KAHLER V. KANSAS: A DEFENSE DENIED

ABSTRACT

The roots of the insanity defense date back to ancient times, and the defense is repeatedly discussed in English common law. The U.S. Supreme Court, however, refuses to provide a bare minimum threshold for the defense, despite the fact that the essence of it lies in principles that should be ranked as fundamental. James Kahler, the defendant in *Kahler v. Kansas*, challenged Kansas's treatment of the insanity defense as unconstitutional. Kansas only allows evidence of mental illness to negate the requisite *mens rea* for a crime or to show that defendants are not aware of the nature of their acts. Notably, evidence that defendants do not realize their actions are wrong cannot be submitted in support of the insanity defense. The Court held that Kansas's treatment of the insanity defense was constitutional because the "moral incapacity" test, which asks whether defendants knew their conduct was morally wrong, could not be ranked as fundamental among our legal history.

This Comment first argues that the "right and wrong" test, which asks whether defendants acted with the knowledge that their conduct was wrong, dates back to ancient texts about legal responsibility, supporting the conclusion that such a test should be ranked as fundamental within our legal history. This Comment then transitions to an argument that the primary reason that the majority and the dissent come to different conclusions is because the two opinions apply different meanings of the term *mens rea*, and that the dissent has the right interpretation. Next, this Comment argues that the approach to insanity that Kansas employs does not pass constitutional muster, as it does nothing more than afford the defendant a right to present evidence that he did not possess the necessary *mens rea*, a right which is available to every defendant, mentally ill or otherwise. Finally, this Comment asserts that not setting the moral incapacity standard as the baseline of the insanity defense is inconsistent with well-established and accepted common law defenses such as infancy and duress. As such, this Comment argues that the constitutional threshold of the insanity defense, at the very least, should be that defendants possess the ability to discern between right and wrong at the time of the committed crime.

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INTRODUCTION

"Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms."[1] In *Powell v. Texas*,[2] the U.S. Supreme Court declined to establish constitutional limits to the doctrine of insanity.[3] This line is often quoted throughout U.S. jurisprudence surrounding the insanity defense.[4] However, when courts use this quotation to justify declining to set bare thresholds to provide any sort of legal fairness to those with a mental illness, the last, more hopeful line of the opinion is consistently forgotten: "It is simply not *yet* the time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear to either doctors or lawyers."[5] The Court decided *Powell* in 1968.[6] Fifty-three years later, the time to establish constitutional thresholds is here.

The insanity defense in U.S. common law dates back to 1300s English law.[7] However, the legal and moral reasoning supporting the necessity

1. 392 U.S. 514, 536 (1968).
2. *Id.*
3. *Id.* at 536–37.
4. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1028 (2020); State v. Delling, 267 P.3d 709, 716 (Idaho 2011); State v. Bethel, 66 P.3d 840, 848 (Kan. 2003).
5. *Powell*, 392 U.S. at 537 (emphasis added).
6. *Id.* at 514.
7. *Good Law | Bad Law: Is the Insanity Defense Constitutional? A Conversation with Stephen Morse*, PODBEAN (Nov. 22, 2019), https://www.podbean.com/media/share/pb-vztf3-c889c6?utm_campaign=w_share_ep&utm_medium=dlink&utm_source=w_share [hereinafter *Good Law, Bad Law*]; Sheila Hafter Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 559 (1972); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004–07 (1932).

of the defense[8] and the defense itself is "ancient" in other civilizations.[9] In U.S. law, every state and federal jurisdiction offered an affirmative defense of insanity until 1979.[10] An affirmative defense of insanity means that defendants may be acquitted by reason of insanity, despite the prosecution proving that the defendant committed every element of the crime.[11] In most modern U.S. jurisdictions, defendants carry the burden of proving their insanity.[12] In 1995, Kansas became the fourth state to abolish the affirmative defense of insanity.[13] Thus, in Kansas, the only evidence of mental illness defendants may set forth as a defense is evidence that their mental illness negated the requisite *mens rea* for the charged crime.[14]

This method of introducing evidence in an attempt to negate the requisite intent is called the "*mens rea* approach."[15] This approach intersects with an insanity test called the "cognitive incapacity" test.[16] The cognitive incapacity test asks whether defendants were capable of understanding the "nature and quality" of their criminal acts.[17] These two approaches blur together because they are intrinsically connected; the *mens rea* approach only allows evidence of cognitive incapacity because defendants can only negate their *mens rea* if they did not know what they were doing.[18] Without that knowledge, the prosecution cannot prove intent.[19] The difference

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8. Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 161 (1994) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002), *holding modified by* Boyde v. California, 494 U.S. 370 (1990)).

9. Stephanie C. Stimpson, State v. Cowan*: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 504 (1994).

10. Amy Howe, *Argument Preview: Justices to Hear Challenge to Lack of Insanity Defense*, SCOTUSBLOG (Sept. 30, 2019, 4:18 PM), https://www.scotusblog.com/2019/09/argument-preview-justices-to-hear-challenge-to-lack-of-insanity-defense/; *see also* Stephen M. LeBlanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1283–89 (2007).

11. LeBlanc, *supra* note 10, at 1290.

12. Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1517 (2002).

13. *Id.* at 1520. Kansas passed the bill in 1995 and it took effect on January 1, 1996. *See* State v. Bethel, 66 P.3d 840, 844 (2003) (quoting State v. Jorrick, 4 P.3d 610, 610 (2000)). "Abolish" refers to the elimination of a plea "not guilty by reason of insanity." Lisa Callahan, Connie Mayer, & Henry J. Steadman, *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 54 (1987). Kansas originally enacted the statute under KAN. STAT. ANN. § 22-3220 (2007) (repealed 2011). Kansas slightly reworded the statute and moved it to a different section. *See* KS Legis. Summ., 2010 Reg. Sess. H.B. 2668; KS Gov. Mess., 5/18/2010. There are no substantial differences between the two versions. *See* KAN. STAT. ANN. § 21-5209 (2021) ("It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.").

14. KAN. STAT. ANN. § 21-5209 (2021); Kahler v. Kansas, 140 S. Ct. 1021, 1025 (2020).

15. Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 460–61 (2008).

16. *Kahler*, 140 S. Ct. at 1025; *see* Finger v. State, 27 P.3d 66, 75 (Nev. 2001).

17. M'Naghten's Case, 8 Eng. Rep. 718, 722, 10 Cl. & Fin. 200, 209–10 (HL 1843).

18. *Kahler*, 140 S. Ct. at 1025.

19. *See* Nusbaum, *supra* note 12, at 1521 (quoting Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 261 (1999)) ("In order for a mentally ill offender to be excused under the mens rea approach, she must establish mental incapacity which prevents her from formulating the mens rea of the crime.").

between the *mens rea* approach and the approach used by a majority of U.S. jurisdictions—which allow insanity as an affirmative defense—is the absence of the "moral incapacity" test, which asks not whether defendants knew what they were doing, but whether they knew their acts were morally wrong.[20] In *Kahler v. Kansas*,[21] the defendant argued that, as a matter of due process, defendants with mental illness should be entitled to the moral incapacity test.[22] For the entirety of U.S. Supreme Court insanity defense jurisprudence, the Court has refused to draw constitutional lines delineating the insanity defense.[23] The Court continued this trend in *Kahler*, reasoning that the moral incapacity test could not be ranked as a fundamental constitutional right under U.S. common law tradition.[24]

In Parts I and II, this Comment reviews the Court's decisions surrounding defenses rooted in mental illness and provides a description of the Court's opinion in *Kahler*. This Comment argues in Section III.A that the essence of the moral incapacity test—whether the defendant was capable of distinguishing between right and wrong—is so rooted in U.S. common law that it should be ranked as fundamental. In Section III.B, this Comment argues the difference in opinion between the majority and the dissent is grounded in a misunderstanding of the meaning of the term *mens rea* in thirteenth- to seventeenth-century common law. Section III.C argues the *mens rea* approach does not provide due process for defendants with mental illness. In Section III.D, this Comment argues that denying the moral incapacity test as a defense for defendants with mental illness is fundamentally at odds with allowing other affirmative defenses derived from the common law, such as infancy and duress, which U.S. courts universally accept.

I. BACKGROUND

Criminal common law is based on a presumption of free will.[25] Jurisprudence reflects the belief that only those individuals who choose to act

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20. Henry F. Fradella, *How* Clark v. Arizona *Imprisoned Another Schizophrenic While Signaling the Demise of Clinical Forensic Psychology in Criminal Courts*, 10 N.Y. CITY L. REV. 127, 132 (2006); M'Naghten's Case, 8 Eng. Rep. 718, 722, 10 Cl. & Fin. 200, 209–10 (HL 1843).

21. *Kahler*, 140 S. Ct.

22. *Id.* at 1027.

23. *See infra* notes 78–88 and accompanying text.

24. *Kahler*, 140 S. Ct. at 1037.

25. Morissette v. United States, 342 U.S. 246, 250 (1952); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 14 (1736) ("[M]an is naturally endowed with these two great faculties, understanding and liberty of will. . . ."); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 426 (1939); S. S. Glueck, *Ethics, Psychology and the Criminal Responsibility of the Insane*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 208, 208 (1923); Sayre, *supra* note 7, at 1013; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 611 (1990); Heathcote W. Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 690 (1976); Demetrios Agretelis, *"Mens Rea" in Plato and Aristotle*, 1 ISSUES IN CRIMINOLOGY 19, 32–33 (1965); Albert Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 578 (1922). This Comment does not intend to partake in the free will versus determinism debate, primarily because such a debate, for the most part, did not occur during the relevant time period.

in a way that is morally blameworthy should be held criminally responsible.[26]

The affirmative defense of insanity dates back to the 1300s.[27] This defense, if successfully proven, precludes a finding of culpability and mandates a verdict of "not guilty by reason of insanity," despite the prosecution proving the defendant with a mental illness satisfied each element of the crime.[28] The established common law legacy of the defense is documented by prominent common law jurists such as Henry de Bracton, Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone.[29]

De Bracton's thirteenth century writings discussed how a "madman" cannot commit unlawful conduct because he lacks reason and judgment.[30] Next, Coke's early seventeenth century writings stated that a "madman" could not be found culpable for his bad acts.[31] Hale, who also wrote in the seventeenth century, thought that defendants who are insane could not possess the requisite "understanding" and subsequent free will that dictated criminal liability.[32] Finally, Blackstone, an eighteenth century writer, stated that criminal liability required a blameworthy will in addition to a blameworthy act.[33] More explicitly, he explained that murder must be committed by those of sound discretion.[34] All four of these common law jurists likened insane people to children and similarly analyzed their

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26. *See* RITA JAMES SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 4–5 (1988).

27. *Good Law, Bad Law*, *supra* note 7.

28. Angela Paulsen, *Limiting the Scope of State Power to Confine Insanity Acquittees:* Foucha v. Louisiana, 28 TULSA L.J. 537, 549 (1993).

29. *See* HENRY DE BRACTON, 2 BRACTON ON LAWS AND CUSTOMS OF ENGLAND 424 (S. Thorne transl. 1968); 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND § 405, p. 247(b) (1628); HALE, *supra* note 25, at 14–15; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 195–96 (1769).

30. *See Bracton Online*, HARV. L. SCH. LIBR., https://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/424.htm (last visited Apr. 20, 2021).

31. COKE, *supra* note 29, at 247(b).

32. HALE, *supra* note 29, at 14–15. It is important to note that "insanity [is] primarily a legal concept, not a scientific one." Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 134 (1984). References to "insanity" or "people who are insane" in this Comment refer to the legal meanings of those terms.

33. BLACKSTONE, *supra* note 29, at 195–96.

34. *Id.*

> Murder is, therefore, now thus defined or rather described by Sir Edward Coke: "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought either express or implied." The best way of examining the nature of this crime will be by considering several branches of this definition.
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> First, it must be committed by a *person of sound memory and discretion*; for lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.
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> Next, it happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder.

Id.

culpability under the theory that individuals with mental illness, like children, could not possess the requisite discretion to distinguish good from evil.[35]

Continuing through the common law, in 1843, English judges created the *M'Naghten* rule.[36] This rule was created when Daniel M'Naghten assassinated Edward Drummond, a secretary to the Prime Minister, Sir Robert Peel.[37] M'Naghten mistakenly thought Drummond was Peel.[38] He claimed that he shot Drummond under the delusion that Peel's political party was plotting to kill him.[39] M'Naghten intended to kill Peel; however, his motive was formed by a delusion stemming from his mental illness.[40] A British court acquitted M'Naghten.[41] The acquittal enraged both the public and Queen Victoria.[42] Three years prior, Queen Victoria was the target of an assassination attempt, and a court also acquitted her assailant on insanity grounds.[43] After M'Naghten's acquittal, Queen Victoria directed the House of Lords to ask fifteen judges to provide a legal opinion delineating England's insanity defense.[44] Thus, the *M'Naghten* rule does not originate from the holding of M'Naghten's trial but from the subsequent opinion of the judges.[45]

Under the *M'Naghten* rule, a defendant must be acquitted if the defendant "labour[ed] under such a defect of reason, from disease of the mind, [1] as to not know the nature and quality of the act he was doing; or, [2] if he did know it, that he did not know he was doing what was wrong."[46] Part one of the *M'Naghten* rule is referred to as "cognitive incapacity" and part two is referred to as "moral incapacity."[47] This articulation of the insanity defense proved influential, and this test has become the most popular approach to the insanity defense in the United States.[48]

The difference between cognitive incapacity and moral incapacity is subtle but vital. The quintessential example of cognitive incapacity is the defendant who believed he squeezed a lemon but actually strangled

35. *Id.* at 343; DE BRACTON, *supra* note 29, at 424; COKE, *supra* note 29, at 247(b); HALE, *supra* note 25, at 14–30.

36. RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 1 (1981).

37. *Id.*

38. Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 123 (2018).

39. MORAN, *supra* note 36, at 1; *Good Law, Bad Law*, *supra* note 7.

40. *Good Law, Bad Law*, *supra* note 7.

41. Garvey, *supra* note 38, at 125.

42. Stimpson, *supra* note 9, at 506.

43. Garvey, *supra* note 38, at 127.

44. *Id.*

45. Cynthia G. Hawkins-Léon, *"Literature as Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 391 (1999).

46. MORAN, *supra* note 36, at 2.

47. Clark v. Arizona, 548 U.S. 735, 747–48 (2006); Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R. 4th 526 § 2[a] (1981).

48. MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 219 (1984).

another human.[49] The defense centers around whether defendants understand the nature and quality of their actions.[50] Conversely, the moral incapacity defense centers around whether defendants knew that their conduct was morally wrong.[51] An example of this that made headlines was a mother who, under an insane delusion, believed that she had to kill her children to save their souls from the devil.[52] The mother faced a "psychotic dilemma," and stated that "[the children] had to die to be saved."[53]

These two tests were only the starting point, paving the way for more expansive and encompassing versions of the test to be created.[54] An example of this is the "irresistible impulse" test.[55] This test allows protection for defendants with mental illness who know that their actions were wrong but were nonetheless compelled by their mental illness to act.[56] The test focuses on whether defendants have lost the capability to *choose* between right and wrong.[57] The irresistible impulse test works under the theory that criminal law is predicated on the assumption of autonomy and free agency of all people; something this test argues certain defendants with mental illness do not possess.[58] The next test is the "product of mental illness" test, which provides that a defendant should be found insane for any crime that is the product of a mental illness;[59] however, because of the breadth

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49. *See* Rosen, *supra* note 19, at 261; Wales, *supra* note 25, at 690; Harv. L. Rev., *Due Process — Insanity Defense — Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges. —* State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990)*, 104 HARV. L. REV. 1132, 1135–36 (1991); Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1088 (2007); Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. Rev. 283, 287–88 (1988); Fradella, *supra* note 20, at 132; Jenny Williams, Comment, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M'Naughten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense [*State v. Bethel*, 66 P.3D 840 (Kan. 2003)]*, 44 WASHBURN L.J. 213, 223 (2004).

50. Rosen, *supra* note 19, at 262. Some commentators group the cognitive incapacity and moral incapacity tests together as one test and refer to both aspects as cognitive incapacity. Craig A. Stern, *The Heart of Mens Rea and the Insanity of Psychopaths*, 42 CAP. U. L. REV. 619, 643–44 (2014).

51. Rosen, *supra* note 19, at 254.

52. Phillip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 CLEV. ST. L. REV. 147, 149 (2007).

53. *Id.* at 150.

54. Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 319–20 (2003).

55. *Id.* at 319. One of the leading and earliest U.S. cases enunciating this test is *Parsons v. State*, 2 So. 854, 859 (Ala. 1887). *See* 2 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 8:5, n.2 (2020–2021 ed. 2020).

56. Jodie English, *The Light between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 2–3 (1988).

57. Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1383–84 (1986).

58. *Id.* at 1383 (citing Parsons v. State, 2 So. 854, 859 (Ala. 1886)). This Comment does not discuss whether the irresistible impulse defense should similarly be ranked as fundamental. However, for a compelling argument that this defense should be ranked as fundamental, see generally English, *supra* note 56, at 30–31.

59. Slobogin, *supra* note 54, at 320.

of this test, it is now seldom available to defendants.[60] These two tests fall under the broader category of "volitional tests" because they focus not on whether defendants knew right from wrong or the nature of their actions, but on whether the mental illness impaired their ability to exercise free will.[61]

Prior to 1979, every U.S. jurisdiction offered the affirmative defense of insanity.[62] The affirmative defense was not the only mechanism available to defendants to introduce evidence of a mental illness because defendants could always utilize the previously discussed *mens rea* approach.[63] In 1979, Montana was the first state to statutorily abolish the affirmative defense of insanity.[64] Montana overcame constitutional challenges to abolition by still allowing evidence of mental illness through the *mens rea* approach.[65] Idaho, Utah, Kansas, and Alaska have since followed suit.[66]

After Montana, the states that abolished their insanity defenses were likely influenced by John Hinckley's assassination attempt on

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60. *Id.*

61. Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 974–75 (1996). Only New Hampshire still uses the product of mental illness test. *See id.* at 974; State v. Fichera, 903 A.2d 1030, 1034 (2006).

62. Nusbaum, *supra* note 12, at 1518. It is noteworthy that the defense is rarely asserted and even more rarely successful. *See, e.g.*, Christina A. Studebaker, *Evaluating the Insanity Defense: Identifying Empirical and Moral Questions*, 5 U. CHI. L. SCH. ROUNDTABLE 345, 345 (1998) (citing Lisa A. Callahan, Henry J. Steadman, Margaret A. McGrevy, & Pamela Clark Robbins, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991)). The defense is only successful in "a fraction of one percent of all cases." MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 2 (1994); *see also* Arthur J. Lurigio, *Examining Prevailing Beliefs About People with Serious Mental Illness in the Criminal Justice System*, 75 FED. PROB. 11, 12 (2011) ("Fewer than 1 percent of criminal defendants proffer the insanity defense, and only a small percentage are successful[.]"); DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN, BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CIRCLE OF AGGRESSION 28 (1999) ("[F]ewer than 1 percent of defendants facing felony indictments resort to the insanity defense; of these, no more than one-quarter are successful."). Additionally, those who unsuccessfully plead this defense are typically subject to harsher punishments than similarly situated defendants who do not assert the defense. PERLIN, *supra*, at 4.

63. Nusbaum, *supra* note 12, at 1518.

64. Elizabeth Bennion, *Death is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under* Graham v. Florida, 61 DEPAUL L. REV. 1, 41 (2011); Stimpson, *supra* note 9, at 503, 510. Research conducted in Montana demonstrates that the abolition of the insanity defense led to more dismissals (26% pre-enactment versus 86% post-enactment) of defendants who would likely be found not guilty by reason of insanity under the previous mechanism. George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 L. & PSYCH. REV. 69, 99–100 (1994) (citing and discussing Henry J. Steadman, Lisa A. Callahan, Pamela C. Robbins, & Joseph P. Morrissey, *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCH. 357, 357–60 (1989)). This leads to the conclusion that "Montana merely adopted another means of dealing with defendants who might have been found" not guilty by reason of insanity (NGRI) prior to abolition. *Id.*

65. INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS 12 (1984).

66. *See, e.g.*, ALASKA STAT. ANN. §§ 12.47.010(a), 12.47.020(a) (West 2020); Andrew P. March, *Insanity in Alaska*, 98 GEO. L.J. 1481, 1497–99 (2010); Nusbaum, *supra* note 12, at 1520. Nevada also statutorily abolished the defense; however, the Nevada Supreme Court found this unconstitutional under both the state constitution and the federal Constitution. Finger v. State, 27 P.3d 66, 68, 86 (Nev. 2001). The court held that while neither Constitution mandated "that the issue of insanity be procedurally litigated as an affirmative defense[,]" that "an individual who lacks the mental capacity to form the requisite intent or *mens rea* of a criminal offense cannot be convicted of that offense without violating the due process provisions of the United States and Nevada Constitutions." *Id.* at 86.

then-President Ronald Reagan.[67] Many witnesses saw the shooting both in person and on television.[68] During his 1982 trial, Hinckley asserted the insanity defense.[69] He succeeded and the court found him not guilty by reason of insanity.[70] The acquittal caused public outrage.[71] After Hinckley's trial,[72] thirty-six states (all of which had previously authorized some version of the insanity defense) reformed their insanity defense test or completely abolished it.[73]

This outrage is most clearly demonstrated by the Idaho state legislature's repeal of the defense only months after Hinckley's trial.[74] Moreover, the federal government responded by passing the Insanity Defense Reform

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67. *See* Christopher Liberati-Conant & Sheila E. Shea, *'You Have to Be Crazy to Plead Insanity': How an Acquittal Can Lead to Lifetime Confinement*, 91 N.Y. ST. BAR ASS'N J. 28, 29 (2019); THE NAT'L COMM'N ON THE INSANITY DEF., MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 5 (1983) [hereinafter MYTHS & REALITIES]. Commentators frequently note that changes in insanity laws occur because of adverse reaction to high-profile cases. *See* Blau & Pasewark, *supra* note 64, at 70, 106 ("Statutory alterations often appear to be cosmetic reactions to notorious cases and do not often produce substantive changes in the disposition of these defendants."); Perlin, *supra* note 25, at 609 (quoting Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) ("Just as '[c]onstitutional law tends to define itself through reaction to great cases,' insanity defense jurisprudence tends to define itself through reaction to scandalous, sensational, hysteria-creating, or outrageous cases.").

68. *See* SIMON & AARONSON, *supra* note 26, at 1.

69. Jessica Harrison, Comment and Case Note, *Idaho's Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 584 (2015).

70. *Id.*

71. KEILITZ & FULTON, *supra* note 65, at 3.

72. Commentators frequently discuss the similarities between the M'Naghten case and the acquittal of John Hinckley. *See* PERLIN, *supra* note 62, at 25; Yale Kamisar, *The Assassination Attempt*, 27 L. QUADRANGLE NOTES 1, 2 (1982); Michael Edmund O'Neill, *Stalking the Mark of Cain*, 25 HARV. J.L. & PUB. POL'Y 31, 46 (2001); Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 42 (1997); SIMON & AARONSON, *supra* note 26, at 12; English, *supra* note 56, at 6–8.

73. Harrison, *supra* note 69, at 585. Additionally, more than twenty jurisdictions adopted the "guilty but mentally ill" (GBMI) standard. Bradford H. Charles, *Pennsylvania's Definitions of Insanity and Mental Illness: A Distinction with a Difference?*, 12 TEMP. POL. & C.R. L. REV. 265, 268 (2003) (collecting cases). Michigan became the first state to create this new standard in 1975. Blau & Pasewark, *supra* note 64, at 87. Similar to the reaction to the acquittal of John Hinckley, Michigan created GBMI as a reaction to public outrage. *See* Bradley D. McGraw, Daina Farthing-Capowich, & Ingo Keilitz, *The Guilty but Mentally Ill Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 124 (1985). The Michigan Supreme Court struck down a state statute, which led to the release of 270 individuals who had successfully asserted the insanity defense. *Id.* Following the release of the individuals, one acquittee raped two women and another acquittee murdered his wife. *Id.* The key distinction between an NGRI verdict and a GBMI verdict is that, in a GBMI verdict, the defendant does not need to be found legally insane, but only to be experiencing a mental illness. SIMON & AARONSON, *supra* note 26, at 188–89. If a defendant is convicted of GBMI, then the court imposes a sentence "as if the individual were found guilty." Blau & Pasewark, *supra* note 64, 87–88. Theoretically, the government will then provide mental health treatment. *Id.* at 88. Under a GBMI verdict, the defendant serves the entirety of the sentence, even after completing mental health treatment. *Id.* Importantly, Simon and Aaronson found that, in states that offer GBMI, "there is no guarantee that psychiatric treatment will be provided to defendants found GBMI." SIMON & AARONSON, *supra* note 26, at 193; *see also* MYTHS & REALITIES, *supra* note 67, at 26 ("[M]ental health treatment is no more available to those found 'guilty but mentally ill' than for other convicted persons.") (explaining the findings of The National Commission on the Insanity Defense on GBMI).

74. *See* Harrison, *supra* note 69, at 584–85. Notably, the federal government originally made efforts to abolish the federal insanity defense. Elkins, *supra* note 8, at 154. However, this intention was abandoned when even the Reagan administration (which initially advocated strongly and loudly for abolition) no longer called for the defense's abolition and instead supported the Insanity Defense Reform Act. PERLIN, *supra* note 62, at 25.

Act of 1984,[75] which created a new standard of insanity that essentially returned to the *M'Naghten* rule while adding language from other tests.[76] More notably, this legislation shifted the burden of proof in proving insanity.[77] Instead of requiring the prosecution to prove the sanity of defendants "beyond a reasonable doubt," defendants must now prove their insanity by "clear and convincing evidence."[78] While state and federal legislatures have restructured and set limits on the insanity defense, the U.S. Supreme Court has been cautious against constitutionally delineating the defense.[79]

Historically, the U.S. Supreme Court has been reluctant to define insanity tests and standards in constitutional terms.[80] To start, there is a high constitutional standard to overcome: a state criminal law only violates due process if it "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental."[81] For example, the defendant in *Leland v. Oregon*[82] challenged the state's use of the moral incapacity test, and argued that the state should require the broader volitional incapacity test.[83] The Court rejected this argument because of lack of scientific knowledge about mental illness and questions of basic policy, which it reasoned were reserved for the states.[84] The defendant also argued that proving insanity beyond a reasonable doubt was too high of a burden.[85] The Court rejected this argument because the burden of proof the defendant advocated for was not ranked as fundamental within our criminal justice system.[86]

The Court revisited mental health again in *Powell*, where the defendant argued that chronic alcoholism should serve as a defense to the charge of public drunkenness.[87] The Court rejected this argument for lack of sufficient medical knowledge and a preference for the states to experiment and resolve evolving aims of criminal law with newly created tensions on their own, rather than creating constitutional mandates outlining criminal liability.[88]

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75. Anne C. Gresham, *The Insanity Plea: A Futile Defense for Serial Killers*, 17 L. & PSYCH. REV. 193, 197 (1993).

76. Harrison, *supra* note 69, at 585–86.

77. *See* 18 U.S.C. § 17(b) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.").

78. *See id.* Additionally, following the *Hinckley* trial, seventeen states shifted the burden of proving insanity from the prosecution to the defense. Blau & Pasewark, *supra* note 64, at 70. Researchers in Honolulu County, Hawaii found that shifting the burden of proving insanity from the prosecution to the defense "did not, as legislative proponents anticipated, significantly decrease either the frequency of the plea or its success rate." Richard A. Pasewark, Barbara Parnell, & Jane Rock, *Insanity Defense: Shifting the Burden of Proof*, 10 J. FOR POLICE & CRIM. PSYCH. 1, 1–2 (1994).

79. Spring, *supra* note 72, at 44.

80. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1028 (2020).

81. *Id.* at 1027 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).

82. 343 U.S. 790 (1952).

83. *Id.* at 800.

84. *Id.* at 800–01.

85. *Id.* at 792–93.

86. *Id.* at 798.

87. 392 U.S. 514, 517 (1968).

88. *Id.* at 535–36.

The Court returned to this issue more recently in *Clark v. Arizona*,[89] where the defendant challenged the state's decision to only offer the moral incapacity test instead of the cognitive incapacity test.[90] The Court rejected this argument for the familiar reasons of scientific uncertainties and deference to the states.[91] The Court also discussed the presence of two other insanity tests in the U.S. judicial system: (1) the volitional incapacity test, which asks whether defendants' mental illnesses are so severe that they have no control over the ability to exercise free will;[92] and (2) the product-of-mental-illness test, which is broader and asks whether defendants' criminal acts stem from a mental illness.[93]

After the discussion of these tests, the Court mentioned the slight variation in insanity laws throughout the United States and declared, "due process imposes no single canonical formulation of legal insanity."[94] Turning directly to the defendant's argument that only offering the moral incapacity defense deprived him of constitutional protection, the Court stressed that "cognitive incapacity is itself enough to demonstrate moral incapacity."[95] The Court further explained that defendants who do not understand the nature and quality of their act cannot conceivably understand that their acts are morally wrong.[96] With *Clark*, the Court continued its trend of refusing to provide a constitutional baseline for the insanity defense.[97]

II. *KAHLER V. KANSAS*

This Part discusses *Kahler.* Section II.A describes the facts of the case and its procedural history. Section II.B discusses the majority opinion's major points. Section II.C describes the dissenting opinion's major arguments and disagreements with the majority.

A. Facts and Procedural History

Acquaintances thought the Kahlers to be the "perfect family."[98] James and Karen Kahler had three children: Emily, Lauren, and Sean.[99] In 2008, the family resided in Texas until James relocated to Missouri for a new job.[100] The family was to follow him in the move in the fall of that same year.[101] Before James left, Karen told him that she wanted to enter

89. 548 U.S. 742 (2006).
90. *Id.* at 746–47.
91. *Id.* at 752–53.
92. *Id.* at 749.
93. *Id.* at 749–50.
94. *Id.* at 753.
95. *Id.* at 737.
96. *Id.*
97. *Id.*
98. State v. Kahler, 410 P.3d 105, 113 (Kan. 2018), *aff'd*, 140 S. Ct. 1021 (2020).
99. *Id.* This Comment uses Karen and James's first names for ease of reference. No disrespect is intended.
100. *Id.*
101. *Id.*

into a sexual relationship with a woman with whom she worked.[102] James consented to Karen engaging in this relationship.[103] The family moved to Missouri, however Karen's relationship with her coworker did not end when the family moved.[104] In early 2009, Karen filed for divorce from her husband.[105] She moved out of the home with the couple's three children.[106]

In the following months, James's mental state began to deteriorate, and he subsequently developed major depression.[107] Additionally, because his mental health issues prevented him from fully paying attention to his job, his employer terminated his employment.[108] Out of concern, James's parents moved him to their ranch.[109] James's son, Sean, joined James on Thanksgiving at the Kahlers' ranch.[110] The family planned for Sean to return to his mother's family the Saturday after Thanksgiving; however, Sean called Karen to ask if he could stay with his father.[111] Karen told Sean no and James's mother returned Sean to Karen.[112]

That same evening, James entered Karen's grandmother's house—where he knew the family would be staying—and began shooting.[113] Although Sean and Karen were in the same room, James did not attempt to shoot Sean—only Karen.[114] James then shot his two daughters and Karen's grandmother.[115] Each victim either died on the scene or later died from their wounds.[116] James turned himself in the next day and the State charged him with capital murder.[117]

Before trial, James filed a motion that argued that Kansas's treatment of the insanity defense violated the Due Process Clause of the Fourteenth Amendment.[118] The crux of his argument was that Kansas unconstitutionally denied defendants the use of the moral incapacity defense.[119] The trial court denied this motion and maintained that Kahler could only introduce evidence that his mental illness prevented him from forming the requisite intent to kill.[120] "The jury convicted [James] of capital murder."[121] In Kansas, only at the sentencing phase may a defendant introduce moral

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Kahler v. Kansas, 140 S. Ct. 1021, 1026–27 (2020).
108. *Kahler*, 410 P.3d at 113.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 114.
116. *Id.*
117. *Id.*
118. Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020).
119. *Id.*
120. *Id.*
121. *Id.*

incapacity evidence.[122] Despite James presenting such evidence at sentencing, the jury imposed the death penalty.[123]

James appealed on the same grounds as his original motion and argued against the constitutionality of Kansas's treatment of the insanity defense.[124] Relying on Kansas precedent, the Kansas Supreme Court rejected his argument and stated that no aspect or variation of the insanity defense could be considered so fundamental that its absence is violative of due process.[125] The U.S. Supreme Court granted certiorari "to decide whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not 'distinguish right from wrong' when committing his crime."[126]

B. Opinion of the Court

Justice Kagan authored the majority opinion.[127] Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh joined.[128] The Court affirmed the Kansas Supreme Court's ruling and found that the Due Process Clause of the Fourteenth Amendment does not mandate the acquittal of any defendant who, because of a mental illness, did not understand their criminal acts were wrong.[129]

Justice Kagan first explained the status and implications of Kansas's insanity laws by using an example of a defendant shooting and killing someone.[130] Under a jurisdiction like Kansas, using only the *mens rea* approach and cognitive incapacity defense, the defendant could offer psychiatric testimony "that he did not understand the function of a gun or the consequences of its use," and he could be acquitted upon a jury crediting that testimony.[131] Justice Kagan then altered the example to fit a situation that would only pass the moral incapacity test, and described a man shooting and killing another person under the delusion that God mandated it.[132] She stated that because in this second example the man had the cognitive awareness for the act itself, despite the fact that he did not know his acts were wrong, he could only be acquitted in a jurisdiction that uses a moral incapacity test.[133]

The majority opinion emphasized that in Kansas, after conviction and during sentencing, defendants may assert evidence of their mental illness

122. *Id.* at 1026.
123. *Id.* at 1027.
124. *Id.*
125. *Id.* (discussing State v. Bethel, 66 P.3d 840, 851 (2003)).
126. *Id.*
127. *Id.* at 1021.
128. *Id.* at 1023.
129. *Id.* at 1024–25.
130. *Id.* at 1025–26.
131. *Id.*
132. *Id.* at 1026.
133. *Id.*

to prove that they should receive a lesser punishment.[134] This includes evidence that defendants did not know the moral wrongness of their acts.[135] The opinion then stated that, after introduction of this evidence, a court may place a defendant of this nature in a mental health facility instead of a prison, and the defendant "may wind up in the same kind of institution as a like defendant in a State that would bar his conviction."[136]

Justice Kagan then explained the applicable law used to determine whether a state law about criminal liability violates due process.[137] Due process is only violated if, when pertaining to either elements or defenses of a crime, the state rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[138] The primary guide in applying this standard is historical practice and in examining such practice, courts look to eminent common law authorities (such as de Bracton, Coke, Hale, and Blackstone) and early English and U.S. judicial decisions.[139] The primary question is whether a rule is "entrenched in the *central values* of our legal system . . . as to prevent a State from ever choosing another."[140]

Justice Kagan then briefly discussed *Powell*, emphasizing its warning that courts should be cautious before imposing a constitutional doctrine defining criminal liability, as this arena is typically reserved for the states.[141] Justice Kagan stressed that the Court has closely adhered to this warning with regard to the insanity defense because of the uncertainties of the human mind.[142] Next, Justice Kagan discussed *Leland* and *Clark* and emphasized that in both, the Court declined to impose constitutional requirements on the insanity test.[143]

After a historical discussion of insanity defense jurisprudence,[144] Justice Kagan rejected Kahler's argument that the moral incapacity test is fundamental to U.S. common law.[145] The majority opinion conceded that, generally, the idea of the insanity defense is fundamental to U.S. common law, but maintained that Kansas has not completely abolished the insanity defense because it allows the *mens rea* approach and evidence of mental illness at the sentencing phase; therefore, the Court held that Kansas properly allowed its own version of the insanity defense.[146] Justice Kagan stressed that Kansas courts decided to delay weighing the relevant moral

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1027.
138. *Id.* (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).
139. Montana v. Egelhoff, 518 U.S. 37, 43–44 (1996) (plurality opinion).
140. *Kahler*, 140 S. Ct. at 1028 (emphasis added).
141. *Id.*
142. *Id.*
143. *Id.*
144. Justice Kagan's discussion of the history of the insanity defense referenced the works of de Bracton, Coke, Hale, and Blackstone. *Id.* at 1030, 1032.
145. *Id.* at 1029–30.
146. *Id.* at 1030–31.

incapacity evidence until the post-conviction stage, and that this is "the appropriate place to consider mitigation."[147]

Justice Kagan then transitioned to the discussion of early common law commentaries regarding the insanity defense and ultimately concluded that the early common law reaches no consensus favoring the moral incapacity approach and as such, the test cannot be deemed "fundamental."[148] Justice Kagan then discussed the "canonical" case, *Rex v. Arnold*.[149] In this case, the defendant shot another man whom he believed, under his delusion, to have bewitched him.[150] The majority opinion in *Kahler* then quoted the case, and wrote "it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."[151] The Court used *Rex* and other common law cases in its assertion that cognition, rather than moral awareness, is stressed by common law courts at such a frequency that the moral incapacity test could not be ranked as fundamental.[152]

The Court then discussed *M'Naghten*, and its influence and prominence in both England and the United States.[153] However, this discussion of *M'Naghten*'s relevance ended with the statement, "Still, *Clark* unhesitatingly declared: 'History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle.'"[154]

To conclude, the majority opinion reiterated that such decisions regarding the insanity defense are better left to the states for the reasons of scientific uncertainty and the long history of reserving the delineation of criminal laws to the states.[155] The Court declined to require the adoption of the moral incapacity test and stated, "No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later."[156]

C. Dissenting Opinion

Justice Breyer authored the dissenting opinion.[157] Justices Ginsburg and Sotomayor joined.[158] The dissent first argued that the majority opinion

147. *Id.* at 1031–32.
148. *See id.* at 1032–34.
149. *Id.* at 1033 (citing Rex v. Arnold, 16 How. St. Tr. 695, 764–65 (1724)).
150. *Id.* at 1042 (citing Rex v. Arnold, 16 How. St. Tr. 695, 699, 721 (1724)).
151. *Id.* at 1033 (citing Rex v. Arnold, 16 How. St. Tr. 695, 699, 764–65 (1724)). Judge Tracy's use of the term "wild beast" was actually a mistranslation of the word "brutis." Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES CRIMINOLOGY 1, 8–9 (1965). De Bracton employed the word brutis to denote the lack of reason that was typically attributed to people with mental illness. *Id.* at 9. The phrase was not employed to indicate "wildness" or "beastliness." *Id.*
152. *Kahler*, 140 S. Ct. at 1034.
153. *Id.* at 1035.
154. *Id.* (quoting Clark v. Arizona, 548 U.S. 735, 749 (2006)).
155. *Id.* at 1037.
156. *Id.*
157. *Id.* (Breyer, J., dissenting).
158. *Id.*

did not simply decide against constitutionally defining the insanity defense but instead, "eliminated [its] core" by refusing to mandate the moral incapacity test.[159] Justice Breyer stressed that the Constitution did not require the *M'Naghten* rule; instead, *M'Naghten* simply articulated a more fundamental idea that "[a] defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime."[160] Justice Breyer argued that while the language used in expressing the legal standards for insanity has varied over time, the fundamental requirement of moral blameworthiness has always remained.[161]

Justice Breyer then discussed the common law history of the insanity defense.[162] Within this history, he found support in the works of de Bracton, Blackstone, Coke, and Hale,[163] which the majority admitted are guideposts for determining if a practice is fundamental.[164] Justice Breyer argued that these works prove that the moral incapacity rule should be ranked as fundamental.[165] Justice Breyer then stated that the common law sources, relied on by the majority opinion, which reference *mens rea* and intent, more accurately support the dissent's position because the common law meaning of *mens rea* refers to moral blameworthiness rather than the modern, narrow meaning of *mens rea* that courts employ today.[166] The dissent argued that the majority opinion often conflated the different meanings of *mens rea* when it interpreted the common law references to the insanity defense.[167]

The dissenting opinion argued that this is a disservice because common law authors—de Bracton, Blackstone, Coke, and Hale—did not indicate that these common law works intended the modern day meaning of *mens rea*.[168] Justice Breyer argued that the majority's conclusion that *Rex* stressed the cognitive capacity of a defendant was not a holistic interpretation of the case.[169] For support, Justice Breyer looked to the passage from *Rex* immediately preceding the portion cited by the majority:

> That he shot, and that willfully [is proved]: but whether maliciously, that is the thing: that is the question; whether this man hath the use of his reason and sense? If he was under the visitation of God, and could not distinguish *between good and evil*, and did not know what he did, though he committed the greatest offence, yet he could not be guilty

159. *Id.* at 1038.
160. *Id.* at 1039.
161. *See id.*
162. *Id.* at 1040–44.
163. *Id.* at 1040–41.
164. *Id.* at 1027 (majority opinion).
165. *Id.* at 1040–44 (Breyer, J., dissenting).
166. *Id.* at 1042.
167. *Id.*
168. *Id.* (citing Arnold's Case, 16 Howell State Trials 695, 764 (1724)). Additionally, the dissent discusses specific common law cases, including *Rex v. Arnold*, on which the majority also relied. *See id.*
169. *See id.*

> of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man.[170]

The portion the majority quoted to support its argument that *Rex* emphasized cognitive incapacity—"If a man be *deprived of his reason, and consequently of his intention, he cannot be guilty*"—appears only after the discussion of good and evil.[171] Justice Breyer then discussed other early common law cases and argued that these cases further exemplify that the common law meaning of *mens rea* simply indicated moral blameworthiness.[172] The dissent argued, based on case law and legal scholarship, by the time *M'Naghten* was decided in 1843, its fundamental essence was already embedded within the common law.[173]

Justice Breyer then addressed the relevance of jurisdictions' adoption of insanity defenses, such as the volitional incapacity defenses.[174] These tests, the dissent argued, are an expansion of the fundamental moral incapacity test, not a restriction.[175] Another example is the legal incapacity test, which asks whether defendants knew their conduct was illegal.[176] Justice Breyer argued that the legal incapacity test is an extension of the moral incapacity test because an act forbidden by law is also condemned as an offense that is morally wrong.[177]

Justice Breyer then moved to a discussion of *Clark*, where the Court held that the Constitution did not require Arizona to offer defendants both the moral incapacity test *and* the cognitive incapacity test when it offered only the moral incapacity test.[178] Justice Breyer argued "cognitive incapacity is itself enough to demonstrate moral incapacity,"[179] meaning evidence that individuals did not understand the nature of their acts is indicative that they also did not understand their acts were wrong.[180] Thus, the dissent argued the holding in *Clark* did not prevent the mandate of the moral incapacity defense.[181]

The dissenting opinion then discussed the relevance of Kansas courts allowing moral incapacity evidence at the sentencing stage.[182] The dissent argued that this is insufficient because U.S. legal tradition typically absolves defendants found legally insane of all culpability and protects them from the harsh criminal sanctions, stigma, and collateral consequences of

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170. *Id.* (quoting Arnold's Case, 16 Howell State Trials 695, 764 (1724)) (emphasis added, brackets in original).
171. *Id.* (quoting Arnold's Case, 16 Howell State Trials 695, 764 (1724)).
172. *Id.* at 1042–44.
173. *Id.* at 1045.
174. *Id.*
175. *Id.*
176. *See id.* at 1046.
177. *Id.*
178. *Id.* at 1049 (discussing Clark v. Arizona, 548 U.S. 735, 778–79 (2006)).
179. *Id.* (quoting *Clark*, 548 U.S. at 753).
180. *Id.* (citing *Clark*, 548 U.S. at 753–54).
181. *See id.*
182. *Id.* at 1049–50.

a conviction.[183] Kansas's approach mitigates the sentencing burden of a conviction that the defendant was never meant to carry.[184]

III. ANALYSIS

The Court incorrectly decided *Kahler* for four reasons. First, Section III.A argues the majority's ruling did not analyze the underlying issue surrounding the moral incapacity defense: the longstanding idea that a defendant, mentally ill or otherwise, must be able to discern between right and wrong to be held criminally responsible. This analysis does not revolve around the moral incapacity test; instead, the moral incapacity test is born out of this analysis. Section III.B argues the majority and the dissent reached different conclusions due to the majority's misinterpretation of the common law definition of *mens rea*. Employing the correct meaning of *mens rea*, the moral incapacity test should be ranked as fundamental. Section III.C argues the Court's assertion that the *mens rea* approach and the cognitive incapacity test sufficiently meet constitutionally required due process is misplaced because it conflates these terms with the usual intent requirements applied to all defendants. Finally, Section III.D asserts barring the moral incapacity defense is incongruent with constitutionally supported affirmative defenses, such as infancy and duress.

A. History May Not Show Deference to M'Naghten*, but* M'Naghten *Shows Deference to History*

This Section discusses how the "right and wrong test" and its historical development provided the basis for the *M'Naghten* rule. Subsection III.A.1 describes the historical influences leading up to and following the creation of the rule. Subsection III.A.2 argues that moral blameworthiness—and thus the moral incapacity test—should be fundamental to the insanity defense.

1. The Right and Wrong Test's Influence on English and U.S. Common Law

The right and wrong test provided the basis for the *M'Naghten* rule's creation.[185] Frequently used as a synonym for right and wrong—especially in older texts—is "knowledge of good and evil."[186] One of the earliest sources containing this phrase appears in the book of Genesis in the

183. *Id.*
184. *See id.* at 1050.
185. Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1258 (1966).
186. *Id.* at 1258.

Bible.[187] This idea next arrived in Hebrew law.[188] Hebrew law became the first to distinguish between intentional and unintentional crimes.[189] The most frequently used examples to distinguish unintentional crimes were accidental homicide, crimes committed by children, and crimes committed by individuals with mental illness.[190] Further, because of this incapability of intention, Hebrew law did not require children and individuals with mental illness to compensate individuals that they harm.[191]

Greek philosophers further expanded on this doctrine of right and wrong.[192] By the end of the seventh century BCE, the Greeks recognized the distinction between intentional and unintentional homicide.[193] Aristotle believed that for an act to be blameworthy, it must be voluntary.[194] Aristotle foreshadowed the mistake of fact defense[195] and argued that the

187. *Genesis* 2:9 ("The Lord God made all kinds of trees grow out of the ground—trees that were pleasing to the eye and good for food. In the middle of the garden were the tree of life and the tree of the knowledge of good and evil."); *Genesis* 2:16–17 ("And the Lord God commanded the man, 'You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat from it you will certainly die.'"); *Genesis* 3:5 ("For God knows that when you eat from it your eyes will be opened, and you will be like God, knowing good and evil."); *Genesis* 3:22 ("And the Lord God said, 'The man has now become like one of us, knowing good and evil. He must not be allowed to reach out his hand and take also from the tree of life and eat, and live forever.'"). Importantly, Adam and Eve did not gain true consciousness, or feel shame from standing naked, until they ate from the tree of good and evil. *Genesis* 2:25, 3:10 (noting that before they ate from the tree and gained awareness of good and evil, they remained innocent); *see* Thomas Morawetz, *Adam, Eve, and Emma: On Criminal Responsibility and Moral Wisdom*, 22 QUINNIPIAC L. REV. 23, 23–24 (2003); Sheldon Nahmod, *The GFP (Green) Bunny: Reflections on the Intersection of Art, Science, and the First Amendment*, 34 SUFFOLK U. L. REV. 473, 483 (2001).

188. GEORGE HOROWITZ, SPIRIT OF JEWISH LAW: A BRIEF ACCOUNT OF BIBLICAL AND RABBINICAL JURISPRUDENCE WITH A SPECIAL NOTE ON JEWISH LAW AND THE STATE OF ISRAEL 168 (1953).

189. Stimpson, *supra* note 9, at 505 (citing Platt & Diamond, *supra* note 185, at 1228–29); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 642 (1993); *see also E*xodus 21:12–14.

190. HOROWITZ, *supra* note 188, at 241 ("The stock phrase *heresh shoteh we-katon* occurs repeatedly in the Talmud grouping together the deaf-mute, persons of unsound mind and the minor, as persons of limited liability and of limited legal capacity. They were broadly speaking not liable for their torts, nor punishable for their offenses.").

191. *Id.*

192. *See* Agretelis, *supra* note 25, at 32–33.

193. J. WALTER JONES, THE LAW AND LEGAL THEORY OF THE GREEKS; AN INTRODUCTION 259 (1956). Additionally, it is noteworthy that Plato, while recognizing this distinction, rejects it in favor of his own belief that all acts of injustice are involuntary. Agretelis, *supra* note 25, at 26. In Plato's *Laws*, Plato writes, "[H]e that commits an unjust act does so unwillingly in the opinion of him who assumes that injustice is involuntary—a conclusion which I also must now allow; for I agree that all men do unjust acts unwillingly." PLATO, LAWS, Vol. II 223 (R.G. Bury trans., Harvard Univ. Press 1961). Plato's conclusion that injustice is involuntary lies in his belief that when individuals engage in such conduct, their "reason becomes a slave to the appetite of the soul." Agretelis, *supra* note 25, at 26.

194. Sendor, *supra* note 57, at 1372 (citing ARISTOTLE, ETHICA NICOMACHEA 1109b (W. Ross trans. 1925)).

195. The Model Penal Code defines mistake of fact as the following:

> Ignorance or mistake as to a matter of fact . . . is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

MODEL PENAL CODE § 2.04(1)(a)–(b) (AM. L. INST. 2019).

actions of people operating under such a mistake were morally excusable.[196] He further believed that "the insane, as well as the sane could be mistaken in this way."[197] This is because, according to Aristotle, moral responsibility could only be truly found if individuals possessed knowledge of the circumstances surrounding their acts, and if they are acting of their own volition and free will, absent external coercion.[198] This trend continued in Roman law and by the time Emperor Justinian ordered codification of the law in sixth century CE,[199] evidence supported the notion that children and individuals with mental illness held a special, privileged place in the law.[200] Christianity expanded upon these influences during Medieval times.[201] The Roman Catholic Church held a special interest in children, which can be seen by the Church's view that children were incapable of sin (aside from original sin) until they reached a more advanced age. [202]

After a millennia of influence, the good and evil test appeared in English law in the fourteenth century.[203] The phrasing appeared in a case reported in the *Eyre of Kent*, describing the requisite test for an infancy defense.[204] The case provided, "An infant under the age of seven years, though he be convicted of felony, shall go free of judgment, because he knoweth not of good and evil[.]"[205] For the next three centuries, children asserted the infancy defense for their crimes, and courts frequently employed the good and evil test as a method to decide whether to find the child responsible.[206] Throughout that same time, criminal law continued to

196. Nigel Walker, *The Insanity Defense Before 1800*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 26 (1985).

197. *Id.*

198. Platt & Diamond, *supra* note 185, at 1229.

199. John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L. 1, 38–39 (2003).

200. *See* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 763–64 (2004); DIG. 48.8.12 (Modestinus, *Rules*, *Book VIII*) ("When an infant or an insane person commits homicide, he is not liable under the Cornealean law; for absence of intention protects the one, and his unhappy fate excuses the other.").

201. JOHN BIGGS, JR., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 18–19 (1955). The treatment of people with mental illness during the Middle Ages will not be discussed further because, to quote a commentator, "The history of insanity during the Middle Ages is a disgrace to humanity." FRANCIS WHARTON, MORETON STILLÉ, FRANK H BOWLBY, JAMES HENDRIE LLOYD, ROBERT AMORY, R L EMERSON & TRUMAN ABBE, WHARTON AND STILLÉ'S MEDICAL JURISPRUDENCE: MENTAL UNSOUNDNESS 472 (5th ed. 1905). The Church and courts deemed mental illness to be a supernatural phenomenon and attempted to "cure" those experiencing mental illness with extremely inhumane methods. *Id.*

202. Platt & Diamond, *supra* note 185, at 1232–33.

203. *Id.* at 1233.

204. *Eyre of Kent (1313–14)*, (S.S) ii, 109, *in* YEAR BOOKS OF EDWARD II, (Maitland ed. 1910).

205. *Id.*

206. *See* Woodbridge, *supra* note 25, at 431, 433–34 (discussing the English court's application of the "good and evil" test from the fourteenth through the seventeenth centuries); Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1597 (2018).

group together and treat similarly children and those with a mental illness.[207]

By the end of the sixteenth century, as defendants more frequently asserted an insanity defense,[208] courts began applying the knowledge of good and evil test to individuals asserting the insanity defense in addition to children asserting the infancy defense.[209] In the latter part of the sixteenth century, Coke likened defendants with mental illness to children in terms of moral capacity.[210] In his writings, Hale mentioned and approved the knowledge of good and evil test several times.[211] Blackstone did the same and wrote that when two boys killed another child, one demonstrated his guilt by hiding the child's body and the other by hiding from the authorities, and that these actions further demonstrated that the children possessed the "discretion to discern between good and evil."[212]

Courts in the United States utilized the right and wrong test long before *M'Naghten* in 1843.[213] For example, ten out of twelve insanity cases decided between 1816 and 1841, which were considered authoritative by leading contemporary commentators, referenced right and wrong, good and evil, or some other synonym.[214] Between the remaining two cases, one was for a plea of "drunkenness" and the other did not mention a specific test.[215]

Thus, by the time the court decided *M'Naghten* in 1843 and English judges articulated the two-part test of insanity as (1) whether the defendant understood the nature of his acts; and (2) whether the defendant understood that his acts were wrong, such a standard had already been ranked in our history as fundamental.[216] "The famous *M'Naghten* trial of 1843 and the subsequent opinion of the judges provided only the name, '*M'Naghten* Rule.' The essential concept and phraseology of the rule were already ancient and thoroughly embedded in the law."[217]

In relatively recent examples, the U.S. Supreme Court has invoked the essence of the right and wrong test, acknowledging that defendants

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207. MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 65–66 (1984).

208. Platt & Diamond, *supra* note 185, at 1234 ("Very few cases of insanity were reported in English criminal law before the seventeenth century.").

209. *Id.* at 1235.

210. COKE, *supra* note 29, at 247.

211. HALE, *supra* note 25, at 25.

212. BLACKSTONE, *supra* note 29, at 23–24.

213. Platt & Diamond, *supra* note 185, at 1250–51.

214. *Id.* at 1256–57.

215. *Id.* at 1257.

216. *See id.* at 1258; O'Neill, *supra* note 72, at 46–47.

217. Platt & Diamond, *supra* note 185, at 1258; *see also* W. Chris Jordan, *Conditioned to Kill: Volition, Combat Related PTSD, and the Insanity Defense—Providing a Uniform Test for Uniformed Trauma*, 16 RUTGERS J.L. & PUB. POL'Y 1, 15 (2019) ("[T]he judges in the *M'Naghten* case were not setting out a new test for a person suffering from delusions, but merely stating the law as it already existed at that time in England; courts had applied the *M'Naghten* test prior to the decision that gave it the name it has today."); Hawkins-Léon, *supra* note 46, at 391 ("[T]he M'Naghten Rule is considered a restatement of the law rather than a new theory.").

should understand their actions are wrong before holding them accountable.[218] In *Davis v. United States*,[219] the Court approvingly quoted Blackstone and wrote "to constitute a crime against human laws, there must be first, a vicious will; and secondly, an unlawful act, consequent upon such vicious will," and that "[o]ne who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life . . . unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act."[220] In *Morissette v. United States*,[221] the Court emphasized that the idea that a crime occurs only when intention to harm is present is "no provincial or transient notion," and that a requisite intention to harm "is as *universal and persistent* in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[222] The Court continued that "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and *took deep and early root in American soil*."[223]

The Court reiterated the idea in *United States v. X-Citement Video, Inc.*[224] that "[c]riminal intent serves to separate those who understand the wrongful nature of their act from those who do not."[225] These U.S. Supreme Court cases represent just a fraction of U.S. cases using this language and setting this standard.[226] The concept that defendants must know that their actions are morally wrong should not be a privilege granted only to mentally healthy defendants; if our most basic protections do not protect the most vulnerable members of our society, then our society is not worthy of such protections.

2. Moral Blameworthiness is Fundamental to the Insanity Defense

To reiterate, the Court has historically provided the following guidelines for determining whether a state rule establishing a criminal liability standard violates due process:

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218. *See* Davis v. United States, 160 U.S. 469, 484–85 (1895), *superseded by statute on other grounds*, 18 U.S.C. §17, *as recognized in* United States v. Dixon, 548 U.S. 1, 12–17 (2006); *see also* Morissette v. United States, 342 U.S. 246, 250 (1952).

219. 160 U.S. 469 (1895).

220. *Id.* at 484–85.

221. 342 U.S. 246 (1952).

222. *Id.* at 250 (emphasis added).

223. *Id.* at 251–52 (emphasis added).

224. 513 U.S. 64 (1994).

225. *Id.* at 72, n.3 (citing United States v. Feola, 420 U.S. 671, 685 (1975)).

226. *See* Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) (emphasis added) (first citing *X-Citement Video*, 513 U.S. at 70; then citing Staples v. United States, 511 U.S. 600, 610 (1994); then citing Liparota v. United States, 471 U.S. 419, 425 (1985); then citing United States v. Bailey, 444 U.S. 394, 406 (1980); then citing United States v. U.S. Gympsum Co., 438 U.S. 422, 436 (1978); and then citing Morissette v. United States, 342 U.S. 246, 250–51 (1952)) ("The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are *legion*."); Elonis v. United States, 135 S. Ct. 2001, 2009 (2015); Dixon v. United States, 548 U.S. 1, 6 (2006); United States v. Balint, 258 U.S. 250, 251 (1922).

> [I]f [the rule] "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our primary guide in applying that is "historical practice." And in assessing that practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to the early English and American judicial decisions. The question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the *central values* of our legal system—as to prevent a State from ever choosing another.[227]

The theory that individuals must be aware of the moral implications of their actions, whatever name may be attached to such a theory, has been present since ancient times.[228] Moreover, the primary question in assessing historical practice is not based on the frequency of a specific test being applied over time, but on the central values of our legal system.[229] Throughout our history, as demonstrated by the creation of affirmative defenses and the theory of *mens rea*, the central value that defendants must know their actions are wrong is ever-present.[230]

Such a sentiment does not remain throughout U.S. history by chance; generations have grappled with the same questions of criminal responsibility as the *Kahler* Court addressed.[231] In *Kahler*, the Court failed to consider the context of *M'Naghten* within the English common law.[232] The *Kahler* Court relied on a false premise that the moral incapacity test came from *M'Naghten*.[233] While the name of the rule derived from *M'Naghten*, the essence of the rule has been a constant since humanity's ideologies and philosophies about moral culpability and legal responsibility began to take shape.[234] The idea that defendants must be able to possess the understanding that their actions were wrong is so rooted in the central values of English and U.S. history and common law that it should be ranked as fundamental.[235]

B. The Majority's Misunderstanding of Mens Rea

This Section discusses how the history and influences of *mens rea* shaped its common law meaning. Subsection III.B.1 discusses how the common law meaning of *mens rea* necessitated moral blameworthiness. Subsection III.B.2 argues that the common-law writers cited by the majority in *Kahler* intended *mens rea* to mean moral blameworthiness and the

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227. Kahler v. Kansas, 140 S. Ct. 1021, 1027–28 (2020) (majority opinion) (emphasis added) (internal citations and quotations omitted).
228. *See* sources cited *supra* note 212 and accompanying text.
229. *Kahler*, 140 S. Ct. at 1028.
230. *See* discussion *supra* Section II.A.1.
231. *See* discussion *supra* Section II.A.1; *Kahler*, 140 S. Ct. at 1027–37.
232. *See generally Kahler*, 140 S. Ct. at 1027–37.
233. *Id.* at 1029.
234. *See* sources cited *supra* note 212 and accompanying text.
235. *See* discussion *supra* Section III.A.

reason that the majority and the dissent reached different conclusions is because they attached different meanings to *mens rea*.

1. Common Law *Mens Rea* Necessitated Moral Blameworthiness

The misunderstanding of the common law definition of *mens rea* is the reason the majority and the dissent disagreed.[236] Due process is only violated if, when pertaining to either elements or defenses of a crime, the state rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[237] The primary guide in applying this standard is historical practice.[238] This inquiry involves examining the works of de Bracton, Coke, Hale, and Blackstone; additionally, early English and U.S. judicial decisions are relevant to the inquiry.[239] The Court correctly articulates the standard, but ultimately misapplies it.[240]

Both the majority and the dissent cited to de Bracton, Coke, Hale, and Blackstone, and both argued that these common law writings support their respective positions.[241] The opinions took the same writings of these jurists and applied them differently because of the different meanings that they associated with *mens rea* and intent.[242] The majority opinion wrote, "Sir Edward Coke . . . linked the definition of insanity to a defendant's inability to form *criminal intent*. He described . . . legally insane [people] in 1628 as so utterly 'without [their] mind or discretion' that [they] could not have the needed *mens rea*."[243] The majority interpreted this quote with modern understandings of *mens rea* and intent,[244] while the dissent interpreted this with the historical, common law meaning of the phrase.[245] The majority opinion conflated the modern day meaning of *mens rea* with the common law meaning of *mens rea*.[246] To understand the common law meaning of *mens rea*, an understanding of its history is required.

During the eleventh and twelfth centuries, the Catholic Church's influence on English law steadily increased.[247] The Church and the State

236. *See infra* notes 232–51 and accompanying text.
237. *Kahler*, 140 S. Ct. at 1027 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).
238. Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (plurality opinion).
239. *Kahler*, 140 S. Ct. at 1027 (2020) (first citing Egelhoff, 518 U.S. at 43 (1996); and then citing Patterson v. New York, 432 U.S. 197, 202 (1977)).
240. *Id.* at 1027, 1032.
241. *Id.* at 1030, 1032–34, 1040–41 (2020) (majority first citing BLACKSTONE, *supra* note 29, at 24; then citing DE BRACTON, *supra* note 29, at 384; then citing COKE, *supra* note 29, at 247(b); and then citing HALE, *supra* note 25, at 30, 37) (dissent first citing DE BRACTON, *supra* note 29, at 324, 356, 379, 384, 424; then citing COKE, *supra* note 29, at 247(b); then citing HALE *supra* note 25, at 14–15, 26–27, 30–32; and then citing BLACKSTONE, *supra* note 29, at 21, 24, 189, 195–96).
242. *See id.* at 1032 n.8, 1042.
243. *Id.* at 1032 (internal quotation marks omitted) (emphasis added) (quoting and discussing COKE, *supra* note 29, at 247(b)).
244. *Id.*
245. *Id.* at 1042.
246. *See* Sayre, *supra* note 7, at 993.
247. Gardner, *supra* note 189, at 654; Paul E. Raymond, *The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law*, 15 OR. L. REV 93, 112–13 (1936) ("What was done and thought in the Church usually came to be the practice in the secular laws.").

were intrinsically connected; priests conducted trials by ordeal and served as educators.[248] De Bracton, in addition to being Chief Justiciary of the highest court in England, was a prominent ecclesiastic who eventually became the archdeacon of Barnstable and chancellor of Exeter Cathedral.[249] Naturally, his writings were strongly influenced by the canonist ideas surrounding him.[250] The primary example of this influence is de Bracton's conceptualization of *mens rea*.[251] When determining the presence of sin, the moral element is equally as important, if not more important, than the physical element.[252] De Bracton's thirteenth century writings reflect this idea, emphasizing it is "desire and purpose [that] distinguish evil-doing."[253] De Bracton's emphasis on the mental state would prove influential.[254]

The essence of moral guilt as a requisite element of a crime proved indispensable in developing the meaning of *mens rea*.[255] The Church influenced the idea that criminal liability hinged on moral guilt.[256] Indeed, scholars credit St. Augustine as the first to implement the term *mens rea*.[257]

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248. Sayre, *supra* note 7, at 983; Laurie C. Kadoch, *So Help Me God: Reflections on Language, Thought, and the Rules of Evidence Remembered*, 9 RUTGERS J. L. & RELIGION 2, 2 (2007). Trial by ordeal was a practice where the Church determined defendants' guilt by subjecting them to "a painful task." Martin D. Beirne & Scott D. Marrs, *Judicial Control over Questionable Jury Verdicts: Historical Underpinnings of an Age-Old Practice*, FED. LAW., June 2004, at 23 n.7. Trials by ordeal could take several forms. *Id.* In a trial by water, defendants were bound and thrown into the water—"innocent" defendants would sink whereas "guilty" ones would float. *Id.* In an ordeal through "hot water or hot iron," defendants had to take an object out of boiling water and carry it nine feet. H.L. Ho, *The Legitimacy of Medieval Proof*, 19 J.L. & RELIGION 259, 261 (2004). The presiding priest examined the wounds three days after the event. *Id.* If the wounds were properly healing, the defendants were innocent, whereas festering wounds were indicative of guilt. *Id.* Finally, defendants could choose trial by combat, and if they or their champion proved successful, they were found innocent. *Id.* Trials by ordeal were essentially outlawed in 1215, when the Catholic Church prohibited priests from conducting future trials. Renée McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 510 (2014). The popularity of trials by ordeal soon declined because without the presence of priests, the divine authority of the trials diminished. *Id.*

249. Platt, *supra* note 151, at 4.

250. Sayre, *supra* note 7, at 984. Roman law also influenced de Bracton, and he drew inspiration and ideas from Justinian's Code and Digest. BIGGS, *supra* note 201, at 54 (1955); Milhizer, *supra* note 200, at 775; Gaines Post, *A Romano-Canonical Maxim, 'Quod Omnes Tangit,' in Bracton*, 4 TRADITIO 197, 215–17 (1946).

251. Sayre, *supra* note 7, at 983.

252. Gardner, *supra* note 189, at 654; Albert Lévitt, *Origin of the Doctrine of Mens Rea*, 17 U. ILL. L. REV. 117, 128 (1922); *see also Matthew* 5:27–28 ("You have heard that it was said, 'Thou shall not commit adultery.' But I say unto you that whosoever looketh at a woman to lust after her hath committed adultery already with her in his heart.").

253. Sayre, *supra* note 7, at 985.

254. O'Neill, *supra* note 72, at 40.

255. Sayre, *supra* note 7, at 988; *see* Raymond, *supra* note 247, at 111.

256. Sayre, *supra* note 7, at 988.

257. Gardner, *supra* note 189, at 654–55 (citing Lévitt, *supra note 252, at 123–27)*; Agretelis, *supra* note 25, at 21 (crediting Lévitt with this idea). St. Augustine best explained this idea when he spoke of perjury. *See* ST. AUGUSTINE, SERMONS ON SELECTED LESSONS OF THE NEW TESTAMENT: VOL. II. S. JOHN, ACTS, ROMANS, 1 CORINTHIANS, GALATIANS, EPHESIANS, PHILIPPIANS, 1 THESSALONIANS, 1 TIMOTHY, TITUS, JAMES, 1 JOHN 937–38 (Walter Smith (Late Mozley) ed. 1883).

> For men swear falsely, when either they deceive, or are deceived. For a man either thinks that to be true which is false, and swears rashly; or he knows or thinks it to be false, and yet swears it as true, and no less in wickedness swears. But these two false swearings, which I have mentioned, differ. Suppose a man to swear, who thinks what he swears for to

Further, moral blameworthiness became the essential element of felonies, because these crimes reflected the greatest sins of the time,[258] and bad acts without malicious intent became the basis for the original distinctions between crime and tort.[259] By the time Coke and Hale became relevant in the seventeenth century, their writings reflected the idea that it was "universally accepted law that an evil intent was as necessary for a felony as the act itself."[260]

In the evolution of the modern common law, courts began attempting to define the exact mental requisites for felonies.[261] This distinction is observed through the evolution of the *mens rea* standard for the felony of arson. In the thirteenth century, in order to convict a defendant of arson, the government was required to prove *mala conscienta*—meaning evil design, such as a desire to injure or general malevolence.[262] This evil intention requirement continued well into Coke's time, and his writings supported its continuation.[263] In modern times, however, *mens rea* no longer requires evil intent.[264] Instead, arson requires a "specific intent," simply, to burn a building, regardless of whether the motive is morally

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> be true; he thinks it to be true, and yet it is false. He does not intentionally swear falsely, he is deceived, he takes this for true which is false, does not knowingly offer an oath for a false thing. Suppose another, who knows it to be false, and says it is true; and swears as though what he knows to be false were true. See ye how detestable a monster this is, and fit to be exterminated from human intercourse? For who would wish to have this done? All men detest such things. Suppose another, he thinks it to be false, and swears as though it were true, and perhaps it is true. For example, that you may understand, "Has it rained in such a place?" you ask a man; and he thinks it has not rained, and it suits his purpose to say, "It has rained;[sic]" but he thinks it has not; you say to him, "Has it really rained?" "Really," and he swears; and yet it has rained there, but he does not know it, and thinks that it has not rained; he is a false swearer. The question is, how does the word proceed out of the mind. *Nothing makes the tongue guilty, but a guilty mind*.

Id. (emphasis added).

258. At common law, "every prohibited act was also known to be evil. Thus, an intention to do this act amounted to an evil intention, a mens rea." Gerhard O. W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1058 (1958). Additionally, by the time of de Bracton, "felony" imposed a "certain wickedness of the doer of it." SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 263 (reprt. of 2d ed. 2010). Moreover, the word "felony" was used to signify moral blameworthiness. *Id.*

259. Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1428–29 (2012).

260. Sayre, *supra* note 7, at 993.

261. *Id.* at 994.

262. *Id.* at 1002.

263. *See* COKE, *supra* note 29, at 66–67; *see also* John W. Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 323 (1986) ("[I]t is entirely accurate to define arson at common law as the *malicious* burning of the dwelling house of another."). Coke did not actually use the term "arson." *See* COKE, *supra* note 29, at 66–67.

264. Sayre, *supra* note 7, at 1003.

blameworthy.[265] Today, the general *mens rea* moral blameworthiness requirement has been drastically eroded by specific intent requirements.[266]

2. The Cited Common-Law Writers Used *Mens Rea* Synonymously with Moral Blameworthiness

The Court's conflation of modern and common law meanings of *mens rea* led to its decision that the moral incapacity defense is not fundamental to the common law.[267] The Court consistently cited seventeenth century sources that referenced "felonious intent" and "the needed *mens rea*."[268] The Court failed to realize or acknowledge, however, that this felonious intent and needed *mens rea*, as outlined by Coke and Hale, referred to moral blameworthiness.[269] By refusing to mandate the moral incapacity defense as required under due process, the Court denied defendants the right to introduce evidence negating moral blameworthiness[270]—which according to the common law writings cited by the Court itself, the prosecution must prove as an essential element of the crime.[271]

From the thirteenth century and past the seventeenth century, *mens rea* meant moral blameworthiness.[272] This idea is fundamental to the common law. A defendant with mental illness who cannot tell right from wrong necessarily is not morally blameworthy. Because of the multitude of common law jurists and cases cited by both the majority and the dissent,[273] the moral incapacity test should be ranked as fundamental because its purpose determines whether the defendant acted with moral blameworthiness.[274]

C. The Mens Rea *Approach and Cognitive Incapacity Do Not Suffice*

The *mens rea* approach and the cognitive incapacity defense do not ensure due process for defendants with mental illness. The majority held that the insanity defense rule adopted by Kansas upholds due process, despite not offering a moral incapacity defense, because the rule allows

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265. Sayre, *supra* note 7, at 1003; *see* Poulos, *supra* note 263, at 417 (1986) (analyzing U.S. arson laws as of 1986 and finding that "the majority of states confine[d] felony liability to intentionally (purposefully) or knowingly damaging property" and that only a minority of states maintained the common law requirement of malice).

266. *See* Wales, *supra* note 25, at 691 ("*Mens rea* has not always been so narrow a construct."); *see also* Staples v. United States, 511 U.S. 600, 638 n.25 (1994) (Stevens, J., dissenting) ("Our use of the term *mens rea* has not been consistent. In *Morissette*, we used the term as if it always connoted a form of wrongful intent. In other cases, we employ it simply to mean whatever level of knowledge is required for any particular crime.").

267. *See* discussion *supra* Section II.B.1.

268. Kahler v. Kansas, 140 S. Ct. 1021, 1032 (2020).

269. Sayre, *supra* note 7, at 989–90, 993–94.

270. *Kahler*, 140 S. Ct. at 1037.

271. *Id.* at 1032 (first citing DE BRACTON, *supra* note 29, at 384; then citing COKE, *supra* note 29, at 247(b); and then citing HALE, *supra* note 25, at 30, 37).

272. *See* discussion *supra* Section III.B.

273. *Kahler*, 140 S. Ct. at 1030–32, 1040–42.

274. Morissette v. United States, 342 U.S. 246, 250 n.4 (1952) ("Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.").

defendants with mental illness to present psychiatric evidence to negate the charge that the defendant had the requisite mental state for the crime.[275] The only evidence defendants can set forth, however, is evidence demonstrating a lack of cognitive capacity—that they did not understand the nature of their acts.[276] This is problematic for several reasons. First, quoting Justice Kagan's statement at oral argument in response to Kansas's counsel describing the cognitive incapacity defense:

> [W]hat you are suggesting as a test for insanity is not a test for insanity. It's just the usual intent requirement that we apply to all defendants. If the defendant doesn't have the intent to kill, then the defendant is not culpable for that act. And it has nothing to do with his insanity or not.[277]

As Justice Kagan's statement makes clear, the prosecution always has the burden to prove every element of every crime beyond a reasonable doubt, including mental states.[278] Additionally, defendants have a constitutional right to present evidence to disprove any element of a crime charged against them.[279] Attempting to frame the cognitive incapacity defense as an affirmative defense of insanity is simply a mischaracterization of its actual use.[280] If defendants truly had no idea the nature of their acts, then evidence could be introduced on its own to negate the requisite *mens rea* for the crime.[281] There is no need for this separate defense absent a complete bar on evidence of mental illness.[282] In essence, the cognitive incapacity defense and the *mens rea* approach are two names used to describe the same concept.

Second, mental illness rarely renders defendants so out of touch with reality as to not understand the nature of their acts.[283] "A defendant can be both legally insane and capable of having the requisite intent; the two

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275. *Kahler*, 140 S. Ct. at 1030.

276. *Id.* at 1030–31.

277. Transcript of Oral Argument at 54, Kansas v. Kahler, 140 S. Ct. 1021 (2020) (No. 18-6135); *see also* Gilles Phillips & Woodman, *supra* note 15, at 489.

278. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 5 (1984); Morse & Hoffman, *supra* note 49, at 1074.

279. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); Morse, *supra* note 278, at 5–6.

280. *Cf.* Morse, *supra* note 278, at 6 (arguing that the *mens rea* variant of diminished capacity should not be viewed as an affirmative defense, but as a method for a defendant to simply prove his innocence).

281. Nusbaum, *supra* note 12, at 1521.

282. *Id.* at 1518. Indeed, three states—Louisiana, Mississippi, and Washington—attempted to completely abolish the defense in the early 1900s. Andrew M. Levine, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drug and Alcohol Abuse*, 78 B.U. L. REV. 75, 84 (1998). Each respective state supreme court struck down the statutes as unconstitutional. *See* State v. Lange, 123 So. 639, 641–42 (La. 1929); Sinclair v. State, 132 So. 581, 582 (Miss. 1931); State v. Strasburg, 110 P. 1020, 1024 (Wash. 1910).

283. Rosen, *supra* note 19, at 261.

concepts are not mutually exclusive."[284] Therefore, because cognitive incapacity and the *mens rea* approach are, in essence, the same, Kansas's regime protects very few defendants with mental illness.[285] Evidence of a mental illness does not preclude a defendant from possessing the specific intent to commit the crime; in fact, it rarely does.[286] Typically, mental illness warps the *motive* behind the intent, not the intent itself.[287] However, motive is irrelevant under the *mens rea* approach.[288] For example, a mother drowned all five of her small children in an attempt to "save" them from the devil and damnation.[289] Clearly, in that moment, the mother intended to kill her children.[290] But, she did so presumably under the unshakeable delusion that she was actually doing what was best for her children. Her motive in acting was to protect them from the devil.[291] In Kansas, she would be convicted because she intended her actions, even though she was incapable of seeing that they were wrong.[292] The assumption that intent is indicative of moral blameworthiness is false.[293] Very few defendants with a mental illness can demonstrate that their perception of the world was so flawed as to prevent them from accurately processing the nature of their actions.[294]

Finally, introducing evidence of moral incapacity at sentencing simply does not suffice to meet due process requirements. At the point that the evidence is finally introduced, the defendant has already been convicted. The purpose of the insanity defense is to prevent a defendant with mental illness from ever being convicted and protect the defendant from a conviction's collateral consequences—which, in Kahler's case, was a death sentence.[295]

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284. *Id.*

285. Phillips & Woodman, *supra* note 15, at 471.

286. Morse, *supra* note 278, at 18.

287. Nusbaum, *supra* note 12, at 1522.

288. *Id.*

289. Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 47–48 (2003).

290. The defendant, Andrea Yates, waited to kill her children until her husband left home and before she knew her mother-in-law would arrive to help her with the children. Resnick, *supra* note 52, at 149. She killed all five children in less than an hour. *Id.*

291. Denno, *supra* note 289, at 47–48.

292. Nusbuam, *supra* note 12, at 1522. The defendant was originally found guilty after the jury rejected her insanity plea. Resnick, *supra* note 52, at 147. However, the court of appeals reversed the judgment because of an error made by the prosecution's psychiatric witness. Yates v. State, 171 S.W.3d 215, 222 (Tex. App. 2005). After the second trial, the defendant was found not guilty by reason of insanity. Resnick, *supra* note 52, at 147.

293. O'Neill, *supra* note 72, at 36–37.

294. Nusbaum, *supra* note 12, at 1522.

295. Kahler v. Kansas, 140 S. Ct. 1021, 1027, 1049 (2020); Michael Andrew Tesner, Note, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?*, 11 B.C. THIRD L.J. 307, 324 (1991) ("The purpose of the insanity defense is to excuse those defendants whose unusual circumstances evidence a situation in which the purposes of the criminal law would not be served by conviction of the defendant."). This is not to say that a defendant who receives a verdict of "not guilty by reason of insanity" escapes all collateral consequences. Paul H. Robinson, *Criminal Law Defenses: a Systematic Analysis*, 82 COLUM. L. REV. 199, 285 (1982). Indeed, in *State v. Jones*, the Court held that the government may commit a defendant "to a mental institution

D. Inconsistency with Affirmative Defenses

This Section argues that the Court's decision to allow Kansas to abolish the moral incapacity insanity defense is inconsistent with common law traditions of certain affirmative defenses. During the same period that moral blameworthiness became the common standard for requisite mental elements, certain defenses—including insanity, infancy, and duress—developed because defendants could properly prove they lacked moral blameworthiness.[296] Subsection III.D.1 argues that Kansas's denial of the moral incapacity defense as a mechanism to prove moral innocence is inconsistent with longstanding U.S. tradition of allowing infancy defenses.[297] Subsection III.D.2 argues that Kansas's denial of the moral

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until such time as he has regained his sanity or is no longer a danger to himself or society." 463 U.S. 354, 370 (1983). This is so even if the length of commitment exceeds the maximum sentence that defendants would have received had they not asserted the insanity defense. *Id.* at 368–69. The Court refined this holding in *Foucha v. Louisiana*, to clarify that the government may hold an insanity acquittee "as long as he is both mentally ill and dangerous, but no longer." 504 U.S. 71, 77 (1992). Despite this clarification, however, "[w]hen a not-guilty-by-reason-of-insanity defense does succeed, it tends to resemble a conviction more than an acquittal—the acquitted individuals often endure longer periods of confinement, as they are pulled into a broken mental health system that can be more difficult to leave than prison." Samantha M. Caspar & Artem M. Joukov, *Worse Than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499, 515 (2020). These collateral consequences are still markedly different from the collateral consequences of a conviction. Gabriel J. Chin, *What Are Defense Lawyers for? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 155–56 (2012). Collateral consequences of a conviction can include society labeling convicted individuals as criminals, the government regulating convicted individuals for the remainder of their lives, parole, probation, fines, or ineligibility for certain public benefits. *Id.* At the most serious level—as was the case for James Kahler—a collateral consequence of a conviction may also include the imposition of the death penalty. *Kahler*, 140 S. Ct. at 1027.

296. Sayre, *supra* note 7, at 993.

297. Note that in the United States, the formation of juvenile courts has, for the most part, taken the place of the infancy defense. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 506, 544 (1984); *see* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 262 (1987); Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 721 (2006) ("[T]he juvenile court's focus on rehabilitation instead of criminality quickly led to a series of decisions finding the infancy defense inoperative in juvenile court proceedings. In turn, because the juvenile courts at least initially exercised jurisdiction over the vast majority of children accused of crimes, the infancy defense, while never rejected as an essential principle in criminal proceedings, did lose some of its stature as a critically important doctrine of American criminal law."). However, the fact that there are such separate courts should lend itself to the conclusion that infancy is a deeply rooted, fundamental common law defense. Additionally, the infancy defense is still available to those children who find themselves in criminal court. *Id.* at 709. Nonetheless, per se laws against young children being held criminally liable still exist. *See* WASH. REV. CODE § 9A.04.050 (2020) (children under eight incapable, children between eight and twelve possess a presumption of incapacity which can be rebutted by evidence that the child "underst[ood] the act or neglect" and knew "that it was wrong"); COLO. REV. STAT. ANN. § 18-1-801 (2020) (children under ten incapable, children between ten and eighteen subject to Colorado's Children's Code); KAN. STAT. ANN. § 38-2302(n) (2020) (children under ten); LA. STAT. ANN. § 14:13 (2020) (children under ten); OR. REV. STAT. § 161.290 (2020) (children under twelve); GA. CODE ANN. § 16-3-1 (West 2020) (children under thirteen); 720 ILL. COMP. STAT. 5/6-1 (2020) (children under thirteen); MINN. STAT. § 609.055 (2020) (children under fourteen); N.J. REV. STAT. § 2C:4-11 (2020) (children under fourteen); UTAH CODE ANN. § 76-2-301 (West 2020) (children under fourteen); ALA. CODE § 13A-3-3 (2020) (children under fourteen cannot be tried as an adult); N.H. REV. STAT. ANN. § 628:1 (2020) (under fifteen generally, thirteen for certain offenses); N.Y. PENAL LAW § 30.00 (McKinney 2020) (under eighteen, however, with significant exceptions lowering the age to thirteen for certain offenses). The states that do not have statutes on the issue fall under the presumption that the infancy defense—

incapacity defense is inconsistent with U.S. acceptance of duress as an affirmative defense.[298]

1. Infancy

Similar to the origins of the right and wrong test, the roots of a child's inability to discern from right and wrong may be found in the Bible.[299] In Hebrew law,[300] the Talmud repeatedly refers to the limited liability of children.[301] Two provisions contained in the Twelve Tables—the earliest compilation of Roman law—referenced a regard for youths.[302] Moreover, by the fifth century CE, Roman law dictated that children under seven years were "*doli incapax*," meaning "incapable of malice or criminal intent."[303]

In English law during the fourteenth century, infancy grew into a valid and recognized defense.[304] The basis of such a defense was premised on the fact that small children lack the discretion to know right from wrong.[305] Typically, children between seven and fourteen were only subject to criminal laws if the prosecution could prove that the child possessed

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because it is a common law doctrine that can only be abrogated with legislative intent—is available to children. Carter, *supra*, at 732 (citing NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61:1 (6th ed. 2001)).

298. *See infra* text accompanying notes 310–11.

299. *Deuteronomy* 1:39 ("And the little ones that you said would be taken captive, your children who do not yet know good from bad—they will enter the land."); *Isaiah* 7:15–16 ("He will be eating curds and honey when he knows enough to reject the wrong and choose the right, for before the boy knows enough to reject the wrong and choose the right, the land of the two kings you dread will be laid to waste."); *Hebrews* 5:13–14 ("Anyone who lives on milk, being still an infant, is not acquainted with the teaching about righteousness. But solid food is for the mature, who by constant use have trained themselves to distinguish good from evil.").

300. Civilizations have typically categorized children's legal responsibility according to their age. For example, in Jewish law, the periods of maturity of children were divided as follows: (1) "*katon*" children ranging from "little" to six years old; (2) "*pa'ut*" children ranging from six years old to thirteen years old for males, six years old to twelve years old for females; (3) "*gadol*" children classified as "big" ranging from thirteen years old to twenty years old. HOROWITZ, *supra* note 188, at 241.

301. *Id.* at 642 ("According to the Talmud, all *adult* persons who were of sound mind were subject to be charged and tried under the laws of Penalties, Capital Offenses, and Prohibitions. . . .") (emphasis added).

302. Woodbridge, *supra* note 25, at 428; M. Stuart Madden, *The Græco-Roman Antecedents of Modern Tort Law*, 44 BRANDEIS L.J. 865, 888 (2006); Adam F. Streisand & Lena G. Streisand, *Conflicts of International Inheritance Laws in the Age of Multinational Lives*, 52 CORNELL INT'L L.J. 675, 679 (2020) (footnotes omitted) ("The founding instrument of Roman law is the Twelve Tables. The Twelve Tables were a set of laws inscribed on 12 bronze tablets in 451 and 450 B.C.E.").

303. Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 36 (2007).

304. A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364, 365–66 (1937); Carter, *supra* note 292, at 695, 747.

305. Carter, *supra* note 292, at 709; *see supra* Section III.A.

the capability to discern between good and evil.[306] The purpose behind this defense was to avoid punishing children who were incapable of forming criminal intent.[307] Children under seven could not be prosecuted because they were thought to be incapable of evil intent.[308] De Bracton, Coke, Hale, and Blackstone all likened the criminal acts of individuals with mental illness to the criminal acts of children, both incapable of possessing the requisite moral blameworthiness.[309] This is not a coincidence and not without reason. This is because certain individuals with mental illness, much like young children, do not always possess the ability to tell right from wrong.[310] All four jurists—de Bracton, Coke, Hale, and Blackstone—pointed to this reasoning.[311] This tradition continued in early U.S. jurisprudence.[312]

Kansas protects children from criminal prosecution but prohibits evidence that defendants with mental illness could not understand that their acts were wrong.[313] The underlying capability of discretion between children and certain individuals with mental illness may be the same, but the differing treatment of the two leads to drastic results: children under ten face no legal repercussions while defendants with mental illness risk the imposition of the death penalty.[314]

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306. BLACKSTONE, *supra* note 29, at 23; HALE, *supra* note 25, at 26; Woodbridge, *supra* note 25, at 434. However, this was only with respect to capital felony cases. *See* Lerner, *supra* note 201, at 1588 (describing that if a child was only accused of a misdemeanor—unless the misdemeanor was battery or riot—then the infancy defense precluded liability until the accused was fourteen years old and was sometimes available to defendants as old as twenty-one). Additionally, before Coke and Hale's time, there was no widespread registration of birth. Kean, *supra* note 299, at 370. Thus, in the absence of sufficient evidence of a child's age, the reliance on proving whether children understood their actions were wrong was that much more necessary. *Id.* at 369–70.

307. Walkover, *supra* note 292, at 512.

308. BLACKSTONE, *supra* note 29, at 23; *see* Mueller, *supra* note 253, at 1050 (describing that the common law draws a line at age seven for a child to act morally versus rationally or intentionally).

309. Robinson, *supra* note 290, at 224.

310. Kaban & Orlando, *supra* note 298, at 38 ("Although children may intend to commit a specific harmful or dangerous act, they may not appreciate the consequences or wrongfulness of that act.").

311. DE BRACTON, *supra* note 29, at 424; HALE, *supra* note 25, at 16–29; BLACKSTONE, *supra* note 19, at 195; COKE, supra note 19, at 247(b).

312. *See, e.g.*, State v. Doherty, 2 Tenn. 79, 88 (Tenn. Super. L. & Eq. 1806); State v. Aaron, 4 N.J.L. 231, 238 (N.J. 1818) ("It is perfectly settled that an infant within the age of seven years cannot be punished for any capital offence. . . . It is perfectly settled, also, that between the age of seven and the age of fourteen years, the infant shall be presumed incapable of committing crime . . . [unless] it shall appear by *strong* and *irresistible* evidence that he had sufficient discernment to distinguish good from evil. . . .").

313. Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020); KAN. STAT. ANN. § 38-2302(n) (2020) (juvenile code facilitating prosecution of youths does not apply to children under ten). For example, in 2009, three boys tried to set an apartment on fire. Ron Sylvester, *Law: Don't Charge Offenders Younger than 10*, THE WICHITA EAGLE (Oct. 7, 2009), https://www.kansas.com/news/local/crime/article1016115.html. One of the boys was eleven and the other two boys were eight and nine. *Id.* The state sent the eleven-year-old to juvenile detention but sent the two younger boys home to their parents. *Id.* A representative from the local District Attorney's office explained that the reasoning behind the law is that children under ten are "too young to be able to form the intent to commit a crime," but that once a child "reach[es] 11, they should know right from wrong." *Id.*

314. Kahler v. Kansas, 140 S. Ct. 1021, 1027, 1049 (2020); Sylvester, *supra* note 313.

2. Duress

Duress was introduced as an affirmative defense as early as the fourteenth century.[315] The theory is that if defendants could prove that they acted because of fear of bodily harm or death, or fear of that harm to others, then their acts were not a proper exercise of free will.[316] If defendants' choices are not free ones, then they do not have a blameworthy mind and thus cannot be criminally responsible.[317]

To exemplify the similarities between duress and insanity, consider the following scenarios. First, imagine Defendant A is acting under duress. There is a gun to her head, and she is forced to commit a grave crime. Next, imagine Defendant B is a defendant with mental illness who, instead of being under physical duress, is subject to a delusion that she is under duress. In her delusion, there is a gun to her head, and she is forced to commit the same grave crime. She is neither capable of realizing that the delusion is imaginary nor that her conduct is gravely wrong. What is the difference in moral blameworthiness between the two defendants? They both intend to commit a grave crime and they both actually commit the grave crime for what they believe to be the same reason. However, Defendant B, experiencing a mental illness, cannot introduce evidence that she did not know her acts were wrong. Her motive behind acting, that she thought herself to be in grave danger, cannot be introduced because it was caused by a mental illness. Where is the justice in allowing a defendant who employs the insanity defense to introduce less evidence than a sane individual? When a defense that purportedly exists to protect defendants with mental illness causes a defendant who employs the defense to introduce *less* evidence than a sane defendant, that is an indication that the defense is being ill-interpreted.

CONCLUSION

The *Kahler* decision is a continuation of the Court's refusal to establish a constitutional baseline for the insanity defense. The Court should set forth the moral incapacity defense as the minimum constitutional baseline because whether an individual can tell right from wrong has been the basis for criminal responsibility since the formations of our own understandings of the topic. This is the appropriate baseline because defendants' moral blameworthiness has always been the crux of common law *mens rea*. The *mens rea* approach, through introduction of cognitive incapacity evidence, simply does not pass constitutional muster because it prohibits critical evidence of moral innocence. Finally, barring evidence that defendants did not comprehend their acts were morally wrong is incongruent with other affirmative defenses, such as infancy and duress, that are entrenched in

315. Gardner, *supra* note 189, at 665.

316. Gerald A. Williams, *Criminal Law: Tully v. State of Oklahoma: Oklahoma Recognizes Duress as a Defense for Felony-Murder*, 41 OKLA. L. REV. 515, 516 (1988) (first citing Hackley v. Headley, 8 N.W. 511, 512–13 (Mich. 1881); and then United States v. Bailey, 444 U.S. 394, 409 (1980)).

317. Gardner, *supra* note 189, at 665.

common law tradition. Fifty-three years after *Powell*, it is time to set a constitutional threshold to the insanity defense. This is not because the resources to understand how the mind itself works are finally available, as such a lofty goal is not currently attainable. But what we have are the resources that provide a deeper and more complete understanding of our legal history surrounding defendants with mental illness and how the answer has been in front of us all along.

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