appellate court reversed and remanded since it found that the defense had provided substantial evidence supporting an insanity defense.[107]

The PTSD was included into the DSM-III in 1980.[108] Upon its inclusion in the DSM-III, attorneys used it, successfully, as one of the bases for insanity defenses.[109] In *State of New Jersey v. Cocuzza*, the defendant was found not guilty by reason of insanity. [110] In this case, the defendant was a Vietnam veteran who assaulted a police officer.[111] His defense argued that he suffered from PTSD due to Vietnam war and he thought he was attacking enemy soldiers when he assaulted the police officer.[112] The defense was supported by the testimony of another police officer who saw the defendant holding a stick as if it were a rifle.[113] In a similar case, *State v. Heads*, the defendant – who was also was a Vietnam veteran – murdered his sister-in-law's husband by a gun shot after entering her house searching for his estranged wife.[114] After he was found guilty in the first trial, the appellate court remanded the case and he was found not guilty in a second trial after his defense introduced an expert testimony about the defendant's PTSD.[115] The expert testimony provided that the defendant suffered from PTSD, that he experienced one dissociative episode before, and there was a similar resemblance between the crime scene and Vietnam.[116]

Further, in *State v. Wood*, a defendant who was a Vietnam veteran was found not guilty by reason of insanity after he shot a foreman in the factory he worked at upon

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[106] Berger, McNeil, and Renee, *supra* note 19.
[107] *Id.*
[108] American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Third Edition. Washington, DC: American Psychiatric Association, 1980.
[109] Berger, McNeil, and Renee, supra note 19.
[110] *State v. Cocuzza*, 301 A. 2d 204 - NJ: Superior Court, Law Div. 1973.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *State v. Heads*, 385 So. 2d 230 - La: Supreme Court 1980
[115] *Id.*
[116] *Id.*

being confronted by his alcohol problem.[117] The defense presented expert testimony about PTSD, combat exposure by the defendant, factory environment resembling the reminiscent of combat, and dissociative state.[118] Finally, in *Commonwealth v. Tracy* (a 1989 Massachusetts case), the Vietnam veteran defendant charged with armed robbery was found NGRI based on PTSD.[119] Similar to the cases above, his defense argued that he was in a dissociative state during the robbery.[120] Further, the defendant's dissociative state was triggered by the sight of a funeral parlor that reminded him of his Vietnam experience.[121] The court found him not guilty by reason of insanity based on PTSD.[122]

In contrast, PTSD has often been rejected as an insanity defense. In *United States v. Duggan*, the district court denied an insanity plea for the lack of evidence or clinical findings that support an insanity defense.[123] The court also questioned if a PTSD general diagnosis can ever amount to a successful insanity defense.[124] Moreover, in *United States v. Whitehead*, the federal court found insufficient evidence of an insanity defense based on PTSD although the defendant was a Vietnam veteran and his defense provided expert testimony of a psychologist.[125] The appellate court upheld the trial court's decision on the same grounds – that the evidence presented was insufficient in proving legal insanity by a clear and convincing standard.[126] In both of these cases, the PTSD-insanity defense failed for the lack of a sufficient link between PTSD evidence presented and establishing the M'Naughten test.

Thus, it is important to note that the admission of PTSD evidence might be contingent upon its sufficient relevance to the insanity defense under the M'Naughten test. In *United States v. Rezaq*, the prosecution requested that the court exclude the PTSD evidence as an insufficient basis for insanity.[127] The DC court denied the prosecution's

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[117] *State v. Wood*, No. 80-7410 (Ill. Cir. Ct. May 5, 1982).
[118] *Id.*
[119] *Commonwealth v. Tracy*, 539 N.E.2d 1043 (Mass. App. Ct. 1989).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *United States v. Duggan*, 743 F.2d 59, 81 (2d Cir. 1984).
[124] *Id.*
[125] *United States v. Whitehead*, 896 F.2d 432 (9th Cir. 1990).
[126] *Id*.
[127] *United States v. Rezaq*, 918 F. Supp. 463 (D.D.C. 1996).

request and admitted the PTSD evidence as it found that it "clearly indicate that defendant's diagnosis of PTSD meets the test of insanity as set out" in federal statutes.[128] However, in *United States v. Cartagena-Carrasquillo*, the district court excluded PTSD evidence after initially reviewing it after it found that the report presented did not reveal how the defendant did not know right from wrong.[129] Thus, the defense must establish sufficient and relevant evidence regarding PTSD, especially on how it affected the defendant at the time s/he committed the crime in a manner that meets the M'Naughten test.

By tracing the characteristics of successful and unsuccessful PTSD insanity defense in the above cases, we deduce four important substantive elements that must be present in a sufficient PTSD evidence that can establish a successful insanity defense – from the initial evidence and reports to the expert testimony. First, that the defendant not only suffers from PTSD in general, but more specifically suffers from a dissociative state as an extreme PTSD symptom. Second, that the defendant had experienced a dissociative state at least one time in the past. Third, that the defendant was under a dissociative state at the time s/he committed the crime. Finally, this dissociative state of PTSD was triggered by the perception through the senses (especially sight and hearing) of an environment that resembled the original stressor to the defendant.

These four elements we put forward also parallel the recent neuroscience findings regarding dissociative PTSD, which emphasize the fact that an individual's brain's grey matter changes dramatically during a dissociative state.[130] Moreover, courts tend to deny evidence of a general PTSD (as opposed to associative PTSD) in establishing a successful insanity defense.[131]

Yet, as we argued above, courts should consider dissociative PTSD effect on *actus reus* since it is a form of an involuntary act, rather than on *mens rea* in the form of an insanity defense. Besides being the accurate characterization of dissociative PTSD,

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[128] *Id.*
[129] *United States v. Cartagena-Carrasquillo*, 70 F.3d 706 (1st Cir. 1995).
[130] See VAN DER KOLK, *supra* note 40.
[131] Berger, McNeil, and Renee, *supra* note 19.

considering dissociative PTSD effect on *actus reus* will yield fairer outcomes. That is because the jury does not neutrally apply the dissociative PTSD evidence on *mens rea* to find a defendant legally insane under M'Naugten. As psychological scholars argue, many jurors enter the deliberation room with an existing bias, negative attitude, and formed opinion associated with the stigmatization of mental illness.[132] Thus, this often leads the jurors to issue a verdict that does not reflect the psychological and mental illness evidence presented at trial.[133] As statistics show, the affirmative insanity defense is invoked in 1% of all felony charge cases and is only successful in a fraction of those cases.[134] However, until now, courts are reluctant to consider dissociative PTSD evidence effect on *actus reus* by following the herd of courts who consider the dissociative PTSD evidence in light of *mens rea*, despite perfectly resembling an involuntary act under the MPC.

2. General PTSD Effect on the General Intent of the *Mens Rea*: Does it Diminish the *Mens Rea*?

There are two aspects of *mens rea*: the general intent that must be present in all crimes and the specific intent that must be established with regards to specific crimes.[135] In the following paragraphs, we will analyze the courts' decisions to determine the effect of general non-dissociative PTSD on the *mens rea*.

The Insanity Defense Reform Act precludes defenses aimed at diminishing criminal capacity or responsibility, also known as the general intent component of *mens rea*.[136] The senate report behind the Act directs us to the purpose behind this restriction, namely: limiting the introduction of "needlessly confusing psychiatric testimony" to the jury.[137]

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[132] Chloe Janelle Punsalan, The Insanity Defense Reform Act of 1984: 18 USCS § 17, Legal Studies 100, 5-6 (2019).
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *US v. Pohlot*, 827 F. 2d 889 - Court of Appeals, 3rd Circuit 1987, 903.
[137] S.Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), reprinted in 1984 U.S.Code Cong & Ad.News 3182, 3411 (hereinafter Senate Report).

The third Circuit Court, citing *Arenella* in *US v. Pohlot*, opined that: "[c]ommentators have agreed, however, that only in the most extraordinary circumstances could a defendant actually lack the capacity to form *mens rea* as it is normally understood in American law… [e]ven the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any *mens rea* requirement."[138] Moreover, the third Circuit Court, quoting Professor Morse's writings on the issue, stated that: "[a]t nearly all times, human beings are conscious of themselves, they perceive and are aware of what they are doing as they do it.... This self-reflective split in consciousness that allows self-monitoring is an important regulator of behavior, for it provides constant feedback that allows us to correct maladaptive behaviors.... [Is the state of lacking self-awareness a state] in which mens rea is lacking? On the one hand, the defendant knows at some level what he is doing and intends to do it; on the other hand, he is not fully conscious of his actions in the usual sense. I believe that this situation is better handled as a matter of affirmative defense. Mens rea is present but the usual control structures are compromised."[139]

In other words, courts should judge criminal culpability at the conscious level so long as the defendant could think, plan, and execute.[140] Nonetheless, as pointed out by the Third Circuit court's reference to the Insanity Defense Reform Act and its senate report, psychiatric evidence is blocked if solely used to argue for the formation of the *mens rea* rather than the fulfillment or unfulfillment of its elements.[141] Accordingly, psychiatric evidence may only be admitted in the form of an affirmative defense (insanity defense) as discussed above or in the form of proving or rebutting the elements of *mens rea*.[142]

3. General PTSD Effect on Malice and Specific Intent of *Mens Rea*:

Many US Courts accept psychiatric evidence of mental illness if it is presented to dismiss the defendant's state of mind in a specific intent crime. In *People v. Wells*, the

[138] *Pohlot*, 827 F. 2d 889, at 903.
[139] *Id.* at 904.
[140] *Id.*
[141] *Id.*
[142] *Id.*

defense thought to admit expert testimony on the defendant's misinterpretation and overreaction to external stimuli, which made him believe that he was defending himself.[143] After the trial court rejected this testimony, the California Supreme Court decided that this was admissible evidence under a strict *mens rea* approach.[144] That is because if the defendant thought that he was acting in self-defense, he could not have planned the crime in advance, and an advance planning of the crime is a necessary element to establish a malice afterthought crime.[145]

In *People v. Gorshen* – a case concerning a first-degree murder charge, the California Supreme Court ordered a retrial after the trial court excluded evidence presented to prove that the defendant was suffering from paranoid schizophrenia that disallowed him to reflect during the premeditation stage of the first degree murder.[146] The California Supreme Court ordered a retrial allowing the admission of the psychiatric evidence of the defendant's paranoid schizophrenia as sufficiently relevant to show that the defendant is not guilty of first-degree murder.[147] In *People v. Wolff*, the California Supreme Court again recognized a diminished capacity defense for a first-degree murder and rape charge after it held that the defendant was not guilty of first-degree murder due to his mental illness.[148] Again, in this case, the court only admitted the psychiatric evidence for diminishing criminal culpability only to dismiss a specific intent crime rather than a general intent *mens rea*. The evolution of these cases has led to the amendment of Cal.Penal Code § 28, restricting the use of psychiatric evidence only to specific intent crimes in California.[149]

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[143] *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949)
[144] *Id.*
[145] *Id.*
[146] *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959).
[147] Id.
[148] People v. Wolff, 61 Cal.2d 795, 821, 394 P.2d 959, 975, 40 Cal.Rptr. 271, 287 (1964).
[149] Cal.Penal Code § 28 (a); the Act provides that: "[e]vidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." In section (b), the Act states that: "[a]s a matter of public policy there shall be no defense of diminished

Similarly, the Third Circuit Court followed the same path as California Supreme Court in restricting psychiatric evidence only to dismiss an element of a specific intent crime.[150] Accordingly, the Third Circuit court denied the government request to exclude psychiatric evidence presented to prove the defendant's lack of specific intent to commit the offense.[151] The court concluded that: "that although Congress intended § 17(a) to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other *mens rea*, which are elements of the offense. While the contours of the doctrines of diminished responsibility and diminished capacity are unclear, the defenses that Congress intended to preclude usually permit exoneration or decrease of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection; however, these matters do not strictly negate *mens rea*. Despite our disagreement with the government's broad contention, we agree that the Congressional prohibition of diminished responsibility defenses requires courts to carefully scrutinize psychiatric defense theories bearing on *mens rea*. Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of *mens rea*. Presenting defense theories or psychiatric testimony to juries that do not truly negate *mens rea* may cause confusion about what the law requires."[152]

Since many courts allow the admission of psychiatric evidence to dismiss the element of premeditation, malice, or specific intent crimes, we find it helpful to compare PTSD to involuntary intoxication and heat of passion to be able to clarify the contours of the criminal culpability in the last section of this research.

4. PTSD *versus* Voluntary and Involuntary Intoxication:

capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing."

[150] *US v. Pohlot*, 827 F. 2d 889 - Court of Appeals, 3rd Circuit 1987, 903.

[151] *Id.*

[152] *US v. Pohlot*, 827 F. 2d 889 - Court of Appeals, 3rd Circuit 1987, par. 891.

Both voluntary and involuntary intoxication have an impact on the criminal culpability of the defendant. Under the MPC, an extreme involuntary intoxication may amount to a general excuse defense that may meet an insanity defense.[153] That is because it might result in cognitive and control dysfunction severe enough to render the individual unconscious and unaware of the nature of his/her conduct or unable to control it.[154] On the other hand, voluntary intoxication may only be provided to the jury to exclude a specific intent crime.[155]

Some courts have allowed voluntary intoxication to eliminate a general rather than specific intent crime. For instance, the Montana Supreme Court opined that evidence of extreme voluntary intoxication may be included to disprove that the defendant has committed the crime "purposely" or "knowingly."[156] Nonetheless, the US Supreme Court reversed Montana's Supreme Court's decision after concluding that the exclusion of such evidence does not violate the due process.[157]

Justice O'Connor, Justice Stevens, Justice Souter, and Justice Breyer dissented.[158] The dissenting opinion stipulated that: "[C]ourts across the country agreed that where a subjective mental state was an element of the crime to be proved, the defense must be permitted to show, by reference to intoxication, the absence of that element. One court commented that it seemed "incontrovertible and to be universally applicable" that "where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or

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[153] MPC section 2.08(4) reads: Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

[154] Paul H Robinson, A brief summary and critique of criminal liability rules for intoxicated conduct, the Journal of Criminal Law, 382.

[155] See e.g. People v. Ochoa, 966 P. 2d 442 - Cal: Supreme Court 1998, par 450 (holding that Jury instructions was appropriate in referring to the effect of intoxication on the specific intent required for the first-degree murder charged).

[156] *Montana v. Egelhoff*, 518 US 37.

[157] Egelhoff, 518 US 37. at 41-57.

[158] Id. par. 70.

mitigate the offence but to show that it was not committed."[159] Thus, while involuntary intoxication can amount to unconsciousness that may lead to an insanity defense, voluntary intoxication may be introduced to the jury to show that the elements of *mens rea* regarding the specific crime charged is missing – that the crime has not been committed as prescribed in the criminal statute. A question then arises: how do PTSD symptoms compare to voluntary and involuntary intoxication?

As we mentioned in the first section of this article, PTSD symptoms are on a spectrum that greatly varies from strong agitation to the extreme case of dissociation from reality and automatization.[160] Nonetheless, the PTSD – with its qualifying factors in the DSM-5 – falls under the half end of the PTSD spectrum. As neuroscientist have found, the individual suffering from a PTSD has hormonal secretions and activation of brain regions responsible for memory and attention when confronted with a sensory input that reminds them of the stressor.[161] Thus, individuals diagnosed with PTSD under the strict standards of the DSM-5 share an extremely weakened conscious and control over their actions and emotions.[162] Conceptually, the non-dissociative PTSD is close to involuntary intoxication than to voluntary intoxication. That is because a PTSD patient did not choose to develop a PTSD, nor did they choose to be exposed to a stressor reminder. Thus, a notable question arises: do courts consider the effect of PTSD as having the same effect of involuntary or voluntary intoxication in practice?

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[159] Id. at par. 70; to strengthen its argument, the dissenting opinion cited: People v. Robinson, 2 Park. Crim. 235, 306 (N. Y. Sup. Ct. 1855). See also Swan v. State, 23 Tenn. 136, 141-142 (1843); State v. Donovan, 61 Iowa 369, 370-371, 16 N. W. 206, 206-207 (1883); Mooney v. State, 33 Ala. 419, 420 (1859); Aszman v. State, 123 Ind. 347, 24 N. E. 123 (1890) (citing cases). The dissent opinion concluded that: "[W]ith similar reasoning, the Montana Supreme Court recognized the incompatibility of a jury instruction pursuant to § 45-2-203 in conjunction with the legislature's decision to require a mental state of "purposely" or "knowingly" for deliberate homicide. It held that intoxication is relevant to formation of the requisite mental state. Unless a defendant is proved beyond a reasonable doubt to have possessed the requisite mental state, he did not commit the offense. Elimination of a critical category of defense evidence precludes a defendant from effectively rebutting the mental-state element, while simultaneously shielding the State from the effort of proving the requisite mental state in the face of negating evidence. It was this effect on the adversarial process that persuaded the Montana Supreme Court that the disallowance was unconstitutional."

[160] See supra notes 27-40.

[161] *Id.*

[162] *Id.*

Unconsciousness of the defendant is considered an exculpating defense in which PTSD has had great relevance.[163] In the unconsciousness defense, the defendant argues that s/he was lacking consciousness at the time of the event's commission.[164] There is an important difference, however, between the unconsciousness defense and insanity defense. While a successful insanity defense results in hospital commitment, a successful unconsciousness defense results in complete exoneration.[165] In *People v. Lisnow*, a California court was faced by a defendant who was charged with battery in an unprovoked assault while dining at a restaurant.[166] The defense argued that the defendant lacked consciousness at the time he committed the battery through expert testimony relating to the defendant's service in Vietnam and PTSD traumatic neurosis he suffers from.[167] After the trial court denied the expert witness testimony on the defendant's PTSD leading to his unconsciousness, the appellate Court reversed finding that the evidence presented of the defendant's unconsciousness was both admissible and compelling.[168] In *State v. Fields*, the trial court prohibited the defense from presenting an unconsciousness defense based on evidence presented by an expert testimony relating to the PTSD suffered by the defendant at the time he committed the first-degree murder.[169] Nonetheless, the appellate court found that the trial court erred in not informing the jury of the defendant's unconsciousness based on such evidence of PTSD.[170]

Accordingly, extreme PTSD symptoms – similar to involuntary intoxication – result in unconsciousness at the time of an alleged crime's commission. In contrast, milder PTSD symptoms may only be used to eliminate a specific intent crime, as seen with the voluntary intoxication defense.[171] For instance, in *State v. Warden*, the defendant was charged with first-degree murder (a specific intent crime) for killing her housekeeper.[172]

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[163] See Omri Berger, Dale E. McNiel, and Rene´e L. Binder, PTSD as a Criminal Defense: A Review of Case Law, J Am Acad Psychiatry Law 40:509–21, 514-5 (2012).
[164] *Id.*
[165] *Id.*
[166] *People v. Lisnow*, 151 Cal. Rptr. 621 (Cal. App. Dep't Super. Ct. 1978)

[167] *Id.*
[168] *Id.*
[169] *State v. Fields*, 376 S.E.2d 740 (N.C. 1989).
[170] *Id.*
[171] *State v. Warden*, 947 P.2d 708 (Wash. 1997).
[172] *Id.*

Her defense invoked diminished capacity by presenting PTSD evidence through expert testimony.[173] After the trial the judge instructed the jury on first and second degree murders—on appeal, the supreme court reversed on the ground that the PTSD evidence was sufficient to eliminate the specific intent crime of first degree murder and was capable of reducing it to the lesser charge of manslaughter.[174] In *State v. Bottrell*, the Washington Appellate Court explicitly opined that: "Washington case law acknowledges that PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in diminished capacity."[175]

In conclusion, most courts accept psychiatric evidence on whether the *mens rea* elements of the crime are fulfilled, but do not accept psychiatric evidence on whether the defendant can or cannot form such *mens rea*.[176]

5. PTSD *versus* the Heat of Passion:

The heat of passion concept or its alternative "the extreme emotional disturbance" downgrades a murder charge (which requires malice as a criminal intent) to

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[173] *Id.*

[174] *Id.*

[175] *State v. Bottrell*, 14 P. 3d 164, par. 169.

[176] *People v. Coddington* (2000) 23 Cal.4th 529 [97 Cal.Rptr.2d 528, 2 P.3d 1081] (Coddington), our Supreme Court summarized permissible and impermissible expert testimony on mental state evidence in criminal trials.[14] "Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state. An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence vel non [(or not)] of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (Coddington, at pp. 582-583, italics added, fns. omitted.) Citing People v. Nunn 903*903 (1996) 50 Cal.App.4th 1357 [58 Cal.Rptr.2d 294] (Nunn), People v. Young (1987) 189 Cal.App.3d 891, 905 [234 Cal.Rptr. 819] (Young), People v. McCowan (1986) 182 Cal.App.3d 1, 12-15 [227 Cal.Rptr. 23] (McCowan), and People v. Whitler (1985) 171 Cal.App.3d 337 [214 Cal.Rptr. 610] (Whitler) for the proposition that a criminal defendant's federal constitutional right to present a defense is not violated by the "exclusion of expert testimony on the ultimate question of fact as to whether appellant did form those mental states," the Coddington court concluded: "Sections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of a charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." (Coddington, at p. 583, italics added.)

manslaughter.[177] The MPC provides that a murder is downgraded to manslaughter when it is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[178] The reasoning behind this downgrade finds its roots in diminishing culpability and thus requires an inquiry into the defendant's mental status at the time of crime commission.[179] If the defendant was disturbed by passion that would cause any reasonable person in his/her position to be disturbed and act upon passion rather than judgment, a heat of passion defense applies and a homicide can be downgraded to manslaughter – due to lack of malice afterthought.[180] That is because a defendant who kills in the heat of passion is not as blameworthy as a defendant who kills while having a malice afterthought – a calm state of mind.[181] Further, the prosecution is under the burden to prove the absence of heat of passion beyond a reasonable doubt.[182]

Then how does PTSD compare to heat of passion? We will attempt to answer this question in the next paragraphs. Some of the very prominent symptoms of PTSD are hyperarousal, hypervigilance, and the overestimation of danger.[183] These symptoms share some similarities and differences with the heat of passion defense. The similarities are that both the mentioned PTSD symptoms and the heat of passion characteristics render the defendant less blameworthy. That is because the defendant did not commit the crime in a calm state-of-mind that amounts to a malice afterthought. The differences between them lie in the standard of assessing PTSD symptoms compared to the heat of passion. While the heat of passion needs to be assessed by the reasonable person standard objectively and subjectively, the PTSD is not assessed under the reasonable person standard. In contrast, the PTSD evidence role is to reveal that while the provocation may

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[177] Crime of Passion, Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/crime_of_passion.

[178] Model Penal Code (section 210.3).

[179] *See* Crime of Passion, Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/crime_of_passion.

[180] *Id.*

[181] *State v. Lafferty*, 309 A. 2d, at 671, 673 (concurring opinion).

[182] Mens Rea, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/mens_rea; Mullaney v. Wilbur, 421 US 684; In this case, the US Supreme Court opined that: "[i]n the past half century, the large majority of States have abandoned York and now require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt. See W. LaFave & A. Scott, Handbook on Criminal Law 539-540 (1972)."

[183] Bergen, *supra* note 19, at 519.

seem simple and normal to an ordinary person without PTSD, its danger and arousal is scientifically proven for a person suffering from PTSD.[184]

The best example of PTSD type that resembles a less blameworthy *mens rea* that does not meet the reasonable person standard under the heat of passion is the Battered Woman Syndrome ("BWS").

The BWS is often used by defense attorneys to argue that women who suffer from BWS are in a state of mind that triggers self-defense even if objectively the situation does not create any danger or necessitate any action on behalf of the victim.[185] For instance, BWS was accepted in self-defense arguments at times when a man was resting, sleeping, or not directly engaged in beating the wife at the moment of homicide.[186] The BWS evidence may also negate a murder by omission crime that results upon the mother's failure to protect the child leading to a child abuse charge.[187] An example of this latter is Ms. Spinuzzi's case we briefly discussed in the introduction of this article. Ms. Spinuzzi was subject to continuous domestic violence by her boyfriend at the time when the latter issued blunt force trauma upon the foster baby, killing him. While the boyfriend was charged with a first-degree murder, Ms. Spinuzzi was charged with, among other charges, child abuse resulting in death under Colorado law. The charge of child abuse resulting in death under Colorado law is equivalent to the murder by omission crime due to the guardian's failure to protect the child or allow a violent partner to be present with the child.

Nevertheless, there are certain issues with the BWS evidence that might hinder its effect on diminishing the criminal culpability. First, many states follow the reasonable person standard in evaluating the perception of the defendant at the time she committed the crime.[188] Yet there is nothing reasonable in applying a reasonable person standard on a

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[184] *State v. Kelly*, 478 A.2d 364, 382 (N.J. 1984).
[185] Lenore E. A. Walker, Battered Women Syndrome and Self-Defense, 6 NOTRE DAME J.L. Ethics & PUB. POL'y 321-2 (1992).

[186] *Id.*
[187] *Id.*
[188] Walker, *supra* note 183, at 323.

battered woman who uncontrollably overestimates danger due to her PTSD.[189] Thus, expert testimony becomes extremely important in explaining to the court and jury, why the woman-defendant felt in danger and how this overestimated feeling is scientifically proven as one of the PTSD or BWS symptoms.[190] This would allow for a fairer consideration of the abuse victim's state of mind at the time she committed the crime.[191] In some states, there is a difference between an honest and reasonable perception on one hand and an honest and unreasonable perception of danger.[192] The latter is often used in BWS cases as a lessening mechanism, lowering a homicide to manslaughter.[193] This decrease often is a safety net to battered women who did not convince the court that they reasonably believed they were in danger due to their PTSD, yet they honestly believed they were in danger.[194]

Second, the prosecution often attempts to rebut BWS evidence on the ground that she could simply leave the domestic violence relationship.[195] They often argue that if the battered woman had left, they would not have been subject to an agitation or overestimated danger that led them to murder their intimate partner.[196] This also constitutes a similarity between BWS and heat of passion, since the prosecution may also argue that a reasonable person in the defendant's place could have left the cause of intimidation instead of committing the homicide. Yet none of these prosecutorial arguments is persuasive, at least according to research in psychology. Psychological research on BWS has shown that battered women could rarely leave a violent relationship with the batterer due to the peculiar nature of the repeating BWS three cycles: tension, violence, and forgiveness/showing affection.[197] Furthermore, many battered women

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[189] *Id.*
[190] *Id.*
[191] *See* id.
[192] *Id* at 324.
[193] *Id.*
[194] *See* id.
[195] *State v. Kelly*, 478 A.2d 364, 382 (N.J. 1984).
[196] *See* id.
[197] One author describes this attachment to the battered relationship as follows: "[H]er lack of alternatives leads the battered woman to cling to the illusion that her man will change. Her illusion is often reinforced by the man's promises to reform. " When the violence recurs and escalates, the battered woman realizes she lacks control over the situation. ' She lives with "learned helplessness,"" expecting more severe and increasingly unpredictable beatings."; *See generally*, R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES (1979); R. GELLES, THE VIOLENT HOME (1972); R. LANGLEY & R. LEVY, WIFE BEATING (1977); D. MARTIN,

cannot leave for financial reasons: they cannot afford living on their own without their partner's financial assistance.[198] Battered women may also decide to stay in a domestic violent relationship for social reasons such as for the sake of their child.[199] Accordingly, the effect of guilt, shame, fear, and terror on the battered woman cannot be underestimated.[200] That is because psychological research demonstrates that battered women may feel they are failures who do not deserve help and that they are responsible for their victimization.[201] This ongoing shame may impact a woman's decision to stay in the violent relationship.[202] Moreover, research indicates that battered women often return to their batterer multiple times – average three to four times – before they eventually leave the relationship.[203]

This heavy weight of psychological evidence regarding battered women behavior and perception cannot be ignored in courts even after considering prosecutorial objections. Thus, the reasonable standard to assess the state of mind or *mens rea* of a battered woman is the standard of a battered woman in her place, by seeing the world through a battered woman's gaze.[204] This differs substantially from the standard used to assess the effect of

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BATTERED WrvEs (1976); E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974) [hereinafter cited as E. PIzZEY]; S. STEINMETZ, THE CYCLE OF VIOLENCE (1977); U.S. COMM'N ON CrVIL RIGHTS, BATTERED WOMEN (1978); VIOLENCE IN THE FAMILY (S. Steinmetz & M. Straus eds. 1974); L. WALKER, BATTERED WOMEN AND LEARNED HELPLESSNESS (1979); Barden, Wife Beaters: Few of Them Ever Appear Before a Court of Law, N.Y Times, Oct. 21, 1974, § 2, at 38, col. 1 [hereinafter cited as Barden]; Durbin, Wife-Beating, LADIEs HOME J., June, 1974, at 62; Eisenberg & Michlow, The Assaulted Wife: "Catch-22" Revisited, 3 WOMEN'S RIGHTS L. REP. 138 (1977); Straus, Wife-Beating: How Common and Why?, 2 VICTIMOLOGY 443 (1978).

[198]Taylor, Laura Ashley., The relationship between shame and leave-taking behavior, duration of violent relationship, social support -seeking, attributions, emotional abuse, sexual assault, and PTSD symptoms in battered women, ProQuest Dissertation, 26 (2003)

[199] *Id.*

[200] Gina Troisi, Measuring Intimate Partner Violence and Traumatic Affect: Development of VITA, an Italian Scale, Frontiers in Psychology, 3 (2018).

[201] Taylor, Laura Ashley., The relationship between shame and leave-taking behavior, duration of violent relationship, social support -seeking, attributions, emotional abuse, sexual assault, and PTSD symptoms in battered women, ProQuest Dissertation, 25 (2003).

[202] Woelz-Stirling and colleagues (1998) and Tan and colleagues (1994) conducted research with Filipina women. These researchers found that these women were likely to remain in their violent relationship for many reasons, including commitment, sense of obligation, self-esteem issues, embarrassment, stigma, legal threats, and shame.

[203] Ashley, *supra* note 184, at 30; Labell, 1979; Snyder & Fruchtman, 1981; Strube & Barbour, 1984

[204] *See* Gina Troisi, Measuring Intimate Partner Violence and Traumatic Affect: Development of VITA, an Italian Scale, Frontiers in Psychology, 3 (2018). Gina provides that: "Psychoanalytic theories on the trauma suggest … the role played by the affects of fear, shame, and guilt in women victims of IPV (Nunziante Cesàro and Troisi, 2016). Authors underscored the difference between fear, associated with the escape

intimidation in "heat of passion" crimes since this latter is only subject to the reasonable person standard found in contemplating what a reasonable person would do under the same circumstances.[205]

III. The Contours of Criminal Culpability and the Position of Criminal Defendants with PTSD:

To hold a person criminally accountable for a crime they committed, they must possess the autonomy to make a choice.[206] However, there are instances where a person's behavior is strongly predetermined to the extent that they should not be held criminally liable for the proscribed conduct.[207] This makes the principle of individual autonomy the core base for criminal culpability.[208] It also becomes the basis for linking criminal culpability to personal awareness of the individual's own conduct.[209] For these reasons, criminal law requires an *actus reus* and *mens rea* to hold a defendant criminally accountable for their conduct. *Actus reus* requires a voluntary conduct and *mens rea* requires a specific, purposeful, knowing, reckless, or negligent intent. Thoroughly explaining the contours of criminal culpability may require a book-length publication, thus we will restrict ourselves to discussing the placing of defendants who suffer from PTSD within the contours of criminal culpability. This requires us to briefly provide for the current contour of criminal culpability. Afterwards, we will use our research findings to place the defendants with PTSD in an appropriate and more enlightened position on the spectrum of criminal culpability.

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from danger and therefore understood as an active defense, and terror associated with paralysis and freezing, in line with psychoanalytical (Diel, 1956; Clit, 2002) and neurophysiological studies (Hagenaars et al., 2014). Considering the three possible reactions that an individual can develop in the face of danger, the attack is associated with anger, the escape is associated with fear and abandonment is associated with terror. Fear, therefore, seems to be a protection that puts the subject in a state of activity and makes them alert, activating sensorial and perceptive systems linked to the awareness of an event that is perceived as traumatic (Nunziante Cesàro and Troisi, 2016)

[205] Crime of Passion, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/crime_of_passion.
[206] *See* Mark Findlay, Stephen Odgers, and Stanley Yeo, Australian Criminal Justice, Oxford University Press, Ch.1, 19 (2015).
[207] *Id.*
[208] *Id,* at 20.
[209] *Id.*

One core difference between the *actus reus* and *mens rea* is whether it is assessed by an objective or a subjective lens. While *actus reus* is almost always assessed objectively and *mens rea* is almost always assessed through a subjective lens, their assessment may include both objective and subjective standards at times. The goal behind using a subjective standard to assess the *mens rea* is to find whether the defendant chose – with specific intent, malice, or knowingly – to bring about a conduct that the defendant knows would have certain consequences.[210] Thus, the personal viewpoint of the individual becomes the most relevant for assessing their *mens rea*.[211] That is because if the defendant did not *subjectively* aim to bring about the conduct, they cease to become blameworthy individuals to society.[212] The landmark example for this can be found in a negligent conduct that results in an extreme outcome such as involuntary manslaughter. Under involuntary manslaughter, the defendant does not become criminally culpable or blameworthy for murdering someone. They become blameworthy for being negligent compared to the reasonable person standard in not observing the rules and procedures in place.[213] If they have diligently observed the rules and procedures and a manslaughter is still a consequence to their conduct, they do not become criminally culpable at all for the lack of *mens rea*. The prosecution should prove beyond a reasonable doubt the presence of *actus reus* and *mens rea*. While the former is often easily proved by just referring to a voluntary act of the defendant from an objective point view, *mens rea* forms the largest battleground between the prosecution and defense attorneys.[214] Consequently, criminal

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[210] *Id.*

[211] *Id.*

[212] *Id.* at 9. The author provides that: "It should be noted that this 'harms to others' approach relates to individuals who have reached a sufficient degree of mental maturity to competently decide what is best for themselves. Proponents would permit the use of the criminal law to protect individuals who lack such maturity, for example, children and intellectually disabled people. This may be described as legal paternalism as it conveys an image of the law acting as a protective parent or guardian to especially vulnerable or dependent individuals. Thus, the criminal law may be applied to prohibit children below a certain age from engaging in activities such as homosexual or heterosexual intercourse, drinking alcohol in pubs, or driving a motor vehicle on a public road. These activities are criminally proscribed not because they are harmful in themselves, but because they have potentially harmful consequences that immature people may not sufficiently appreciate."

[213] Involuntary Manslaughter, Justia, https://www.justia.com/criminal/offenses/homicide/involuntary-manslaughter/.

[214] *See* Id.

culpability and punishment follows proportionally with the blameworthiness of the individual both in criminal codes and in practice before courts.[215]

Nevertheless, the broad contours of *mens rea* provided in current criminal codes often lack detailed reference to the culpable mental state required to find a defendant criminally culpable.[216] Some criminal scholars – such as Serota – have called for an explicit and detailed mention of all types of aggravating and mitigating circumstances and how they interplay with criminal charges in the body of the criminal code.[217] They proposed reforms to definitions of crimes and their penalties in a manner that reflects the threshold and contours of the *mens rea*.[218]

The hierarchy of the *mens rea* categories – ranked from the most to the least culpable – are as follows: first, specific intent crimes require the highest culpable *mens rea* and are generally worthy of the most severe punishments.[219] Second, malice crimes require an ill and evil state of mind to kill or cause a serious body harm without any justification or excuse.[220] Thus, a specific intent crime is generally higher in criminal culpability than a malice crime, at least in the homicide arena. This is often reflected in some states' criminal codes differentiating between first and second degree murder, considering the first-degree murder a specific intent crime requiring a premeditation/deliberation period and intent, whereas the second-degree murder is considered as a malice intent crime requiring an ill criminal intent to cause death or serious bodily harm.[221] Yet, most statutes do not specifically provide for the position of PTSD and similar mental disorders in the *mens rea* spectrum.

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[215] Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE Forest L. REV. 1201, 1229 (2017).
[216] *Id.* at 1210.
[217] *Id.*
[218] *Id.* at 1227.
[219] Criminal Intent, Criminal Law, Lumen Learning, https://courses.lumenlearning.com/suny-criminallaw/chapter/4-2-criminal-intent/.
[220] Criminal Law - Malice - Massachusetts, Person, Element, and Commonwealth - JRank Articles https://law.jrank.org/pages/5864/Criminal-Law-Malice.html#ixzz7AX2ay6Xa, "According to the Supreme Judicial Court of Massachusetts malice is a mental state that "includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow" (Commonwealth v. Huot, 403 N.E.2d 411 [1980])."
[221] *Id.*

After these two peculiar *mens rea* categories, the MPC and most criminal codes divide the general intent *mens rea* or the "guilty mind" as follows: first, acting *purposely* – the defendant *knew* about their conduct and *acted consciously* towards it.[222] Second, acting

[222] *Mens Rea*, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/mens_rea.

knowingly – the defendant *knew* that their conduct would cause a particular result.[223] Third, acting *recklessly* – the defendant knew yet consciously disregarded the substantial or unjustifiable risk of harm to others.[224] Finally, acting *negligently*: the defendant – at the time performing the act – was not aware of the risk but should have been aware of such risk.[225] This hierarchy carries with it punishments correspondent to each category.[226]

Both the MPC and most criminal codes also provide for the possible defenses against the *mens rea* such as the insanity defense, involuntary intoxication, heat of passion...etc. [227] Yet most, if not all, criminal codes do not provide for the effect of other mental illnesses– that do not rise to the level of an insanity defense such as general PTSD – on the *mens rea* of the defendant's criminal culpability.[228] Further, as we provided above, the Third Circuit court has held that expert testimony provided to diminish the *mens rea* is not admissible unless it is provided to show that the defendant lacked the *mens rea*.[229] Moreover, courts' consideration of PTSD effect on *mens rea* is different depending on the unique facts of every case.[230]

This raises the question: where do we situate both the dissociative PTSD and general PTSD defenses in the *mens rea* criminal culpability contours? This question becomes extremely important in light of the newly discovered psychological findings on the PTSD effect on an individual. That is because an individual who suffers from general PTSD symptoms has a reduced autonomy and conscience is held to the same criminal standard as an individual who does not suffer from PTSD. And if all criminal codes – and the MPC – are written in a manner to punish each act in accordance with its level of blameworthiness (specific intent, malice, purposely, knowingly, recklessly, and negligently), then it logically follows that there must be a place for an act that is voluntary yet is not a result of perfectly working autonomy. Should State legislatures

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[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] Serota, *supra* note 213.
[228] *Id.*
[229] *Id.*
[230] Bergen et al, *supra* note 19.

include crimes committed by an individual who is suffering from a PTSD in the same category as involuntary intoxication and heat of passion to negate a specific intent crime such as a first-degree murder charge? How can judges apply both the dissociative PTSD and general PTSD on the required *actus reus* and *mens rea* that should be present in the defendant's act?

States' legislatures are advised to incorporate in their criminal codes the effect of PTSD and other similar mental illnesses on the contours of *mens rea*. This will not only result in the evolution of the criminal justice system, but also in providing clarity to courts, prosecution, and defense attorneys. First, the PTSD, and other similar mental illnesses that share the same symptoms, negate a specific intent crime similar to voluntary intoxication. That is because PTSD – as provided in the DSM-5 – dramatically diminishes the autonomy of an individual. Since the autonomy of a PTSD defendant is diminished, their culpability shall be lesser than the culpability of a defendant of sound mind and complete autonomy. Second, even in malice crimes, a PTSD defendant shall not be treated as an ordinary defendant with sound mind. The PTSD defendant might intend to cause the conduct and the result of murdering someone, but his intention is rather flawed since it emanates from his mental illness. In this respect, the PTSD effect on the *mens rea* is similar to a defendant who committed the crime under the heat of passion. Both defendants lack *complete* control over their conduct and behavior. While a heat of passion defendant is provoked by a qualifying event that gives rise to that defense, a PTSD defendant is also triggered by an event or a place that reminds them of the stressor.

We further offer a five-step approach that could be followed in courts to place PTSD accurately in the spectrum of *mens rea*. Judges may utilize this five-step approach to reach a unified and coherent decisions in cases that involve individuals with PTSD. The analysis behind these five steps can also be adopted by state legislatures to clarify the effect of PTSD – and other similar mental disorders – on the degrees of *mens rea*.

First, a judge should consider – under the current criminal codes and MPC – whether there is an *actus reus* to the crime committed. Although the prosecution is burdened with

proving the *actus reus* beyond a reasonable doubt, many criminal law scholars have criticized courts for almost assuming the existence of *actus reus* by the existence of a conduct that resulted in a punishable crime. Yet there is a concrete difference between the existence of such an act and whether this act was a result of a voluntary or involuntary bodily movement.

As we pointed above, psychological and neuroscience findings regarding dissociative PTSD provide substantial evidence that an individual who suffers from a dissociative PTSD, acts involuntarily when confronted with a reminder of their subjective PTSD stressor. Accordingly, judges may first accept evidence of dissociative PTSD not for an affirmative insanity defense, and not to diminish the *mens rea*, but to assess whether an *actus reus* of the crimes exists. Since neuroscience and psychology have established the scientific fact that these individuals act involuntarily when they are in the middle of a dissociative episode, it is very unlikely for the prosecution to be able to prove the existence of *actus reus* beyond a reasonable doubt. In fact, a good prosecutorial practice would require the prosecution to dismiss the criminal charge in the first place if it was obvious – under the recent psychological findings – that no *actus reus* exists for the crime as the act was completely involuntary.

Although most courts apply dissociative PTSD to grant an insanity defense, its application on the *actus reus* has better outcomes to both the administration of justice and defendants with PTSD. Further, our approach in establishing evidence regarding dissociative PTSD can be both accurate and timesaving for courts. The defendant falls under the general PTSD category if they cannot prove that they suffer from dissociative PTSD under our evidentiary four-element test: 1) expert testimony and witness statements that the defendant suffers from dissociative PTSD before they have committed the crime; 2) that the defendant had experienced a dissociative state at least one time in the past; 3) that the defendant was under a dissociative state at the time they committed the crime; 4) that their dissociative state of PTSD was triggered by their perception of an environment or a situation that resembled their initial PTSD stressor.

Second, if the defendant does not suffer, or cannot prove that they suffer from dissociative PTSD, a defendant falls under the general non-dissociative PTSD category. The non-dissociative PTSD category encompasses all other subcategories of PTSD including BWS. A judge shall consider the effect of non-dissociative PTSD in the process of analyzing the *mens rea* of the crime. This requires a case-by-case approach since the spectrum of non-dissociative PTSD may vary from mild to severe effects on the defendant's autonomy and choice. Yet we provide a useful formula for judges to consider the effect of non-dissociative PTSD on the *mens rea*. As a first step, a judge shall generally allow expert evidence of PTSD as both relevant and compelling in any case where a defendant has claimed to suffer from non-dissociative or general PTSD if presented to argue their effect on the elements of *mens rea*.[231] However, a judge may deny such evidence if presented to argue diminished *mens rea* and was not pleaded affirmatively before trial.[232] Second, a judge shall qualify the evidence while considering whether the defendant possessed the elements of the *mens rea* required for the crime.[233] Third, a judge shall consider whether the expert testimony, witness statements, and other evidence regarding PTSD sufficiently hindered the autonomy and choice of the defendant.[234] If the evidence – taken in totality – sufficiently hindered the autonomy and the choice of a defendant, such PTSD evidence shall be sufficient to downgrade the *purposely and knowingly* contour of *mens rea* to the lowest category of *mens rea* of *negligent, reckless,* or *involuntary*. This becomes critical during jury instructions. If a judge does not give clear instructions to the jury to distinguish between the classes of *mens rea* correspondent to the factual matrix of the case, that may lead to a reverse

[231] *See* e.g., State v. Clark, 389 P. 3d 462, par. 467. The appellate court opined that: "However, expert opinion testimony that a defendant has a mental disorder that impaired the defendant's ability to *form* the requisite mens rea is relevant only to diminished capacity. Diminished capacity must be affirmatively pleaded before trial, and in this case, Clark specifically disavowed any intent to plead diminished capacity. The court thus properly allowed relevant observation testimony tending to rebut the State's mens rea evidence and properly excluded expert testimony that was not relevant absent a diminished capacity defense. To the extent, if any, that the court unduly restricted the scope of allowable observation testimony by lay witnesses, Clark does not raise that issue on review. He does not otherwise show reversible error, and we therefore affirm."

[232] *Id.*

[233] *Id.*

[234] *State v. Bottrell*, 14 P.3d 164 (Wash. Ct. App. 2000).

decision by an appellate court.[235] It also results in extreme injustices to defendants whose actions are less culpable than knowledgeable and willful defendants.[236]

In case the non-dissociative PTSD evidence does not significantly hinder the autonomy or choice of a defendant, a judge may only consider such PTSD evidence to negate a specific intent crime (same as involuntary intoxication and the heat of passion) and malice crimes that require an ill-intent. Thus, in such case, the *mens rea* may be downgraded from the highest category of specific intent and malice to the general intent *reckless* category. That is because defendants with "mild" PTSD still are not fully capable of making a free choice that may qualify to be *purposeful and knowing*, yet they are still conscious enough about their act to be held accountable.[237]

Third, a judge who finds that both the *actus reus* and *mens rea* are sufficiently established, may consider the non-dissociative PTSD evidence while assessing a self-defense argument. In *State v. Kelly*, the New Jersey Supreme Court examined whether expert testimony about battered woman syndrome (BWS) is admissible to establish a claim of self-defense in a homicide case.[238] The court acknowledged that the question was one of first impression at the time.[239] The NJ Supreme Court held that the expert testimony on the battered woman syndrome is admissible to support a defense theory claiming that the defendant believed it was necessary to use deadly force to protect herself against death or serious bodily harm.[240] The factual matrix behind the case involves a battered woman who stabbed her husband with a pair of scissors after seven

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[235] *Id.*

[236] CRIMINAL LAW — WILLFUL BLINDNESS — NINTH CIRCUIT HOLDS THAT MOTIVE IS NOT AN ELEMENT OF WILLFUL BLINDNESS. — United States v. Heredia, 483 F.3d 913 (9th Cir.) (en banc), cert. denied, 76 U.S.L.W. 3303 (U.S. Dec. 11, 2007) (No. 07-5762). "The *Heredia* court, in failing to preserve the requirement that the willfully blind actor have a motive to avoid criminal punishment, removed an important protection for defendants. The concept of willful blindness is useful in providing a means to bring culpable actors to justice. But its use can cause an erosion of the mens rea standard, resulting in the unfair conviction of defendants whose actions are less culpable than those of the knowledgeable actor. To prevent such a result, courts should be careful to distinguish those willfully blind actors who are more like knowing actors from those who are more like reckless actors."

[237] *Clark, infra* note 253.

[238] *State v. Kelly*, 478 A. 2d 364 - NJ: Supreme Court 1984.

[239] *Id.*

[240] *Id.*

years of an abusive marriage.[241] During the marriage, the defendant was subject to periodical attacks by her husband.[242] The defendant was indicted for murder.[243] During the trial, the defendant asserted a self-defense argument through establishing her requisite state of mind by using an expert witness to testify about battered woman syndrome. The trial court held that the expert testimony regarding BWS was inadmissible on self-defense.[244] The NJ Supreme Court reversed and remanded after finding that the expert testimony evidence is admissible.[245]

In its analysis, the court carefully considered whether the expert testimony offered was relevant to the self-defense argument and whether it was offered by a reliable expert witness.[246] The court found the expert testimony on BWS relevant since it established that the defendant's belief in necessity to use deadly force at the time she committed the murder was both reasonable and honest.[247] The BWS expert testimony evidence

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[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id*; on the reliability of the expert witness, the court opined that: "the record before us reveals that the battered woman's syndrome has a sufficient scientific basis to produce uniform and reasonably reliable results as required by State v. Cavallo, and Evid.R. 56(2). The numerous books, articles and papers referred to earlier indicate the presence of a growing field of study and research about the battered woman's syndrome and recognition of the syndrome in the scientific field. However, while the record before us could require such a ruling, we refrain from conclusively ruling that Dr. Veronen's proffered testimony about the battered-woman's syndrome would satisfy New Jersey's standard of acceptability for scientific evidence. This is because the State was not given a full opportunity in the trial court to question Dr. Veronen's methodology in studying battered women or her implicit assertion that the battered-woman's syndrome has been accepted by the relevant scientific community. Finally, before expert testimony may be presented, there must be a showing that the proffered expert witness has sufficient expertise to offer the intended testimony. State v. Cavallo, supra, 88 N.J. at 516. In this case, it appears that Dr. Veronen is qualified to testify as an expert. She has a Ph.D. in clinical psychology, as well as an M.A. from North Texas State. She is a member of four professional associations. As of 1980, when she was offered as a witness at Ms. Kelly's trial, Dr. 212*212 Veronen had been an assistant professor at the medical school at the University of South Carolina for three years. Twenty percent of her time at the Universty was spent teaching, some of it on topics related to the battered-woman's syndrome, and 80% of her time was spent conducting research, most of it on the psychological reaction of women who are victims of violent assaults. She had spent two years studying the battered-woman's syndrome, with the goal of changing the patterns of fear and anxiety of battered women. Dr. Veronen is a clinical psychologist, licensed to practice in two states, and in that capacity had, by 1980, treated approximately thirty battered women and seen seventy others. Because these thirty women have several important characteristics in common with Ms. Kelly (the thirty women had all been in battering relationships for more than two years, were beaten more than six times, and were within the same age group as Ms. Kelly), Dr. Veronen is familiar with battered women who share Ms. Kelly's background."
[247] *Id.*

established the scientific fact that the defendant and other women who suffer from BWS have an altered state of mind whereby they honestly and reasonably fear death or serious bodily harm by their partners.[248]

Furthermore, the court adequately analyzed the relevance and effect of the battered defendant's state of mind on the reasonableness requirement of self-defense as follows: "[w]e also find the expert testimony relevant to the reasonableness of defendant's belief that she was in imminent danger of death or serious injury. We do not mean that the expert's testimony could be used to show that it was understandable that a battered woman might believe that her life was in danger when indeed it was not and when a reasonable person would not have so believed, for admission for that purpose would clearly violate the rule set forth in *State v. Bess*... Expert testimony in that direction would be relevant solely to the honesty of defendant's belief, not its objective reasonableness. Rather, our conclusion is that the expert's testimony, if accepted by the jury, would have aided it in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life."[249]

The court further clarified the limitations for using such evidence by restricting it to the expert's opinion on whether the defendant 1) has a battered woman syndrome; 2) explaining the BWS in detail 3) and relating its characteristics to the defendant to establish if the defendant feared for her life at the time.[250] This expert evidence shall aid the jury in deciding whether the defendant has acted in self-defense, with reasonableness and honesty where she thought her aggression was necessary at the time she committed the crime.[251] This approach was justified on the ground that the jury members – composed of lay people – are often helpless in dealing with subjects that are outside common knowledge.[252]

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[248] *Id.* at 203.
[249] *Id.* at 204.
[250] *Id.*
[251] *Id.*
[252] *Angel v. Rand Express Lines, Inc.*, 66 N.J. Super. 77, 85 (App.Div. 1961).

Nonetheless, it is worth noting that states cannot use their ability to shift the burden of proving the elements of the crime on a claim of self-defense.[253] In *Martin v. Ohio*, the US Supreme Court found that "… if the jury were disallowed from considering self-defense evidence for purposes of deciding the elements of the offense, it "would relieve the State of its burden and plainly run afoul of *Winship*'s mandate."

Finally, the fourth stage concerns the jury instructions. Judges should provide in their legal instructions to the jury the effect of PTSD evidence on the elements of *mens rea*. A judge may benefit from our analysis discussed in the second stage regarding the effect of PTSD on the contours of *mens rea*.

While it may seem that what we are proposing contradict with the text and purpose of the Insanity Reform Act, in fact, it does not. As the Third Circuit court has argued, the IRA prohibited judges from considering such evidence to assess whether a defendant could form the *mens rea*, yet it allowed judges to consider such evidence of diminished culpability in assessing whether the elements of the crime's *mens rea* existed and to give instructions to the jury towards a mitigated sentence.[254]

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[253] Martin v. Ohio, 480 U. S. 228, 233-234 (1987).

[254] *US v. Pohlot*, 827 F. 2d 889 - Court of Appeals, 3rd Circuit 1987; the Third Circuit court opined that: "[a]lthough we reject the government's broader argument, the Senate Report makes clear that § 17(a) does preclude defenses akin to partially diminished capacity or diminished responsibility. Senate Report at 229 (§ 17(a) abolishes "diminished responsibility" defense); see also 130 Cong.Rec. S 425 (daily ed. Jan. 30, 1984) (comments of Senator Laxalt) (§ 17(a) abolishes "diminished capacity" defense). The Senate Report indicates disapproval in this context not just of the creation of actual technical defenses but also of presenting the jury with "needlessly confusing psychiatric testimony." As the House Report and floor statements of Senator Hatch indicate, see supra typescript at 22-23, Congress focused its disapproval on the version of diminished responsibility adopted by the California courts in the 1960's and 1970's. As the conflicting cases cited above indicate, the terms "diminished responsibility" and "diminished capacity" do not have a clearly accepted meaning in the courts. To the extent that American courts have adopted cognate doctrines, they generally have done so sub silentio. By reference to the careful work of many commentators heard and cited by Congress, however, we believe that we can identify the "diminished responsibility" defenses that Congress intended § 17(a) to prohibit. See Arenella, supra (cited in House Report at 15 n. 24); Morse, supra (cited in House Report on other issues at 11, 16 n. 28); see also Dressler, Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse, 75 J.Crim.L. & Criminology 953 (1984); Note, Diminished Capacity and Diminished Responsibility: Irreconcilable Doctrines Confused in State v. Wilcox, 14 Toledo L.Rev. 1399 (1983). The first variant of what courts have called "diminished capacity" defenses inappropriately is the evidentiary doctrine which we have already noted is not a defense at all but merely a rule of evidence; specifically, the admission of evidence of mental abnormality to negate mens rea. A second strain of diminished capacity permits a defendant to show not only that he lacked the mens rea in the particular case but also that he lacked the capacity to form the mens rea. Whether a defendant has the capacity to form mens rea is, of course,

The US Supreme Court had also considered whether obstructing evidence regarding the mental disorder suffered by a defendant that may have an effect on *mens rea* is in breach of due process under *Clark v. Arizona*.[255] In that case, Clark was charged with first-degree premeditated murder of a police officer in prison.[256] The defense used both expert testimony and witness statements to argue that Clark lacked the elements of *mens rea* under the Arizona statute since he suffered from schizophrenia at the time he committed the crime.[257] The trial court excluded the evidence and the jury found Clark guilty of first-degree murder.[258]

The US Supreme Court granted *certiorari* to answer two questions, one of which is our concern in this article: "whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea,* or guilty mind)."[259] The US Supreme Court *astonishingly* found no violation of due process in both instances.[260] Yet, it should be noted that the analysis of the US Supreme Court in Clark's decision is only restricted to whether excluding such evidence – under the fact pattern of the case – violates the due process and it does not extend to answer the question: how do such evidence affect the elements of *mens rea*.

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logically connected to whether the defendant possessed the requisite mens rea. Commentators have agreed, however, that only in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. See Arenella, supra, at 834. Even the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any mens rea requirement. Commentators have therefore argued that permitting evidence and arguments about a defendant's capacity to form mens rea distracts 904*904 and confuses the jury from focusing on the actual presence or absence of mens rea…. Finally, commentators have identified defenses generally categorized as "diminished responsibility" or "partially diminished capacity." Pure "diminished responsibility" exists in many European countries as a formal defense. It "permits the jury to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act."

[255] Clark v. Arizona, 548 US 735.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

Nevertheless, the majority opinion of the Court was a far cry from justice, fairness, and constitutionality. The Court simply built its conviction on three intertwined constructs of reasoning that we will summarize in simplicity. First, psychiatrists and psychologists can only testify on psychological findings and provide their expert opinion on whether the defendant suffers from a mental disorder.[261] Yet they cannot determine if the defendant possessed or lacked the necessary mental capacity to fulfill the *mens rea* prescribed by the statute.[262] Second, that the trial court has ample discretion to exclude evidence that may confuse or mislead the jury no matter how important and relevant their bearing on the defendant's *mens rea* or criminal culpability.[263] Third, that the jury can easily be misled or confused by the interplay between psychological findings (such as the defendant suffers from schizophrenia) and the required *mens rea* of the crime under the statute (e.g., first-degree murder requires a specific intent).[264] Instead of facing the hard question with concrete analysis, the Court chose the easiest answer, namely: restricting expert testimony to affirmative pleading of insanity because the jury *may* get confused and misled by this evidence.

More astonishingly, the Court made a strong distinction between the mental disorder or undermined mental state of the defendant and their *mens rea* to commit the crime – sacrificing all psychological findings in existence.[265] The Court's argument behind neglecting all psychological findings on human behavior was that psychologists produce their assessment of human behavior (including mental illness) for treatment purposes not for punishment purposes.[266] In contrast, the Court opined that the trial court is more aware of the *mens rea* required and its corresponding human behavior.[267] Yet the very core of the *mens rea* is grounded in human behavior and whether they possessed an autonomy to make a choice, and this latter is solely grounded in psychological factual findings.[268] This begs the question: how can the Court neglect the core psychological

[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*

science providing *facts* about human behavior while assessing the defendant's *mens rea*? The majority of the Court did not provide any answer to this question except that the Court is afraid that this evidence may mislead the jury in determining the *mens rea*.

On the other hand, Justice Kennedy, Justice Stevens, and Justice Ginsburg wrote a more sensible and daring opinion in their dissent. In their wise words: "[t]he issue is not, as the Court insists, whether Clark's mental illness acts as an "excuse from customary criminal responsibility," ..., but whether his mental illness, as a factual matter, made him unaware that he was shooting a police officer. If it did, Clark needs no excuse, as then he did not commit the crime as Arizona defines it. For the elements of first-degree murder, where the question is knowledge of particular facts—that one is killing a police officer—the determination depends not on moral responsibility but on empirical fact. Clark's evidence of mental illness had a direct and substantial bearing upon what he knew, or thought he knew, to be the facts when he pulled the trigger; this lay at the heart of the matter."[269]

The dissent opinion also counterargued the Court's opinion by referring to the Confrontation Clause under which such evidence – pertaining to the *mens rea* of the defendant – must be admissible.[270] The majority opinion basically barred all direct evidence regarding Clark's mental illness and their effect on *mens rea* from consideration, throwing all the defense theory out of place.[271] Furthermore, the majority opinion cared too much about the probability of confusing the jury by the expert evidence regarding mental illness, yet ignored the extreme risk of "misjudging an innocent man

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[269] *Id* at paras. 790-1.

[270] *Id.* at paras. 791-2. The dissent opinion provided that: "The trial court's exclusion was all the more severe because it barred from consideration on the issue of mens rea all this evidence, from any source, thus preventing Clark from showing he did not commit the crime as defined by Arizona law. Quite apart from due process principles, we have held that a bar of this sort can be inconsistent with the Confrontation Clause.See Delaware v. Van Arsdall, 475 U. S. 673 (1986). In Van Arsdall the Court held a state court erred in making a ruling that "prohibited all inquiry into" an event. Id., at 679. At issue was a line of defense questioning designed to show the bias of a prosecution witness. In the instant case the ruling in question bars from consideration all testimony from all witnesses necessary to present the argument that was central to the whole case for the defense: a challenge to the State's own proof on an element of the crime. The Due Process and Compulsory Process Clauses, and not the Confrontation Clause, may be the controlling standard; but the disability imposed on the accused is every bit as substantial and pervasive here as it was in Van Arsdall."

[271] *Id.*

guilty from refusing to consider this highly relevant evidence at all."[272] Moreover, the American Psychiatric Association stressed the crucial importance of psychiatric evidence on the facts regarding the mental abilities of a defendant and their bearing on deciding criminal cases.[273] Under Rehnquist, J., concurring opinion in *Mullaney v. Wilbur,* Rehnquist, J., the Court made clear that "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."[274] In other words, mental-illness evidence may be considered in both criminal responsibility regarding insanity and the consideration of *mens rea* elements of the crime.[275]

The dissenting opinion further argued that this has significant consequences on the burden of proof. While a defendant must prove insanity by clear and convincing evidence, the burden of proof is upon the prosecution to prove the *mens rea* elements of the crime beyond a reasonable doubt.[276] Finally, the dissent opinion concluded by recharacterizing the flaws of the majority opinion as follows: "the rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness. This rule has no rational justification and imposes a significant burden upon a straightforward defense: He did not commit the crime with which he was charged."[277]

Accordingly, the contours we proposed for the effect of non-dissociative PTSD on the *mens rea* do not contradict with the Insanity Reform Act. Moreover, they do not contradict with the US Supreme Court relevant decisions. This leaves us with the final recommendation: state legislatures must intervene and amend their criminal codes in light of our suggested contours as referred to above. Clarifying the interplay between PTSD and other similar mental disorders in the body of the criminal code will provide more clarity for courts when faced with a mentally ill defendant who lacks the criminal

[272] *Id.*
[273] *Id.*
[274] *Mullaney v. Wilbur*, 421 U. S. 684, 706 (1975) (Rehnquist, J., concurring).
[275] *Clark v. Arizona*, 548 US 735, paras. 797-8.
[276] *Id*; *In re Winship*, 397 U. S. 358, 364 (1970).
[277] Clark, 548 US 735, at paras. 800-1.

culpability of a mentally sound defendant without reaching the level of insanity. Further, this will bring about more justice in conformity with criminal theories of retribution and deterrence. That is because the philosophy behind criminal and penal codes is to provide a punishment that reflects the severity of the defendant's act constituting a crime. Thus, if a defendant's autonomy suffers from extreme turbulence that affect their ability to make a choice, that choice should not be punishable as if it was a result of perfect and complete autonomy.

CONCLUSION:

The current state of courts' consideration of psychological evidence regarding PTSD effect on criminal culpability is chaotic. It does not reflect what has become widely acknowledged by psychology and neuroscience scientific communities regarding the PTSD effect on individual behavior, which inherently affects the degree of criminal culpability.

Courts mistakenly consider dissociative PTSD effect on *mens rea* rather than on *actus reus*, despite rendering an act involuntary and sharing explicit characteristics with examples of involuntary acts under the MPC. This has led to a wide-ranging consequence including a vicious non-breakable circle of mischaracterization. Since courts tend to consider dissociative PTSD evidence as part of an NGRI plea, defense attorneys find themselves encouraged to use dissociative PTSD evidence affirmatively in an insanity plea, which furthers the mischaracterization of courts. The defense attorneys' attitude is understandable, since NGRI plea must be made affirmatively before trial. Nonetheless, we suggest that attorneys additionally incorporate dissociative PTSD evidence as a counterargument to the prosecution evidence regarding the existence of *actus reus*.

Further, some courts (such as California courts) have obstructed the PTSD evidence except in cases where it is used to negate a specific intent crime. Yet other courts, such as the third Circuit courts, have accepted the PTSD evidence to prove

whether the elements of the *mens rea* of the charged crime have been met by the defendant rather than if the latter has the capacity to form the intent or not.

On the other hand, the US Supreme Court decided that the obstruction of psychiatric evidence regarding PTSD, or any other mental disorder, does not violate the due process clause since it alleviates the chances of confusing the jury. Yet, as the dissent opinion had argued, the obstruction of PTSD and mental disorder evidence may violate the Confrontation clause since it prevents a defendant from arguing their diminished culpability or whether the elements of the crime charged have been satisfied. Moreover, the dissent opinion acknowledged that the jury is entrusted with all evidence submitted by the defendant so long as they meet the admission standards of the courts.

Finally, we provided a clear pathway for courts to follow in order to adequately consider the criminal culpability of the defendant without violating the confrontation clause. Our four-step pathway guarantees – to some extent – that courts would not mischaracterize or obstruct relevant evidence in instructing the jury to enable them to reach a fair verdict. We also encourage statutory changes to outdated criminal culpability standards to consider the recent findings of psychology and how they affect the levels of criminal culpability: specific intent, purposeful, knowing, recklessness, and negligence. Both states legislatures and circuit courts are encouraged to follow or adopt our pathway to amend the current criminal codes and to apply them in a way that brings more fairness to mentally ill defendants who do not qualify for an insanity defense. We proposed two methods for this reform. First, legislating the effect of PTSD (and other similar mental illnesses) on the general contours of *mens rea* (specific intent, malice, knowingly, purposefully). States' legislatures may benefit from our analysis in the last part of this research to place the effect of PTSD accurately on the spectrum of *mens rea*. Second, we proposed a five-step approach to be utilized by judges – derived from a review of multiple courts' decisions and the most recent findings in psychology and neuroscience.