AMERICAN CONSTITUTIONALISM

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Due Process and Habeas Corpus/Due Process

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

*James Kraig Kahler murdered his estranged spouse, his spouse’s grandmother and his two daughters on Saturday, November 28, 2009. At trial, Kahler conceded that he fired the fatal shots, but contended that he should be found not guilty by reason of insanity. A psychiatrist testifying for the defense diagnosed Kahler with severe major depression and claimed that “his capacity to manage his own behavior had been severely degraded so that he couldn’t refrain from doing what he did.” Psychiatrists testifying for the prosecution insisted that, despite Kahler’s condition, he was capable of pre-mediation and forming an intent to kill. That was sufficient under Kansas law, which limited the insanity defense to defendants who, “as a result of mental disease or defect, lacked the mental state required as an element of the offense charged.” “Mental disease or defect,” the law clearly stated, “is not otherwise a defense.” Kahler claimed this law was unconstitutional. Due process, in his view, encompassed a basic principle of justice that forbade states from imposing criminal liability on persons who could not appreciate the morality of their conduct. This argument fell on deaf Kansas ear. Kahler was found guilty, sentenced to death, and the Supreme Court of Kansas rejected his claim the Kansas law violated the due process clause of the Fourteenth Amendment by unduly restricting the insanity defense. Kahler appealed this decision to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote sustained the Kansas Law. Justice Elena Kagan’s majority opinion held that due process required that persons must have the intention to commit murder to be found guilty of murder, but not that persons must know that murder is wrong. Why does Kagan reach this conclusion? Why does Justice Stephen Breyer in dissent conclude that due process requires that a person know their conduct is wrong? Who has the better of the argument? Both Kagan and Breyer based their arguments on history, on what common law judges thought about insanity. Do contemporary psychiatrists think about insanity in the same way? Should justices base decisions on contemporary psychiatry or is incorporating contemporary psychiatry into law a task better suited for legislatures?*

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819771d6cd611ea96bae63bc27a1895) delivered the opinion of the Court.

. . . . In Kansas, a defendant can invoke mental illness to show that he lacked the requisite *mens rea* (intent) for a crime. . . . But Kansas, unlike many States, will not wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong. The issue here is whether the Constitution's Due Process Clause forces Kansas to do so—otherwise said, whether that Clause compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime. We hold that the Clause imposes no such requirement.

In *Clark v. Arizona*, 548 U.S. (2006), this Court catalogued state insanity defenses, counting four “strains variously combined to yield a diversity of American standards” for when to absolve mentally ill defendants of criminal culpability. The first strain asks about a defendant's “cognitive capacity”—whether a mental illness left him “unable to understand what he [was] doing” when he committed a crime.  The second examines his “moral capacity”—whether his illness rendered him “unable to understand that his action [was] wrong.” . . . If the defendant lacks either cognitive or moral capacity, he is not criminally responsible for his behavior. Yet a third “building block[ ]” of state insanity tests, gaining popularity from the mid-19th century on, focuses on “volitional incapacity”—whether a defendant's mental illness made him subject to “irresistible[ ] impulse[s]” or otherwise unable to “control[ ] his actions.”  And bringing up the rear, . . . the “product-of-mental-illness test” broadly considers whether the defendant's criminal act stemmed from a mental disease. . . . [E]ven that taxonomy fails to capture the field's complexity. . . . Instead of examining whether a mentally ill defendant could grasp that his act was *immoral*, some jurisdictions took to asking whether the defendant could understand that his act was *illegal*. . . .

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A challenge like Kahler's must surmount a high bar. Under well-settled precedent, a state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Our primary guide in applying that standard is “historical practice.”  And in assessing that practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions. . . .

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Nowhere has the Court hewed more closely to that view than in addressing the contours of the insanity defense. Here, uncertainties about the human mind loom large. . . . Even as some puzzles get resolved, others emerge. And those perennial gaps in knowledge intersect with differing opinions about how far, and in what ways, mental illness should excuse criminal conduct.  “This whole problem,” we have noted, “has evoked wide disagreement.”  On such unsettled ground, we have hesitated to reduce “experimentation, and freeze [the] dialogue between law and psychiatry into a rigid constitutional mold.” . . . .

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One point, first, of agreement: Kahler is right that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime. . . . But neither do we think Kansas departs from that broad principle. First, Kansas has an insanity defense negating criminal liability—even though not the type Kahler demands. As noted earlier, Kansas law provides that it is “a defense to a prosecution” that “the defendant, as a result of mental disease or defect, lacked the culpable mental state required” for a crime. . . . Second, and significantly, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing. . . . In other words, any manifestation of mental illness that Kansas's guilt-phase insanity defense disregards—including the moral incapacity Kahler highlights—can come in later to mitigate culpability and lessen punishment. And that same kind of evidence can persuade a judge to replace any prison term with commitment to a mental health facility. So as noted above, a defendant arguing moral incapacity may well receive the same treatment in Kansas as in States that would acquit—and, almost certainly, commit—him for that reason. . . . .

. . . . Early commentators on the common law proposed various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach. Kahler cites William Lambard's 16th-century treatise defining a “mad man” as one who “hath no knowledge of good nor evil” (the right and wrong of the day). He likewise points to William Hawkins's statement, over a hundred years later, that a “lunatick[ ]” is not punishable because “under a natural disability of distinguishing between good and evil.” . . . But other early versions of the insanity test—and from a more famous trio of jurists—demanded the kind of cognitive impairment that prevented a defendant from understanding the nature of his acts, and thus intending his crime. Henry de Bracton's 13th-century treatise gave rise to what became known as the “wild beast” test. Used for hundreds of years, it likened a “madman” to an “animal[ ] which lack[s] reason” and so could not have “the intention to injure.” Sir Edward Coke similarly linked the definition of insanity to a defendant's inability to form criminal intent. He described a legally insane person in 1628 as so utterly “without his mind or discretion” that he could not have the needed *mens rea*. So too Lord Matthew Hale a century later. He explained that insanity involves “a total alienation of the mind or perfect madness,” such that a defendant could not act “*animo felonico*,” meaning with felonious intent.

Quite a few of the old common-law cases similarly stressed the issue of cognitive capacity. . . . [M]oral incapacity was a byproduct of the kind of cognitive breakdown that precluded finding *mens rea*, rather than a self-sufficient test of insanity. Or said another way, a mentally ill defendant's inability to distinguish right from wrong, rather than independently producing an insanity acquittal, served as a sign—almost a kind of evidence—that the defendant lacked the needed criminal intent.

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Only with *M'Naghten*, in 1843, did a court articulate, and momentum grow toward accepting, an insanity defense based independently on moral incapacity. See [*Clark*, 548 U.S. at 749, 126 S.Ct. 2709](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009455266&pubNum=0000780&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RP&fi=co_pp_sp_780_749&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_749); [*Leland*, 343 U.S. at 801, 72 S.Ct. 1002](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952117928&pubNum=0000780&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RP&fi=co_pp_sp_780_801&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_801); *supra*, at 1025, 1028 - 1029. The M'Naghten[*‘s Case* (1843)] test . . . found insanity in either of two circumstances. A defendant was acquitted if he “labour[ed] under such a defect of reason, from disease of the mind, [1] as not to know the nature and quality of the act he was doing; *or*, [2] if he did know it, that he did \*1035 not know he was doing what was wrong.” That test disaggregated the concepts of cognitive and moral incapacity, so that each served as a stand-alone defense. And its crisp two-part formulation proved influential, not only in Great Britain but in the United States too. Over the course of the 19th century, many States adopted the test, making it the most popular one in the country.

Still, [*Clark*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009455266&pubNum=0000780&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) unhesitatingly declared: “History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle” . . States continued to experiment with insanity rules, reflecting what one court called “the infinite variety of forms [of] insanity” and the “difficult and perplexing” nature of the defense. . . . Much as medical views of mental illness changed as time passed, so too did legal views of how to account for that illness when assigning blame.

As earlier noted, even the States that adopted *M'Naghten* soon divided on what its second prong should mean. Most began by asking, as Kahler does, about a defendant's ability to grasp that his act was *immoral*. But over the years, 16 States have reoriented the test to focus on the defendant's understanding that his act was *illegal*—that is, legally rather than morally “wrong.” They thereby excluded from the ranks of the insane those who knew an act was criminal but still thought it right.

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Indeed, just decades ago Congress gave serious consideration to adopting a *mens rea* approach like Kansas's as the federal insanity rule. The Department of Justice at the time favored that version of the insanity test. Perhaps more surprisingly, the American Medical Association did too. And the American Psychiatric Association took no position one way or the other. Although Congress chose in the end to adhere to the *M'Naghten* rule, the debate over the bill itself reveals continuing division over the proper scope of the insanity defense.

Nor is that surprising, given the nature of the inquiry. As the American Psychiatric Association once noted, “insanity is a matter of some uncertainty.”  Across both time and place, doctors and scientists have held many competing ideas about mental illness. And that is only the half of it. Formulating an insanity defense also involves choosing among theories of moral and legal culpability, themselves the subject of recurrent controversy. . . .

. . . . Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.

We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later. For that reason, we affirm the judgment below.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819771d6cd611ea96bae63bc27a1895), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819771d6cd611ea96bae63bc27a1895) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Id819771d6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819771d6cd611ea96bae63bc27a1895) join, dissenting.

Like the Court, I believe that the Constitution gives the States broad leeway to define state crimes and criminal procedures, including leeway to provide different definitions and standards related to the defense of insanity. But here, Kansas has not simply redefined the insanity defense. Rather, it has eliminated the core of a defense that has existed for centuries: that the defendant, *due to mental illness*, lacked the mental capacity necessary for his conduct to be considered morally blameworthy. Seven hundred years of Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law itself, convince me that Kansas' law “ ‘offends ... principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ ”

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

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*M'Naghten’s Case*'s (1843*)* second prong is merely one way of describing something more fundamental. Its basic insight is that mental illness may so impair a person's mental capacities as to render him no more responsible for his actions than a young child or a wild animal. Such a person is not properly the subject of the criminal law. . . [T]he law has attempted to embody this principle in a variety of ways. As a historical matter, *M'Naghten* is by far its most prominent expression, but not its exclusive one. Other ways of capturing it may well emerge in the future. The problem with Kansas' law is that it excises this fundamental principle from its law entirely.

The Due Process Clause protects those “ ‘principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” Our “primary guide” in determining whether a principle of justice ranks as fundamental is “historical practice.” . . .

Few doctrines are as deeply rooted in our common-law heritage as the insanity defense. Although English and early American sources differ in their linguistic formulations of the legal test for insanity, with striking consistency, they all express the same underlying idea: A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime. . . .

Consider the established common-law background of the insanity defense at and around the time the Framers wrote the Constitution. The four preeminent common-law jurists, Bracton, Coke, Hale, and Blackstone, each linked criminality to the presence of reason, free will, and moral understanding. . . . Bracton described such persons as “without sense and reason” and “lack[ing] *animus*.” And he likened a “lunatic” to an “infant,” who cannot be held liable in damages unless he “is capable of perceiving the wrongful character of his act.” . . . Coke, like Bracton before him, likened a “mad man” to an “[i]nfant,” who could not be punished as a criminal “untill he be of the age of fourteene, which in Law is accounted the age of discretion.”  What is it that the “[i]nfant” lacks? Since long before Coke's time, English jurists and scholars believed that it was the moral nature, not the physical nature, of an act that a young child is unlikely to understand. . . .Hale, too, likened insane persons to “infants” under the age of 14, who were subject to the criminal laws only if they “had discretion to judge between good and evil.” . . . Sir William Blackstone, whose influence on the founding generation was the most profound, was yet more explicit. . . . Citing Coke, he explained that murder must be “committed by a person of sound memory and discretion” because a “lunatic or infant” is “incapable of committing any crime, unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.” And he opined that deprivation of “the capacity of discerning right from wrong” is necessary “to form a legal excuse.”

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. . . The Court points out, correctly, that many of the common-law sources state that the insane lack *mens rea* or felonious intent. But what did they mean by that? At common law, the term *mens rea* ordinarily incorporated the notion of “general moral blameworthiness” required for criminal punishment.  The modern meaning of *mens rea* is narrower and more technical*.* It refers to the “state of mind or inattention that, together with its accompanying conduct, the criminal law defines as an offense.” When common-law writers speak of intent or *mens rea*, we cannot simply assume that they use those terms in the modern sense. . . .

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These fundamental principles of criminal responsibility were incorporated into American law from the early days of the Republic. Early American commentaries on the criminal law generally consisted of abridgments of the works of prominent English jurists. As early as 1792, one such abridgment instructed that “lunaticks, who are under a natural disability of distinguishing between good and evil are not punishable by any criminal prosecution.” . . . Early American jurists closely hewed to these principles. In case after case, judges instructed juries that they must inquire into the defendant's capacity for moral understanding.

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It is true that, even following *M'Naghten*, States continued to experiment with different formulations of the insanity defense. Some adopted the volitional incapacity, or “irresistible-impulse,” test. But those States understood that innovation to expand, not contract, the scope of the insanity defense, excusing not only defendants who met some variant of the traditional *M'Naghten* test but also those who understood that their conduct was wrong but were incapable of restraint.

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In the early 20th century, several States attempted to break with that tradition. The high courts of those States quickly struck down their restrictive laws. As one justice of the Mississippi Supreme Court wrote in 1931: The “common law proceeds upon an idea that before there can be a crime there must be an intelligence capable of comprehending the act prohibited, and the probable consequence of the act, and that the act is wrong.” . . . .

Today, 45 States, the Federal Government, and the District of Columbia continue to recognize an insanity defense that retains some inquiry into the blameworthiness of the accused. Seventeen States and the Federal Government use variants of the *M'Naghten* test, with its alternative cognitive and moral incapacity prongs. Three States have adopted *M'Naghten* plus the volitional test. Ten States recognize a defense based on moral incapacity alone. Thirteen States and the District of Columbia have adopted variants of the Model Penal Code test, which combines volitional incapacity with an expanded version of moral incapacity. . . . Of the States that have adopted the *M'Naghten* or Model Penal Code tests, some interpret knowledge of wrongfulness to refer to moral wrong, whereas others hold that it means legal wrong. While there is, of course, a logical distinction between those interpretations, there is no indication that it makes a meaningful difference in practice. The two inquiries are closely related and excuse roughly the same universe of defendants.

Consider the basic reason that underlies and explains this long legal tradition. . . . The criminal law does not adopt, nor does it perfectly track, moral law. It is no defense simply to claim that one's criminal conduct was morally right. But the criminal law nonetheless tries in various ways to prevent the distance between criminal law and morality from becoming too great. . . . . With respect to the defense of insanity, I believe that our history shows clearly that the criminal law has always required a higher degree of individual culpability than the modern concept of *mens rea*. And in my view, Kansas' departure from this long uniform tradition poses a serious problem.

To see why Kansas' departure is so serious, go back to our two simplified prosecutions: the first of the defendant who, because of serious mental illness, believes the victim is a dog; the second of a defendant who, because of serious mental illness, believes the dog commanded him to kill the victim. Now ask, what moral difference exists between the defendants in the two examples? Assuming equivalently convincing evidence of mental illness, I can find none at all. In both cases, the defendants differ from ordinary persons in ways that would lead most of us to say that they should not be held morally responsible for their acts. I cannot find one defendant more responsible than the other. And for centuries, neither has the law. . . . [M]ental illness typically does not deprive individuals of the ability to form intent. Rather, it affects their *motivations* for forming such intent. . . .

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. . . . [T]he United States as *amicus curiae* suggests that the insanity defense is simply too difficult for juries to administer.. Without doubt, assessing the defendant's claim of insanity is difficult. That is one reason I believe that States must remain free to refine and redefine their insanity rules within broad bounds. But juries have been making that determination for centuries and continue to do so in 45 States. And I do not see how an administrative difficulty can justify abolishing the heart of the defense.

. . . Kansas argues that it has not abolished the insanity defense or any significant part of it. It has simply moved the stage at which a defendant can present the full range of mental-capacity evidence to sentencing. But our tradition demands that an insane defendant should not be found guilty in the first place. . . .

Finally, Kansas argues that the insane, provided they are capable of intentional action, are culpable and should be held liable for their antisocial conduct. To say this, however, is simply to restate the conclusion for which Kansas argues in this case. It is a conclusion that in my view runs contrary to a legal tradition that embodies a fundamental precept of our criminal law and that stretches back, at least, to the origins of our Nation.