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Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits, 53 UIC J. Marshall L. Rev. 633 (2021)

Michelle DiSilvestro

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KAHLER V. KANSAS: THE SUPREME
COURT CASE TO DECIDE THE
CONSTITUTIONALITY OF ABOLISHING
THE TRADITIONAL INSANITY DEFENSE
AND RECONCILE THE SPLIT AMONG THE
CIRCUITS

MICHELLE DISILVESTRO*

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I. INTRODUCTION

Up until March 2020, state supreme courts have disagreed on the constitutionality of abolishing the insanity defense.¹ Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replace it with a mens rea approach.² The mens rea approach will likely lead to more mentally ill, criminal defendants being incarcerated rather than receiving the treatment they need.

The purpose of the traditional insanity defense is to ensure that criminal culpability is only imposed upon those individuals who have the mental capacity to comply with the law.³ The purpose of the mens rea approach, however, only allows a criminal defendant to introduce evidence showing the existence of mental disease in order to negate intent.⁴ The following two scenarios lay out the significant differences in the two approaches.⁵

In the first scenario, a defendant kills someone he thinks is a demon.⁶ Here, the defendant believes he is killing a demon and did

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1. *See, e.g.*, *State v. Korell*, 690 P.2d 992 (Mont. 1984) (upholding a statute that abolished the traditional insanity defense and replacing it with the mens rea approach) *and* *Finger v. State*, 27 P.3d 66 (Nev. 2001) (rejecting the mens rea approach).

2. *See, e.g.*, *Korell*, 690 P.2d 992 (upholding a statute that abolished the traditional insanity defense and replacing it with the mens rea approach) *and* *Finger*, 27 P.3d 66 (rejecting the mens rea approach).

3. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 9 (1967).

4. *See* *State v. Jorrick*, 4 P.3d 610, 617 (Kan. 2000) (stating “[t]his approach permits a defendant to introduce expert psychiatric witnesses or evidence to litigate the intent elements of a crime”). “If the evidence negates the requisite intent, the defendant is entitled to an acquittal.” *Id.*

5. Transcript of Oral Arg. at 38, *Kahler v. Kansas*, 140 S.Ct. 1021 (2019) (No. 18-6135). In the oral argument for *Kahler v. Kansas*, Justice Stephen Breyer asked the Respondent a similar question. *Id.* He questioned:

[I]magine two defendants. Both defendants, 1 and 2, are certified by whatever board of psychiatrists you want as totally insane . . . The first defendant shoots and kills Smith. The second defendant shoots and kills Jones. The first defendant thinks that Smith is a dog. The second defendant knows it's a person but thinks the dog told him to do it . . . What's the difference?

Id.

6. *See* *People v. McGehee*, 201 Cal. Rptr. 3d 714 (Ct. App. 2016) (discussing a defendant who stabbed his mother to death, but substantial evidence showed that he believed she was a demon at the time he killed her). *See also* *People v. Ramsey*, 280 N.W.2d 565 (Mich. Ct. App. 1979) (describing a man who murdered his wife because he believed she was possessed by a demon and needed to restore life to her).

not intentionally kill another human being. Thus, the defendant did not form the required criminal intent for a homicide conviction under the mens rea approach. This defendant is protected under both the traditional insanity defense and the mens rea approach.

However, in the second scenario, a defendant kills another human because a demon told him to.⁷ In this example, the defendant knows and intended to kill another human being. The defendant formed the required criminal intent for conviction. However, what motivated the defendant to form that intent was based on a delusion or hallucination. This defendant would be protected under the traditional, affirmative insanity defense, but not under the mens rea approach. There is little doubt that the latter excludes a large percentage of defendants that would normally qualify for the defense under the traditional approach.

On October 7, 2019, the United States Supreme Court heard oral arguments about the case *Kahler v. Kansas*, discussing questions and concerns about the constitutionality of abolishing the insanity defense.⁸ The issue presented before the Court was whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense.⁹ On March 23, 2020, the Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the States to adopt an insanity defense based on a defendant's ability to understand that his or her crime was morally wrong.¹⁰

This Comment will first introduce background information on the history of the traditional insanity defense and its migration toward the mens rea approach. The following section describes the facts of *Kahler v. Kansas* and analyzes both the Kansas Supreme Court and the United States Supreme Court decisions in detail. The final section of this Comment proposes means of resolving the uncertainties and differences among the States with regard to legal insanity.

It is important to note that this Comment is limited to addressing the constitutionality of abolishing the insanity defense under the Fourteenth Amendment. Further, this Comment will

7. See *State v. Winn*, 828 P.2d 879, 881 (Idaho 1992) (discussing a defendant who poisoned her son and alleged a demon told her that her son must die); see also *People v. Serravo*, 823 P.2d 128, 130-31 (Colo. 1992) (en banc) (describing an offender who hallucinated that he heard God's voice and believed that God commanded him to kill).

8. Transcript of Oral Argument, *supra* note 5; Amy Howe, *Argument Analysis: Justices Open New Term with Questions and Concerns About Insanity Defense*, SCOTUSBLOG (Oct. 7, 2019, 3:58 PM), www.scotusblog.com/2019/10/argument-analysis-justices-open-new-term-with-questions-and-concerns-about-insanity-defense/.

9. Petition for Writ of Certiorari at i, *Kahler v. Kansas*, 140 S.Ct. 1021 (2018) (No. 18-6135).

10. *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020).

only take into account legal insanity. There are noteworthy differences between fitness to stand trial and the insanity defense.¹¹

II. BACKGROUND

This section will set the foundation for analyzing *Kahler v. Kansas*. First, it will provide background information on the relationship between mental illness and criminality. Second, this section will provide history and background information on the affirmative insanity defense. This section will then introduce the effects of the *Hinckley* verdict and how this decision initiated the transition toward the mens rea approach¹². Finally, it will briefly discuss the legal history of the Fourteenth Amendment Due Process Clause.

A. Mental Illness and Criminality

Mental disorders are not simply an assortment of unpleasant character traits but a fixed mental state marked by biological and cognitive abnormalities.¹³ For instance, extreme narcissism distorts rational judgment, sometimes “to the point of psychosis” or “the outbreak of insanity.”¹⁴ Narcissists attempt to escape frustration through emotional reactions, such as repression, distortions, and denial.¹⁵ The impairments of personality disorders can be as severe and similar to the impairments of mental disorders, and both have established legal insanity in the past.¹⁶

Fortunately, significant developments in insanity law took

11. *People v. Sedlacek*, 2013 IL App (5th) 120106, ¶ 27; *People v. Clay*, 836 N.E.2d 872, 884 (Ill. App. Ct. 2005). The inquiry regarding fitness or competency addresses a defendant’s ability to participate in court proceedings, whereas insanity involves “whether a defendant, because of a mental disease or defect, lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” *People v. Burton*, 703 N.E.2d 49, 61 (Ill. 1998). A finding that a defendant is unfit to stand trial is not “proof of insanity at the time of the offense.” *People v. Manns*, 869 N.E.2d 437, 443 (Ill. App. Ct. 2007).

12. *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982). This case involved a man who attempted to assassinate President Ronald Reagan. *Id.* at 117. Hinckley received a verdict of not guilty by reason of insanity, which sparked controversy surrounding the insanity defense. AM. BAR ASS’N, CRIM. JUST. MENTAL HEALTH STANDARDS 7-288, 7-298 (1989).

13. Frank George, *The Cognitive Neuroscience of Narcissism*, 1 J. BRAIN BEHAV. & COGNITIVE SCI. 1, 6 (Feb. 2018) (noting that narcissists have steady structural deficits in the anterior insular cortex).

14. ERICH FROMM, *THE HEART OF MAN: ITS GENIUS FOR GOOD AND EVIL* 73, 76 (American Mental Health Foundation Books 2011) (1964).

15. Edith Weigert, *Narcissism: Benign and Malignant Forms*, in CROSSCURRENTS IN PSYCHIATRY & PSYCHOANALYSIS 222, 229 (Robert W. Gibson ed., 1967).

16. Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J. L. MED. & ETHICS 745, 750 (2010).

place in the United States throughout the twentieth century.¹⁷ The current scientific approach is to allow juries and judges to determine whether functional impairments associated with a personality disorder sufficiently impaired an offender as to abolish responsibility of a criminal act.¹⁸

B. The Historical Development of the Insanity Defense

History has recognized some form of the insanity defense for thousands of years.¹⁹ Ancient societies distinguished between blameworthy and blameless acts of harm.²⁰ English common law followed these same principles of legal insanity, noting the inability to distinguish good from evil as an excuse to legal insanity.²¹ Around the Fourteenth Century, there was a shift in which insanity became recognized as a complete defense.²² By the Eighteenth Century, courts commonly used the “knowledge of the good and evil” test in insanity cases.²³ Our founders and American courts focused on the

17. Norman J. Finkel, *Insanity on Trial* 63 (1988).

In the terms and practices that relate most closely to insanity and the law, twentieth-century medico-psychological experts assume the witness stand with far greater confidence than their forebears did: their descriptions of types of mental disorders are more detailed and discriminating, their diagnostic tools are more varied and validated, their knowledge regarding physical and psychological causation is grounded more solidly in empirics; and their treatments, be it physical, chemical, electrical, surgical, or psychological, are more potent.

Id.

18. *Id.* at 755.

19. Rael Strous, *The Shoteh and Psychosis in Halakhah with Contemporary Clinical Application*, 12 TORAH U-MADDA J. 158, 167 (2004). Talmudic literature recognized madmen as a category of people who lack understanding and are therefore exempt from criminal punishment. *Id.* See also *Genesis* 2:9, 2:17, 3:5, 3:22. “Madness” was an excuse for punishable crimes, and even the Torah begins with an introduction of the “knowledge of good and evil” as central to every human being. *Id.*

20. Anthony Michael Platt & Bernard L. Diamond, *The Origins and Development of the “Wild Beast” Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 355, 366 (1965). The Jewish tradition “distinguished between harmful acts traceable to fault and those that occur without fault.” *Id.* Such harmful acts that occur without fault are committed by people who are “incapable of weighing the moral implications of personal behavior, even when willful.” *Id.*

21. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004–06 (1932) (discussing Henry II institutionalizing the common law insanity defense in 1154); EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 247a–247b (1853) (following the maxim that “a madman is only punished by his madness”).

22. *State v. Searcy*, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting) (discussing the history of the insanity defense and that the defense was a “special verdict of madness”).

23. Sayre, *supra* note 21, at 1235-36 (explaining that the law goes back to

defendant's ability to understand right from wrong,²⁴ and that those not fit for punishment must be acquitted.²⁵ Juries at this time were directed to consider whether the defendant "was able to distinguish whether he was doing good or evil," could "discern the difference between good and evil," or "had enough intelligence to distinguish between right and wrong."²⁶

The affirmative insanity defense was officially formalized in the Nineteenth Century and became known as the M'Naghten test of insanity.²⁷ This test arose from a case in 1843, where the defendant Daniel M'Naghten suffered from paranoid delusions that compelled him to attempt to kill Prime Minister Robert Peel.²⁸ At trial, the defendant was acquitted under the insanity defense.²⁹ The judges provided the following test:

[I]t must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.³⁰

The M'Naghten test became the accepted standard in the United States within a short period of time but not without criticism.³¹ Many courts believed the test was too narrow and

"old ethical basis of criminal responsibility" by asking whether the defendant could differentiate good from evil).

24. *People v Kleim*, 1 Edm. Sel. Cas. 13, 25 (N.Y. Sup. Ct. 1845). (stating that "[t]he inquiry to be made under the rule of law as now established, was as to the prisoner's knowledge of right and wrong at the time of committing the offense"); *State v. Marler*, 2 Ala. 43, 48 (1841) (expressing that an insanity plea requires "that the prisoner was incapable of judging between right and wrong").

25. *In re McElroy*, 6 Watts & Serg. 451, 456 (Pa. 1843) ("When a man is charged with a crime, and labours under total insanity, he is so clearly an irresponsible being, that the law does not consider him a fit subject for punishment, and he must be acquitted").

26. Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV. 105, 114–15 (1924).

27. See *M'Naghten's Case*, 8 ENG. REP. 718 (1843) (establishing the M'Naghten test of legal insanity). The terms "right and wrong" often took the place of "good and evil," however the phrases continued to be used interchangeably. *Id.* See also Platt & Diamond, *supra* 20, at 1237 (tracing the "wild beast" concept of mental illness with reference to legal insanity).

28. *M'Naghten's Case*, 8 Eng. Rep. at 718. The defendant thought he was shooting the Prime Minister while experiencing paranoid delusions but shot his civil servant Edward Drummond instead. *Id.*

29. *Id.*

30. *Id.* at 722.

31. ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 21 (1838). Dr. Isaac Ray thought the M'Naghten Test failed to acknowledge "those nice shades of the disease" that could render a defendant faultless for antisocial conduct. *Id.* Ray also believed that the defense should turn on whether "the mental unsoundness . . . embraces the act within the sphere of its influence." *Id.*

supplemented it with the irresistible impulse doctrine, which states that those who cannot control their actions should not be held criminally liable.³² In 1955, the American Law Institute promulgated the Model Penal Code test for mental responsibility, which essentially combined the M’Naghten test and the irresistible impulse doctrine.³³ The language of the Model Penal Code test makes clear that a defendant only needs to reveal “substantial” cognitive or volitional impairments, rather than total, in order to establish the defense.³⁴

Throughout the twentieth century, most jurisdictions have adopted either the M’Naghten test, the irresistible impulse test, or the Model Penal Code test (or some minor variation).³⁵ Forty-five states and the federal government all provide some form of an affirmative insanity defense based on a defendant’s lack of moral culpability.³⁶ However, four states have completely abolished the defense,³⁷ and one state provides an affirmative defense that only encompasses cognitive incapacity, not lack of moral culpability.³⁸

C. *The Affirmative Insanity Defense*

As seen from the historical development of the insanity defense, there are many different standards of insanity for the purposes of criminal responsibility. One reason for the absence of a comprehensive approach is due to limited knowledge about how the mind works.³⁹ In addition, there is disagreement between the legal

32. See *Parsons v. State*, 2 So. 854, 866 (Ala. 1887) (explaining irresistible impulses as “[losing] the power to choose between right and wrong, and [avoiding to do] the act in question, as that his free agency was at the time destroyed”); see also *State v. White*, 270 P.2d 727, 730 (N.M. 1954) (discussing irresistible impulses as “deprived of the normal governing power of [her] will”), *State v. Staten*, 247 N.E.2d 293, 298 (Ohio. 1969) (having no “capacity to avoid [her] action”), and *Commonwealth v. Rogers*, 7 Met. 500, 502 (Mass. 1844) (describing acting from “an irresistible and uncontrollable impulse”).

33. Model Penal Code § 4.01 (2020) (providing “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law”).

34. *Id.*

35. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-297 n. 15.

36. Brief for Petitioner at 26, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019), (No. 18-6135).

37. IDAHO CODE § 18-207 (2020); KAN. STAT. ANN. § 22-3219 (2020); MONT. CODE ANN. 46-14-102 (2019); UTAH CODE ANN. § 76-2-305(1) (2020).

38. ALASKA STAT. ANN. § 12.47.010 (2020). “In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.” *Id.*

39. *U.S. v. Williams*, 483 F. Supp. 453, 462 (E.D.N.Y. 1980).

profession and the medical community in formulating a uniform standard.⁴⁰

The insanity defense “defines the extent to which [those] accused of crime may be relieved of criminal responsibility by virtue of mental disease.”⁴¹ Generally, the purpose of the insanity defense is to ensure that criminal culpability is only imposed on those who have the cognitive and volitional capacity to comply with the law.⁴² It is well-established by the courts that those whose mental disorders deprive them of this capacity are neither culpable nor deterrable and therefore, should not be subject to the same penalties as those who are sane.⁴³

In order to successfully assert the insanity defense, a defendant must prove that his insanity resulted from a disease or defect of the mind.⁴⁴ Unusual behavior or bizarre statements alone are not enough to show insanity required for the defense.⁴⁵ Additionally, mental illness alone is not sufficient to alleviate a defendant of criminal liability.⁴⁶

The difficulty . . . in adopting any standard of criminal responsibility is that between the extreme cases of the raving lunatic and the man of perfectly sound understanding is every degree of mental capacity. Those who are mentally impaired are not easily discerned; they are not limited to the eccentric madman. Thus, the consequent struggle exists to identify the true capacity of the individual.

Id.

40. *State v. Smith*, 574 P.2d 548, 552 (Kan. 1977).

[T]he basic problem with any insanity test evolves from the inability of the legal and medical professions to develop a mutual insanity standard. The legal profession functions from an objective, rhetorical base which seeks definitions and applies those definitions to the facts. It seeks the accountability of individual actions, the protection of society and the deterrence of crime. Conversely, the medical profession (in particular the psychiatric branch) functions from a subjective personality base which seeks behavioral nuances and analyzes those nuances by individual expertise. It seeks the discovery of mental illness, the rehabilitation of the patient and the abolition of punishment.

Id.

41. GOLDSTEIN, *supra* note 3, at 9.

42. *Bethea v. United States*, 365 A.2d 64, 72 (D.C. 1976).

43. *Robey v. State*, 456 A.2d 953, 960 (Md. 1983).

44. See Natalie Abrams, *Definition of Mental Illness and the Insanity Defense*, 7 J. PSYCHIATRY & L. 441 (1979) (reviewing different versions of the insanity defense test).

45. *Albarran v. State*, 96 So. 3d 131, 189 (Ala. Crim. App. 2011); *People v. Frank-McCarron*, 934 N.E.2d 76, 88 (Ill. App. Ct. 2010).

46. *Fernbach v. State*, 954 N.E.2d 1080, 1088 (Ind. Ct. App. 2011). “We do not doubt that Fernbach suffers from some form of mental illness . . . [but the] question is whether there was sufficient evidence of probative value supporting the jury’s conclusion that Fernbach was not insane at the time of his crimes.”
Id.

Insanity must be proven at the time of the criminal act.⁴⁷ Further, the insanity defense is either a complete defense or no defense at all.⁴⁸ It is noteworthy to mention that some jurisdictions recognize a diminished capacity defense, under which the defendant accepts criminal responsibility but is convicted of a lesser offense due to a mental defect.⁴⁹

The question of insanity is a legal, rather than medical, question.⁵⁰ The United States Court of Appeals for the Second Circuit provided that expert psychiatrists are to offer data and evidence for which the legal judgment is based.⁵¹ However, once this information is provided, “it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts.”⁵²

As previously mentioned, most jurisdictions include a defense that tests the defendant’s capacity to understand the nature of the act and the defendant’s ability to distinguish right from wrong.⁵³ However, Kansas is one of five states that only recognizes the mental disease or defect defense for mental capacity.⁵⁴ The *Hinckley* verdict likely caused these states to shift to the mens rea approach.

D. Effects of the *Hinckley* Verdict

In one of the most famous insanity cases, a man named John Hinckley attempted to assassinate President Ronald Reagan and wounded four people in the process.⁵⁵ At his trial, Hinckley presented evidence that he was suffering from a mental disease and that his criminal actions were a result of that disease.⁵⁶ The jury

47. *State v. Lamb*, 330 N.W.2d 462, 469 (Neb. 1983).

48. *People v. Elmore*, 325 P.3d 951, 966 (Cal. 2014).

49. *United States v. Twine*, 853 F.2d 676, 678 (9th Cir. 1988). Unlike insanity, the diminished capacity defense is not an excuse and is concerned with whether the defendant possessed a culpable state of mind in the commission of the crime. *Id.*

50. *See United States v. Freeman*, 357 F.2d 606, 619 (2d Cir. 1966) (reversing the defendant’s conviction and ordering the district court to evaluate his mental capacity based upon Model Penal Code § 4.01).

51. *Id.* at 619-20.

52. *Id.*

53. *State v. France*, 776 N.W.2d 510, 516 (Neb. 2009); *White v. Commonwealth*, 636 S.E.2d 353, 356 (Va. 2006)

54. KAN. STAT. ANN. § 22-3219 (2020).

55. *Hinckley*, 672 F.2d 115, 117 (D.C. Cir. 1982); *Hinckley v. United States*, 140 F.3d 277, 279 (D.C. Cir. 1998).

56. *Hinckley*, 140 F.3d at 279. Hinckley presented four expert witnesses at trial: two psychologists and two psychiatrists. *Id.* All four of his experts testified that Hinckley suffered from psychotic disorder and major depression, which were in remission. *Id.* They also testified that he suffered from narcissistic personality disorder, which was active. *Id.*

found Hinckley not guilty by reason of insanity (“NGRI”).⁵⁷ The district court then committed Hinckley to St. Elizabeth’s Hospital, where he remained until his release in September 2016.⁵⁸

The verdict of not guilty by reason of insanity in this highly publicized case resulted in controversy and prompted a national discussion of the insanity defense in the 1980s.⁵⁹ Controversy stemmed from the verdict, which led state legislatures to oppose the M’Naghten Rule and create a “hostile public mood” toward the defense.⁶⁰ The American Bar Association (“ABA”) expressed that the negative and unwarranted overreaction to the problems exemplified by the *Hinckley* verdict triggered the adoption of the mens rea approach, and the ABA outwardly rejects the abolition of the traditional insanity defense.⁶¹

E. Transition to the Mens Rea Approach

Until recently, all fifty states and the federal government used some version of the affirmative insanity defense that allowed juries to reach a verdict of not guilty by reason of insanity.⁶² During the first half of the twentieth century, three state legislatures attempted to completely eliminate the insanity defense, but each attempt was struck down as unconstitutional by its state supreme court.⁶³ The problem was the fact that each statute denied the

57. *Hinckley*, 672 F.2d at 132-33 (stating that insanity is an affirmative defense, therefore the defendant carries the burden of proving insanity).

58. *See* United States v. Hinckley, 200 F. Supp. 3d 1 (D.D.C. 2016) (discussing Hinckley’s release from prison and deciding that he would: (1) not be a danger to himself or the public; (2) complete a daily activity log; (3) be required to wear an ankle bracelet and/or install a vehicle tracking device; and (4) not be permitted to access the internet for at least six months). *See also* Ralph Ellis, *Reagan Shooter John Hinckley Jr. Released from Hospital*, CNN (Sep. 10, 2016, 6:49 PM), www.cnn.com/2016/09/10/politics/reagan-shooter-john-hinckley-jr-released-from-hospital/index.html (discussing the Honorable Paul Friedman allowing John Hinckley to be released and reside in his mother’s home under certain restrictions).

59. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-288, 7-298 (expressing that “the attempted assassination of President Reagan by John W. Hinckley, Jr., resulted in a new round of controversy over the defense” and that the Insanity Defense Reform Act of 1984 was undoubtedly influenced by the *Hinckley* verdict).

60. *Id.* at 7-288, 7-301 (“Such a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and unwarranted overreaction to the problems typified by the *Hinckley* verdict.”).

61. *Id.* (expressing that “[t]he American Bar Association opposes abolition . . . [insanity] defense”); *see also* Brief for the Am. Bar Ass’n as Amicus Curiae in Support of Petitioner, *Kahler v. Kansas*, 140 S. Ct. 1021 (2018) (No. 18-6135).

62. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-293 (stating that “mental nonresponsibility [insanity] is a jurisprudential, not a medical, concept”).

63. *See* State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910) (holding that §

defendant his or her due process right to introduce evidence of mental illness.⁶⁴ The Supreme Court of Washington maintained that there can be no criminal responsibility for those who are so deprived of reason as to be incapable of forming criminal intent.⁶⁵ Because evidence of a mental disorder is relevant to the question of responsibility, it cannot be excluded when a defendant's life and liberty are at stake.⁶⁶ The rulings in these cases established that evidence of mental illness that may have contributed to a crime cannot be omitted in its entirety.⁶⁷

Later in the twentieth century, state legislatures in five states eliminated the affirmative insanity defense and replaced it with the mens rea approach.⁶⁸ These states allow for the introduction of evidence of mental illness only to rebut the mens rea element of the crime.⁶⁹ Thus, the new statutes do not fully deny the introduction of mental health evidence like the older statutes did but severely limit the scope of the insanity defense.⁷⁰

2259 deprives a criminal defendant of his due process rights), *State v. Lange*, 123 So. 639, 642 (La. 1929) (declaring Act No. 17 unconstitutional), *and Sinclair v. State*, 132 So. 581, 588 (Miss. 1931) (holding that the statute abolishing the insanity defense violates Mississippi's Constitution).

64. *Strasburg*, 110 P. 1020, 1024; *Lange*, 123 So. 639, 641-42; *Sinclair*, 132 So. 581, 582.

65. *Strasburg*, 110 P. at 1022.

No insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is, that there must be a criminal intent, in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong.

Id.

66. *Strasburg*, 110 P. at 1024.

Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury.

Id.

67. *Strasburg*, 110 P. 1020, 1024; *Lange*, 123 So. 639, 641-642; *Sinclair*, 132 So. 581, 582.

68. IDAHO CODE § 18-207 (2020); KAN. STAT. ANN. § 22-3219 (2020); MONT. CODE ANN. 46-14-102 (2019); UTAH CODE ANN. § 76-2-305(1) (2020); *Finger*, 27 P.3d at 68. Nevada, Kansas, Montana, Idaho, and Utah were the five states that adopted statutes reflecting the mens rea approach. IDAHO CODE § 18-207; KAN. STAT. ANN. § 22-3219; MONT. CODE ANN. 46-14-102; UTAH CODE ANN. § 76-2-305(1). All but the Nevada statute survived review in state courts. *Finger*, 27 P.3d at 86.

69. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 340 (8th ed. 2018). Mental illness is essentially irrelevant in these four states except to rebut the element of mens rea. *Id.*

70. IDAHO CODE § 18-207 (2020); KAN. STAT. ANN. § 22-3219 (2020); MONT. CODE ANN. 46-14-102 (2019); UTAH CODE ANN. § 76-2-305(1) (2020).

In 2001, the Nevada Supreme Court struck down Nevada's statute that eliminated the insanity defense, holding that it violated due process of both the United States Constitution and the State Constitution.⁷¹ However, Kansas, Idaho, Montana, and Utah survived review in state court.⁷² Further, the state of Alaska has not completely eliminated the affirmative insanity defense but has limited it to considerations of mens rea.⁷³

The United States Supreme Court has declined a factually similar case to *Kahler* in the past.⁷⁴ Therefore, states have remained free to address mental illness and criminal culpability in a severely restrictive manner, like the state of Idaho.⁷⁵ There, for example, insanity remains pertinent to culpability, but only with regard to criminal intent.⁷⁶

The Supreme Court does not provide advisory opinions⁷⁷ and generally only accepts cases where there is a disagreement among

71 *Finger*, 27 P.3d at 79.

The Due Process Clause mandates protection of those principles deemed “fundamental to the American scheme of justice The history of American jurisprudence reflects that it is a fundamental principle of our law that a defendant who is incapable of forming the requisite intent, or *mens rea*, to commit a crime cannot be convicted of a crime. One who does not possess the necessary criminal intent is not subject to criminal punishment.”

Id.

72 See *State v. Bethel*, 66 P.3d 840, 846 (Kan. 2003) (concluding the constitutionality of § 22-3219 is not properly before the Kansas Supreme Court). See also *Korell*, 690 P.2d at 1008 (upholding a statute that abolished the traditional insanity defense and replaced it with the mens rea approach), *Searcy*, 798 P.2d at 916 (concluding that neither the state nor federal Constitutions set forth the right to plead insanity), and *State v. Herrera*, 895 P.2d 359, 367 (Utah 1995) (holding the Utah legislature's decision to restrict the traditional insanity defense did not violate defendants' due process rights).

73. ALASKA STAT. ANN. § 12.47.010 (2020). The Alaska statute is set up as an affirmative defense, yet only protects defendants who are “unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.” Brief for Respondent at 31, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019) (No. 18-6135). It is unclear how a decision against the state of Kansas would have affected Alaska. *Id.* It is likely that the four states with the mens rea approach would have adopted an affirmative defense similar to § 12.47.010. *Id.*

74. *State v. Delling*, 267 P.3d 709, 721 (Idaho 2011), *cert. denied* *Delling v. Idaho*, 568 U.S. 1038 (2012) (declining to consider whether Idaho's abolition of the insanity defense is constitutional).

75. Marc W. Pearce & Lori J. Butts, *Insanity in the State of Idaho*, 44 JUD. NOTEBOOK 28 (Feb. 2013), www.apa.org/monitor/2013/02/jn (analyzing the case of *State v. Delling*).

76. *Delling*, 568 U.S. at 1039 (Breyer, J., dissenting).

77. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (“We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.”).

lower courts.⁷⁸ Here, there was a circuit split regarding the constitutionality of states abolishing the insanity defense.⁷⁹ Specifically, there was a divide among the states that have adopted the mens rea approach to insanity⁸⁰ and the state of Nevada that has rejected it.⁸¹

F. *The Fourteenth Amendment Due Process Clause*

The issue in *Kahler* is whether abolishing the insanity defense violates the Fourteenth Amendment Due Process Clause and the Eighth Amendment Cruel and Unusual Punishment Clause of the United States Constitution.⁸² The Fourteenth Amendment's Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."⁸³ The Due Process Clause protects those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁸⁴ These principles emanate from history and basic societal values.⁸⁵ The Bill of Rights and the Due Process Clause were established to "protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy."⁸⁶ These deeply rooted rights and basic values that protect America's liberty must be followed by the states.⁸⁷

The United States Supreme Court has not hesitated to protect fundamental rights against encroachment by the states.⁸⁸ The test

78. *See* *Milner v. Dep't of the Navy*, 562 U.S. 562, 569 (2011) (granting certiorari in light of the Circuit split regarding the meaning of Exemption 2); *see also* *Abramski v. United States*, 573 U.S. 169, 176 (2014) (granting certiorari principally to resolve the Circuit split about §922(a)(6)).

79. *See Bethel*, 66 P.3d at 846 (adopting the mens rea approach to insanity); *see also Korell*, 690 P.2d at 1008 (adopting the mens rea approach to insanity), *Searcy*, 798 P.2d at 916 (adopting the mens rea approach to insanity), *Herrera*, 895 P.2d at 367 (adopting the mens rea approach to insanity), and *Finger*, 27 P.3d at 86 (rejecting the mens rea approach to insanity).

80. *Bethel*, 66 P.3d at 846. *See also Korell*, 690 P.2d at 1008 (discussing the process of Montana abolishing the insanity defense and replacing it with the mens rea approach), *Searcy*, 798 P.2d at 917 (discussing how three states have abolished the insanity defense), and *Herrera*, 895 P.2d at 367 (discussing Utah's policy decision to limit the traditional insanity defense).

81. *Finger*, 27 P.3d at 86.

82. Petition for Writ of Certiorari, *supra* note 9 at i.

83. U.S. CONST. amend. XIV, § 1.

84. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

85. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1972) (plurality opinion).

86. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

87. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (explaining that due process guarantees right to a jury trial in all criminal cases); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (expressing how due process prohibits "grossly excessive" punitive damages).

88. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (protecting the

to determine whether a right is fundamental is historical practice,⁸⁹ but the fact that many states follow a practice is worth considering.⁹⁰ An abundance of state courts recognize the insanity defense as a fundamental principle of United States law that is protected by the due process clause.⁹¹

III. ANALYSIS

This section provides a detailed analysis of *Kahler v. Kansas*. It first provides factual background of the case, including the Kahler's family history, the shooting, and James Kahler's history of mental illness. Second, it introduces the Kansas statute at issue and facts from Kahler's trial. Next, this section analyzes the Kansas Supreme Court decision of *Kahler v. Kansas* by exploring *State v. Bethel*. Finally, this section ends with an analysis of the United States Supreme Court decision and the dissent.

A. Kahler Family History

In the years leading up to James Kahler's crime, he and his family experienced several important events. In 2008, James and his family lived in Weatherford, Texas.⁹² James and his wife, Karen Kahler, both held successful careers, and acquaintances even

fundamental right to marital privacy by use of contraceptive). *See also* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (U.S. 2015) (holding that same-sex couples have the fundamental right to marry).

89. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992).

90. *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

[T]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Id.

91. *See Finger*, 27 P.3d at 84 (concluding that legal insanity is a fundamental principle that is protected by both the United States and Nevada Constitutions); *see also* *People v. Skinner*, 704 P.2d 752, 758 (Cal. 1985) (accepting the proposition that the affirmative insanity defense is required by due process), *State ex rel. Causey*, 363 So. 2d 472, 474 (La. 1978) (holding that the Fourteenth Amendment guarantees the right to plead not guilty by reason of insanity), *State v. Strasburg*, 110 P. 1020, 1025 (Wash. 1910) (holding that § 2259 deprives a criminal defendant of his due process rights), *State v. Lange*, 123 So. 639, 642 (La. 1929) (declaring Act No. 17 unconstitutional), *and* *Sinclair v. State*, 132 So. 581, 588 (Miss. 1931) (holding that the statute abolishing the insanity defense violates Mississippi's Constitution).

92. *State v. Kahler*, 410 P.3d 105, 113 (Kan. 2018).

described them as the perfect family.⁹³ That summer, James accepted a new job as the city of Columbia's director of water and light.⁹⁴ James moved to Columbia by himself, while Karen and their three children, Emily, Lauren, and Sean, remained in Weatherford and planned to move in the fall.⁹⁵

Before James moved to Colombia, Karen had expressed an interest in engaging in a sexual relationship with a female trainer with whom she worked.⁹⁶ James consented to the relationship thinking that the affair would not last.⁹⁷ However, the affair did not end once Karen moved to Colombia.⁹⁸ The affair caused tension at a New Year's Eve party in Weatherford, Texas when James became mortified by Karen and her lover's behavior.⁹⁹ The night ended when the Kahlers became physically aggressive with one another.¹⁰⁰ The couple attempted marriage counseling, but Karen filed for divorce in mid-January 2009.¹⁰¹

That following March, James was arrested after Karen made a battery complaint against him.¹⁰² Shortly after, Karen moved out of James' residence with her two daughters and son.¹⁰³ The crumbling of James' marriage and family relationships led to a personal and professional breakdown when he was fired from his new job and was forced to move back in with his parents at their ranch.¹⁰⁴

B. The Shooting

In 2009, the Kahler's son, Sean, spent Thanksgiving with his father at his grandparents' ranch in Meriden, Kansas.¹⁰⁵ Their two daughters, Emily and Lauren, spent the holiday in Burlingame, Kansas, with Karen and their grandmother, Dorothy Wight.¹⁰⁶ Karen planned to pick Sean up on Saturday, November 28 and take him to Dorothy's home in Burlingame.¹⁰⁷ Sean, however, asked to stay longer because he was enjoying fishing and hunting with his father.¹⁰⁸ Karen refused to let him stay longer.¹⁰⁹ While James was

93. *Kahler*, 410 P.3d at 113.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

out of the house, James' mother drove Sean to meet Karen.¹¹⁰

Later that evening, Dorothy's neighbor notified the police regarding a suspicious man in a red Ford Explorer, which turned out to be James' vehicle.¹¹¹ Less than an hour later, James entered Dorothy's house through the back door and started shooting.¹¹² Karen and Sean were in the kitchen, while Emily, Lauren, and Dorothy were elsewhere in the house.¹¹³ James shot Karen twice, but did not attempt to harm Sean, who safely ran out the back door.¹¹⁴

The police found Karen lying unconscious on the kitchen floor.¹¹⁵ Emily was found dead in the living room.¹¹⁶ Dorothy was alive, still in a living room chair, with injuries to her abdomen.¹¹⁷ Lauren was found upstairs conscious but barely breathing.¹¹⁸ Before dying, Dorothy and Lauren told the police that James had shot them.¹¹⁹ The police arrested James the next morning as he was found walking down a country road.¹²⁰

C. Kahler's Mental Health

When James shot four members of his family, he was suffering from severe mental disease.¹²¹ He was experiencing overpowering obsessive compulsions, extreme emotional disturbance, and possibly dissociated from reality.¹²² For a long time, James suffered from mixed obsessive-compulsive, narcissistic, histrionic, and paranoid personality disorders and eventually fell into a severe depression.¹²³ Although it was undiagnosed at the time, doctors determined that James had severe obsessive-compulsive disorder.¹²⁴ As a result, James was always fixated on maintaining a perfect public image.¹²⁵ James also "imposed stubborn controls of

110. *Kahler*, 410 P.3d at 113.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 114.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Joint Appendix at 84, *Kahler v. Kansas*, 140 S. Ct. 1021 (2019) (No. 18-6135).

122. *Id.*

123. *Id.*

124. *Id.* at 91-92.

125. *Id.* *Kahler* "showed preoccupation with appearing as an orderly family, with extreme inflexibility about social mores." *Id.* He also had high expectations of his "wish for her appearance, desirability, and 'perfect' family life." *Id.* *Kahler* "thrived on the sense of self-importance, community prestige, and being

his family.”¹²⁶

In 2008, James’ zealously enforced routines began to fall apart when the family moved to Missouri and Karen began her affair.¹²⁷ James was unable to cope with the changes in his life, especially when he realized he was no longer Karen’s center of attention.¹²⁸ After Karen filed for divorce, James’ obsession about his image took over and his depression intensified.¹²⁹ Family, friends, and colleagues noted James’ deterioration.¹³⁰ His behavior toward Karen became even more extreme and controlling.¹³¹ James projected Karen’s betrayal onto his teenage daughters and blamed them for Karen’s affair,¹³² while maintaining a close relationship with his son.¹³³

After the shooting, James was unable to recall any events between leaving his parents’ house and surrendering to the police.¹³⁴ James’ inability to recall the events may indicate short-term dissociation, which is detachment from self or loss of memory.¹³⁵ Dorothy’s LifeAlert device captured James exclaiming, “Oh s**t! I am going to kill her . . . G-d damn it!” in a tone that implied disbelief and dissociation.¹³⁶

Before trial, James was evaluated by two forensic psychiatrists: one serving as the defense’s expert and the other serving the State.¹³⁷ These experts agreed on many things, and both concluded that James suffered from obsessive-compulsive personality disorder, major depressive disorder, and borderline,

perceived as an ideal or perfect marriage.” *Id.*

126. *Id.* at 91. “Kahler demonstrated obsessive preoccupation with sexual activity with Karen (detailed sex log in college) and highly rigid approach to nightly sex. The family habituated to the routine.” *Id.*

127. Brief for Petitioner, *supra* note 36 at 7.

128. Brief for Petitioner, *supra* note 36 at 7-8.

129. *Id.* at 8.

130. Joint Appendix, *supra* note 121 at 64-65. In an interview, Tina McNew stated that Kahler had “gone off the deep end and even his parents were concerned for him.” *Id.* Further, Kahler felt as if “he was losing his mind” and could not concentrate at work. *Id.*

131. Brief for Petitioner, *supra* note 36 at 7. Kahler monitored Karen’s conversations with her lover, drove 150 miles in an attempt to catch Karen with her lover, and hired a private investigator to spy on the two of them. *Id.*

132. Joint Appendix, *supra* note 121 at 69, 97. Kahler expressed that Emily and Lauren “became their mom” and that they ultimately “became fused in his mind with Karen.” *Id.*

133. *Id.* at 85 (“Sean [James Kahler’s son] was more attached to him [James] at the end. The girls were more attached to Karen”).

134. *Id.* at 72, 87.

135. *Id.*; Philip Wang, *What Are Dissociative Disorders?*, AMERICAN PSYCHIATRIC ASSOCIATION (Aug. 2018), www.psychiatry.org/patients-families/dissociative-disorders/what-are-dissociative-disorders.

136. Brief for Petitioner, *supra* note 36 at 10.

137. *Id.*

paranoid, and narcissistic personality tendencies.¹³⁸ The defense's expert stated that James' depression was so severe that he did not genuinely choose to kill his family.¹³⁹ In contrast, the State of Kansas provided evidence to contradict the defense expert's testimony, claiming that James "methodically went through the house shooting each of the women in turn."¹⁴⁰ Further, James did not attempt to harm or shoot Sean, who James believed was the only child that did not betray him.¹⁴¹ James also did not shoot the neighbors, who were shining flashlights at him and yelling at him to stop.¹⁴²

D. Kansas Law

The Kansas legislature abandoned the M'Naghten test when it enacted Kan. Stat. Ann. § 22-3220.¹⁴³ The Statute provides: "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."¹⁴⁴ This statute adopted the mens rea approach to insanity and allows evidence of mental disease or defect to negate the mental element of a crime.¹⁴⁵ It also completely abandons the defense of lack of capacity to know right from wrong.¹⁴⁶

Mental condition is also relevant at the sentencing phase under Kan. Stat. Ann. § 21-6815(c)(1)(C), which allows for mitigating circumstances where the defendant lacked substantial capacity for judgment due to a physical or mental impairment.¹⁴⁷ For more serious crimes, like capital murder, mitigating factors

138. Joint Appendix, *supra* note 121 at 74, 142-43.

139. *Id.* at 48-49. Dr. Peterson, the defense expert, stated that Kahler "felt compelled and . . . was in great conflict about what he was doing . . . [H]e had basically for that [*sic*] at least that short period of time completely lost control." *Id.* He further testified that Kahler's capacity to control his "behavior had been severely degraded so that he couldn't refrain from doing what he did." *Id.*

140. Joint Appendix, *supra* note 121 at 261.

141. Brief for Respondent, *supra* note 73 at 5.

142. *Id.* at 6.

143. *State v. Kahler*, 410 P.3d 105, 125 (Kan. 2018).

144. KAN. STAT. ANN. § 22-3220 (2009), repealed by KAN. STAT. ANN. § 21-5209. This statute titled "Defense of Lack of Mental State" first codified as § 22-3220 and is now codified without change since 2010 as § 21-5209. § 21-5209 (2020)..

145. *Jorrick*, 4 P.3d at 617.

146. *Id.* The mens rea approach "permits a defendant to introduce expert psychiatric witnesses or evidence to litigate the intent elements of a crime. If the evidence negates the requisite intent, the defendant is entitled to an acquittal." *Id.*

147. KAN. STAT. ANN. § 21-6815 (2020) ("[M]itigating factors may be considered in determining whether . . . [t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed").

include an analysis of whether “[t]he capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.”¹⁴⁸ Finally, Kansas law gives a trial judge the power to commit a defendant convicted of a felony to a mental health institution instead of prison.¹⁴⁹

E. The Trial of Kahler v. Kansas

The State charged James Kahler with one count of capital murder and one count of aggravated battery.¹⁵⁰ At trial, the defense did not contest that James killed the victims.¹⁵¹ Instead, the defense's theory was that James' severe depression prevented him from forming the intent and premeditation required for the crime of capital murder.¹⁵²

Defense counsel introduced testimony from Dr. Stephen Peterson, a forensic psychologist, who stated that James suffered from severe depression and could not control his behavior at the time he shot the victims.¹⁵³ Dr. Peterson did not address whether or not James was capable of forming the intent required to commit the crimes.¹⁵⁴ The State provided expert testimony from Dr. William Logan who stated that James had the capacity to form the requisite intent and premeditation, despite being mentally unwell.¹⁵⁵

During closing arguments, defense counsel stressed that James was incapable of forming the required mens rea.¹⁵⁶ However, the State pointed out that the defense's expert failed to address this specific and crucial point, and that his mental health did not act as a barrier for conviction.¹⁵⁷ The jury found James guilty of capital murder.¹⁵⁸ After hearing aggravating and mitigating evidence in

148. KAN. STAT. ANN. § 21-6625(a)(6) (2011).

149. KAN. STAT. ANN. § 22-3430 (2014). The judge has this authorization when (1) the defendant needs psychiatric care and treatment, (2) such treatment may aid in the defendant's rehabilitation, (3) the defendant and society are not likely to be endangered by permitting the defendant to receive such treatment, and (4) in lieu of confinement or imprisonment. *Id.*

150. State v. Kahler, 410 P.3d 105, 114 (Kan. 2018).

151. *Id.*

152. *Id.*

153. *Id.* Dr. Peterson further testified that “his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did.” *Id.* A description of this type of behavior would potentially prove a person to be insane under the irresistible impulse test noted above, but not to negate mens rea. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

the penalty phase, the jury also proposed the death sentence.¹⁵⁹

On appeal to the Kansas Supreme Court, James Kahler introduced ten issues regarding his capital murder conviction and death sentence, including a challenge to the statute.¹⁶⁰

F. Kansas Supreme Court Decision

The Kansas Supreme Court affirmed James Kahler's conviction of capital murder and his death sentence.¹⁶¹ Regarding the issue of the constitutionality of the mens rea approach, the Kansas Supreme Court rejected Kahler's argument that the Kansas statute violates the due process clause.¹⁶² In doing so, it heavily relied upon its 2003 decision in *State v. Bethel*.¹⁶³

1. Analysis of Bethel

In *Bethel*, the defendant Michael Bethel shot and killed his father along with two other women because "God told [him] to do it."¹⁶⁴ Bethel waived his right to a jury trial based on an agreement between the parties.¹⁶⁵ The bench trial proceeding was based on stipulated facts.¹⁶⁶ Pursuant to the agreement, the State did not pursue the death penalty.¹⁶⁷ Bethel was sentenced to a controlling term of 100 years of imprisonment.¹⁶⁸ Like *Kahler*, Bethel asserted that Kansas' mens rea approach violated his due process rights because the insanity defense is deeply rooted in the traditions of the United States, and therefore, is fundamental to the justice system.¹⁶⁹

In its analysis, the Kansas Supreme Court determined that the insanity defense is not expressly protected by the United States

159. *Id.*

160. *Id.* The issues raised by Kahler include: 1) prosecutorial error, 2) judicial misconduct, 3) expert witness instruction, 4) the constitutionality of K.S.S. 22-3220, 5) lesser included offense instruction on felony murder, 6) limitations on defense on voir dire, 7) cumulative error during the guilt phase, 8) Eighth Amendment categorical challenge to the death penalty, 9) the constitutionality of the aggravating circumstances, and 10) sufficiency of the evidence of an aggravating circumstance. *Id.* However, this Comment is limited to the discussion of the constitutionality of K.S.S. 22-3220 and the Eighth Amendment categorical challenge to the death penalty. *Id.*

161. *Kahler*, 410 P.3d at 133.

162. *Id.* at 125.

163. *Id.*; *Bethel*, 66 P.3d at 842.

164. *Bethel*, 66 P.3d at 842.

165. *Id.* at 841.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

Constitution.¹⁷⁰ Its analysis rested on the argument that dealing with crime is the States' business rather than the Federal Government's.¹⁷¹ The court relied on the United States Supreme Court's instruction that lower courts should "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."¹⁷²

2. *Prior Kansas Supreme Court Opinions Considering § 22-3220*

The *Bethel* Court then looked to other cases where it previously considered and applied the mens rea approach under § 22-3220.¹⁷³ In *State v. Jorrick*, the defendant shot the victim while everything "was just a blur" after drinking for most of the day and smoking marijuana.¹⁷⁴ The defendant argued that he had no intent to kill the victim, and that the trial court erred by not instructing the jury on diminished capacity.¹⁷⁵ The court affirmed the trial court's conviction, holding that a reasonable factfinder could find that the defendant intended to kill the victim based on the evidence provided.¹⁷⁶ The court also found that the jury did not need to be instructed on diminished capacity because § 22-3220 prevents a defendant from raising diminished capacity as a defense.¹⁷⁷ The

170. *Id.* at 844.

171. *Id.*; See also *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government"), and *Irvine v. People of California*, 347 U.S. 128, 134, (1954) (plurality opinion) (stating, "[t]he chief burden of administering criminal justice rests upon state courts").

172. *Patterson*, 432 U.S. at 201–02.

[I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. (internal quotations omitted).

173. *Bethel*, 66 P.3d at 844.

174. *Jorrick*, 4 P.3d at 617 ("He claimed he was still in a "dream-like" state. Jorrick then drove home, told his mother that he thought he had just shot Keezer, and then went to bed"). In *Jorrick*, § 22-3220 was examined in the context of diminished capacity, not insanity. *Bethel*, 66 P.3d at 844.

175. *Jorrick*, 4 P.3d at 613, 617.

176. *Id.* at 614. Two experts testified that the defendant was not suffering from a major mental illness, and therefore, was able to form the intent to kill. *Id.* The expert for the defense, however, testified that the defendant was suffering from a dissociative disorder, which prevented him from forming the requisite premeditation before the murder. *Id.*

177. *Id.* at 617 ("Kansas is among a minority of states that have done away

mens rea approach only allows a defendant to introduce expert psychiatric evidence to negate the intent required for the crime.¹⁷⁸ Kansas law clearly limits the introduction of evidence showing the existence of a mental disease.¹⁷⁹

In *State v. Albright*, the defendant was convicted of premeditated murder for stabbing the victim.¹⁸⁰ On appeal, the defendant argued that § 22-3220 was unconstitutional because it violated Albright's due process rights under the federal and state constitutions.¹⁸¹ However, the defendant failed to raise the constitutionality issue at trial and there were no exceptional circumstances, so the Kansas Supreme Court ruled that the question was not properly before the court.¹⁸² Thus, the court did not consider the constitutionality of § 22-3220 in *Albright*.¹⁸³

3. *Out-of-State Cases Relied Upon by Kansas in Bethel*

The Court in *Bethel* cited to *State v. Korell*, *State v. Searcy*, and *State v. Herrera*, all cases from other states that concluded that the affirmative insanity defense is not a fundamental right.¹⁸⁴ As shown below, the Montana, Idaho, and Utah state legislatures abolished the insanity defense and replaced it with the mens rea approach like the state of Kansas.¹⁸⁵

In *Korell*, the defendant, a Vietnam veteran with several psychological problems, was convicted of attempted deliberate homicide and aggravated assault.¹⁸⁶ The defense argued that his acts were not voluntary, yet three expert witnesses testified on behalf of the State that the defendant was capable of acting

with the insanity and diminished capacity defenses.”).

178. *Id.*

179. *Id.*

180. *State v. Albright*, 46 P.3d 1167, 1169-70 (Kan. 2002).

181. *Id.* at 1176.

182. *Id.* at 1177; *see also* *State v. Mason*, 986 P.2d 387, 389 (Kan. 1999) (expressing, “[w]e may consider such issues in exceptional circumstances where the asserted error involves a strictly legal question that will be determinative of the case or where consideration of the new issue is necessary to serve the interests of justice or to prevent a denial of fundamental rights”). The defendant asserted that the constitutional issue of § 22-3220 was “necessary to serve the ends of justice,” but the court found his argument unpersuasive. *Albright*, 46 P.3d at 1177.

183. *Albright*, 46 P.3d at 1177.

184. *Bethel*, 66 P.3d at 846; *see also* *Korell*, 690 P.2d at 995 (discussing a defendant who took a handgun from his friend's home and had an acquaintance purchase ammunition before firing at his hospital supervisor), *Searcy*, 798 P.2d at 915 (describing a defendant who killed a store owner while committing a robbery in order to get money to purchase cocaine), and *Herrera*, 895 P.2d at 361 (discussing a defendant who shot and killed his ex-girlfriend).

185. *Bethel*, 66 P.3d at 846.

186. *Korell*, 690 P.2d at 994.

knowingly or purposefully.¹⁸⁷ On appeal, the defendant raised the question of whether there is “a constitutional right to raise insanity as an independent defense to criminal charges.”¹⁸⁸ The court discussed Montana’s alternate procedures for introducing evidence of a criminal defendant’s mental condition¹⁸⁹ and then considered four opinions that upheld Montana’s approach to insanity.¹⁹⁰ The Montana Supreme Court continued with a due process analysis.¹⁹¹ The court expressed that the United States Supreme Court has never held that “there is a constitutional right to plea an insanity defense” and that this topic is generally left to the states.¹⁹² Further, the affirmative insanity defense is not a fundamental right because the defense “grew out of earlier notions of *mens rea*.”¹⁹³ Essentially, Montana believes that the concept of *mens rea*, rather than the affirmative insanity defense, is deeply rooted in our nation’s history and tradition.¹⁹⁴ The state of Montana solely recognizes that “one who lacks the requisite criminal state of mind may not be convicted or punished.”¹⁹⁵ However, Justice Sheehy of the Montana Supreme

187. *Id.* at 995.

188. *Id.* at 996.

189. *Id.* Montana substituted procedures for considering a defendant’s mental condition and abolished the affirmative insanity defense. *Id.* Evidence of mental disease or defect can be presented at the following three phases of a criminal proceeding: (1) before trial, to show a defendant is unfit to stand trial; (2) during trial, to prove that “at the time of the offense charged, the defendant did not have the state of mind that is an element of the crime charged” or that the defendant did not act purposely or knowingly; and (3) at the dispositional stage, the sentencing judge can consider evidence from trial along with evidence introduced at the sentencing hearing to determine “whether the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law at the time he committed the offense.” *Id.*

190. *Id.* at 997; *see also* State v. Mercer, 625 P.2d 44 (Mont. 1981) (finding no authority holding that imprisonment instead of medical care of a person that alleges to be insane, but has not been adjudicated insane, constitutes cruel and unusual punishment), State v. Doney, 636 P.2d 1377 (Mont. 1981) (proving the requisite mental state beyond a reasonable doubt is the practice in Montana, not proving the defendant’s sanity beyond a reasonable doubt), State v. Zampich, 667 P.2d 955 (Mont. 1983) (upholding a conviction where the defendant may not have been acting voluntarily, but had the ability to act purposely and knowingly), *and* State v. Watson, 686 P.2d 879 (Mont. 1984) (upholding a 300 year sentence of an offender who suffered from a serious mental disorder).

191. *Korell*, 690 P.2d at 998-99.

192. *Id.* at 999.

193. *Id.* “Development of the *mens rea* concept preceded recognition of the insanity defense.” *Id.* “For centuries evidence of mental illness was admitted to show the accused was incapable of forming criminal intent. Insanity did not come to be generally recognized as an affirmative defense and an independent ground for acquittal until the nineteenth century.” *Id.* (citing N. Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 500 (1982)).

194. *Korell*, 690 P.2d at 998-99.

195. *Id.* at 999.

Court firmly stated in his dissent that Montana's handling of the insanity defense is unconstitutional for two reasons: (1) it deprives an insane defendant of jury trial for each element of the crime he or she is charged, thereby depriving the defendant of due process, and (2) it intrudes upon a defendant's right against self-incrimination.¹⁹⁶

In *Searcy*, the Idaho Supreme Court followed the reasoning of the Montana Supreme Court.¹⁹⁷ In *Searcy*, the defendant appealed his conviction of first-degree murder with a "determinate life sentence without the possibility of parole."¹⁹⁸ The Supreme Court of Idaho concluded that the United States and Idaho Constitutions do not require an insanity defense and that the Idaho statute did not deprive the defendant of his due process rights.¹⁹⁹ The court reached this conclusion by following an analysis similar to that of the Montana Supreme Court in *Korell*.²⁰⁰ For instance, the court first looked to *State v. Beam*, where the Idaho Supreme Court upheld § 18-207 against a related argument.²⁰¹ In *Beam*, the court stated that § 18-207 reduces the question of mental condition to an evidentiary question, but still recognizes that only responsible defendants can be convicted.²⁰²

Finally, in *Herrera*, two defendants challenged the constitutionality of § 76-2-305, otherwise known as Utah's insanity defense.²⁰³ On appeal, the Supreme Court of Utah expressed that it could not strike down legislation unless it clearly violated the state or federal constitutions.²⁰⁴ The court further held that the Utah statute is constitutional and that there is no federal or state due process right to an independent insanity defense.²⁰⁵

196. *Id.* at 1005-06 (Sheehy, J., dissenting) ("If the criminal act is the product of mental aberration, and not of a straight-thinking cognitive direction, it would seem plausible that society should offer treatment, but if not treatment, at least not punishment.").

197. *Bethel*, 66 P.3d at 847; *see also Searcy*, 798 P.2d at 915 (describing a defendant who killed a store owner while committing a robbery in order to get money to purchase cocaine).

198. *Searcy*, 798 P.2d at 915.

199. *Id.* at 919; *Bethel*, 66 P.3d at 847.

200. *Bethel*, 66 P.3d at 847; *Searcy*, 798 P.2d at 917-919.

201. *Searcy*, 798 P.2d at 917; *see also State v. Beam*, 710 P.2d 526 (Idaho 1985) (discussing a defendant who appealed his conviction of first-degree murder and death sentence for raping and murdering a thirteen-year-old girl).

202. *Beam*, 710 P.2d at 531. ("[Section] 18-207(c) specifically provides that a defendant is not prohibited from presenting evidence of mental disease or defect which would negate intent.").

203. *Herrera*, 895 P.2d at 361. *Herrera* is an interlocutory appeal, in which two cases were consolidated for appellate purposes. *Id.*

204. *Id.* at 363 ("There is no doubt that we cannot strike down any legislation unless it expressly violates the constitution.").

205. *Id.* at 365-67.

G. *The Defense's Argument*

After the Kansas Supreme Court affirmed the trial court's decision, James Kahler asked the United States Supreme Court to determine whether Due Process requires the States to offer an insanity defense that acquits criminal defendants who cannot differentiate right from wrong.²⁰⁶ The Court granted certiorari and heard oral arguments on October 7, 2019.²⁰⁷ As stated above, Kahler argued that Kansas' version of the insanity defense violates the Due Process Clause of the Fourteenth Amendment.²⁰⁸ The Defense in *Kahler* failed to persuade both the Kansas Supreme Court and the United States Supreme Court that the mens rea approach violated James Kahler's due process rights.²⁰⁹

Several state courts recognize legal insanity as a deeply rooted, fundamental principle that is protected by the Due Process Clause.²¹⁰ Three state supreme courts specifically overturned statutes that abolished the insanity defense and held those efforts as unconstitutional.²¹¹ The precedential value of these earlier cases is questionable because, unlike the mens rea approach, these unconstitutional statutes failed to replace the affirmative insanity defense with a doctrine that considers some aspect of mental deficiency.²¹²

James Kahler relied upon the Nevada Supreme Court's ruling in *Finger v. State* in which the Court held that legal insanity is a fundamental principle in the United States.²¹³ In *Finger*, the defendant was accused of murdering his mother and intended to

206. *Kahler*, 140 S. Ct. at 1027.

207. *Kahler v. Kansas*, 139 S. Ct. 1318 (2019); Transcript of Oral Argument, *supra* note 5.

208. *Kahler*, 140 S. Ct. at 1027.

209. *Id.*; *Kahler*, 410 P.3d at 125.

210. Brief for Petitioner, *supra* note 36 at 17 (citing *Finger*, 27 P.3d at 84); *People v. Skinner*, 704 P.2d 752, 758-59 (Cal. 1985); *State ex rel. Causey*, 363 So. 2d 472, 474 (La. 1978); *Ingles v. People*, 22 P.2d 1109, 1111 (Colo. 1933); *People v. Hill*, 934 P.2d 821, 825 (Colo. 1997); *Sinclair v. State*, 132 So. 581, 582 (Miss. 1931); *State v. Lange*, 123 So. 639, 642 (La. 1929); *State v. Strasburg*, 110 P. 1020, 1021 (Wash. 1910)).

211. *See Strasburg*, 110 P. at 1025 (concluding that the defendant's constitutional rights were violated by instructing the jury that insanity was not a defense); *see also Lange*, 123 So. at 643 (declaring a Louisiana statute unconstitutional because it withdrew final determination of insanity from a jury), *and Sinclair*, 132 So. at 582 (declaring a statute that does not allow insanity to be a defense for murder indictments a violation of due process and unconstitutional).

212. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 1235 at 7-301 n.38.

213. *Kahler*, 410 P.3d at 125; *see also Finger*, 27 P.3d at 86 (discussing a defendant who was charged for murdering his mother by stabbing her in the head with a knife).

assert the insanity defense.²¹⁴ However, the Nevada Legislature abolished the insanity defense in 1995.²¹⁵ The district court convicted the defendant of second-degree murder and sentenced him to serve life in prison.²¹⁶ The defendant challenged his conviction on Eighth and Fourteenth Amendment grounds.²¹⁷

While neither the United States nor the Nevada Constitutions explicitly require an affirmative insanity defense, the Nevada Supreme Court expressed that an individual cannot be convicted of a crime without the requisite intent to commit the offense.²¹⁸ The Court decided that the Nevada statute allowed an individual who lacks the requisite intent or mens rea of a criminal offense to be convicted of that offense, and therefore violated due process.²¹⁹ The Nevada Supreme Court stated, “[i]nsanity is a mental condition that interferes with the ability of a person to form criminal intent.”²²⁰ The *Kahler* court, however, stood by its decision in *Bethel*, and rejected the Nevada Supreme Court’s reasoning.²²¹

James Kahler also addressed a written dissent from the denial of certiorari in *Delling v. Idaho*.²²² Here, three justices stated that they would have granted the petition for certiorari to address whether Idaho’s approach to insanity is consistent with the Fourteenth Amendment.²²³ In *State v. Delling*, the defendant pleaded guilty to second-degree murder.²²⁴ The defendant, however, preserved his right to appeal the denial of his motion which declared the I.C. § 18-207 unconstitutional.²²⁵ The Idaho Supreme Court upheld I.C. § 18-207 as constitutional and affirmed the district court’s denial.²²⁶ The defendant then petitioned for writ of

214. *Finger*, 27 P.3d at 68.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 86.

220. *Id.*

Individuals are considered to be legally insane when their mental condition rises to a level so as to relieve them of criminal culpability for their actions because they are incapable of developing the necessary mens rea. Where the mens rea of a crime requires that defendants understand the nature and consequences of their conduct and that the conduct is wrong, then legal insanity is established when one of these two elements is missing . . . The Legislature cannot abolish the concept of legal insanity.

Id.

221. *Kahler*, 410 P.3d at 125.

222. *Id.*; *Delling*, 267 P.3d at 721.

223. *Delling*, 568 U.S. at 1041.

224. *Delling*, 267 P.3d at 711.

225. *Id.*

226. *Id.* at 721.

certiorari, but the United States Supreme Court denied it.²²⁷

Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, dissented the denial of certiorari.²²⁸ The three justices emphasized how criminal punishment is improper for those who are unable to tell right from wrong by reason of insanity.²²⁹ Similar to Kansas, insanity is only applicable with regard to intent and mens rea in Idaho.²³⁰ The justices, however, stressed that this modification from the affirmative insanity defense is “significant.”²³¹ Idaho’s standard permits the conviction of an individual who lacked the capacity to understand right from wrong, but understood the nature of his or her actions.²³² In *Kahler*, the Kansas Supreme Court stated that the *Delling* dissent has no effect on its decision.²³³

H. United States Supreme Court Decision of Kahler v. Kansas

On March 23, 2020, the United States Supreme Court held that Due Process does not require the States to adopt an insanity test that turns on a defendant’s ability to recognize that his or her crime was wrong.²³⁴ As shown below, the Court cites to several previous Supreme Court decisions in its analysis.

1. Previous United States Supreme Court Decisions on the Insanity Defense

Before *Kahler*, the Supreme Court had not held whether the Constitution requires an insanity defense.²³⁵ Historically, standards and procedures regarding the insanity defense have been left up to state choice;²³⁶ however, the Court has now decided that

227. *Delling*, 568 U.S. at 1038.

228. *Delling*, 568 U.S. at 1039 (Breyer, J., dissenting).

229. *Id.*

230. *Id.*

231. *Id.* at 1040.

232. *Id.*

233. *State v. Kahler*, 410 P.3d 105, 125 (Kan. 2018).

234. *Kahler*, 140 S. Ct. at 1027.

235. *Clark v. Arizona*, 548 U.S. 735, 752 n.20 (2006) “We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter.” *Id.*

236. *Id.* at 752. (“It is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice”); *see also Leland*, 343 U.S. 790 (holding that an Oregon statute the required a defendant to establish the insanity defense beyond a reasonable doubt did not violate the due process clause).

states can completely abolish the affirmative defense.²³⁷

Regarding insanity, the Supreme Court has held that an indigent defendant has a federal constitutional right to receive assistance from a psychiatric expert at state expense²³⁸ and that experts must work independently from the prosecution.²³⁹ The Court has also held that narrowing the insanity defense to only the moral incapacity prong did not violate due process.²⁴⁰ For instance, in *Clark v. Arizona*, the defendant, who shot and killed a police officer at a traffic stop, relied upon his paranoid schizophrenia to argue that he lacked the specific intent to shoot the officer at the time of the incident.²⁴¹ However, under § 13-502(A), the state of Arizona restricted its insanity defense to prove that the defendant did not know the wrongfulness of his acts.²⁴² The trial court ruled that the defendant could not rely on evidence of a mental disorder to dispute the mens rea element.²⁴³ The purpose of this rule is to avoid confusing and misleading the jury through the introduction of psychological or psychiatric testimony.²⁴⁴ The United State Supreme Court held that Arizona's insanity defense did not violate the Fourteenth Amendment due process clause by stating the defense solely in terms of capacity to tell right from wrong.²⁴⁵ In its decision, Justice Souter noted, "We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter."²⁴⁶

Further, in *Leland v. Oregon*, the defendant was tried for murder and asserted the insanity defense, but was found guilty and sentenced to death.²⁴⁷ An Oregon statute required the defendant to

237. See Cynthia Calkins, *Can a State Abolish the Insanity Defense?*, 50 JUD. NOTEBOOK 31 (May 2019), www.apa.org/monitor/2019/05/jn (analyzing the case of *Kahler v. Kansas*).

238. See *Ake v. Oklahoma*, 470 U.S. 68 (1985) (reversing a conviction because due process requires that the state provide psychiatric assistance).

239. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017) ("[T]he State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in evaluation, preparation, and presentation of the defense.").

240. *Clark*, 548 U.S. at 779.

241. *Id.* at 743.

242. *Id.* at 744; see also *Ariz. Rev. Stat. § 13-502* (2008) (stating, "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong").

243. *Clark*, 548 U.S. at 745 (citing *State v. Mott*, 931 P.2d 1046 (Ariz. 1997) (en banc), cert. denied, 520 U.S. 1234 (1997)).

244. *Clark*, 548 U.S. at 775.

245. *Id.* at 756 ("We are satisfied that neither in theory nor in practice did Arizona's 1993 abridgment of the insanity formulation deprive Clark of due process.").

246. *Id.* at 752 n.20.

247. *Leland*, 343 U.S. at 791.

prove his insanity beyond a reasonable doubt; the defendant appealed, arguing that this statute violated his due process rights guaranteed by the Fourteenth Amendment.²⁴⁸ However, the Court stated that:

The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’.²⁴⁹

The United States Supreme Court therefore affirmed the defendant’s conviction, holding that Oregon’s statute was not unconstitutional merely because it placed a heavier burden of proof on the defendant than many other states.²⁵⁰

In *Powell v. Texas*, the defendant was found guilty for being in a state of intoxication in a public place, in violation of Article 477 of the Texas Penal Code.²⁵¹ The defense counsel argued that the defendant was inflicted with the “disease of chronic alcoholism” and that criminally punishing him for his conduct violates the Eighth and Fourteenth Amendments.²⁵² While the facts and outcome of *Powell* are irrelevant to this Comment, Justice Marshall provided some useful insight.²⁵³ In the opinion, Justice Marshall stated:

[T]his Court has never articulated a general constitutional doctrine of *mens rea*. We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.²⁵⁴

Justice Marshall further expressed:

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms . . . But

248. *Id.* at 792 (“When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt[.]”).

249. *Id.* at 798 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

250. *Id.* at 798, 802.

251. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (“Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”).

252. *Id.*

253. *Id.* at 535-36.

254. *Id.*

formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.²⁵⁵

The Supreme Court found that the defendant's conviction was not unconstitutional because the lower court did not seek to punish the defendant's condition, but rather it sought to punish his public behavior that raised safety concerns.²⁵⁶

2. *United States Supreme Court Analysis of Kahler*

The Court references the aforementioned Supreme Court decisions in its analysis of *Kahler*.²⁵⁷ In her opinion, Justice Elena Kagan began by stating that Kahler had to overcome a high bar in arguing that the Kansas statute violates his constitutional rights.²⁵⁸ Kagan explained that a state law regarding criminal liability will only violate due process if the law "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁵⁹ In applying that standard, the Court looks to historical practice, including early judicial decisions.²⁶⁰

As stated above, the Supreme Court has largely left decisions regarding criminal liability to the States.²⁶¹ The Court cited to Justice Marshall's opinion in *Powell v. Texas*, agreeing that doctrines of insanity and mens rea are constantly changing and that it would be wrong for the Court to define some sort of insanity test because it would decrease experimentation.²⁶² Kagan noted that there are many differing opinions and uncertainties regarding mental illness and the human mind in general.²⁶³ On such unsettled ground, the Supreme Court has hesitated to reduce experimentation by outlining a specific insanity defense.²⁶⁴ Kagan then provides *Leland v. Oregon* and *Clark v. Arizona* as two examples where the Court has declined to define a test for

255. *Id.* at 536-37.

256. *Id.* at 532 ("The State of Texas thus has not sought to punish a mere status, as California did in *Robinson* . . . Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public.").

257. *Kahler*, 140 S. Ct. at 1027-1029.

258. *Id.* at 1027.

259. *Id.* (citing *Leland*, 343 U.S. at 798).

260. *Kahler*, 140 S. Ct. at 1027-28 (asking whether a rule is "so entrenched in the central values of our legal system—as to prevent a State from ever choosing another"); *Egelhoff*, 518 U.S. at 43.

261. *Clark*, 548 U.S. at 752 n.20.

262. *Kahler*, 140 S. Ct. at 1028 (citing *Powell*, 392 U.S. at 535-36).

263. *Kahler*, 140 S. Ct. at 1028.

264. *Id.*

insanity.²⁶⁵

The Supreme Court then refutes the defense's argument that the Kansas insanity defense statute violates due process.²⁶⁶ Kahler maintains that the moral-incapacity test is the touchstone of legal insanity.²⁶⁷ The Court agrees that insanity as relief of responsibility for a crime has been recognized for thousands of years.²⁶⁸ However, the Court did not find that Kansas diverges from this broad notion of insanity.²⁶⁹ The state has an insanity defense that negates criminal liability, even if it does not include a moral-incapacity prong.²⁷⁰ While Kansas may not follow the traditional approach to insanity, it still considers mental health at both trial and sentencing.²⁷¹

The Court does not agree with Kahler that due process requires a specific test for insanity.²⁷² History reveals early versions of insanity that favor a moral incapacity approach, but also versions based on a mens rea approach.²⁷³ Courts became more accepting of an insanity test based on moral incapacity only after *M'Naghten* in 1843.²⁷⁴ Still, the United States Supreme Court makes clear that the moral incapacity prong of the *M'Naghten* test is not a fundamental principle.²⁷⁵

For these reasons, the Court declined to require the States to adopt a specific insanity test based on a defendant's ability to recognize right from wrong.²⁷⁶ *Kahler v. Kansas* settles the question of whether the States can abolish the traditional, affirmative insanity defense and replace it with a mens rea approach.²⁷⁷ This decision gives states the choice in adopting an insanity defense.²⁷⁸

265. *Id.* at 1028-29; *see generally Leland*, 343 U.S. 790 (holding that an Oregon statute that required a defendant to establish the insanity defense beyond a reasonable doubt did not violate the due process clause); *see also Clark*, 548 U.S. 735 (determining that Arizona's insanity defense which was stated solely in terms of the ability to tell right from wrong did not violate due process).

266. *Kahler*, 140 S. Ct. at 1029.

267. *Id.*

268. *Id.* at 1030.

269. *Id.*

270. *Id.* at 1030-31.

271. *Id.* at 1037.

272. *Id.* at 1031-32.

273. *Id.* at 1032-34 (referencing common law cases that focus on cognitive incapacity approach). For example, a test in *Rex v. Arnold* associated lack of reason and mens rea and provided that if a man is "deprived of his reason, and consequently of his intention, he cannot be guilty." *Id.* at 1033 (*citing Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724)).

274. *Id.* at 1034.

275. *Id.* at 1035 (*citing Clark*, 548 U.S. at 749) (stating, "History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle").

276. *Id.* at 1037.

277. *Id.*

278. *Id.*

I. *Kahler v. Kansas Dissent*

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, dissented to the majority opinion.²⁷⁹ Interestingly, these same three Justices dissented to the Supreme Court's denial of certiorari in *Delling v. Idaho*.²⁸⁰ In his *Kahler* dissent, Justice Breyer explained that more defendants will be convicted under the mens rea approach to insanity.²⁸¹ He also rejected Kansas' argument that it had not abolished the insanity defense, but simply changed when a defendant can present mental-capacity evidence to the sentencing phase.²⁸² According to Justice Breyer, history and tradition indicate that insane defendants should not be found guilty in the first place.²⁸³

Under Kansas law, insane defendants are exposed to harsh punishments, including the death penalty.²⁸⁴ Moreover, Kansas's sentencing provisions do not alleviate the stigma that is associated with a criminal conviction.²⁸⁵ Forty-five states, along with the Federal Government and the District of Columbia, recognize an insanity defense that considers whether the defendant knew the difference between right and wrong.²⁸⁶ In general, Justice Breyer believes that Kansas' view contradicts a fundamental tradition of criminal law that dates back to the country's founding.²⁸⁷

279. *Id.* at 1037-38 (Breyer, J., dissenting).

280. *Id.*; see also *Delling*, 568 U.S. at 1039 (2012) (Breyer, J., dissenting). Justices Ginsberg and Sotomayor joined Justice Breyer in dissenting to the denial of certiorari. *Id.*

281. *Kahler*, 140 S. Ct. at 1038 (Breyer, J., dissenting).

Consider two similar prosecutions for murder. In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecution Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Under Kansas' rule, it can convict the second but not the first.

Id.

282. *Id.* at 1049.

283. *Id.*

284. *Id.* at 1049-50.

285. *Id.*

286. *Id.* at 1046.

287. *Id.* at 1050.

IV. PROPOSAL

This section suggests various means of resolving the differences in the insanity defense among the States. First, the United States Supreme Court should reconsider and rule in favor of the traditional insanity defense. Second, this section proposes various changes to be made to the insanity defense, such as restricting the types of mental health disorders and eliminating the volitional defense. Finally, this section suggests that sentencing should not be left to the discretion of a judge, but rather to an unbiased expert.

A. Supreme Court Should Rule in Favor of the Traditional Insanity Defense

The first potential solution to this issue is for the United States Supreme Court to reconsider and rule in favor of an insanity defense that encompasses criminal blameworthiness and moral culpability. Specifically, the Court should require an affirmative insanity defense that encompasses a criminal defendant's ability to understand the wrongfulness of his or her conduct. The inclusion of criminal blameworthiness warrants a deeper inquiry than the mens rea approach.²⁸⁸ This is because it entails a "certain *quality* of knowledge and intent transcending a minimal awareness and purpose."²⁸⁹ For example, the criminal defendant who knowingly and deliberately kills another human under psychotic delusions and hallucinations would be held criminally responsible and convicted under the mens rea approach.²⁹⁰ The mens rea approach is not only gravely unjust but also opposes the framework of this country's criminal justice system.²⁹¹

If the United States Supreme Court required that all jurisdictions enact an insanity defense that considers not just criminal intent, but also moral culpability, then there likely would have been little change throughout the country. The four states that have adopted the mens rea approach would be compelled to revert

288. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-301.

289. *Id.*

290. *Id.*; *see also Serravo*, 823 P.2d at 130 (holding that a defendant could be found legally insane where the defendant's cognitive ability to distinguish right from wrong at the time of committing a crime had been destroyed as a result of a psychotic delusion).

291. *See Bethea*, 365 A.2d at 74 (stating the purpose of the insanity defense is to ensure that criminal culpability is only imposed on those who have the capacity to comply with the law); *see also Robey*, 456 A.2d at 960 (stating that those criminal defendants whose mental disorders deprive them of this capacity are neither culpable nor deterrable, and should not be subject to the same penalties as those who are sane).

back to the affirmative defense that includes a moral incapacity prong.

Conversely, because the Court permitted the States to abolish the affirmative defense in its entirety, several states might follow Montana, Idaho, Utah, and Kansas in adopting the mens rea approach. As a result, courts will likely see detrimental effects.²⁹² For instance, a study of mental disorder claims pre- and post-abolition of the insanity defense in Montana found three major effects.²⁹³ First, there were still approximately the same amount of mental illness defenses raised by defendants after the mens rea reform, and Montana essentially eliminated insanity acquittals.²⁹⁴ Second, a larger portion of defendants were found guilty and convicted.²⁹⁵ The increase in convictions confirms that the mens rea approach exposes severely mentally ill offenders to imprisonment and unjust punishment.²⁹⁶ Lastly, the study found that a decline in acquittals by reason of insanity led to a significant increase in offenders found incompetent to stand trial.²⁹⁷ In other words, offenders who otherwise would be competent to stand trial but acquitted under the affirmative insanity defense, are now being found incompetent instead of acquitted under the insanity defense.²⁹⁸ Those found incompetent to stand trial often had their charges dismissed or deferred, and being incompetent to stand trial did not ensure hospitalization or treatment.²⁹⁹ Overall, this study demonstrated that the more restrictive mens rea approach to insanity correlates with fewer involuntary hospitalizations for those defendants that raise the mental disease defense at trial.³⁰⁰ It is highly likely that all jurisdictions that adopt the mens rea approach will notice similar, negative effects due to the ruling in *Kahler*.

292. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors in Support of Petitioner's Request for Reversal and Remand at 14, *Kahler v. Kansas*, 140 S. Ct. (2019) (No. 18-6135).

293. *Id.* See also Lisa Callahan et al., *The Hidden Effects of Montana's "Abolition" of the Insanity Defense*, 66 PSYCHIATRIC Q. 103 (1995) (explaining that the number of acquittals due to mental disease dropped from 38 NGRI verdicts in the three years before the change to 6 NGRI acquittals in the six years after the adoption of the mens rea approach).

294. *Id.* at 107, 116.

295. *Id.* at 116.

296. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors, *supra* note 292 at 14.

297. Callahan, *supra* note 293 at 109, 116.

298. *Id.*

299. *Id.* at 116 (explaining how all 38 defendants found NGRI were hospitalized in the three years before the mens rea approach, but less than two-thirds of the 63 of the offenders found incompetent to stand trial received hospitalization in the six years after the change).

300. *Id.*

B. Changes Must be Made to the Affirmative Insanity Defense

Regardless of the Supreme Court's ruling in *Kahler*, there are still a multitude of issues and inconsistencies with the affirmative insanity defense. The second prong of this proposal is to more clearly define a test for insanity. Of course, mental illness is highly subjective and difficult to measure.³⁰¹ Insanity defense tests ask indeterminate questions and prescribe a behavioral continuum.³⁰² With that being said, questions about insanity are no more difficult to answer than judgments regarding reasonableness or recklessness that juries routinely make.³⁰³

It is important to note, however, that this Comment does not propose total consistency in one, specific insanity defense throughout the states. Constitutionalizing one standard for insanity would impede future development of the insanity defense. There must be continued experimentation among the states, especially considering psychology is constantly advancing.

1. Restrict the Types of Mental Health Disorders for the Insanity Defense

First, the types of mental health disorders and diseases that serve as a basis for the insanity defense should be restricted. There are many vague and broad interpretations of the term "mental disease," which leads to disagreement in psychiatric expert opinions on causes of criminal behavior and a loss of public trust.³⁰⁴ The Diagnostic Statistical Manual includes the criteria for various mental illnesses, some of which are more likely to result in delusions, hallucinations, and lost perception of reality.³⁰⁵ The test for insanity should express which of these mental diseases and disorders must be present in order to raise the defense. In other words, the test should clearly state which mental illnesses constitute moral blamelessness.

For instance, those criminal defendants with antisocial personality disorder, or psychopathy, are generally not considered "morally blameless" although they lack the capacity to distinguish right from wrong.³⁰⁶ Psychopathy is characterized by lack of

301. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors, *supra* note 292 at 20.

302. *Id.* at 20-21.

303. *Id.* at 21.

304. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-304.

305. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

306. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); *see also* Robert Kinscherff, *Proposition: A Personality Disorder May Nullify*

empathy and guilt, manipulativenness, impulsivity, and often, criminal behavior.³⁰⁷ For this reason, psychopaths are normally not allowed to raise the insanity defense.³⁰⁸ Psychopathy and antisocial personality disorder are more permanent mental illnesses with a small possibility for successful treatment and change.³⁰⁹

2. *Eliminate the Volitional Test for Insanity*

The volitional test for insanity reflected optimism in the field of clinical psychology.³¹⁰ Unfortunately, experience has not returned this optimism, and behavioral science has not yielded clinical tools.³¹¹ The fact that an impulse is unusual does not prove that it is irresistible.³¹² The American Psychological Association stated that testimony under a cognitive test is more likely to be established from scientific foundation than testimony under a volitional test.³¹³ Rejecting the volitional criteria for insanity and focusing, instead, on whether a criminal defendant could appreciate the wrongfulness of his or her conduct is in unison with current clinical findings.³¹⁴ This approach concentrates on objective psychiatric factors to consider when determining responsibility for a crime and reduces speculation in expert psychiatric testimony.³¹⁵

Responsibility for a Criminal Act, 38 J. L., MED., & ETHICS, 745-59 (2010) (explaining how certain categories of mental illness are excluded from meeting the threshold requirement of raising the insanity defense).

307. Helge Hoff et al., *Evidence of Deviant Emotional Processing in Psychopathy: A fMRI Case Study*, 119 INT'L J. NEUROSCIENCE 857 (2009).

308. Kinscherff, *supra* note 306 at 745-59.

309. *Id.*

310. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-304 (“The inclusion in the ALI test of a volitional element reflected a wave of clinical optimism that scientific knowledge concerning psychopathology had progressed substantially enough to permit informed judgments about the causes of unknown behavior.”).

311. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-304 (explaining how there is no objective standard to differentiate between impulses that were irresistible and impulses that were merely not resisted).

312. Barbara Wootton, *The Insanity Defense*, 77 YALE L.J. 1019, 1026-27 (1968) (reviewing ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 9 (1967)). The author notes how it is impossible to devise a volitional test where the validity can be objectively established. *Id.*

313. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-305; see also AMERICAN PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 11, 12 (Dec. 1982) (expressing how psychiatric testimony on volition is more likely to confuse jurors than psychiatric testimony on cognition).

314. Statement on the Insanity Defense, *supra* note 313 at 12.

315. CRIM. JUST. MENTAL HEALTH STANDARDS, *supra* note 12 at 7-306.

C. Sentencing of the Insane Should Not Be Left to the Discretion of a Judge

The third potential solution to this issue is to allow unbiased mental health experts to make sentencing decisions regarding defendants that raise the insanity defense. Many states that have adopted the mens rea approach permit the introduction of evidence on moral blameworthiness at the sentencing phase.³¹⁶ This allows the trial court to have discretion to place a criminal defendant in a mental institution.³¹⁷

Sentencing the insane should never be left to the discretion of a judge or jury because they do not specialize in mental disease or defects. Moral culpability, which is the basic concept of the insanity defense, is evident and considered in the sentencing context.³¹⁸ In *Korell*, Justice Haswell stated:

It is further argued that subjecting the insane to the stigma of a criminal conviction violates fundamental principles of justice. We cannot agree. The legislature has made a conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition. Arguably, this policy does not further criminal justice goals of deterrence and prevention in cases where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct. However, the policy does further goals of protection of society and education.³¹⁹

Further, in the dissenting opinion of *State v. Stacy*, Justice Henry stated, "the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society."³²⁰

The opinions of Justice Haswell and Justice Henry could not be more wrong. There is no evidence that the insanity defense or released acquittees pose a risk to public safety.³²¹ Rather, the

316. *Korell*, 690 P.2d at 996. In Montana, the sentencing judge can consider evidence from trial along with evidence introduced at the sentencing hearing to determine "whether the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law at the time he committed the offense." *Id.*

317. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors, *supra* note 292 at 17.

318. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) (explaining, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"); *see also Roper v. Simmons*, 543 U.S. 551, 568 (2005) (stating, "[c]apital punishment must be limited to those offenders...whose extreme culpability makes them 'the most deserving of execution'").

319. *Korell*, 690 P.2d at 1002.

320. *State v. Stacy*, 601 S.W.2d 696, 704 (Tenn. 1980) (Henry J., dissenting).

321. *See Michael K. Spodak et al., Criminality of Discharged Insanity*

insanity defense actually promotes public safety.³²² For instance, a study conducted in Maryland analyzed a large cohort of 86 insanity acquittees over a fifteen year period after discharge from the hospital.³²³ This study reported the acquittees' arrests, convictions, and incarcerations and found a clear reduction in arrests after discharge from the hospital.³²⁴ The Maryland study also found that 87% of the cohort was not reincarcerated in nearly ten years after release.³²⁵ These promising results are likely due to hospitalization and conditional release programs.³²⁶ In another study conducted on NGRI acquittees, only ten percent were rearrested after discharge.³²⁷ Of that ten percent, the majority were rearrested for nonviolent offenses.³²⁸ These findings suggest that insanity acquittees do not present a serious danger to public safety.³²⁹ A defendant's future dangerousness is better treated in an involuntary commitment to a mental institute rather than with a release after a short prison sentence.

V. CONCLUSION

Before the Supreme Court's decision in *Kahler*, the circuits were split on the constitutionality of abolishing the traditional insanity defense. In March 2020, the United States Supreme Court finally answered questions and concerns about the insanity defense and the alternative mens rea approach.³³⁰ Before *Kahler*, four states had replaced the traditional defense with the modified mens rea

Acquittees: Fifteen Year Experience in Maryland Reviewed, 12 BULL. AM. ACAD. PSYCHIATRY L. 373, 382 (1984) (reporting on a compilation of insanity acquittees in Maryland after release from discharge), Mark R. Wiederanders et al., *Forensic Conditional Release Programs and Outcomes in Three States*, 20 INT'L J.L. & PSYCHIATRY 249, 249-57 (1997) (studying the effects of conditional release programs), Callahan, *supra* note 293 (studying the drop in the number of acquittals after adopting the mens rea approach), George F. Parker, *Outcomes of Assertive Community Treatment in an NGRI Conditional Release Program*, 32 J. AM. ACAD. PSYCHIATRY & L. 291, 291-303 (2004) (describing the five-year outcomes of an assertive community treatment on NGRI acquittals and placed on conditional release in the community), and Henry J. Steadman et al., *Factors Associated with a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 402-03 (1983) (revealing data of 202 insanity pleas entered in Erie County, New York).

322. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors, *supra* note 292 at 19-20.

323. Spodak et. al., *supra* note 321, at 373.

324. *Id.* at 373, 380.

325. *Id.* at 382.

326. *Id.* at 380, 382.

327. Wiederanders et al., *supra* note 321, at 253-55.

328. *Id.*

329. *Id.* at 255; Spodak et. al., *supra* note 321, at 382.

330. *See generally Kahler*, 140 S. Ct. 1021 (holding that states may abolish the affirmative insanity defense).

approach.³³¹ However, the Supreme Court of Nevada held that abolishing the insanity defense violates due process rights.³³² The United States Supreme Court reconciled the circuit split and ruled that due process does not require the States to adopt an insanity test based on a defendant being able to recognize that his or her crime was morally wrong.³³³

While the *Kahler* decision answered whether the States can abolish the moral-incapacity prong of the insanity test, there are still major indeterminacies and variations of the test throughout the country.³³⁴ This Comment proposed various means of resolving these differences among the States. First, the United States Supreme Court should reconsider and rule in favor of the traditional insanity defense which turns on a defendant's ability to recognize right from wrong. Further, various changes need to be made to the insanity defense, such as restricting the types of mental health disorders and eliminating the volitional defense. Finally, sentencing should not be left to the discretion of a judge, but rather to an unbiased expert. In general, it is imperative that insane, criminal offenders are relieved from criminal responsibility and receive proper treatment.

331. IDAHO CODE § 18-207 (2020); KAN. STAT. ANN. § 22-3219 (2020); MONT. CODE ANN. 46-14-102 (2019); UTAH CODE ANN. § 76-2-305(1) (2020).

332. *Finger*, 27 P.3d at 86.

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

334. Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors, *supra* note 292 at 20-21.

