KAHLER V. KANSAS: THE END OF THE INSANITY DEFENSE?

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INTRODUCTION

For centuries, American and English courts refused to assign criminal liability to defendants who, because of mental illness, did not understand the wrongfulness of their actions. Hundreds of years before the Framers were born, English courts widely recognized a mentally ill defendant's right to avoid criminal liability when he lacked moral understanding. From the American Revolution to the turn of the twenty-first century, courts in every jurisdiction in America widely recognized this right as well.

In 1995, Kansas, along with a small number of other states, passed a statute abrogating the widely recognized common law insanity defense. At common law, a defendant could raise the defense when a mental illness impaired his ability to distinguish right from wrong, allowing him to escape liability even when the elements of the crime were otherwise fulfilled. However, under Kansas' statutory scheme, evidence of a defendant's mental illness can only be used to negate the *mens rea* element of the offense. In other words, evidence of mental illness is only relevant when it shows that the defendant lacked the intent to commit the act itself, regardless of whether he believed that act was moral. In Kansas, a defendant driven by mental illness to intentionally harm another has no viable path to acquittal at trial, even when his mental illness caused him to believe his actions were morally right.

In *Kahler v. Kansas*,[1] the Supreme Court will consider the constitutionality of Kansas's statutory scheme. The Court's decision in this case will have profound implications for how courts deal with defendants struggling with mental illness. A decision to uphold Kansas's statute could be interpreted as a green light for other states to

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1. 139 S. Ct. 1318 (2019).

abolish a right that was firmly entrenched in common law long before the Court even existed.

This Commentary will analyze Kansas's statute in light of the Petitioner's Due Process and Eighth Amendment challenges. Doing so requires examining the origins of the insanity defense and the importance of moral capacity in the American criminal justice system. This Commentary will argue that (1) Kansas's statute is unconstitutional because the Due Process Clause proscribes state governments from assigning criminal liability to defendants who cannot differentiate right from wrong; and (2) the Eighth Amendment does not apply to the statute at issue in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Insanity Defense Law in Kansas

From 1881 to 1995, defendants in Kansas were able to raise an affirmative insanity defense.[2] This defense excused a defendant from criminal liability "(1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act."[3] If a defendant could affirmatively prove either prong of the test, he was excused from liability, whether or not the prosecution otherwise proved the elements of the offense.[4] Kansas's rule was the norm—the affirmative insanity defense was available in some form to defendants in every state until 1979.[5]

However, in 1995, the Kansas legislature passed a law to restrict defendants' access to the common law insanity defense.[6] After a string of high-profile cases where defendants were found not guilty by reason of insanity, the Kansas legislature sought to make it more difficult for defendants to utilize the insanity defense. The legislature decreed that mental illness could only be used at trial to show that the defendant "lacked the mental state required as an element of the offense charged."[7]

2. Brief for Petitioner at *2, Kahler v. Kansas, No. 18-6135 (May 31, 2019) [hereinafter Brief for Petitioner].
3. State v. Baker, 819 P.2d 1173, 1187 (Kan. 1991).
4. *See id*.
5. Brief for Petitioner, *supra* note 2, at *2.
6. *Id*. at *5.
7. KAN. STAT. ANN. § 21-5209 (2010).

Under Kansas's new *mens rea* scheme, a defendant's ability to distinguish right from wrong has no bearing on his guilt or innocence.[8] Moreover, the defendant can no longer use evidence of mental illness affirmatively. After the law passed, the Kansas Supreme Court recognized that the legislature had abolished the insanity defense.[9]

B. Facts

Petitioner, James Kahler, has long suffered from obsessive-compulsive personality disorder, major depressive disorder, and narcissistic personality disorder.[10] Throughout his adult life, he was obsessed with what others thought of him and his family.[11] His mental illness manifested in exercising meticulous control over his family affairs and micro-managing the lives of his wife, Karen, as well as his children.[12]

In 2008, James Kahler's life changed drastically.[13] The Kahler family moved from Texas to Missouri.[14] Karen had an extramarital affair with her personal trainer and soon filed for divorce.[15] As Mr. Kahler's carefully controlled routine fell apart, his mental state also deteriorated.[16] He was obsessively suspicious that Karen was trying to humiliate him.[17] He tracked Karen's phone calls, text messages, and social media interactions.[18] He stalked his wife and kids.[19] His obsessions overtook his work life, and he lost his job in 2009.[20] Without work, he moved back in with his parents at their ranch.[21] Kahler increasingly focused all of his rage on his wife and daughters, believing they were the sole cause of his failure.[22]

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8. Brief for Petitioner, *supra* note 2, at *5.
9. State v. Bethel, 66 P.3d 840, 844 (Kan. 2003); *see also* State v. Jorrick, 4 P.3d 610, 617 (Kan. 2000) ("Kansas is among a minority of states that have done away with the insanity and diminished capacity defenses.").
10. Brief for Petitioner, *supra* note 2, at *6–7.
11. *Id*. at *7.
12. *Id*.
13. *Id*. at *7–8.
14. *Id*.
15. *Id*. at *8.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at *9.
22. *Id*.

Mr. Kahler's devolving mental state reached a critical point during Thanksgiving of 2009.[23] On Friday, November 27, Kahler's son came to stay with Kahler and his paternal grandparents at the ranch.[24] Mr. Kahler and Karen had planned for their son to have Thanksgiving dinner at his maternal grandmother's house with his mother and sisters the next day.[25] However, on Saturday morning, Kahler's son called Karen and asked if he could remain with his father for an additional day.[26] Karen refused.[27] While Mr. Kahler was out cashing a paycheck, his son returned to his maternal grandmother's house to celebrate Thanksgiving with his mother and sisters.[28]

When Mr. Kahler arrived home to find his son gone, he "snapped."[29] He drove to his ex-mother-in-law's house with several loaded rifles.[30] He entered the home in a fit of rage, shouting expletives, and shot his wife, her mother, and his daughters.[31] Kahler's son ran out the back door unharmed.[32] Police found Mr. Kahler walking down a country road the next day, and he submitted to arrest without protest.[33]

C. Proceedings Below

Before Mr. Kahler's capital murder trial, he requested jury instructions that would mandate acquittal if he proved that, because of his mental illness, he did not understand that his actions were wrong.[34] The trial court denied the request, finding that the instructions were prohibited by the governing statute.[35] At trial, the judge instructed the jury that Mr. Kahler's mental illness was only relevant if it affected his intent to kill.[36] The jury found him guilty and sentenced him to death.[37]

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23. *Id*. at *9–10.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*. Mr. Kahler's actions are undeniably heinous. However, this Commentary focuses on the facts of Mr. Kahler's *mental illness* and the Due Process that should be afforded to all defendants suffering from mental illnesses.
34. *Id*. at *11.
35. *Id*.
36. *Id*.
37. *Id*.

Kahler appealed to the Kansas Supreme Court.[38] He argued that his conviction violated the Due Process Clause and that his death sentence was proscribed by the Eighth Amendment's ban on cruel and unusual punishment.[39] The court rejected both arguments, affirming his conviction and sentence.[40] Mr. Kahler filed a petition for writ of certiorari on September 28, 2018.[41] The Supreme Court granted certiorari on March 18, 2019.[42]

II. LEGAL BACKGROUND

A. The Insanity Defense

The insanity defense is a common law fixture older than the United States itself. As early as the fourteenth century, English courts regularly applied the "good and evil" test, which excused a defendant from criminal liability when his mental illness prevented him from understanding that his actions were immoral.[43] In 1843, the English Lords of Justice addressed the issue of legal insanity in *M'Naghten's Case*.[44] The justices incorporated hundreds of years of Anglo-American common law, articulating a seminal rule:

> To establish a defence on the ground of insanity it 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*.[45]

At the time of the American Revolution, English courts frequently excused defendants who, as a result of mental illness, did not

38. *Id*.
39. *Id*.
40. *Id*. at *11–12.
41. *Id*. at *1.
42. 139 S. Ct. 1318 (2019).
43. *See* State v. Searcy, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting) ("During the reign of Edward II (1307-1321), there was a shift toward recognizing insanity as a complete defense, which was perfected by the time of the ascension of Edward III to the throne (1326-1327)."); Finger v. State, 27 P.3d 66, 84 (Nev. 2001) ("Legal insanity has been an established concept in English common law for centuries."). *See also* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1234 (1966) ("During the fourteenth, fifteenth, and sixteenth centuries . . . the 'good and evil' test was regularly cited by judges and legal commentators.").
44. M'Naghten's Case (1843) 8 Eng. Rep. 718.
45. *Id*. at 722 (emphasis added).

understand that their actions were wrong.[46] Early American courts adopted the English insanity defense, integrating the principle that criminal liability required that a defendant had "sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong . . . ."[47]

On several occasions, the Supreme Court recognized the fundamental nature of an insanity defense that excuses those who, as a result of mental illness, do not appreciate the moral nature of their actions. In *Morissette v. United States*, the Court observed that the requirement that criminal defendants possess an "evil-meaning mind . . . took deep and early root in American soil."[48] In *Penry v. Lynaugh*, the Court held that "it was well settled at common law that [mentally ill defendants] were not subject to punishment for criminal acts committed under those incapacities."[49]

As American jurisprudence evolved, the common law yielded several different variations of the insanity defense. These included cognitive incapacity, where the defendant cannot appreciate the nature of his actions; volitional incapacity, where the defendant cannot control his actions; and the product-of-mental-illness test, where the defendant's actions were the product of mental disease or defect.[50] Underlying all of these variations was the unifying concept espoused in the original "good and evil" test: a defendant cannot be criminally liable when, as a result of mental defect, he does not understand his actions were wrong.

While the Court has allowed states the freedom to implement and experiment with a variety of insanity defense rules,[51] it has never expressly permitted a state to ignore the impact of a defendant's mental illness on his understanding of the wrongfulness of his behavior. In

46. *See* Platt & Diamond, *supra* note 43, at 1236 ("In the eighteenth century, the 'good and evil' test was regularly used in both insanity and infancy cases.").

47. *See* Roberts v. State, 3 Ga. 310, 326 (1847); *see also* State v. Spencer, 1846 WL 3316 at *202 (N.J. O. & T. 1846) (considering whether the defendant is "capable of moral action and of discerning between right and wrong"), People v. Kleim, 1 Edm. Sel. Cas. 13, 25 (N.Y. Sup. Ct. 1845) ("The 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."), Commonwealth v. Rogers, 48 Mass. 500, 501–02 (1844) (holding that when a defendant cannot "distinguish between right and wrong . . . he is not responsible for such act"), State v. Marler, 2 Ala. 43, 48 (1841) (holding that the insanity defense requires that a defendant is "incapable of judging between right and wrong").

48. 342 U.S. 246, 251–52 (1952).

49. 492 U.S. 302, 331 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

50. Clark v. Arizona, 548 U.S. 735, 749 (2006).

51. *See id*. at 752 ("[T]he insanity rule . . . is substantially open to state choice.").

Clark v. Arizona, the state passed a statute prohibiting defendants from arguing that their mental illness caused cognitive incapacity.[52] The Court found that Arizona's scheme was "constitutionally adequate[,]" in part because the state still allowed defendants to argue that they did not know that their actions were wrong.[53] The Court noted that it has long been understood that the cognitive incapacity defense is merely a subcategory of the larger moral incapacity rule.[54]

B. Due Process

The Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."[55] The Court generally defers to the states in matters of criminal law.[56] However, a state criminal law still violates the Due Process Clause when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[57] The Court looks to "the teachings of history" and a "solid recognition of the basic values that underlie our society" when determining whether legal principles are fundamental and deeply rooted.[58]

C. The Eighth Amendment

The Eighth Amendment proscribes "cruel and unusual punishments."[59] In determining which punishments qualify as cruel and unusual, the Court has applied two different forms of analyses: (1) founding-era analysis[60] and (2) proportionality analysis.[61]

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52. *Id*. at 748.

53. *See id*. at 753 (Noting that "cognitive incapacity is itself enough to demonstrate moral incapacity" because, "if a defendant did not know what he was doing when he acted, he could not have known that he was performing . . . [a] wrongful act.").

54. *See id*. at 754 (Noting the "long-accepted understanding that the cognitively incapacitated are a subset of the morally incapacitated.").

55. U.S. CONST. amend. XIV § 1.

56. Patterson v. New York, 432 U.S. 197, 201 (1977).

57. *Id*. at 201–02 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

58. Moore v. Cty. of East Cleveland, 431 U.S. 494, 503 (1972) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J. concurring)).

59. U.S. CONST. amend. VIII.

60. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 406 (1986) (holding that the Eighth Amendment bans "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted").

61. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) (holding that the punishment for crime should be "graduated and proportioned to the offense") (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Under the founding-era analysis, the Eighth Amendment bans "those practices condemned by the common law in 1789."[62] Thus, punishments that "a reader at the time of the Eighth Amendment's adoption" would have considered cruel and unusual are proscribed.[63]

Proportionality analysis is based on the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[64] To determine whether a particular punishment is proportional to the offense, the Court examines "objective indicia of society's standards, as expressed in legislative enactments and state practice."[65] The Court also exercises its independent judgment, considering factors such as the Court's prior precedents,[66] the offender's culpability, and penological goals served by the challenged sentence.[67]

III. HOLDING

The Kansas Supreme Court affirmed Mr. Kahler's conviction and sentence, citing its prior holding in *State v. Bethel*.[68] In *Bethel*, the Kansas Supreme Court concluded that the affirmative insanity defense was "not so ingrained in [Kansas's] legal system" as to be considered fundamental, and that Kansas's *mens rea* approach survived Eighth Amendment scrutiny because it "does not expressly or effectively make mental disease a criminal offense."[69]

IV. ARGUMENTS

A. Petitioner's Arguments

Petitioner makes two core assertions: (1) Kansas's statute violates the Due Process Clause by eliminating the insanity defense, and (2) Kansas's statutory scheme constitutes cruel and unusual punishment in violation of the Eighth Amendment.[70]

62. *Ford*, 477 U.S at 399.
63. Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019).
64. *Graham*, 560 U.S. at 48.
65. *Id*. at 61.
66. *Id*.
67. *Id*. at 67.
68. State v. Kahler, 410 P.3d 105, 378 (Kan. 2018).
69. State v. Bethel, 66 P.3d 840, 851–52 (2003).
70. Brief for Petitioner, *supra* note 2, at *12 (citing Atkins v. Virginia, 536 U.S. 304, 306 (2002)).

First, Petitioner argues that the Due Process Clause requires a legal path of excuse for defendants who, by nature of their mental illness, lack moral culpability.[71] Petitioner supports this claim through a historical analysis of the insanity defense in ancient cultures, the English common law, and the American legal tradition.[72] Petitioner points out that several religious holy books and ancient Greek philosophers all discuss the need to excuse those who lack moral capacity.[73] Further, academic legal giants in English common law—such as Coke and Blackstone—argued that criminal liability required moral understanding.[74] Turning to American common law, Petitioner points out that most jurisdictions in America have maintained some sort of insanity defense since the Founding and that forty-five out of fifty states still provide an affirmative insanity defense today.[75] After establishing these fundamental standards, Petitioner argues that Kansas's statutory scheme violates the Due Process Clause by eliminating the insanity defense and assigning liability to people without moral culpability.[76]

Second, Petitioner argues that the Eighth Amendment's ban on cruel and unusual punishment prohibits criminal punishment of people who, by reason of insanity, lack moral culpability.[77] Citing the widespread acceptance of the insanity defense in American common law since the Founding,[78] Petitioner argues that criminal punishment of the insane was "condemned by the common law in 1789" and that "a reader at the time of the Eight Amendment's adoption" would have deemed criminal punishment of the insane to be cruel and unusual.[79] Petitioner also argues that criminal punishment of the insane is grossly disproportionate because it serves no penological purpose.[80] Finally,

71. *See id*. ("The Constitution requires states to provide some mechanism to excuse criminal defendants whose mental states render them blameless.").

72. *See id*. at *18–29.

73. *See id*. at *18–20 ("Ancient civilizations recognized the distinction between the insane and those capable of understanding the moral implications of their actions. In the early Jewish tradition, 'madness' was an excuse for otherwise punishable crimes.").

74. *See id*. at *21–22 ("Lunatics or infants . . . are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong.").

75. *See id*. at *14, *28 (citing State v. Korell, 690 P.2d 992, 996 (Mont. 1984)).

76. *See id*. at *39 ("Kansas's '*mens rea* approach' violates the Constitution.").

77. *See id*. at *29. ([T]he Eighth Amendment prohibits a State from punishing a criminal defendant without regard to his ability—as a result of mental illness—to rationally appreciate that his actions are wrong.").

78. *See id.* (citing numerous cases).

79. *See id*. (citing Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) and Ford v. Wainwright, 477 U.S. 399, 406 (1986)).

80. *Id*. at *14.

Petitioner argues that assigning any criminal liability whatsoever to people who cannot tell the difference between right and wrong is cruel and unusual punishment in itself.[81]

B. Respondent's Arguments

Respondent argues that (1) Kansas's *mens rea* approach does not violate the Due Process Clause, and (2) Kansas's statutory scheme does not violate the Eighth Amendment.[82]

First, Respondent argues that no particular insanity test is deeply rooted in the American legal tradition, as the Court noted in *Clark*.[83] Respondent points out that many different tests for insanity have been used at common law, including Kansas's *mens rea* approach.[84] When a principle is not "deeply rooted" in the American legal tradition, the Court typically interprets the Due Process Clause deferentially to avoid interfering with individual states' administration of justice.[85] Respondent believes the Court should apply this deferential approach here.[86]

Respondent then argues that consideration of a defendant's ability to distinguish right from wrong is not deeply rooted in the American legal tradition.[87] Pointing to criminal punishments of religious terrorists and murderers of abortion doctors, Respondent asserts that society can reasonably find individuals blameworthy regardless of whether they understand the wrongness of their actions.[88] Thus, states are free to punish those who do not understand that their actions are wrong.[89]

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81. *See id*. at *29 ("Whether viewed through the Founding-era lens or the modern proportionality lens, the Eight Amendment prohibits a State from punishing a criminal defendant without regard to his ability—as a result of mental illness—to rationally appreciate that his actions are wrong.").

82. Brief for Respondent at *14, Kahler v. Kansas, No. 18-6135 (Aug. 2, 2019) [hereinafter Brief for Respondent].

83. *See id*. at *15 ("As this Court has previously recognized, the Due Process Clause does not mandate that States adopt any one particular approach to insanity.").

84. *See id*. at *32 ("Historically, a variety of tests . . . have been used to define insanity.").

85. *See id*. at *39 ("States have the freedom to determine whether, and to what extent, mental illness should excuse criminal behavior.").

86. *Id*.

87. *See id*. at *16 ("It is a longstanding principle that knowledge of the law is not required for criminal culpability.").

88. *Id*. at *40–41.

89. *See id*. at *40 ("The fact that someone does not understand that what they are doing is morally wrong does not render them blameless.").

Second, Respondent argues that Kansas's statutory scheme does not violate the Eighth Amendment.[90] The Eighth Amendment applies to modes of punishment, not modes of liability.[91] Since Kansas's *mens rea* approach addresses only liability and not punishment, the Eighth Amendment has no bearing on it.[92]

Respondent then argues that even if the Eighth Amendment did apply to the statute at issue, Kansas's statute does not constitute cruel and unusual punishment.[93] Respondent supports this claim by arguing that the *mens rea* requirement and the insanity defense have been historically intertwined.[94] Thus, Kansas's approach would have been acceptable to readers at the time of the Eighth Amendment's adoption.[95] Respondent also argues that the *mens rea* approach does serve penological purposes.[96]

Finally, Respondent argues that Petitioner's Eighth Amendment claim is not properly before the Court because Petitioner did not make an identical argument before the Kansas Supreme Court.[97] Petitioner disputed his sentence—rather than his liability—on Eighth Amendment grounds in the Kansas Supreme Court.[98] Pointing out that the Court has previously refused to consider issues that were not raised below, Respondent argues that the Court should refuse to consider Petitioner's Eighth Amendment claim on either jurisdictional or prudential grounds.[99]

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90. *Id*. at *45.

91. *See id*. at *47 ("[T]he Eighth Amendment only applies to bar certain punishments; it does not constrain the substance of state criminal liability, including what affirmative defenses States must make available.").

92. *See id*.

93. *Id*. at *49.

94. *See id*. ("[I]nsanity was historically equated with a lack of *mens rea*.").

95. *See id*. ("[T]he *mens rea* approach to insanity would not have been considered cruel and unusual at the time of the Founding.").

96. *See id*. at *50. ("Nor is the *mens rea* approach inconsistent with any of the criminal law purposes that Kahler identifies . . .").

97. *See id*. at *45 ("In his briefs before the Kansas Supreme Court, Kahler did not argue that Kansas's *mens rea* approach to insanity violates the Eighth Amendment. As a result, the Kansas Supreme Court did not address this issue. Thus, Kahler's Eighth Amendment claim is not properly before this Court.").

98. *Id*. at *46.

99. *See id*. At *47 ("Because this Court is a court of review, not of first view, it should refuse to consider this issue, regardless of whether the rule is jurisdictional or prudential.") (internal citations omitted).

V. ANALYSIS

A. Respondent's mens rea *scheme violates the Due Process Clause.*

The Due Process Clause protects principles of justice that are so deeply rooted in the American legal conscience as to be considered fundamental.[100] Kansas's scheme violates the deeply rooted principle that criminal liability cannot be assigned to a defendant who, as a result of mental illness, lacks the capacity to understand that his actions were wrong.[101] This underlying principle is the foundation upon which all subsequent variations of the insanity defense rest. As the Court recognized in *Clark*, cognitive incapacity is merely a "subset" of the original "right from wrong" test.[102] In this way, the ability to differentiate right from wrong is the due process foundation that the Fourteenth Amendment protects. States are free to build on that foundation by implementing whatever additional versions of the insanity defense they prefer. But the Due Process Clause forbids states from removing that foundation entirely.

Respondent's so-called "*mens rea* approach" to insanity does not account for the defendant's moral capacity at all. As applied in criminal law today, *mens rea* focuses on the defendant's specific intent to commit particular actions that the state considers to be criminal, ignoring whether the defendant judges those actions to be wrong.[103] Thus, in Kansas, a defendant may be guilty of murder if he knowingly or intentionally kills someone, regardless of whether he believed his killing to be morally justified. This distinction demonstrates that *mens rea* and moral capacity are fundamentally different concepts. *Mens rea* involves the defendant's intent to commit an action.[104] Conversely, moral capacity involves the defendant's ability to evaluate whether that

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

101. *See* State v. Spencer, 1846 WL 3316 (N.J. O. & T. 1846) (considering whether the defendant is "capable of moral action and of discerning between right and wrong"); People v. Kleim, 1 Edm. Sel. Cas. 13, 25 (N.Y. Sup. Ct. 1845) ("The 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."); Commonwealth v. Rogers, 48 Mass. 500, 501–02 (1844) (holding that when a defendant cannot "distinguish between right and wrong . . . he is not responsible for such act"); State v. Marler, 2 Ala. 43, 48 (1841) (holding that the insanity defense requires that a defendant is "incapable of judging between right and wrong").

102. *See* Clark v. Arizona, 548 U.S. 735, 754 (2006) (Noting the "long-accepted understanding that the cognitively incapacitated are a subset of the morally incapacitated.").

103. *See* ABA Criminal Justice Mental Health Standards 337 (1989) ("[*M*]*ens rea* terminology has come to refer to the specific state of mind required for the conviction of particular criminal offenses.").

104. *Id*.

action was right or wrong. For hundreds of years, American jurisdictions have contemplated both factors when assigning criminal liability. Kansas only contemplates one.

Respondent argues that the *mens rea* approach is merely an alternative insanity defense, rather than an outright abolition.[105] This argument misses the mark for three reasons. First, the deeply rooted principle at the base of the insanity defense is the necessity of excusing people who cannot differentiate right from wrong.[106] Thus, a statutory scheme that contradicts this baseline principle is not an insanity defense of any kind. Second, the Kansas legislature quite literally passed the statute in question for the purpose of eliminating the insanity defense.[107] Third, the Kansas Supreme Court has repeatedly identified this statutory scheme for what it is—an abolition of the insanity defense.[108]

Consider the example of a man who killed his friend because, as a result of schizophrenia, he believed that his friend would soon commit a deadly terrorist act. This man undoubtedly has the requisite *mens rea* for murder—the killing was intentional. However, a mental illness caused the man to believe that his intentional actions were morally just. In nearly all jurisdictions throughout Anglo-American common law history, this individual would have had the chance to avoid criminal liability by proving that mental illness prevented him from grasping the wrongfulness of his actions. Not so in Kansas. Instead, Respondent's scheme renders evidence of moral incapacity resulting from mental illness irrelevant, and thus inadmissible. Indeed, Mr. Kahler originally asked the trial court to allow him to argue that his delusions about his family prevented him from fully understanding the wrongfulness of his actions. The trial court denied the request because it found that Kansas's statute rendered such arguments irrelevant. Mr. Kahler had the requisite *mens rea* by intending to kill his victims, which his mental illness did not negate, so his illness played no further part. In short, this

105. *See* Brief for Respondent, *supra* note 82, at *9 ("While Kansas no longer has an *affirmative* defense called insanity, evidence of mental disease or defect is still admissible to show a lack of *mens rea*, thus exempting certain mentally ill individuals from criminal liability.").

106. *See* sources cited *supra* note 101.

107. *See* State v. Jorrick, 4 P.3d 610, 617 (Kan. 2000) ("Kansas . . . legislatively abolished the insanity defense.").

108. *See id.* ("Kansas is among a minority of states that have done away with the insanity and diminished capacity defenses."); *see also* State v. Bethel, 66 P.3d 840, 844 (2003) ("The insanity defense . . . has been abolished in Kansas . . . .").

approach disregards the defendant's inability to differentiate right from wrong. Respondent admits as much.[109]

Furthermore, evidence of mental illness rarely refutes *mens rea* in the first place.[110] Indeed, Justice Breyer has recognized that refutation of *mens rea* "depends not on moral responsibility but on empirical fact."[111] Because mental illnesses typically impact moral responsibility rather than the intent to act, evidence of such illnesses usually does very little to disprove *mens rea*.[112] "[A] man who commits murder because he feels compelled by demons still possesses the *mens rea* required for murder."[113] In other words, the *mens rea* approach offers mentally ill defendants about as much protection in trial as an umbrella made out of tissue paper offers in a thunderstorm. A statutory scheme cannot qualify as a version of the insanity defense when it rarely protects mentally ill defendants and is categorically unrelated to mental illness.

Relying on *Clark*, Respondent points out that the Court has held that no particular insanity test is deeply rooted, and thus, Respondent is entitled to deference when implementing criminal insanity policies.[114] This argument is also unavailing. True, the *Clark* Court held that "due process imposes no single canonical formulation of legal insanity," giving states the freedom to choose among a number of historically utilized insanity tests.[115] However, the *Clark* court did not hold that *any* criminal insanity policy would be constitutional and it did not permit states to ignore defendants' moral understanding of their actions.[116] In fact, the Court in *Clark* held that Arizona's curtailing of its insanity defense was "constitutionally adequate" in part because Arizona still allowed defendants to obtain acquittal by proving moral incapacity

109. Brief for Respondent, *supra* note 82, at *47 ("Convicting those who . . . do not recognize their actions are wrong, is not cruel and unusual.").

110. Brief for Petitioner, *supra* note 2, at *5 ("[M]oral or rational defects almost never negate even the narrowest criminal states of mind.").

111. Clark v. Arizona, 548 U.S. 735, 791 (2006) (Breyer, J., dissenting).

112. Brief of American Psychiatric Association, American Psychological Association, American Academy of Psychiatry and the Law, The Judge David L. Bazelon Center for Mental Health Law, and Mental Health America as Amici Curiae at 25, Kahler v. Kansas, No. 18-6135 (June 7, 2019) ("The clinical experience of mental health professionals, as well as the peer-reviewed scientific literature, support the conclusion that severe mental illness can seriously impair an individual's ability to appreciate the wrongfulness of his or her conduct.").

113. United States v. Pohlot, 827 F.2d 889, 900 (3d Cir. 1987).

114. Brief for Respondent, *supra* note 82, at *39.

115. *Clark*, 548 U.S. at 749.

116. *See id*. at 754 (Holding that a state's insanity defense rule was "constitutionally adequate" in part because it allowed defendants to present evidence of "moral incapacity").

resulting from mental illness.[117] By eliminating the foundational principle that defendants must know right from wrong to be criminally liable, Respondent goes beyond what *Clark* and the Fourteenth Amendment allow.

B. The Eighth Amendment does not apply to the statute at issue in this case.

The Eighth Amendment's ban on cruel and unusual punishment has no bearing on the law at issue because Kansas's statute does not address punishment. The Eighth Amendment applies to "modes or acts of *punishment* . . . ."[118] Justice Scalia noted that, at a minimum, for a statute to be subject to the Eighth Amendment's restrictions, it must impose a "particular mode[] of punishment."[119] Kansas's statute does not. It solely addresses the kinds of arguments a defendant can make at trial. It does not criminalize any activity, and it does not prescribe a sentence. The Eighth Amendment bans cruel and unusual *punishments*, not trial mechanics, criminal proceedings, or other functions of the criminal justice system. To the extent that these other functions treat defendants in a cruel and unusual way, the Due Process Clause is the proper constitutional shield. As explained in Section I, this is exactly the case here.

Relying on *Robinson v. California*, Petitioner argues that a mere felony conviction, regardless of subsequent sentencing, constitutes punishment subject to the Eighth Amendment.[120] Thus, a statute that establishes liability may still qualify as cruel and unusual punishment.[121] This is true. However, this reasoning does not make the Eighth Amendment any more applicable to the statute at issue here. Kansas's statute does not establish liability. It does not criminalize any act.

Furthermore, Petitioner's reliance on *Robinson* is misplaced. The *Robinson* Court struck down a state statute that made it illegal for someone to be addicted to narcotics and mandated a ninety-day prison

117. *Id*.

118. Ford v. Wainwright, 477 U.S. 399, 405 (1986) (emphasis added).

119. *See* Harmelin v. Michigan, 501 U.S. 957, 958 (1991) (opinion of Scalia, J.) ("[T]he Americans who adopted the Eighth Amendment intended its Cruel and Unusual Punishments Clause as a check on the ability of the Legislature to authorize particular modes of punishment—i.e., cruel methods of punishment that are not regularly or customarily employed.").

120. Brief for Petitioner, *supra* note 2, at *29 (citing Robinson v. California, 370 U.S. 660, 667 (1962)).

121. *See id*.

sentence.[122] In that case, the Court held that criminalizing someone's status as an addict constituted cruel and unusual punishment.[123] That decision is not analogous to this case. Kansas's statute does not make it a crime to be mentally ill. It merely governs what arguments a defendant can make at trial when they are accused of violating a different statute entirely. There is a difference between statutes that punish behavior and statutes that set the rules for trial. The former falls under the Eighth Amendment's restrictions; the latter does not. A statue cannot constitute cruel and unusual punishment when it does not punish.

Mr. Kahler may very well be correct that his death sentence serves no penological purpose. He may be correct that sending mentally ill defendants to prison in general serves no penological purpose. But Mr. Kahler was not convicted because he has a mental illness. He was convicted because he committed a murder. Mr. Kalher's arguments may support the Eighth Amendment reversal of his individual sentence, which is not at issue here, but not of an entire statute that bears little relationship to punishment.

CONCLUSION

In *Kahler v. Kansas*, the Court has the opportunity to clarify a clear Due Process Clause standard for the insanity defense. The Court should use this opportunity to formally recognize a bedrock criminal law principle that has been entrenched in the American legal tradition for generations: the Constitution prohibits states from assigning criminal liability to people whose mental illness prevents them from understanding the wrongfulness of their actions. This is the constitutional due process foundation upon which the insanity defense should rest. Such a decision would do right by defendants, the criminal justice system, and the Constitution itself.

122. *See Robinson*, 370 U.S. at 661–667.
123. *Id*. at 666–667.