No. 18-6135

IN THE
Supreme Court of the United States

JAMES K. KAHLER,
Petitioner,
v.
STATE OF KANSAS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Kansas

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") respectfully submits this amicus brief in support of the petitioner to provide this Court with the insight and perspective the ABA has developed through intensive study of mental health issues in the criminal justice system. That work led to the ABA's *Criminal Justice Mental Health Standards* and associated Commentary, which trace the history and tradition of the mental nonresponsibility (or 'insanity') defense from its origins centuries ago to the modern era.[2]

The ABA is one of the largest voluntary professional membership organizations—and is the leading organization of legal professionals—in the United States. The ABA has more than 400,000 members from all fifty states, the District of Columbia, and the United States territories. Its membership includes prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, nonprofit

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Both parties in this case have given blanket consent to the filing of amicus briefs.

[2] Although the ABA uses the term "mental nonresponsibility" defense instead of "insanity" defense in its Standards and Commentary, *see ABA Criminal Justice Mental Health Standards* 323 & n.* (1989), for consistency with the question presented and the parties' briefs, this brief generally uses the term "insanity defense" outside of direct quotations.

organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.[3]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, including the constitutional rights of criminal defendants under the Due Process Clause and the Eighth Amendment's prohibition of cruel and unusual punishment. To that end, the *ABA Criminal Justice Mental Health Standards* set forth ninety-six standards articulating the ABA's recommendations "to define clearly the limits of the state's criminal powers governing the mentally afflicted who become involved with the criminal law." *ABA Criminal Justice Mental Health Standards* at xviii.[4] The *ABA Standards for Criminal Justice* (in which the *Mental Health Standards* originated) have been quoted or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 high state court opinions, and 2,100 law journal articles. Pretrial Justice Institute, *Guidelines for Analyzing*

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[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division or judiciary participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division or judiciary before filing.

[4] The Standards and associated Commentary as written in the 1980s are available in book form. In 2016 the ABA published updated Standards, available at *ABA Criminal Justice Standards on Mental Health* (2016) https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf.

State and Local Pretrial Laws II-ii (2017).

In formulating the Mental Health Standards, the ABA conducted a comprehensive review of the history and policies underlying the insanity defense in Anglo-American law. Based on that review, the ABA adopted Standard 7-6.1, stating that: "A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct." *ABA Criminal Justice Mental Health Standards* 330 (1989).

As part of that review, the ABA also considered laws like Kan. Stat. Ann. § 22-3220 that eliminate the insanity defense as an "independent, exculpatory doctrine." *Id.* at 336–37. Kansas's statute narrows a criminal factfinder's consideration of a defendant's mental disorder to one question: whether, as a result of that mental disorder, the defendant "lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 22-3220 (now codified at § 21-5209).

Under this "*mens rea* approach," *see ABA Criminal Justice Mental Health Standards* 338 (1989), judges and juries no longer consider whether a defendant understood that his or her criminal actions were morally wrong. That is because modern-day statutory *mens rea* requirements generally ask factfinders to consider a defendant's specific intent—and not more general concepts like the defendant's 'evil mind', his capability for moral reasoning, or his moral culpability. Thus in the absence of an insanity defense, "defendants could be convicted of crimes" in places like Kansas "as long as

they knew what they were doing at the time of an offense and possessed the intent to commit it." *Id.* at 337. Statutes like Kansas's therefore allow a defendant "who knowingly and intentionally killed his son under the psychotic delusion that he was the biblical Abraham, and his son the biblical Isaac, [to] be held criminally responsible." *Id.* The ABA rejected laws like Kansas's "out of hand" as "a jarring reversal of hundreds of years of moral and legal history" that predicates criminal culpability on moral blameworthiness. *Id.* at 336-37.

The ABA submits this amicus brief to help ensure that this Court has the full benefit of the Commentary's historical analysis, as well as an explanation of why the ABA has for decades unequivocally opposed laws like the one here that substitute a *mens rea* approach in place of an insanity defense that takes account of the moral blameworthiness of the defendant's conduct.

SUMMARY OF ARGUMENT

The Kansas statute at issue in this case allows a defendant to be convicted of a crime and sentenced to death, even when his mental disorder prevented him from understanding that his actions were wrong. For nearly four decades, the ABA has consistently opposed state statutes that permit this result, given their incompatibility with the Anglo-American legal tradition and with commonly-accepted rationales for punishment.

I. Beginning in 1981, the ABA embarked on a project of unprecedented depth and scope to develop the *Criminal Justice Mental Health Standards*. The ABA convened nearly eighty experts in law and mental health in six task forces for this interdisciplinary effort. With

respect to the insanity defense, these experts researched and drafted a set of ten Standards outlining how courts should approach the defense and issues related to it. Those Standards were presented to and adopted by the ABA's House of Delegates as official ABA policy. Task force members subsequently drafted an accompanying Commentary that was published in 1986. The Mental Health Standards were updated again in 2016 after a similarly comprehensive review, with an updated Commentary to be published in the future. The ABA's Standards and Commentary have been repeatedly cited for their thoroughness, thoughtfulness, and fidelity to the best values of the American criminal justice system.

II. Specifically, Standard 7.6-1 (and its associated Commentary) addresses the insanity defense. The ABA's review of the history and policies underlying Anglo-American criminal law found that for centuries, criminal culpability has required proof of morally blameworthy conduct. Thus in the Anglo-American tradition, morally blameless individuals with mental disorders have been excused from punishment for their otherwise criminal acts. To help define this class of morally blameless criminal defendants consistent with this age-old tradition, the ABA formulated a test that would excuse from responsibility any person who—due to their mental disorder—was unable to appreciate the wrongfulness of their criminal conduct. Although the precise test used for the insanity defense has varied over time and by jurisdiction, the core principle underlying the defense has remained the same: only a morally blameworthy defendant should receive criminal

punishment.

III. In chronicling and endorsing the affirmative insanity defense, the ABA Commentary specifically considered and rejected the kind of '*mens rea*' statute at issue in this case. As the Commentary explained, the *mens rea* approach is not the equivalent of an insanity defense, nor anything close to a redefinition of it. To the contrary, the *mens rea* approach omits the defining feature of the criminal law's traditional treatment of people with mental disorders: an assessment of the moral blameworthiness of the defendant's conduct. Statutes that prevent judges and juries from making such an assessment seriously interfere with the exercise of humane judgment. This is because a defendant may *intend* to do an act that causes harm (*i.e.*, have the requisite statutory *mens rea*) without actually *understanding* that the act is morally wrong—which is an indispensable predicate for criminal punishment. Thus a psychotic or delusional defendant could be convicted under a statute like the one at issue in this case without the prosecution ever having to demonstrate that the defendant is morally accountable for their actions. Such a result is fundamentally at odds with centuries of the Anglo-American legal tradition.

ARGUMENT

I. The ABA's Mental Health Standards Project.

The ABA is well-known for its intensive study of the history, tradition, and policies of the American criminal justice system and its common law roots. One facet of the ABA's work in this area is its landmark Criminal Justice Mental Health Standards Project. Beginning in

1981, the ABA brought together an expert group of scholars, practitioners, and scientists to articulate mental health standards based on a review of the history and values of the American criminal law, as well as the best science available. The ABA then comprehensively revisited the *Mental Health Standards* from 2012 to 2016.

A. The 1984 Mental Health Standards.

While the criminal law had confronted mental health issues for centuries, the ABA recognized in the late 1970s that its criminal standards had not yet dealt with that subject in detail. In 1981, the ABA established the Criminal Justice Mental Health Standards Project to address the effects of mental illness on criminal defendants, to propose interdisciplinary solutions for tackling unjust prosecutions and convictions of the mentally ill, and to formulate standards for addressing issues at the intersection of mental health and the criminal law. Included as part of this review was an assessment of the insanity defense, or the "defense of mental nonresponsibility" as it is referred to in the Standards.

To address that issue and others, the ABA assembled a total of six task forces made up of forty-eight nationally recognized psychiatrists, psychologists, other mental health professionals, prosecutors, defense lawyers, judges, and legal academics. Within a year, a total of seventy-nine legal and mental health experts joined the new Criminal Justice Mental Health Standards Project. The task forces also established formal liaisons with several other leading professional organizations, including the American Psychiatric Association, the

American Psychological Association, the American Orthopsychiatric Association, and the National Sheriffs' Association to ensure adequate interdisciplinary involvement from the medical, professional, and law enforcement communities. These task forces engaged in a comprehensive examination of legal history, social science research, empirical evidence, and best practices over the ensuing five years.

Shortly after the Mental Health Standards development process had begun, John Hinckley Jr. was found not guilty by reason of insanity after being tried for his assassination attempt of President Reagan. That verdict prompted a national discussion surrounding the insanity defense throughout the early 1980s. This "new round of controversy over the defense rival[ed] the *M'Naghten* experience" of the 1840s and led to a spate of state legislation that reflected a "hostile public mood" toward the defense. *ABA Criminal Justice Mental Health Standards* 323-24 (1989).

The ABA saw in these developments a need to better understand the history and interdisciplinary scope of the insanity defense, and placed a renewed emphasis on that subject in its Mental Health Standards Project. The task force considering nonresponsibility for crime (the topical area that included the insanity defense) consisted of prosecutors, defense lawyers, judges, professors, psychiatrists, and psychologists. Although it received interdisciplinary input, the task force's review with respect to the scope of the insanity defense was principally guided by the principle that "'mental nonresponsibility' is a jurisprudential, not a medical, concept." *Id.* at 329. "[T]he decisionmaking function in

criminal trials properly falls to jury and judge," and thus the historical treatment given to the subject by those actors in England and America was central to this inquiry. *Id.* at 329, 331.

Guided by this rich history, described in detail in Part II below, the task force on mental nonresponsibility produced draft Standards, which were adopted by the ABA's House of Delegates in 1984. To implement the age-old principle of moral accountability in black-letter law, the task force formulated—and the ABA adopted—Standard 7-6.1, which stated that:

> A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct.

Id. at 330. Following the adoption of this and the other ninety-five Standards, the Standards Committee undertook the final and painstaking task of updating and editing the lengthy Commentary that illuminates these comprehensive guidelines for criminal justice reform. *Id.* at xxii. That effort led to the publication of the original Standards in 1986.

The Commentary that accompanied Standard 7-6.1 reflected the ABA's careful consideration of history, precedent, policy, and language in studying the insanity defense. It also explicitly considered, and squarely rejected, a new type of statute that a handful of states had recently adopted: a "*mens rea* approach" that replaced the affirmative insanity defense with a *mens rea* inquiry. *Id.* at 336-38.

B. The 2016 Mental Health Standards.

Since their initial adoption, the *ABA Criminal Justice Mental Health Standards* have been relied upon by many courts, including this Court. *See, e.g.*, *Metrish v. Lancaster*, 569 U.S. 351, 367 (2013); *United States v. Preston*, 751 F.3d 1008, 1016-17 (9th Cir. 2014) (en banc); *Robidoux v. O'Brien*, 643 F.3d 334, 339 (1st Cir. 2011); *Watts v. Singletary*, 87 F.3d 1282, 1286 n.4 (11th Cir. 1996). With the passage of time and new insights into the clinical understanding of mental illness, the Standards Committee of the ABA's Criminal Justice Section launched a new Task Force in August 2012 to reexamine the *Mental Health Standards* in their entirety. The Task Force's charge was to "draft proposed revisions to reflect current law and best practices." Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 Hastings Const. L.Q. 1, 2 (2016).

The Task Force's membership included three law professors, one judge, two prosecutors, two defense attorneys, two psychiatrists, and two psychologists. *Id.* The Task Force consulted widely with liaisons from the National Alliance on Mental Illness, the Department of Justice, and the National Association of Criminal Defense Lawyers. After more than three years of deliberations, the Task Force recommended revisions to some aspects of the Standards. The ABA's House of Delegates approved the updated Standards in August 2016, and the process of drafting commentary is ongoing.

While the 2016 Standards revised the 1984 edition in some respects, the ABA left unchanged Standard 7-6.1's

core conclusion: "A person is not responsible for criminal conduct" if that person "was unable to appreciate the wrongfulness of such conduct" as a result "of mental disorder."[5]

II. The Insanity Defense Reflects The Core Values And Long Historical Tradition Of Anglo-American Criminal Law.

About a decade before Kansas adopted § 22-3220, the ABA's painstaking historical research demonstrated that moral blameworthiness is an indispensable principle of Anglo-American criminal law. Throughout the ages, English and American courts have reserved punishment for those defendants whose criminal acts have earned society's moral condemnation. The corollary to that principle—that individuals *without* moral culpability should be excused from legal punishment—is equally entrenched in the history and tradition of our justice system. These historical findings were the

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[5] Compare *ABA Criminal Justice Mental Health Standards* 330 (1989) with *ABA Criminal Justice Standards on Mental Health* 47 (2016). The updated 2016 version of Standard 7-6.1 is:

> **Standard 7-6.1. The defense of mental nonresponsibility [insanity]**
>
> (a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disorder, that person was unable to appreciate the wrongfulness of such conduct.
>
> (b) When used as a legal term in this Standard, mental disorder refers to any disorder that substantially affected the mental or emotional processes of the defendant at the time of the alleged offense, unless it was a disorder manifested primarily by repeated criminal conduct or was attributable solely to the acute effects of voluntary use of alcohol or other drugs.

central reason why the ABA's expert-driven Standards process rejected *mens rea* approach statutes as inconsistent with our justice system's core values.

Early Anglo-American Tradition. The ABA found that well before our Constitution was drafted Anglo-American law rejected the proposition that the concurrence of intent and conduct alone ends the criminal inquiry. Instead, consistent with moral notions stretching back to Greece, Rome, and the Hebrew scriptures about "harmful acts traceable to fault and those that occur without fault," and the capability of individuals to weigh "the moral implications of personal behavior," English kings and juries as far back as the fourteenth and sixteenth centuries refused to punish mentally ill defendants, even if their actions had otherwise been criminal. *See ABA Criminal Justice Mental Health Standards* at 324-25 & n.8.

By the seventeenth century, the ABA noted, jurist Sir Matthew Hale summarized this legal principle as: "where there is a total defect of the understanding there is no free act of the will" that can be considered morally culpable. *See id.* at 325 (citation omitted). Hale and others justified this principle by comparing adults afflicted with mental disorders that affect moral awareness to minors, or others who did not possess the requisite "understanding and memory" to "know what he is doing." *Id.* at 331.

Even at that early date, and although different formulations of the exact test existed back then, the general principle of moral accountability was widely accepted. The ABA found that "[a]t about the same time" as Hale explored the meaning of moral

understanding for criminal punishment, "other English courts" excused from criminal liability "those who lacked the capacity to distinguish 'good from evil' or 'right from wrong.'" *Id.*[6] Courts of this period often treated "good and evil" as a synonym for "right and wrong," and used this test in cases involving people with mental disorders. *See id.* (citing Anthony Platt & Bernard L. Diamond, *The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States*, 54 Cal. L. Rev. 1227, 1236-37 (1966)); *see also* Platt & Diamond, *The Origins of the 'Right and Wrong' Test*, 54 Cal. L. Rev. at 1235-37 ("By the end of the sixteenth century, the courts had begun to apply the test of 'knowledge of good and evil' to the insane. … In the eighteenth century, the 'good and evil' test was regularly used in both insanity and infancy cases.").[7]

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[6] In contrast, and as the decision under review freely admits, Kan. Stat. Ann. § 22-3220 "abandons lack of ability to know right from wrong as a defense" and "allows conviction of an individual who had no capacity to know that what he or she was doing was wrong." J.A. 243-44 (citing in part *Delling v. Idaho*, 568 U.S. 1038, 1041 (2012) (Breyer, J., dissenting from denial of certiorari)).

[7] In 1716, a legal treatise explained that "Guilt of offending against any Law whatsoever, necessarily supposing a willful Disobedience thereof, can never justly be imputed to those who are … uncapable of understanding it" and thus "those who are under a natural Disability of distinguishing between Good and Evil, as Infants under the Age of Discretion, Ideots and Lunaticks, are not punishable by any criminal Prosecution whatsoever." I William Hawkins, *Pleas of the Crown*, 1-2 (1716) (cleaned up). Not long after, a judge in 1724 instructed the jury to consider whether the defendant "knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did." *Rex v. Arnold*, 16 How. St. Tr. 695, 765 (1724). *Cf. Rex v. Lord*

The Defense in the Nineteenth Century. By the nineteenth century, the "right and wrong" test for gauging a defendant's capacity for moral reasoning was firmly entrenched in both English and American law. *See, e.g.*, *Clark's Case*, 1 City-Hall Recorder (New York City) 176, 177 (1816) ("The principal subject of inquiry . . . is whether the prisoner, at the time he committed this offence, had sufficient capacity to discern good from evil."); *see also United States v. Clarke*, 25 F. Cas. 454 (C.C.D.C. 1818) (No. 14,810) (asking jury to decide whether "at the time of committing the act charged" the defendant was "conscious of the moral turpitude of the act"). The classic formulation, as the ABA recognized, came from the House of Lords in *M'Naghten's Case*, which declared in 1843 that a defendant who did not "know the nature and quality of the act he was doing" or who "did not know what he was doing was wrong" would not be held criminally liable. *ABA Criminal Justice Mental Health Standards* 336 (1989) (quoting *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843)); *see also Clark v. Arizona*, 548 U.S. 735, 747–48 (2006) (explaining the *M'Naghten* rule). Underlying the *M'Naghten* formulation was the premise that a defendant must "possess a sufficient degree of reason to be responsible for his crimes," 8 Eng. Rep. at 722, a presumption to which the insanity defense responds, and a presumption that, in the vast majority of criminal prosecutions, goes unrebutted.

Ferrers, 19 How. St. Tr. 885, 947-48 (1760) (prosecution urging conviction of the defendant because he could "discern the difference between moral good and evil" and had both "the capacity and intention" needed for guilt).

The *M'Naghten* test soon "became the accepted standard in both [England and America] within a short period of time," as many American jurisdictions accepted it as the governing formulation of the insanity defense. *ABA Criminal Justice Mental Health Standards* 331–34 (1989). States, commentators, and nongovernmental organizations such as the ABA have since offered a wide variety of formulations for the black-letter test, several of which derive at least in part from *M'Naghten*, *see id.*; *Clark*, 548 U.S. at 748-53, but at bottom the insanity defense remains grounded in the same basic logic articulated long ago: that a lack of moral culpability for criminal actions should be a defense to punishment for those actions, *see ABA Criminal Justice Mental Health Standards* 324 (1989) ("The basis for the nonresponsibility defense is a moral one"); *see also People v. Schmidt*, 110 N.E. 945, 947 (N.Y. 1915) (Cardozo, J.) ("…it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by [*M'Naghten*] as the controlling test. That must certainly have been the test under the older law … [which involved] a capacity to distinguish between good and evil as abstract qualities.").

Modern Formulations. By the turn of the twentieth century, approximately two-thirds of the States had adopted the *M'Naghten* rule, thus ratifying its underlying moral precepts. *ABA Criminal Justice Mental Health Standards* 332 (1989). Nearly all of the others had adopted "nonresponsibility tests consisting of *M'Naghten* and the irresistible impulse rule." *Id.* The latter test "posited that persons who could not control their actions should not be held criminally responsible

for them." *Id.*

That state of affairs remained the same until the 1950s when the American Law Institute defined the defense in the Model Penal Code. That definition was also rooted in the notion of moral accountability: a person is not responsible for criminal conduct "if … as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." *Id.* at 333 (quoting Model Penal Code §4.01). The Model Penal Code definition was adopted by more than 20 States, *id.*, and more than a dozen subscribed to it a half-century later, *see Clark*, 548 U.S. at 751 & n.15. Only a very small minority of states have departed from this longstanding tradition and taken the "no affirmative insanity defense" position that Kansas seeks to defend here. *Id.* at 752 & n.20.

Empirical research. In addition, in its Commentary, the ABA responded to and discredited the common misconception that the insanity defense is systematically abused. *ABA Criminal Justice Mental Health Standards* 342 (1989). At that time, statistics showed that among invocations of the defense "that are successful, most are the result of plea bargain arrangements and many more are resolved at uncontested bench trials." *Id.* The notion that the defense often leads to a "'battle of the experts' before 'impressionable' juries" was mistaken. *Id.*

Indeed, empirical studies have shown that the insanity defense is raised in less than 1% of felony cases nationwide, and is successful in only a fraction of those

cases. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 Law & Human Behav. 375, 378 (1999); *see also* Gary Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 200 & 795 n.11 (4th ed. 2018).[8] Research also indicates that forensic evaluators seldom conclude that defendants referred for evaluation qualify for the defense. *See* Melton et al., *Psychological Evaluations for the Courts* at 200 & 795 n.14. And just as the ABA found, most insanity adjudications involve a plea bargain or bench trial and not a jury verdict. Melton et al., *Psychological Evaluations for the Courts* 200 & 795-96 n.19 (citing multistate study that found that less than 15% of adjudications involving insanity claims were conducted by jury trial).

After canvassing this history from the early seventeenth century onwards, the ABA concluded that "a defense of mental nonresponsibility [insanity] is necessary to the fair administration of criminal justice." *ABA Criminal Justice Mental Health Standards* 338 (1989). While no "bright line exists between the responsible and the nonresponsible" from a medical or

[8] Other studies echo this conclusion, finding that only the "most disturbed" were successful in invoking the insanity defense. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 Bull. Am. Acad. Psychiatry & L. 331, 337 (1991) (reporting results from an eight-state study and finding that "the popular concept that the insanity defense is an 'easy out' for defendants who are either feigning mental illness or who claim temporary insanity is clearly untrue.").

clinical perspective, the study concluded that it is necessary for criminal factfinders as a matter of "moral imperative" to consider whether each individual defendant can be held culpable for their actions and subsequently punished. *See id.* at 338, 342.

III. Kansas's '*Mens Rea* Approach' Is Incompatible With the History and Tradition of the Anglo-American Criminal Justice System.

In this case, Kansas contends that its *mens rea* approach is an acceptable substitute for the traditional affirmative insanity defense. The ABA has long rejected that proposition, because the *mens rea* approach contravenes the core rationale of the insanity defense: that criminal punishment is inappropriate for a defendant who, due to their mental disorder, cannot appreciate that their actions are morally blameworthy. A person may *intend* to perform an act that is criminal (and thus have the requisite *mens rea* for the crime), yet not *understand* that the act is wrong because of mental incapacity. To impose criminal punishment for conduct that, by definition, is not morally blameworthy, represents "a jarring reversal of [the] hundreds of years of moral and legal history" sketched above and it "inhibits if not prevents the exercise of humane judgment that has distinguished our criminal law heritage." *Id.* at 337-38.

The Commentary explained that at common law the concept of *mens rea* "originally was regarded as a generalized requirement of moral blameworthiness" that must be proven in order to impose "criminal liability." *Id.* at 337. But here, Kansas admits that it makes no such finding anymore in its *mens rea*

consideration, at least with respect to the crime at issue in this appeal (also the classic crime associated with the insanity defense)—murder.[9]

Indeed, as the ABA also explained, in the last hundred years "*mens rea* terminology has come to refer to the specific state of mind required for the conviction of particular criminal offenses." *Id.*[10] If the elements of a particular crime do not contain any consideration of moral blameworthiness, as Kansas confirms with respect to its crime of murder, then defendants would be "convicted … as long as they knew what they were doing at the time of an offense and possessed the intent to commit it." *Id.*

"[F]or example, a defendant who knowingly and intentionally killed his son under the psychotic delusion

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[9] *See State v. Bethel*, 66 P.3d 840, 850 (Kan. 2003) ("In a case similar to the present one where a defendant has stated that he or she thought about it ahead of time and intended to kill his or her victims, a jury's deliberation would need to go no further than those two elements and there would be no consideration of whether wrongfulness was inherent in the defendant's intent" — thus "the range of the jury's consideration has been significantly narrowed"). As the decision under review confirms, Kan. Stat. Ann. § 22-3220 "allows conviction of an individual who had no capacity to know that what he or she was doing was wrong." J.A. 244.

[10] *See also* Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1016-17 (1932) (until "modern" times, the "mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong," in contrast to modern *mens rea* formulations that focus on "protecting social and public interests"); *Morissette v. United States*, 342 U.S. 246, 251-52 (1952) (under American common law, crime "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").

that he was the biblical Abraham, and his son the biblical Isaac, could be held criminally responsible." *Id.* In short, a Kansas murder jury is no longer called upon to perform any moral calculus as to a psychotic defendant's culpability, provided the defendant knew (at least in the abstract), that he or she was killing a human being. That policy is inconsistent and irreconcilable with the Anglo-American criminal law tradition, which is what led the ABA to reject *mens rea* statutes "out of hand." *Id.* at 336–37.

Another moral problem that the ABA commentary identified with laws like Kansas's is rooted in present-day concerns: "the *mens rea* limitation forces judges and juries confronted with defendants who are uncontrovertibly psychotic either to return morally obtuse convictions" by punishing those who are not responsible moral agents, "or to acquit in outright defiance of the law" and its obligation to uphold order and provide justice. *See id.* at 338.

By forcing a strictly binary choice of guilty/not guilty upon a situation in which reprehensible acts may have been committed without clear moral responsibility, the Kansas *mens rea* approach leaves criminal factfinders to select between two equally unpalatable and unjust results. *See id.* A system that provides only two unjust options to its key decisionmaker cannot be said to respond to the "moral imperative" of providing the humane and "fair administration of criminal justice." *See id.*

The ABA thus concluded in its Commentary that the *mens rea* approach also constitutes "an unfortunate and unwarranted overreaction to the problems typified by

the *Hinckley* verdict" and popular reaction to it, *see id.* at 337, because it leads to unjust results while also failing to meaningfully advance the integrity of the legal process or the criminal justice system. Indeed, our system only punishes those who should be held morally accountable.

That basic logic of moral culpability—what the ABA has called the "moral basis of the mental nonresponsibility [insanity] defense"—is "undeniable and has been reaffirmed throughout the history of western civilization." *Id.* at 336. That moral logic persists today, as is evident in the sentencing context. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders … whose extreme culpability makes them 'the most deserving of execution'" (citation omitted)).

As the ABA concluded in its Commentary, from a moral perspective, mentally disordered and morally blameless defendants "should not be punished as criminals," and should "be confined only upon a showing that they are dangerous." *ABA Criminal Justice Mental Health Standards* 330 (1989). While there are "various formulations of the defense" that set forth different tests, all of them "respond[] to [the] moral imperative" of punishing only those defendants who have earned society's condemnation. *See id.* at 338. After another round of comprehensive review, the ABA's updated 2016 Standards retain that same core focus on

moral culpability, *see supra* at 11 & n. 5, a concept which from early Anglo-American legal history up through the present day has been recognized as "critical to our shared notions of justice," Jane Campbell Moriarty, *Seeing Voices: Potential Neuroscience Contributions to a Reconstruction of Legal Insanity*, 85 Fordham L. Rev. 599, 600 (2016).

CONCLUSION

This Court should reverse the decision of the Supreme Court of Kansas.

Respectfully submitted,

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