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KAHLER V. *KANSAS*: INSANITY AND THE HISTORICAL UNDERSTANDING OF *MENS REA*

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Abstract The decision in the recent case of *Kahler* v. *Kansas* before the SCOTUS involves important issues in criminal jurisprudence. In this paper, an attempt has been made to trace the nuances of the different forms of defence the insanity plea can take and the practical implications of the same against the background of the *Kahler* case. The issue before the SCOTUS in this case was whether the elimination of any affirmative defence of insanity, and mere provision of a *mens rea* defence, would amount to denial of due process. In this paper, it is contended that a historical understanding of *mens rea* shows that the concept, as it is understood today, differs from what it meant in the 19th century legal landscape. Thus, a *mens rea* approach to insanity then amounted to what is now known as an affirmative defence in several cases. However, a *mens rea* approach today would exclude evidence of mental illness which only affects the appreciation of the nature of the offence, without affecting the formulation of the intention to commit the specific offence. It is further contended that the State's arguments before the SCOTUS in *Kahler* reveal the inconsistency between the *mens rea* approach and American legal history and tradition, and that the State, thus, does not sufficiently discharge its burden of showing that an affirmative defence is not required.

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I. INTRODUCTION

In October of last year, the United States Supreme Court heard oral arguments in the case of *Kahler* v. *Kansas*,[1] and had the opportunity to answer a question that it had been avoiding for some time: does the United States Constitution—in particular, do the Due Process and the Cruel and Unusual Punishment clauses—require each of the jurisdictions of the United States to provide an affirmative defence of insanity for those accused of a crime?[2]

II. WHAT THE ISSUE IS

A. Rebuttal Defences and Affirmative Defences

To avoid confusion in this discussion, we must distinguish between providing a defence of insanity and providing an *affirmative* defence of insanity. The affirmative defences—self-defence, duress, and infancy—if successful, operate to exempt the accused from liability even if all the elements of the crime have been established by the prosecution beyond a reasonable doubt. Suppose, for example, the accused is charged with some version of intentional homicide.[3] The prosecution will have to persuade the finder of fact (the jury in a jury trial, the court in a bench trial) of all the elements of the crime, both the mental element (or *mens rea*), which in this case would be the intent, and the physical element (or *actus reus*), in this case a killing. In the United States, it is imperative that these things be established by the prosecution, and that they be established beyond a reasonable doubt, has been read into the Constitution.[4]

The defendant has the right to rebut the prosecution's evidence by raising a doubt about his causal connection to the killing, for example, thus disputing

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1 Case #18-6135 (Supreme Court of Kansas). The lower court opinion which confirmed Kahler's conviction and death penalty sentence may be found at *Kahler v State* 410 P 3d 105 (Kan 2018).

2 At the time when the final transcript was submitted to the Editorial Board, the case had not been decided by the Court. Oral argument was held on October 7, 2019. The Court's ruling came in March, 2020 stating that the affirmative defence of insanity is not constitutionally required by the United States Constitution. Counsel for Kahler began to introduce the historical point—see the transcript at page three—but as often happens in oral argument, the give-and-take of the hearing did little to clarify the issue. The official transcript is available at <https://www.supremecourt.gov/oral_arguments/argument_transcript/2019> and also at <https://www.scotusblog.com/case-files/cases/kahler-v-kansas/>.

3 For simplicity, I only speak of intent and intention throughout this paper and ignore the other states of mind that might satisfy the definition of crimes. I limit myself to intentional homicide, for example, and ignore the fact that the *mens rea* for murder might, in a given jurisdiction, include recklessness or extreme recklessness or depraved-heart recklessness, and that the *mens rea* for manslaughter might include negligence. What I say about intent goes for those other states of mind as well. And since the insanity defence is not limited to cases of criminal homicide, what I say here extends to the *mens rea* of every crime.

4 *Re Samuel Winship* 1970 SCC OnLine US SC 76 : 25 L ED 2d 368 : 397 US 358 (1970); Wayne LaFave, *Principles of Criminal Law* (2nd edn, 2010) 47.

the physical element. But he may also (if he concedes his connection) rebut the charge by raising a doubt about his intention. If he fired a gun at a target and killed the person standing behind it, he will not have satisfied the requirements of intentional homicide if he had no idea she was standing behind it, and thus did not have the necessary intention. Defences that dispute one or more of the elements of a crime may be called *rebuttal* defences.

But even if the prosecution establishes all the elements of the crime, the defence will have the opportunity to raise the affirmative defences. He may introduce evidence, during the defence phase of the trial, to show that he was in imminent danger of being killed by the victim and acted to defend himself, to save his own life. Yes, he killed the victim, and yes, perhaps he intended to kill her, but he should nevertheless be exempt from punishment because of the affirmative defence of self-defence. In this case, if the jury or the judge is satisfied that the burden of proof for that defence has been satisfied, it will acquit. And so is with duress and infancy, and other defences, perhaps even necessity.

The courts have decided that the Constitution has little to say about the burden in the case of affirmative defences. It may fall on the prosecution or on the defence. It is up to the jurisdiction.[5] Each of the fifty states sets its own rules in the case of affirmative defences, and so do the District of Columbia and the United States. And as to what we may call the 'weight' of the burden, that depends upon the jurisdiction as well. Whichever of the parties has the burden of proof, that burden may be 'beyond a reasonable doubt,' or 'by clear and convincing evidence,' or merely 'by a preponderance of the evidence.'[6]

B. The Affirmative Defence of Insanity

In a jurisdiction in which insanity is an affirmative defence, someone who has intentionally killed another without any other justification or excuse will avoid punishment if he can prove (or if the prosecution cannot disprove, as the case may be) that serious mental disability at the time of the killing deprived him of responsibility and accountability for what he had done. For example, in the famous *Hinckley* trial in the District of Columbia, brought under the criminal law of the District but the common law of the federal courts, John Hinckley did not contest the evidence that he had intentionally fired his

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[5] *Dixon v United States* 2006 SCC OnLine US SC 60 : 548 US 1, 7 (2006) [citing *Patterson v New York* 1977 SCC OnLine US SC 121 : 53 L Ed 2d 281 : 432 US 197, 202 (1977)]; Joshua Dressler, *Understanding Criminal Law* (6th edn, 2012) 74-76, s 7.03.B.4.(b).

[6] Thus, the burden of *persuasion* may be 'beyond a reasonable doubt', ie, for example, the prosecution may have to prove, beyond a reasonable doubt that the killing was not in self-defence, or else the defence may have to prove beyond a reasonable doubt that it *was* in self defence. Or the requirement may be to make the case by clear and convincing evidence, or by a preponderance of the evidence. In every state and in the United States, however, the burden of *coming forward* is on the defence: the defence will have to raise the issue with some bit of evidence even if the burden of persuasion ultimately falls on the prosecution.

pistol at President Reagan in the attempt to kill him.[7] Instead, he argued that he should be found not guilty by reason of insanity—his pulling the trigger was the result of a mental disability that deprived him of the substantial ability either to appreciate that his action was wrongful or to conform to the law. The law placed the burden of persuasion on the prosecution to disprove that argument, and to disprove it beyond a reasonable doubt.[8] The prosecution was unsuccessful in that. The jury found Hinckley not guilty by reason of insanity, and he was, therefore, not imprisoned or otherwise punished, though he remained in confinement in a hospital for the criminally insane, for thirty-four years.

C. The *Mens Rea* Approach to Insanity

Up until recently, each of the jurisdictions—the fifty states and the United States—provided defendants with an affirmative defence by allowing the jury to reach a verdict of "not guilty by reason of insanity." In some cases, the rule was a common law measure,[9] and in other cases, it was introduced by legislation.[10]

The question before the Supreme Court in the *Kahler* case arises because four of the states, Kansas, Montana, Idaho, and Utah,[11] have eliminated the affirmative defence. These states permit the introduction of evidence of mental illness as rebuttal evidence, to rebut the prosecution's evidence for the mental element of crime, and so claim not to have eliminated the insanity defence *tout court*; they have only, they say, eliminated the *affirmative* defence. Their position is known as the *mens rea* approach to insanity. If the accused can show that because of mental illness he did not, in fact, intend the prohibited behaviour, or did not intend the behaviour to have its prohibited effect, he will escape liability in these states, but mental illness is otherwise to be considered irrelevant.

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7 The facts of the *Hinckley* case are summarized in *Hinckley v United States* 163 F 3d 647 (DC Cir 1999) ('*Hinckley*'). There is an excellent overview of both the case and the law in Richard Bonnie, John Calvin Jeffries and Peter Low, *A Case Study in the Insanity Defence: The Trial of John W. Hinckley, Jr.* (3rd edn, Foundation Press 2000).

8 Hinckley was tried in a federal court acting as a District of Columbia court, under District criminal law, making use of an insanity defence adopted as common law by the Federal Appellate Court of the District of Columbia. Almost everything about the defence of insanity in the District of Columbia, including the burden of proof, has changed since 1982.

9 Eg *Orndorff v Commonwealth* 279 Va 597, 601 n 5 (2010).

10 Eg *State v Madigosky* 291 Conn 28, 34 n 4 (2009) (the statute has been amended to exclude Gay and Transgender Panic as a defence).

11 The State of Alaska has also restricted the insanity defence to considerations of *mens rea*, but has not eliminated the affirmative nature of the defence. Whether the difference is anything more than a semantic difference is not clear, and thus, how a decision striking down the Kansas law would affect Alaska is also not clear.

Early in the twentieth century, three states attempted to eliminate the insanity defence by legislation, but in each case the legislation was struck down by the State Supreme Court as unconstitutional under the state constitution or under the federal constitution.[12] In each case, the linchpin of the State Court's decision was the fact that the statute in question denied the defendant the due process right to introduce evidence of mental disturbance. In the *Strasburg* case, for example, the State Court observed that underlying the entire structure of the criminal law was the supposition that only those who were capable of understanding and conforming to the law were to be held responsible for their crimes. The Court declared that evidence of mental disorder was relevant to the question of responsibility and thus, could not be excluded from consideration when a defendant's life or liberty were at issue.[13]

None of these early cases reached the United States Supreme Court, and for much of the century, it was taken for granted that the state constitutions and the United States Constitution required an affirmative defence. But, strictly speaking, the early cases provided precedent only for the proposition that evidence of mental illness that may have contributed to the crime could not, constitutionally, be entirely excluded from the trial.

Late in the century, state legislatures in Nevada and in the four states mentioned above enacted statutes that eliminated the affirmative defence of insanity and replaced it with the *mens rea* approach to insanity.[14] These statutes do not deny the defendant the right to introduce evidence of mental disability, but limit the admissibility to rebutting evidence of *mens rea*. All but the Nevada statute have survived review in state courts.[15]

The Kansas statute at issue in the *Kahler* case is an example. It says:

> "**21-5209. Defence of lack of mental state.** It is a defence 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 defence."[16]

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[12] *State v Strasburg* 60 Wash 106 : 110 P 1020 (1910); *State v Lange* 123 So 639 : 168 La 958 (1929); *Sinclair v State* 161 Miss 142, 132 So 581 (1931).

[13] *Strasburg* (n 12) 112-116.

[14] Idaho Code 2015, s 18-207; Kan Stat Ann 2015, s 22-3220; Mont Code Ann (2015), s 46-14-102; Utah Code Ann, s 76-2-305(1). Idaho enacted 1982 (see Idaho Laws 1982, ch 368 s 2), Kansas enacted 1995 (see Kansas Laws 1995, Ch 251 (HB 2223)), Montana enacted 1991 (see Montana Laws 1991, Ch 800 (SB 51)), Utah enacted 1999 (see Utah Laws, 1999 Ch 2 (SB 20)).

[15] The Nevada statute was struck down by the Nevada Supreme Court in *Finger v State* 117 Nev 548 (2001) as violating the due process provisions of both the Nevada and the United States constitutions.

[16] Adopted by the Kansas legislature in 1995. It was first codified as Kan Stat Ann s 22—3220, then recodified in 2010 without change as Kan Stat Ann s 21-5209.

It is important to understand that in the eyes of the State of Kansas and of the other three states, this sort of provision does not utterly eliminate the insanity defence since it does not utterly disallow the introduction of evidence of mental disability. And since it does not completely disallow the introduction of evidence that may be relevant to the question whether the accused was responsible for the crime, it is not subject to the objection that was raised against the early attempts at abolition of the defence.[17]

D. The 'Cash Value' of the Difference Between the Approaches

The difference between the *mens rea* approach to mental disorder and the affirmative defence of insanity is pointed up sharply by the facts in the *Andrea Yates* case in Texas. Yates became severely depressed after the birth of her fourth child in February 1999.[18] In June of that year, she attempted to kill herself and was briefly hospitalized. After being released, she again threatened suicide and was again hospitalized. Medication seemed to stabilize her, and she was released once more. In July, she suffered a nervous breakdown and attempted suicide twice more. She was then hospitalized and diagnosed with post-partum psychosis. She and her husband were warned not to have more children because future psychotic depression was guaranteed.

She gave birth to her fifth child at the end of November 2000. Shortly after that her father died, and she collapsed. She was in and out of the hospital until June of 2001. On June 20, she filled the bathtub with water and drowned her children, one by one. She later claimed that she felt she had to do it to save them from going to hell.

Evidence at the trial showed that the killings were not only intentional but also premeditated, so in spite of evidence that she was in the grip of psychosis when she acted, she was convicted and sentenced to life in prison. Her conviction was overturned on the basis of misleading prosecution evidence as to her state of mind. At retrial, she was found not guilty by reason of insanity. Unlike the law of many countries, American law does not permit the prosecution to appeal against an acquittal. Yates was committed to a mental institution in Texas and has been institutionalized ever since.

There was no question, at either trial, about *mens rea*. She had, in fact, intended to kill her children, and had confessed that she had considered doing it on a number of previous occasions. Because Texas law permits the admission of evidence of mental disorder to establish an affirmative defence, the

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[17] Wayne LaFave, *Principles of Criminal Law* (6th edn, 2012) 25.06 [B], 357-358.

[18] An excellent discussion of the facts, which space does not permit here, can be found in Christopher Slobogin, 'The Integrationist Alternative to the Insanity Defence: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial' (2003) 30 American Journal of Criminal Law 315.

defence counsel presented expert testimony on her mental state at both trials and, on that ground, the jury acquitted her at her second trial. Had she been tried in Kansas or in any of the other four states with a *mens rea* version of the defence, she would not have been permitted to introduce the evidence of her psychosis, except to show that she did not intend to do what she did, but it flies in the face of common sense to suppose that her actions were not intended.

E. The Current State of the Law Governing Evidence of Mental Illness in Criminal Cases

The law of Kansas and the other three states permits the introduction of evidence of mental illness or disorder at trial but only to rebut *mens rea*. In these states, if the prosecution can establish that the defendant had the intention of killing his victims, there is no further justification for introducing evidence of mental illness. The laws of the other forty-six states, as well as the laws of the United States, all provide for some version of an affirmative defence of insanity, adopted either by the courts as common law or through legislation.[19]

In some states, that means that because of mental illness, the defendant was unaware of the nature of his act or that it was wrong or criminal (the M'Naghten defence).[20] Of course, the actor, who because of mental illness, was unaware of the *nature* of his act—the man who wrings his wife's neck, believing that he is squeezing a lemon, is the usual bizarre example[21]—does not have the *mens rea* for the crime of murder or attempted murder; he does not intend to harm his wife because he does not know that it is his wife before him. Evidence that can establish this fact does exclude the *mens rea* element of the crime and no separate, affirmative defence is necessary.[22] For that reason, the

[19] See NPR's Frontline Program 'The Crime of Mental Illness' <https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/states.html> accessed 12 August, 2019. An interesting point here is that while Kansas and three other states permit evidence of mental illness only on questions of *mens rea*, many other states *exclude* evidence of mental illness on questions of *mens rea*. The reason is that acquittal on *mens rea* grounds means simple acquittal and release; commitment as dangerous to the community would be an entirely separate procedure that might be undertaken or not, that might be successful or not. Part of the reason for the development of the insanity defence, it seems, was to channel cases of offenders who could not control their behaviour in a procedure that would result in commitment to a mental institution, rather than to simply acquit them.

[20] For a more complete historical introduction to the various forms for the defence, see AAPL Taskforce, 'AAPL Practice Guidelines for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defence' (2014) 42(4) The Journal of the American Academy of Psychiatry and the Law S3-S76 <www.aapl.org › docs › pdf › Insanity Defence Guidelines> accessed 6 November, 2019.

[21] But perhaps the example is not so far-fetched after all. See Oliver Sacks, *The Man who Mistook his Wife for a Hat* (Summit Books 2006).

[22] Nevertheless, in the case of the man who thinks he is squeezing a lemon, state law may require that the evidence be channeled through the affirmative defence anyway, so that the

cash value of the M'Naghten defence lies in the affirmative excuse granted to those who do not understand that their act was wrongful.[23] Evidence introduced to establish this claim does not rule out *mens rea*; even someone who acted intentionally may escape the penalty if it can be shown that he did not have the ability to know the difference between right and wrong, or to understand that his act was wrong.[24]

The M'Naghten test is cognitive—to be held criminally liable, the accused must know the nature of his act and know that it was wrong. To this cognitive path, some jurisdictions add a second path, a volitional or control element. Under the second path, even if a defendant acted intentionally, and even if he knew what he was doing was wrong, he might escape the penalty if he can show that he could not conform his behaviour to the law. Painting this in broad strokes, there are two types of jurisdictions that take this two-path approach, those that have adopted an *irresistible-impulse* exception to liability and those that follow the American Law Institute's version of the defence.[25]

First among these are those jurisdictions in which the question of control or volition is taken into account by the simple addition of an irresistible impulse prong to the M'Naghten test. In addition to M'Naghten's cognitive excuse (a lack of understanding of the nature or the wrongfulness of the act), these jurisdictions permit the defendant to argue that because of a mental disorder, he

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dangerously delusional individual is not simply acquitted but will be subject to commitment in a psychiatric facility. This fact throws an interesting light on the affirmative defence. The real reason for the affirmative defence may not be to let offenders off the hook at all—indefinite confinement is not necessarily easier than confinement for a limited time in prison—but rather to protect the community from someone who, by reason of mental illness, is 'outside the law' and the protections of the law. See Michael Louis Corrado, 'Fichte and the Psychopath: Criminal Justice Turned Upside Down' in Elizabeth Shaw, Derk Pereboom, and Gregg Caruso (eds), *Free Will Skepticism in Law and Society: Challenging Retributive Justice* (Cambridge 2019).

[23] There is no reason here to discuss the controversy surrounding the meaning of 'wrongful.' In some jurisdictions, it is understood to mean morally wrongful; in some, the question is the community's conception of right and wrong; in some, to mean in violation of the criminal law. See generally Kate E Block and Jeffery Gould, 'Legal Indeterminacy in Insanity Cases: Clarifying Wrongfulness and Applying a Triadic Approach to Forensic Evaluations' (2016) 67(4) The Hastings Law Journal 913. See also *People v Serravo* 823 P 2d 128, 135 (Colo 1992) (noting the division of American courts); and *State v Warlock* 569 A 2d 1314, 1322 (NJ 1990) ("In most cases, legal wrong is coextensive with moral wrong.")

[24] The insanity provision in federal law, adopted after John Hinckley was acquitted, on insanity grounds, of the charge of attempting to kill President Ronald Reagan, appears to combine the substance of the M'Naghten defence with the language of the Model Penal Code:

"18 U.S. Code § 17. Insanity defence. (a) Affirmative Defence—It is an affirmative defence to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defence.

(b) Burden of Proof. The defendant has the burden of proving the defence of insanity by clear and convincing evidence."

[25] Model Penal Code 1962, s 4.01(1).

had suffered from an irresistible impulse and was unable to control his behaviour at the time of committing the crime.[26]

The American Law Institute's version of the defence ('the ALI defence'),[27] on the other hand, is a refinement of and substantially more liberal toward the accused than the two-path M'Naghten-plus-irresistible-impulse test. It would excuse a defendant if, because of mental illness, the defendant lacked substantial appreciation of the wrongness (or criminality) of his act, or if, because of mental illness, the defendant was substantially unable to conform to the requirements of the law. Where M'Naghten was satisfied with mere knowledge or understanding of right and wrong, or of criminality, the ALI defence requires *appreciation* of those things. The idea is that the accused might have known or understood that the act was wrong without appreciating that fact, that is, without fully understanding the implications. And where M'Naghten-plus-irresistible-impulse excuses only if there is a lack of understanding or control—arguably an *utter* lack of understanding or control—the ALI defence would grant an excuse where there is merely a *substantial* lack of either.

These three versions of the affirmative defence—M'Naghten, M'Naghten-plus-irresistible-impulse, and the ALI's Model Penal Code version—account for nearly all of the jurisdictions that have affirmative defences, taking into consideration the small variations among them. The rule in federal courts, in trials under the federal penal code, is a version of the M'Naghten test, with language borrowed from the Model Penal Code. It was enacted shortly after, and in response to, the Hinckley acquittal.[28]

In Kansas and three other states, as we have seen, the law is different. In these states, someone who intentionally harmed another but because of mental illness, either did not understand that his act was wrong, or was not in control of his behaviour, has no excuse.

There is one more point about the difference between these four states and the others, that should not be lost in the discussion. One who suffered from delusions that caused him to believe, wrongly, that another person was about to kill him, and who acted to prevent it, could not introduce evidence of that to

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[26] Precise language varies: see *Parsons v State* 81 Ala 577 (1887) ("lost the power to choose between right and wrong, and to avoid doing the act in question, as that [her] free agency was at the time destroyed"); *State v White* 270 P 2d 727, 730 (NM 1954) ("was deprived of the power of [her] will"); *State v Staten* 247 NE2d 293, 298 (Ohio 1969) (did not "have the capacity to avoid her actions"); *Commonwealth v Rogers* 48 Mass 500, 502 (1844) (acted from "an irresistible and uncontrollable impulse").

[27] Model Penal Code 1962, s 4.01(1).

[28] In addition to these sorts of defences, there is the so-called 'product' test employed by one state: if the behaviour of the accused was the product of mental illness and would not have otherwise occurred, he is to be excused on grounds of insanity.

argue mistaken self-defence.[29] He would have acted intentionally, as the definition of intentional homicide requires, and his action would have resulted in, the death of the victim.[30] Self-defence is itself an affirmative defence and absence of self-defence is not, in the jurisdictions of the United States, one of the elements of the crime.[31]

Thus, in the *Delling* case in Idaho, the Idaho Supreme Court considered irrelevant the evidence offered to show that because of mental illness, the defendant believed that he was acting in self-defence, because it was not intended to show that he lacked the intent to kill. (In considering the separate question, whether the sentence ought to be mitigated because of Delling's mental illness, the Idaho court concluded that, much to the contrary, the disorder provided Idaho with a "reason to impose a considerable sentence."[32] The trial judge, recognizing Delling's paranoid schizophrenia and his belief that his victims were trying to kill him, said, "I don't question that that's how he frames it in his own mind, but my function here is to protect society.")[33]

III. THE *KAHLER* CASE IN STATE COURT

A. The General Outline of the *Kahler* Case

The Kansas statute at issue in *Kahler* is an example of the *mens rea* approach. Kahler had introduced evidence of mental illness at his trial, and had argued that because of the mental disorder, he did not appreciate the wrongfulness of the action. But because he did not dispute either the fact of the killing or that the killing was intentional, the jury was compelled by Kansas law to disregard that evidence and find him guilty. In the sentencing phase of the trial, where evidence of his mental illness was introduced once more, the jury chose to condemn him to death. There was an automatic appeal against the conviction to the Kansas Supreme Court. The court, citing its

[29] cf Slobogin (n 18).

[30] For simplicity, I speak of intent throughout this paper and ignore the other states of mind that might satisfy the definition of crimes. I limit myself to intentional homicide, for example, and ignore the fact that the *mens rea* for murder might, in a given jurisdiction, include recklessness or extremely recklessness or depraved-heart-recklessness. What I say about intent goes for those other states of mind as well. And since the insanity defence is not limited to cases of criminal homicide, what I say here extends to the *mens rea* of every crime.

[31] Mistaken self-defence is itself an affirmative defence and absence of mistaken self-defence is not one of the elements of the crime, in the jurisdictions of the United States. If the absence of mistaken self-defence were an element of the crime, then it would be up to the state to prove, beyond a reasonable doubt, that the defendant did not believe that he was acting in self-defence in every case, and the question of his mistaken belief would be part of the *mens rea* for the crime. And if that were so, evidence of mental illness would be admissible, as relating to the *mens rea* for the crime, in Kansas and the other three states. Since mistaken self-defence is instead an affirmative defence and its absence is not an element of the crime, mental illness cannot be admitted in those states to establish it.

[32] *State v Delling* 267 P 3d 709, 721 (Idaho 2011).

[33] ibid 720.

earlier *Bethel* case,[34] affirmed both his conviction and sentence, holding that neither violated the state or the federal constitutions.

Kahler then petitioned for review in the United States Supreme Court. In his petition, Kahler argued that by depriving him of an affirmative defence, that is, by admitting evidence of mental illness *only* to rebut *mens rea*, the State of Kansas had violated his due process rights under the United States Constitution, and that the sentence of death in those circumstances was cruel and unusual punishment under the Constitution.

Since the Supreme Court does not issue advisory opinions, important issues of this sort must be raised in the context of a 'case or controversy.' Often, the Court will take up a case only if there has been disagreement among the 'lower' courts; thinking of state supreme courts as lower courts,[35] the disagreement here had been between the courts of those states that had adopted the *mens rea* approach and the Supreme Court of Nevada, which had rejected it. In this case, in spite of the disagreement, the Court had declined to accept the question on a number of occasions.[36] This time, possibly because of a shift in the make-up of the Court, certiorari was granted.[37]

The question before the Court is whether, under the United States Constitution, an offender who suffered from a mental disorder of some sort at the time of his offense must be allowed to introduce evidence of that disorder to avoid criminal liability, and on the basis of that evidence, may avoid liability even if the state can establish that his behaviour satisfied all the elements of the offense.

B. Facts and Law in the Case[38]

In November 2009, James Kahler shot and killed his wife Karen, their two daughters, Emily and Lauren, and Karen's grandmother, Dorothy Wight. Karen had begun divorce proceedings, James had objected, and there was a bitter dispute between them. For our purposes here, all that matters is that James drove to Dorothy Wight's home, where Karen and their three children (the son, Sean,

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[34] *State v Bethel* 275 Kan 456 (2003). The difference between the earlier *Bethel* case and the *Kahler* case, as will become apparent, is that Bethel had not been sentenced to death.

[35] Not every state case may advance to federal courts; reasons for removing to federal court are set out in the Constitution. In this case, the removal to the United States Supreme Court was warranted by the federal constitutional questions involved.

[36] *Delling v Idaho* 2012 SCC OnLine US SC 82 : 568 US 1038 (2012). Breyer dissents from the denial of cert, Ginsburg and Sotomayor join the dissent.

[37] When the moderate Anthony Kennedy retired in 2017, the very conservative Brett Kavanaugh was nominated by the Republican President and confirmed by the Republican Senate, shifting the balance to the 'conservative' side.

[38] The facts are laid out in the State Supreme Court's opinion, as well as in the briefs for the Petitioner and the Respondent in the United States Supreme Court.

was not harmed) were spending the Thanksgiving holiday with Wight, that he went armed, and that he entered the house shooting. Under ordinary conditions, these facts would be enough to establish that Kahler's act was intentional and, in fact, premeditated.

The Kansas jury was given the choice between convicting Kahler on four counts of premeditated, first degree murder[39] or on one count of capital murder.

First degree murder is defined in Kansas this way:

> "**21-3401. Murder in the first degree.** Murder in the first degree is the killing of a human being committed:
>
> (a) Intentionally and with premeditation; or
>
> (b) in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in KSA 21-3436 and amendments thereto.
>
> Murder in the first degree is an off-grid person felony."

Since Kahler was also charged with burglary—breaking and entering with intent to commit a felony—and since burglary is defined in the Kansas Code as one of the "inherently dangerous felonies", he could have been charged with first degree murder on two separate grounds—killing with the intent to commit an inherently dangerous felony, and premeditation. In fact, he was charged with first degree, premeditated murder.

The notion of premeditation is borrowed from Pennsylvania law, and is one of the more obscure terms in American law. In some states, it means merely that some time has passed between the formation of the intent to kill and the killing, where 'some time' may be as brief as an instant. In Kansas, the State Supreme Court most recently defined the term this way: "Premeditation means to have thought the matter over beforehand and does not necessarily mean an act is planned, contrived, or schemed beforehand; rather, premeditation indicates a time of reflection or deliberation." The time for reflection may occur, the Kansas court has said, during "a fight, quarrel, or struggle."[40] Other things

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[39] Does Kansas permit the judge to determine whether sentences are to run concurrently or consecutively? It depends. Terry Savely, '25 Years of the Kansas Sentencing Guidelines: Where We Were, Where We Are, and What's Next?' (2017) 86 Journal of the Kansas Bar Association 22. Also see Kansas Sentencing Commission, Kansas Sentencing Guidelines Desk Reference Manual 2018 <http://www.kslegislature.org/li/b2019_20/committees/ctte_s_jud_1/documents/testimony/20190122_02.pdf> accessed 13 November, 2019.

[40] Citing *State v Walker* 304 Kan 441, 446, 372 P3d 1147, 1153 (Kan 2016); *State v Bernhardt* 304 Kan 460, 464, 372 P3d 1161, 1166 (2016).

being equal, it is difficult to see how Kahler could have avoided a charge of premeditated murder.

The Kansas Penal Code limits the discretion of judges in handing out penalties; the sentence that is to be meted out for a crime is determined under a grid according to the level of the crime and the defendant's prior convictions.[41] Some of the more serious crimes, however, are not on the grid. To say, as the statute does, that a crime is an "off-grid person felony" means that the defendant must be sentenced either to life imprisonment or to death; in the case of first-degree murder, the penalty is life imprisonment with the possibility of parole after twenty-five years.

Capital murder, to the extent it is relevant in the *Kahler* case, is defined in this way:

> "**21-3439. Capital murder.** (a) Capital murder is the:
>
> . . . .
>
> (6) intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
>
> . . . .
>
> (c) Capital murder is an off-grid person felony."

If Kahler's actions were intentional and premeditated, then since he killed four people he would be liable to conviction on this charge as well. If the defendant has been convicted of capital murder, the jury must choose between death penalty, life in prison without parole, and life with the possibility of parole after twenty-five years. Kahler was charged, in the alternative, with capital murder.

The facts, then, appear to support the conclusion that the elements required for either of these crimes were present, so that Kahler could be held criminally liable for either. That is, unless mental illness can be taken into account.

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[41] KSA 2019 Supp. 21-6801 through 21-682; see also RJ Lewis, Jr, 'The Kansas Sentencing Guidelines Act' (1999) 38 Washburn Law Journal 327.

C. The Procedural History

Kahler argued at the trial that depression caused by the divorce kept him from forming the intent to kill his victims. The expert witness who testified on Kahler's behalf at the trial was not asked whether Kahler had in fact formed the intent to kill or whether he was capable of premeditation or of forming the intention to kill. He testified only that Kahler was, because of his depressed state, incapable of controlling his own behaviour, and that he could not refrain from doing what he did. Since that testimony did not go to the question of *mens rea*, it was considered to be irrelevant. The state's expert, on the other hand, testified that Kahler was indeed capable of forming the intention to do what he did.

At the end of the trial, the defence counsel asked the judge to instruct the jury on the affirmative defence of insanity. The judge rejected the request. Instead the judge (properly, under Kansas law) instructed the jury that it could consider evidence of mental illness only on the question of whether Kahler had had the intent to kill. Instructed thus, the jury convicted Kahler of capital murder and, after hearing mitigating evidence that included reference to his mental illness, sentenced him to death.

There was an automatic appeal to the State Supreme Court. In that forum, Kahler's counsel raised the objection that under Kansas law, Kahler had been denied the possibility of arguing mental illness as an excusing factor—that is, as an affirmative defence—in doing so, the counsel challenged the state statute on insanity. The provision in the Kansas Code governing the introduction of evidence of mental illness, the counsel said, was unconstitutional—the statute made mental illness, in essence, a crime. The State Supreme Court stood by its previous ruling in the *Bethel* case, upholding the law as constitutional under both the state constitution and the United States Constitution. Kahler's death sentence was affirmed.

On the question of the constitutionality of the *mens rea* approach to insanity, there was one dissent. Justice Johnson argued,

> "...the majority leans heavily on its assessment that Kahler adds nothing new to the arguments that were rejected in *State* v. *Bethel*...While stare decisis is a valid tack, the majority conveniently overlooks a significant distinction between this case and *Bethel*. Although Bethel was convicted of capital murder, the death penalty was not involved…'A sentence of death is different from any other punishment, and accordingly there is an increased need for reliability in the determination that death is the appropriate sentence.' [Death is] a 'different kind of punishment from any other which may be imposed

> in this country ... in both its severity and its finality.' At the very least, this Court has the obligation to independently analyze whether the procedure of replacing the insanity defence with the *mens rea* approach undermines the reliability of the jury's determination to impose the death penalty. One might question whether a juror would be as likely to vote to kill a defendant who did not know that his or her murderous act was wrong."[42]

D. Possible Outcomes

The case is now before the United States Supreme Court. In addition to briefs from the petitioner Kahler and the respondent Kansas, the Court has accepted amicus briefs from some nine or ten parties—philosophers, legal academics, defence lawyers, and psychiatrists, as well as the American Bar Association and the American Civil Liberties Union, mostly in favor of maintaining the affirmative defence.[43]

What is the just result in a case of this sort? The Court will be asked to decide that question in the context of the *Kahler* case on the basis of precedent and constitutional interpretation. Since it is state law that is at issue, the question of justice comes in through the interpretation of the Due Process Clause of the Fourteenth Amendment to the Constitution and, through the Fourteenth Amendment, the prohibition against cruel and unusual punishment of the Eighth Amendment.[44]

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[42] *Kahler* (n 1) (Johnson J dissenting), 419, 136-137 (citations omitted).

[43] As of September 2019, there were nine amicus briefs filed, eight of which supported the Petitioner's argument that there should be an affirmative defence. One, the amicus brief filed by John F Stinneford, was in support of neither party. At the time, Respondents had received no amicus briefs in support of their position.

[44] The first ten Amendments to the United States Constitution (the United States Bill of Rights) are generally understood to apply to the departments of the federal government and early on were understood to apply *only* to the federal government and not to apply to the states. Thus, for example, when the Fourth Amendment says, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...," it is clear that an objection might be raised under the Fourth Amendment to federal criminal legislation or against an action of the United States Justice Department. But it could not in the early years of the Republic be raised, for example, against a New York law or against the actions of the state or local police in New York. In those years, the states were free to decide the questions answered by the Bill of Rights in their own way, limited only by the common law and the states' own constitutions. In 1865, after the Civil War, the Civil Rights Amendments were passed. One of these, the Fourteenth Amendment, promised equal rights to all persons born or naturalized in the United States. The first paragraph of that Amendment ends with the clause "nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Since that time, the Due Process Clause of the Fourteenth Amendment has been used by the courts to apply the requirements of the Bill of Rights, including the Eighth Amendment's prohibition of cruel and unusual punishment, to the states. The process

The Court might hold that the statute is in violation of either or both of those parts of the Constitution and strike it down. If it did that, the statutes of all four states would have to be considered unconstitutional. As the Court is presently constituted, that outcome seems highly unlikely.

The Court might, on the other hand, hold that the statute does meet the requirements of due process and the prohibition against cruel and unusual punishment. That outcome is more likely, and if that's the Court's decision, we can be pretty sure that a number of states would follow the lead of Kansas and the other four states, and replace their affirmative defence of insanity with the *mens rea* version.

But a third possibility cannot be ruled out: the Court could, in line with the reasoning of the dissent in the Kansas court, hold that although the statute did not on its face violate the Constitution, it went too far in denying the defence to candidates for death penalty. In the past, the Court has been willing to concede that, when it comes to the rules governing punishment, "death is different."[45] Technically, a holding of that sort would leave the question of the overall constitutionality of the *mens rea* approach up in the air since, strictly speaking, it is not before the Court.[46] Only the sentence in this particular case is before the Court.

There are a number of arguments in favor of each of the two positions, but most of them are window dressing. The Supreme Court has acknowledged that the role of the requirement of due process is to protect rights 'deeply rooted' in our history and traditions,[47] and the important disagreement between the parties is over whether the insanity defence is in fact deeply rooted in our history and traditions, and if so, whether history and traditions place any limits on the form that the defence can take.

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was called 'the incorporation' of the individual rights into that Amendment. (It may be worth pointing out that in the United States, the word 'government' covers all three branches, the legislative, the executive, and the judicial; the more common term to apply to the President and his cabinet is 'the administration.')

[45] *Gregg v Georgia* 1976 SCC OnLine US SC 168 : 49 L ED 2d 859 : 428 US 153, 188 (1976) ("The penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); *Reid v Covert* 1957 SCC OnLine US SC 87 : 1 L ED 2d 1148 : 354 US 1, 45-46 (1957) (on rehearing) (Frankfurter J concurring).

[46] There is a fourth possibility suggested by one of the State's arguments: the Court may simply avoid the question by holding that on the evidence given at trial, Kahler was able to tell right from wrong and so would properly have been convicted even under the standard for insanity that he advocated, so that error, if there was any, was harmless.

[47] "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition…' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'..." *Washington v Glucksberg* 1997 SCC OnLine US SC 79 : 138 L ED 2d 772 : 521 US 702, 720-721 (1997) (citations omitted).

According to *Kahler*, the affirmative defence is in fact required by our legal tradition. Starting with historical-religious sources and working up through the ancient commentaries to the Anglo-Saxon common law tradition, Kahler quotes writer after writer and case after case to support the proposition that those whose crimes, intentional or not, are the result of their mental illness are not blameworthy, and that those not blameworthy should not be punished.

The State of Kansas does not dispute the historical argument in favor of an insanity defence. Instead, it makes the point that among the historical supporters of an insanity defence, there is little agreement as to what exactly the defence should be. Some argue that those who cannot control their behaviour are not blameworthy and should not be punished; others point to the actor's inability to understand what he is doing as the key to exculpation; others to a lack of understanding of right and wrong; and others to the absence of *mens rea* because of mental illness. This lack of agreement in the sources has been recognized by the Supreme Court, which has said that no one version of the insanity defence is required by the Constitution.[48] From here, Kansas argues that the *mens rea* approach to insanity is as consistent with our history and traditions as any other.

There is, as we will see, a remarkable leap involved in reaching that conclusion.

IV. THE ARGUMENTS BEFORE THE SUPREME COURT

There is said to be a presumption of constitutionality for statutes:[49] the courts will not interfere with a legislation unless it is clear that the legislation cannot be interpreted in such a way that harmonizes it with the Constitution.[50] At the same time, however, the courts are bound to protect those rights that are 'deeply rooted' in the legal traditions and history of the United States, and a

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[48] See *Clark v Arizona* 2006 SCC OnLine US SC 73 : 548 US 735, 752-53 (2006) ("[T]he insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.") What the Court has *not* said is that the affirmative defence of insanity might be abolished altogether.

[49] *McDonald v Board of Election Commissioners of Chicago* 1969 SCC OnLine US SC 100 : 22 L ED 2d 739 : 394 US 802 (1969). "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." See also *McGowan v State of Maryland Gallagher* 1961 SCC OnLine US SC 100 : 6 L ED 2d 393 : 366 US 420 (1961); *Kotch v Board of River Port Pilot Commissioners* 1947 SCC OnLine US SC 50 : 91 L ED 1093 : 330 US 552 (1947); *Lindseley v Natural Carbonic Gas Co* 1911 SCC OnLine US SC 45 : 55 L ED 369 : 220 US 61 (1911).

[50] Since it is state law that is at issue, the question of constitutionality comes in through interpretation of the Due Process Clause of the Fourteenth Amendment to the Constitution and, through the Fourteenth Amendment, the prohibition against cruel and unusual punishment in the Eighth Amendment. In this paper, I will address only the Due Process controversy.

statute that denies such a right—that cannot be construed other than as denying such a right—must be struck down.[51]

The issue that Kahler has brought before the Supreme Court is whether one such deeply rooted right is the right to an affirmative defence of insanity at a criminal trial. To prevail, Kahler must persuade the Court that the *mens rea* approach, which eliminates the affirmative defence and permits admission of evidence of mental illness only to rebut the state's evidence for the existence of the element of *mens rea*, is inconsistent with our traditions and history. The petitioner's brief devotes the bulk of its argument to making the case that the courts and commentators throughout our common law and case law history have always[52] recognized that mental illness has a bearing not only on *mens rea* but on something else as well, something that can only be captured in an affirmative defence.

In the respondent's brief, the State of Kansas has undertaken to show that Kahler's interpretation of the history and traditions behind the insanity defence is mistaken, and that the *mens rea* approach is consistent with that history and traditions. To be as clear as possible about this, the State is arguing that admitting evidence of mental illness for *no other purpose* than to dispute *mens rea* is consistent with our history, so that no affirmative insanity defence of any sort, whether based upon an understanding of the wrongness of an action or upon an inability to conform behaviour to the law, or upon some combination of the two, is required by that history and, therefore, by the Constitution. As it happens, the State's argument on this point (which takes up the bulk of its brief) is based upon a spectacular *non sequitur*.[53]

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[51] *Washington v Glucksberg* 1997 SCC OnLine US SC 79 : 521 US 702, 720–21 (1997). "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *Moore v City of East Cleveland* 1977 SCC OnLine US SC 93 : 52 L ED 2d 531 : 431 US 494, 503 (1977) (plurality opinion); *Snyder v Commonwealth of Massachusetts* 1934 SCC OnLine US SC 21 : 78 L ED 674 : 291 US 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v State of Connecticut* 1937 SCC OnLine US SC 173 : 82 L ED 288 : 302 US 319, 325, 326 (1937)."

[52] Always, that is, up until 1979 when the first state legislated the *mens rea* approach. Since that legislation is precisely what is in question here, it must be set aside when considering the history of the insanity defence.

[53] The constitutionality argument in the State's brief takes some thirty-two pages, from page eighteen to page fifty. On pages forty through fifty are the State's blameworthiness and Eighth Amendment arguments. The argument from history and precedent occupies pages eighteen to forty.

A. Refining the Issue

The issue before the Court is whether the Constitution requires an affirmative defence of insanity. In order not to lose our way, it is important to clear away some of the surrounding brush.

We should not be distracted by the three side issues that cloud the argument. First, whether there should be an insanity defence at all—that is, whether evidence of mental illness should be admissible at all—is not in issue. Starting with historical-religious sources and working up through the ancient commentaries to the Anglo-Saxon common law tradition, Kahler quotes writer after writer and case after case to support the proposition that those whose crimes are the result of their mental illness should not be punished. This is a point that the State does not dispute.[54] The position of the State of Kansas is that it has not abolished the insanity defence, since evidence of mental illness is admissible in State criminal courts to rebut the State's evidence on an element of the crime, namely the element of *mens rea*. It has only abolished the *affirmative* defence.

Second, the State's brief spends a lot of time and space arguing that the right-wrong test urged by Kahler is not the only test approved by history and traditions. That part of the argument is entirely beside the point. The challenge here for Kahler is *not* to show that one particular affirmative defence is required by the history of our institutions, but rather to show that *some* affirmative defence is required; not to show that history requires that evidence be admissible on the question of the defendant's understanding of right and wrong, or the defendant's understanding that her act was wrong, or her ability to control her behaviour, but rather that that the admission of such evidence cannot be limited to disputing the elements of the crime.

Third, the brief for the State of Kansas appears to argue not only for the proposition that the *mens rea* approach is consistent with our legal tradition, but it also cites authority for the much stronger proposition that it is the *only* historical basis for an insanity defence. That is more than the state needs to show. It only needs to show that it is one of the historical bases for that defence.

The point in issue, then, is not whether there should be an insanity defence; it is assumed by both sides that there must be one. It is not whether

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[54] That question was answered by state courts early in the twentieth century. Several state legislatures had abolished the insanity defence by denying the defendant the right to submit evidence of mental illness. In each case, the State Supreme Court found the legislation unconstitutional on the ground that it excluded evidence that might have a bearing on the defendant's guilt or innocence. That such evidence must be taken into account at trial is now largely taken for granted. Do we have support for this? In the contemporary cases? In the literature?

the right-wrong test is the only test approved by our common law tradition, or even whether it is *one* of the tests approved by our tradition; that's more than Kahler must show. And it is not, on the other hand, whether the *mens rea* approach is the only test approved by tradition; that's more than the state must show. Instead, the issue is whether the utter elimination of any *affirmative* defence is consistent with that tradition, or whether the exclusion of evidence of mental illness on any question other than that of *mens rea* is a denial of due process.

B. The Evolution of the Notion of *Mens Rea*

In the State's brief as well as in the state court cases upholding the *mens rea* approach, the point made is that from early on what was to be found in the cases and commentary was the thread of an argument to the effect that insanity would preclude liability if it negated *mens rea*. From there, the State concludes that permitting evidence of insanity to rebut *mens rea*, and only to rebut *mens rea*, is pretty much consistent with the history of the common law. But the State's argument seems to be an example of what logicians call the fallacy of equivocation.

So, for example, the State cites with approval the work of Norval Morris asserting the strong connection between *mens rea* and the insanity defence. Morris has said that until the nineteenth century, "criminal law doctrines of *mens rea* handled the *entire* problem" of insanity.[55] The State's brief continues:

> "A 'who's who' of early legal thinkers confirm that *mens rea* and insanity were intractably tied together. Bracton, who was influential in incorporating the principle of *mens rea* into English law, believed that 'madmen' should not be punished because they lacked *mens rea* ... Individuals in such a desperate state were considered incapable of forming *mens rea*.
>
> Sir Edward Coke echoed this same understanding in Beverley's Case, 4 Co. Rep. 123b (1603), writing that "[n]o felony or murder can be committed without . . . a felonious intent and purpose," and therefore a "non compos mentis" cannot be guilty of a felony because "he cannot have a felonious intent." Id. at 124b. And in his Institutes, Coke explained that in criminal cases, "the act and wrong of a madman shall not [be] imputed to him, for that in those causes, actus non-facit reum, nisi mens sit rea" (the act does not make a person guilty unless the mind is guilty)—an explicit reference to

[55] Respondent's Brief 20; Norval Morris, *Madness and the Criminal Law* (1982) 54 (emphasis added).

> *mens rea*. 2 Sir Edward Coke, The First Part of the Institutes of the Laws of England, 247b (1628). Because Coke's teachings "were read in the American Colonies by virtually every student of the law," ... these concepts would have been familiar to the framers of the Constitution.
>
> Likewise, Sir Matthew Hale believed "that the defence of insanity is intimately related with the whole topic of criminal intent." Glueck, Mental Disorder and the Criminal Law at 131. Hale therefore sought "to assimilate the defence of insanity to that of infancy on the basis of lack of *mens rea*," postulating that a mentally ill individual who has as much understanding as a 14-year-old child may be found guilty.
>
> So too with Blackstone. Blackstone wrote that "to make a complete crime, cognizable by human laws, there must be both a will and an act"—in other words, *mens rea* and actus reus. Blackstone then laid out several pleas and excuses, including insanity, "which protect the committer of a forbidden act from the punishment," and tied them all to a lack of *mens rea*. Id. at 20 ("An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable.")
>
> Thus, many of the English legal writers most familiar to early Americans—Blackstone, Hale, Coke, and Bracton—all linked insanity to a lack of *mens rea*."[56]

More than two-thirds of the State's argument on due process grounds is on this question of the historical relationship between *mens rea* and insanity.

C. The State's Remarkable Leap in Reasoning

The argument the State wants to make goes something like this:

1. It is consistent with the history and tradition behind the insanity defence to suppose that mental illness is relevant to criminal responsibility if, and only if, it is incompatible with *mens rea*.

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[56] Respondent's Brief 21-23, citing *Beverley's Case* 4 Co Rep 123b, 124b (1603); Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (1628) 247b; Glueck, *Mental Disorder and the Criminal Law* (1925) 131 (citations to Bracton, Hale omitted).

2. The *mens rea* approach adopted by Kansas permits the fact of mental illness to be admitted to rebut evidence of *mens rea*.

3. Thus, Kansas's *mens rea* approach is consistent with the history and tradition behind the insanity defence.

The conclusion does not follow, and here is why: the notion of *mens rea* has changed over the years from the broad idea that a blameworthy state of mind of almost any sort was sufficient for criminal liability to the contemporary more narrow notion of *mens rea* as being whatever state of mind is an element of the definition of the crime. To say that an insane person is incapable of forming an intent of the broader sort is simply to say that the intentions of an insane person cannot, because of their mental disability, be considered wicked in the sense required by the law.

And if that is what the thread of authority that the State points to is really saying, then far from ruling out an affirmative defence, it should stand in support of it: it may well be that this person intended to do what he did—to injure, to kill—and so had *mens rea* in the contemporary sense, but even if that is so, he should be exempt from punishment, if because of mental illness, his intent lacked the sort of wickedness that would permit us to find him blameworthy.

So, for example, the change is illustrated in a case involving the *mens rea* term 'malicious.' Under the older understanding of *mens rea*, a man who, in the effort to steal coins from a building's gas meter, accidentally caused poisonous gas to escape and poison a resident of the building, was charged with and convicted of the crime of 'maliciously' causing the administration of a "noxious thing," "so as to endanger the life of a person." The trial judge had instructed the jury (in keeping with the earlier understanding of malice) that 'malicious' meant 'wicked.' "What you have to decide here," the judge told the jury,

> "… is whether, when he loosed that frightful cloud of coal gas into the house which he shared with this old lady, he caused her to take it by his unlawful and malicious action ... 'Malicious' for this purpose means wicked - something which he has no business to do and perfectly well knows it. 'Wicked' is as good a definition as any other which you would get."

In an opinion that helped mark the turn to the newer conception of *mens rea*, the Court of Appeal reversed the conviction and held that the charge and the jury instruction were improper:

> "With the utmost respect to the learned judge, we think it is incorrect to say that the word 'malicious' in a statutory offence merely means wicked. We think the judge was, in effect, telling the jury that if they were satisfied that the appellant acted wickedly—and he had clearly acted wickedly in stealing the gas meter and its contents—they ought to find that he had acted maliciously in causing the gas to be taken by Mrs. Wade so as thereby to endanger her life."[57]

The *Cunningham* case was a sign of the change in the judicial understanding of *mens rea*, though it had been forecast in critical commentary; the Court of Appeal considered the following principle which was propounded by the late Professor CS Kenny:

> "In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured."[58]

One problem with the earlier understanding of *mens rea* was that it was much too broad and allowed disproportionate punishment for minor crimes. The defendant in the case was obviously acting with 'wicked' or 'evil' intent: he wanted to steal money. But on the charge that was laid against him, what he did was exactly on a level with someone who had caused the poisoning deliberately intending to endanger.

Although the case revolved around the meaning of the word 'malice,' the shift in the interpretation of *mens rea*, from a vague requirement of evil intent to a more specific notion having nothing to do with general wickedness but requiring a focus on the *actus reus* itself, was a shift in the general understanding of what *mens rea* is. On this point, the modern interpretation of *mens rea* is generally conceded to be the better one, and in fact, it is the law in all American jurisdictions.[59]

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[57] *R v Cunningham* (1957) 2 QB 396 : (1957) 3 WLR 76 : (1957) 41 Crim App 155, 157-158 : (1957) 2 All ER 412, 414-415.

[58] CS Kenny, *Outlines of Criminal Law* (1st edn, 1902). The quote from Kenny was attributed by the Court to a later edition of the same work; the Court said the quote was "repeated at p 186 of the 16th edition edited by Mr JW Cecil Turner and published in 1952."

[59] A relic of the older approach to *mens rea* is the felony murder rule found in some of the United States.

Using the *Cunningham* case as an example, Joshua Dressler explains the difference this way:

> "In the older, broader conception, *mens rea* is defined as 'a general immorality of motive,' 'vicious will,' or an 'evil-meaning mind.' Although each of these phrases has a slightly different connotation, *mens rea* as used here suggests a general notion of moral blameworthiness, i.e., that the defendant committed the *actus reus* of an offense with a morally blameworthy state of mind…
>
> In the narrower conception, *mens rea* is defined as "the particular mental state provided for in the definition of an offense."... For example, assume that murder is defined by statute as "the intentional killing of a human being by another human being."... The *mens rea*—the particular mental state provided for in the definition of the offense—is 'intentional'. Applying the elemental meaning of *mens rea*, [defendant] is guilty of murder if he intentionally kills another human being."[60]

On one hand, a prohibited act may spring from a wrongful or wicked or criminal intent, and thus, be accompanied by the required *mens rea* in the earlier sense, without itself being intentional in the contemporary sense. But more importantly for the debate before us, a prohibited act, as we will see, may be intentional in the contemporary sense without springing from a wrongful or wicked or criminal intent: a person may act intentionally without being responsible for her action, or having criminal intent.

Thus, it may well be that the statement that the point of the insanity defence is to negate *mens rea* would mean one thing in the nineteenth century, and another in the twenty-first. The earlier sense was broader both in the scope of exculpation and in the scope of inculpation. To say that someone had *mens rea* in the earlier sense meant that he intended to do something wrongful, but not necessarily that he intended to do the act that he is charged with, even if the law under which he is charged is defined as an intentional or a malicious act.[61] On the other hand, to say that someone lacked *mens rea* in the earlier sense meant *either* that she lacked the intention or awareness required by the definition of the statute, or (because of some disability) she lacked whatever it took to make the intent wrongful.

Someone may, thus, have intended his act without having *mens rea* in that broad sense. According to Herbert Packer,

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[60] Dressler (n 5) 10.02[B] and [C], 118 and 119.

[61] *R v Faulkner* 13 Cox CC 550 (1877).

> "The asserted analogy (or even identity) with *mens rea* that has been pressed by both attackers and defenders of the insanity defence is a red herring. The insanity defence has no more to do with *mens rea* than does the defence of infancy; at most such defences involved what may be called 'constructive *mens rea*.' [The mistake is] to confuse the idea of culpability, which is implicated in the insanity defence, with technical culpability requirements, which are not... It is an overriding, *sui generis* defence that is concerned not with what the actor did or believed but with what kind of person he is."[62]

The comparison between the defence of insanity and the defence of infancy is something the State mentions but fails to grasp.[63] On the State's own showing, the connection is made throughout our tradition: the madman is no more capable of criminal intent than the child. The defence of infancy and the age before which someone is still considered an infant—seven in the common law,[64] higher by statute—has changed over the years. But to say that a child of a lesser age is entitled to a partial or complete presumption of innocence is to say that the child's intent cannot be considered criminal, not that the child was incapable of intending what he did. Below 'the age of reason,' a child will not be held responsible for a crime, even though the child's act was intentional. Below a certain age (and because of her age), intent simply does not count as the intent that would satisfy the definition of a crime. That's why infancy is an affirmative defence.[65]

By the same token, none of the historical sources that the State cites indicate that there is any authority for the narrow, stripped-down *mens rea* approach prior to 1979 when the first state adopted the legislation that is now in issue before the Court. All of our tradition supports the claim that mental illness is relevant to something more than the element of intent. If the long history of the insanity defence is anything, it is the history of a struggle to put that 'something more' into words. It is utterly inconsistent with that history to suppose that the question can just be set aside, as the State of Kansas and the other four states have done.[66]

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62 Herbert Packer, *The Limits of the Criminal Sanction* (1968) 134-135.

63 Respondent's Brief 22.

64 LaFave (n 4) s 8.6, 384. Under modern statutes, even older children may be found incapable of intent; they are then referred to juvenile court for appropriate disposition, much as those found not guilty by reason of insanity are referred for commitment.

65 ibid 384-386. A different but obviously related point can be made about consent to sexual intercourse—an intoxicated person (because of his condition) cannot consent to sexual intercourse, even though the person does, to all appearances, consent—and to consent generally. To do something when intoxicated does not mean to do it unintentionally or by accident.

66 It is not clear whether the Alaska affirmative defence will fall if the Kansas legislation is struck down. If not, a Kahler win here would seem to be pointless in the long run. Alaska Stat s 12.47.010 (2019).

And so, I would argue, to say that a madman is no more capable of criminal intent than an infant is not to say that to be considered a madman under the law he must be incapable of acting intentionally, but that under the law his intent cannot be considered criminal. What keeps it from being considered criminal? That 'something else' that may be presented to the jury in the form of an affirmative defence. In the earlier sense, *mens rea* might well have been understood to incorporate an ability to tell right from wrong—in fact, that is precisely how it seems to have been understood—whereas in the current sense it is not understood in that way. But in any case, there was 'something more:' wrongful intent required something more than mere intent.

Accordingly, a *mens rea* defence based upon the nineteenth century understanding of *mens rea* might well have exempted Andrea Yates from criminal liability, which all things considered seems like the right outcome. A *mens rea* defence based upon the twenty-first century understanding of *mens rea* would not. And if that is so, it is a *non sequitur* for the State of Kansas to support the *mens rea* approach with an appeal to historical sources on the connection between *mens rea* and insanity.[67]

Should you question the relevance of this to the State's argument, return once more to the State's citations of historical authority, quoted above, for the proposition that throughout the history of the common law insanity and *mens rea* were "intractably tied together."[68] When Bracton says that 'madmen' should not be punished because they lack *mens rea*, we must ask what he meant by *mens rea*, and whether he meant the same thing that the Kansas legislature meant. But Nigel Walker quotes Bracton to the effect that madmen are "not very different from animals who lack understanding (*ratio*)," and explains that "[i]n the psychology of Bracton's day '*ratio*' could signify either understanding the nature of one's act or knowledge of its wrongfulness, and it was recognized that madmen might lack either."[69]

What Coke says, even in the State's quotation from him, is that "there is no felony or murder ... without *felonious* intent," and that the act is not guilty unless the mind be guilty.[70] But what is it that makes intent felonious? What is it that makes the 'mind' present in an act a guilty mind? When Hale says

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[67] See Slobogin (n 18) for discussion. The point, of course, is not that anyone who does evil intending to good must be absolved; killing someone who is suffering with a terminal illness to prevent her from having to suffer more is still a crime, though perhaps some mitigation of the penalty is in order. The point is that the early cases and commentators may indeed have intended to excuse some of those who acted intentionally (in the contemporary sense of the term), provided that in the eyes of the jury and because of the defendant's confusion or lack of control *criminal* intent should not be ascribed to them.

[68] Respondent's Brief 21.

[69] Nigel Walker and Sarah McCabe, *Crime and Insanity in England: The Historical Perspective*, vol I (Edinburgh 1968) 28.

[70] Respondent's Brief 21.

that insanity is related to "the whole topic of *criminal* intent",[71] it is telling and ironic that he compares madmen to children less than fourteen years of age in their inability to have criminal intent: no one has ever suggested that children are to be excused only when their actions and the consequences of their actions are utterly unintentional. Blackstone, just after the quote cited by the State, says that what must be demonstrated is "the *depravity* of the will," and that "to constitute a crime against human laws, there must be, first, a *vicious* will."[72]

It is not that anyone whose intentions are good must be excused, but rather that anyone must be excused whose intentions, because of his mental disorder, cannot be bad.[73]

An act can be intentional, then, and thus, there may be *mens rea* in the contemporary sense, without the act being vicious, or criminal, or guilty, or wicked, or depraved, so that these sources quoted emphatically by the State do not support the conclusion that someone may be excused as insane only if he lacks the intent that the definition of the crime requires. That is not even a thread in the history of the insanity defence, let alone a thread that would show that the requirement of an affirmative defence was not deeply rooted in our tradition.

To claim support for a statute in the twenty-first century limiting admissibility of evidence to its relevance to *mens rea* on the basis of nineteenth century sources that appear to connect *mens rea* and insanity would therefore be a serious misstep.[74] If evidence introduced to show the lack of 'evil' or 'wickedness' of the intent due to mental disorder were admissible—that is, evidence introduced to qualify the *nature* of the intent—then that evidence might well absolve a defendant of criminal liability, whereas the same evidence introduced to show that she did not actually intend in the first place to do what she did would properly be considered frivolous. If you believe that because of severe

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71 Walker (n 69) 35.

72 William Blackstone, *Commentaries on the Laws of England*, vol 4 <https://avalon.law.yale.edu/18th_century/blackstone_bk4ch2.asp> (emphasis added).

73 Respondent's Brief 21-22.

74 Consider once more the outline statement of the State's argument, above at the beginning of Section III.C. Both premises of that argument can be true only if the meaning of the term '*mens rea*' is used differently in the two of them—in the broad, archaic sense in the first and in the contemporary sense in the second—an example of the fallacy of equivocation. The conclusion simply does not follow. Even those sources that assert a connection between insanity and a lack of *mens rea* support an affirmative defence of insanity, a defence that should prevail even in the face of evidence of *mens rea*, when (in line with the modern understanding) *mens rea* is understood to be satisfied by an intention or knowledge of any sort, however deranged. On the other hand, if we hold the meaning of '*mens rea*' constant, the conclusion will follow, but one of the premises must be false. If we use the older meaning in both, then the first premise will be true but the second false. If we understand both as involving the newer meaning, then the first premise will be false though the second is true.

post-partum psychosis Andrea Yates was incapable of acting wickedly, however horrifying her actions—her *intentional* actions—then that would be a case in point.

V. CONCLUSION

To be sure, it does not follow from the State's error in reasoning that an affirmative defence of insanity is required by American legal history and traditions. What follows is merely the less imposing conclusion that the State has not shown that the *mens rea* approach is consistent with that history, and so has not shown that an affirmative defence is *not* required. Should the Court choose to ignore the issue and simply defer to the legislature of the State of Kansas on this question, which it might, the defect in the State's argument would be irrelevant.

But the Court's role is not simply to defer to the other branches of government. It is also there to protect individual rights. The legislative branch of government represents the public, as a whole. Some branch of government must protect the constitutional rights of individuals. That branch is the judiciary. Therefore, a court that defers to legislative judgment out of respect for the doctrines of separation-of-powers and federalism may be guilty of abdicating its institutional duty to enforce constitutional edicts.[75]

The Court should not rely simply on a presumption in the State's favour. It should require the State to explain why a right that allows a defendant to avoid the harsh penalties of imprisonment or death, a right that was recognized in every jurisdiction up until 1979, is not a right that is deeply rooted in our tradition, and the State simply did not do that. Every historical source cited by the State appears to identify *mens rea* with something more than a mere state of mind, something that can only be addressed in an affirmative defence, supporting Kahler's argument that the State of Kansas is taking away a right that is ensconced in our legal traditions and that is, therefore, protected by the Constitution.

[75] Dressler (n 5) 37, citing *Marbury v Madison* 2 L ED 60 : 1 Cranch 137 : 5 US 137 (1803).