No. 18-6135

IN THE

Supreme Court of the United States

JAMES KRAIG KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

On Writ of Certiorari to the Kansas Supreme Court

BRIEF FOR PETITIONER

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
CHIKE B. CROSLIN
GABRIEL SCHONFELD
LUCAS CROSLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP*
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063
s-schrup@law.northwestern.edu

NAOMI IGRA
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104
(415) 772-7495

MERYL CARVER-ALLMOND
CLAYTON J. PERKINS
CAPITAL APPELLATE DEFENDER OFFICE
700 S.W. Jackson Street
Suite 903
Topeka, KS 66603
(785) 291-3207

Counsel for Petitioner

* Counsel of Record

May 31, 2019

QUESTION PRESENTED

Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is James Kraig Kahler. Respondent is the State of Kansas. No party is a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Kansas Law	2
B. Factual Background	6
C. Proceedings Below	10
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. THE CONSTITUTION REQUIRES AN INSANITY DEFENSE	15
A. The Due Process Clause requires some mechanism to excuse a non-culpable, mentally ill defendant	16
B. The Eighth Amendment prohibits criminally punishing the insane	29
1. Criminally punishing the insane would have been cruel and unusual at the Founding	30
2. Criminally punishing the insane is grossly disproportionate and serves no legitimate purpose	31

TABLE OF CONTENTS—continued

Page

C. Either of these constitutional bases prohibits the abolition of the affirmative insanity defense 36

II. KANSAS'S OUTLIER SCHEME VIOLATES THE CONSTITUTION BY ABOLISHING THE INSANITY DEFENSE 39

A. Kansas has abolished the insanity defense 39

B. Kansas's scheme is unconstitutional because it ignores an insane defendant's lack of moral culpability 40

CONCLUSION 44

ADDENDUM

TABLE OF AUTHORITIES

Page

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 38
Atkins v. *Virginia*, 536 U.S. 304 (2002) 12, 13, 31, 32, 34
Ball v. *United States*, 470 U.S. 856 (1985) 42
BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 16
Bucklew v. *Precythe*, 139 S. Ct. 1112 (2019) 30, 31
Clark v. *Arizona*, 548 U.S. 735 (2006) .....*passim*
Commonwealth v. *McLaughlin*, 729 N.E.2d 252 (Mass. 2000) 39
Commonwealth v. *Rogers*, 48 Mass. 500 (Mass. 1844) 25
Davis v. *United States*, 160 U.S. 469 (1895) 26
Delling v. *Idaho*, 133 S. Ct. 504 (2012)..... 41, 42
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 16
Finger v. *State*, 27 P.3d 66 (Nev. 2001) 17, 20
Ford v. *Wainwright*, 477 U.S. 399 (1986) 14, 30, 33
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 17, 40
Graham v. *Florida*, 560 U.S. 48 (2010) 14, 31, 32, 34
Ingles v. *People*, 22 P.2d 1109 (Colo. 1933) *superseded on other grounds*, *People* v. *Hill*, 934 P.2d 821 (Colo. 1997) 18
Jones v. *United States*, 463 U.S. 354 (1983) 36
Leland v. *Oregon*, 343 U.S. 790 (1952)..... 17, 38
Mackin v. *State*, 36 A. 1040 (N.J. 1897) 26

TABLE OF AUTHORITIES—continued

Page

In re McElroy, 1843 WL 5177 (Pa. Sept. 1, 1843) 24
Medina v. *California*, 505 U.S. 437 (1992) 16
M'Naghten's Case (1843) 8 Eng. Rep. 718 ... 23, 24
Montana v. *Egelhoff*, 518 U.S. 37 (1996) (plurality op.) 17
Moore v. *City of East Cleveland*, 431 U.S. 494 (1972) (plurality op.) 16
Morissette v. *United States*, 342 U.S. 246 (1952) 13, 26, 41
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 40
Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) 28
Panetti v. *Quarterman*, 551 U.S. 930 (2007) 33
Parker v. *Ellis*, 362 U.S. 574 (1960) (per curiam) 29
Patterson v. *New York*, 432 U.S. 197 (1977) 16
Penry v. *Lynaugh*, 492 U.S. 302 (1989), *abrograted on other grounds by Atkins,* 536 U.S. 68 30
People v. *Kleim*, 1845 WL 4476 (N.Y. Sup. Ct. Jan. 1, 1845) 25
People v. *Skinner*, 704 P.2d 752 (Cal. 1985) 17, 18, 28
Roberts v. *State*, 3 Ga. 310 (Ga. 1847) 25
Robinson v. *California*, 370 U.S. 660 (1962) 29, 43
Rochin v. *California*, 342 U.S. 165 (1952) ... 16, 17
Roper v. *Simmons*, 543 U.S. 551 (2005) 32
Sinclair v. *State*, 132 So. 581 (Miss. 1931) (per curiam) 18, 28, 29, 30

TABLE OF AUTHORITIES—continued

Page

Stanley v. *Illinois*, 405 U.S. 645 (1972) 16
State v. *Baker*, 819 P.2d 1173 (Kan. 1991) 2
State v. *Bethel*, 66 P.3d 840 (Kan. 2003) ..... *passim*
State ex rel. Causey, 363 So. 2d 472 (La. 1978) 18
State v. *Curry*, 543 N.E.2d 1228 (Ohio 1989) 40
State v. Cegelis, 638 A.2d 783 (N.H. 1994) 27
State v. *Dahl*, 783 N.W.2d 41 (N.D. 2010)... 27
State v. *Searcy*, 798 P.2d 914 (Idaho 1990) 20, 21
State v. *Jensen*, 251 N.W.2d 182 (N.D. 1977) 27
State v. *Jorrick*, 4 P.3d 610 (Kan. 2000) 5, 14, 39, 40, 43
State v. *Korell*, 690 P.2d 992 (Mont. 1984) 28
State v. *Lange*, 123 So. 639 (La. 1929) 18, 28
State v. *Mahn*, 25 Kan. 182 (Kan. 1881) 2
State v. *Marler*, 2 Ala. 43 (1841)..... 26
State v. *Olmstead*, 800 P.2d 277 (Or. 1990) 40
State v. *Spencer*, 21 N.J.L. 196 (N.J. O.&T. 1846) 25
State v. *Strasburg*, 110 P. 1020 (Wash. 1910) 18, 28, 29
Tison v. *Arizona*, 481 U.S. 137 (1987) 33
United States ex rel. Smith v. *Baldi*, 344 U.S. 561 (1953) 28

TABLE OF AUTHORITIES—continued

Page

United States v. *Drew*, 25 F. Cas. 913 (C.C.D. Mass. 1828) 24
United States v. *Lawrence*, 26 F. Cas. 887 (C.C.D.D.C. 1835) 24
United States v. *Pohlot*, 827 F.2d 889 (3d Cir. 1987) 6, 41
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 16

STATUTES AND CONSTITUTION

11 Del. Code § 401 37
18 U.S.C. § 17 ..... 37, 38
720 Ill. Comp. Stat. 5/6–2 27
Ala. Code § 13A-3-1 38
Alaska Stat. § 12.47.010 27
Ariz. Rev. Stat. § 13-502 27
Colo. Rev. Stat. § 16-8-105.5 38
Idaho Code § 18-207 6
Iowa Code § 701.4 38
Kan. Stat. Ann. § 22-3220 (2009) 1, 39, 40
Ky. Rev. Stat. Ann. § 504.020 38
Mich. Comp. Laws § 768.21a(1) 37
Mont. Code Ann. § 46-14-102 6
Mont. Code Ann. § 46-14-311 6
N.D. Cent. Code 12.1-04.1-01(1)(a) 27
Or. Rev. Stat. § 161.295 37
S.C. Code § 17-24-10(A) 38
U.S. Const. amend. VIII 1
U.S. Const. amend. XIV § 1 1
Utah Code Ann. § 76-2-305 6

OTHER AUTHORITIES

Am. Bar Ass'n, *Criminal Justice Mental Health Standards* (1989) 18, 19, 42

TABLE OF AUTHORITIES—continued

Page

Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Calif. L. Rev. 1227 (1966) 21, 22, 23

Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2D 419 (2013) 25

Augustine, *Questions Concerning the Old and New Testament*, Question 2, cited by Colin Pickett, *Mental Affliction and Church Law* (1952) 19

Bilal Ali & Hooman Keshavarzi, *Forensic Psychiatry*, *in* Oxford Islamic Studies Online (Oct. 30, 2017) 20

Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of Abolishing the Insanity Defense*, 87 Cornell L. Rev. 1509 (2002) 41

Daniel N. Robinson, *The Insanity Defense as a History of Mental Disorder*, *in* The Oxford Handbook of Phil. & Psychiatry 18 (K.W.M. Fulford *et al.*, eds., 2013)..... 20

David Carrithers, *The Insanity Defense and Presidential Peril,* 22 Society (July–Aug. 1985)..... 19

Edith Weigert, *Narcissism: Benign and Malignant Forms*, *in* Crosscurrents in Psychiatry & Psychoanalysis 222 (Robert W. Gibson ed., 1967) 6

1 Edward Coke, *Institutes of the Laws of England* (1853)..... 21

TABLE OF AUTHORITIES—continued

Page

Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 Crime and Justice 231 (2017) 35
Erich Fromm, *The Heart of Man: Its Genius for Good and Evil* (1964) 6
Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932) 17, 20, 21, 22, 23
Frank George, *The Cognitive Neuroscience of Narcissism*, 1 J. Brain Behav. & Cognitive Sci., Feb. 2018, at 1 6
Genesis 18
Georgios A. Tzeferakos & Athanasios I. Douzenis, *Islam, Mental Health & Law: A General Overview*, 16 Ann. Gen. Psychiatry 28 (2017) 20
Getting Tough on the Mentally Ill, Wichita Eagle, Jan. 16, 1994 2
H.R. Rep. No. 98-577 (1983) 4, 13, 14, 28, 41
Hearing on H.B. 2328 Before the H. Comm. on Judiciary, 1994 Leg. .....
Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958) 42
Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 Cal. L. Rev. 105 (1924)..... 22, 23, 24
Human Rights Watch, *Ill-equipped: U.S. Prisons and Offenders with Mental Illness* (2003), https://goo.gl/wDAsmW..... 35
Hurst Laviana, *Man Deemed Insane in 1987 Fitness Center Shootings May Move From Hospital To Care Home*, Wichita Eagle, Apr. 17, 2014 3

TABLE OF AUTHORITIES—continued

Page

Insanity Ruling Keeps Gunman in State Hands, Wichita Eagle, June 28, 1990 3

Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry L. 104 (2010) 35, 36

Jennifer Bronson & Marcus Berzofsky, Bureau of Justice Statistics, Dep't of Justice, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, *2011-2012* (2017) 35

Jonas Robitscher, *In Defense of the Insanity Defense*, 31 Emory L.J. 9 (1982) 21

II Life and Letters of Joseph Story (William W. Story ed., Houghton & Wood 1851) 24

Kan. Dep't of Corr., *Purpose of Administrative Segregation & Appropriate Placements*, § 20-104(I)(B)(16) 35

Luke 23:34 19

Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 Kan. J.L. & Pub. Pol'y 253 (1998) 4, 41, 42

Michael Clemente, *A Reassessment of the Common Law Protections for "Idiots,"* 124 Yale L.J. 2746 (2015) 22, 25, 31

Model Penal Code § 4.01 (Am. Law Inst. 1985) 26, 34

Norman J. Finkel, *Insanity on Trial* (1988) 22

Plato, *Laws* Book IX (Thomas L. Pangle trans., 1988) (c. 345 B.C.) 19

TABLE OF AUTHORITIES—continued

Page

Rael Strous, *The Shoteh and Psychosis in Halakhah with Contemporary Clinical Application*, 12 Torah U-Madda J. 158 (2004) 18

Raymond Spring, *The End of Insanity: Common Sense and the Insanity Defense* (1983) 5

Raymond Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. Kan. B. Ass'n 38 (1997) 4, 5

Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. Med. & Ethics 745 (2010) 3, 6, 7

Stephen J. Morse, *Moral and Legal Responsibility and the New Neuroscience*, *in* Neuroethics: Defining the issues in theory, practice, and policy (Judy Illes ed., 2004) 33

Spa Killer Ready for Release, Wichita Eagle, Oct. 1, 1995 2

Walter Sinnott-Armstrong & Ken Levy, *Insanity Defenses*, *in* The Oxford Handbook of Philosophy of Criminal Law (John Deigh & David Dolinko eds., 2011) 38

Wayne R. LaFave, 1 Substantive Crim. L. § 7.1 (3d ed. 2018) 34, 40

4 William Blackstone, *Commentaries* (1769) 22

OPINIONS BELOW

The Kansas Supreme Court's opinion is published at 410 P.3d 105. Joint Appendix 205–280 ("J.A."). The trial court's relevant order is unpublished.

JURISDICTION

The Kansas Supreme Court issued its opinion on February 9, 2018. J.A. 205. It denied a motion for rehearing on April 26, 2018, and issued a corrected denial order on May 1, 2018. *Id.* at 281–82. On July 2, 2018, Justice Sotomayor extended the time within which to file a petition for writ of certiorari to September 28, 2018. The petition was filed on that date and granted on March 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, as relevant: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

Kan. Stat. Ann. § 22-3220 (2009) provides: "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."

STATEMENT OF THE CASE

Whether under due process, the Eighth Amendment, or both, Kansas cannot constitutionally abolish the insanity defense. Anglo-American law has for centuries recognized insanity as an excuse to criminal liability. As the law grew to insist that punishment fall only on the blameworthy, it naturally followed that individuals with no meaningful ability to make moral judgments could not be held criminally liable. That was the law in every state until 1979. And in almost every U.S. jurisdiction, it is still the law today. But not in Kansas.

A. Kansas Law

For more than a century, Kansas's treatment of the insanity defense was well within the mainstream. The state followed the *M'Naghten* rule, under which a defendant is excused from criminal responsibility "(1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act." *State* v. *Baker*, 819 P.2d 1173, 1187 (Kan. 1991). Kansas adopted *M'Naghten* in 1881, *State* v. *Mahn*, 25 Kan. 182, 185–86 (Kan. 1881), and the Kansas Supreme Court "steadfastly adhered to that test" from then on. *Baker*, 819 P.2d at 1187.

But beginning in the late 1980s, "public fear and frustration about crime" peaked, and policymakers reacted by—as one headline memorably put it—"Getting Tough on the Mentally Ill." Wichita Eagle, Jan. 16, 1994, at 1B. In Kansas, attention focused on two cases where men committed deadly shootings but were acquitted because of their exceptionally disturbed mental states. In both cases, the defendant's insanity was undisputed. See *Spa Killer Ready for Release*, Wichita Eagle, Oct. 1, 1995, at 1B; *Insanity*

Ruling Keeps Gunman in State Hands, Wichita Eagle, June 28, 1990, at 1A. And in both cases, the defendant was quickly acquitted—and then committed—as a result. *Id.*; J.A. 309–12 (statement of Allen Cox); see also Hurst Laviana, *Man Deemed Insane in 1987 Fitness Center Shootings May Move From Hospital To Care Home*, Wichita Eagle, Apr. 17, 2014 (describing one defendant's transfer after 25 years of hospitalization).

These unique cases loomed large in the hearings that produced Kansas's current law.[1] Rather than viewing these prompt resolutions as the natural and proper functioning of a mechanism designed to excuse the mentally compromised and morally blameless, witnesses portrayed the insanity defense as "automatic," insinuating overuse and malingering.[2] J.A. 307. The legislative committee heard that defendants raising insanity were "treated about the same as someone who had committed a traffic violation," *id.* at 305, and were declared not guilty after an "entire trial [that] did not last any longer than 5 minutes." *Id.* at 311. The public reaction to these cases tied into the larger backlash following the acquittal of John

---

[1] Although the statute here was enacted in 1995, the relevant hearings were held during the 1994 legislative session.

[2] "Contrary to widespread public belief, the defense of 'legal insanity' is not commonly raised, and, when raised, is rarely successful. . . . Moreover, a person acquitted by reason of insanity is automatically committed to a mental hospital for an indeterminate period that often exceeds the sentence that would have been imposed if she or he had been convicted." Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. Med. & Ethics 745, 746 (2010). Thus, "[i]n practice, the insanity defense is usually raised when there is a severe psychiatric disturbance such as acute psychosis with its often extreme disruptions of experiences of reality." *Id.*

Hinckley, Jr., for his attempted assassination of President Reagan. See Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 Kan. J.L. & Pub. Pol'y 253, 256 (1998) (collecting public opinion data and politicians' statements about the defense after Hinckley's acquittal).

The Kansas legislature turned towards a proposal to replace the insanity defense with a "*mens rea* approach," which treated mental disease or defect as relevant only to the defendant's ability to form the requisite scienter for the offense. A key advocate for this proposal was law professor Raymond Spring. See J.A. 290. He believed that the *M'Naghten* rule was a significant—and "monumentally wrong"—departure from the law's prior treatment of insanity. Raymond Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. Kan. B. Ass'n 38, 38 (1997). In his view, the *mens rea* approach would merely "return 'consideration of the matter of a defendant's possible mental disorder to the place assigned that issue throughout the development of the law prior to *M'Naghten*." *Id.* at 45. In fact, however, as Congress explained in rejecting the *mens rea* approach, "[t]he *M'Naghten* Rules were not a statement of new law; they were merely an official pronouncement of the contemporary state of the insanity defense, which focused on the defendant's ability to distinguish right from wrong." H.R. Rep. No. 98-577 at 33 (1983). This has long been the case. See *infra* pp. 20–27.

Thus, although Professor Spring recognized that "insanity . . . disappears as a separate defense" under the *mens rea* approach, Spring, *supra*, at 45, he did not seem to realize—and did not tell the Kansas legislature—that the *mens rea* approach would exclude an entire category of defendants who had historically been in the insanity defense's heartland: Those

whose mental state rendered them morally blameless. See *id.* at 46; J.A. 328 (describing Professor Spring as testifying that the *M'Naghten* rule contains only a cognitive component, excusing only defendants who "do not know what they are doing"). Professor Spring also expressed the view that due process does not require any insanity defense so long as evidence of mental disorder is not completely barred. Spring, *supra*, at 44.[3]

Kansas adopted this proposal, "legislatively abolish[ing] the insanity defense." *State* v. *Jorrick*, 4 P.3d 610, 617 (Kan. 2000); see *State* v. *Bethel*, 66 P.3d 840, 844 (Kan. 2003) ("The insanity defense . . . has been abolished in Kansas . . . ."). The shift from Kansas law as it had existed from 1881 through 1995 was significant. Now, a defendant's mental illness is relevant only if it left him unable to form the mental state required to commit the charged offense. There is no further inquiry aimed at judging whether the defendant's state of mind was morally blameworthy. It does not matter if the defendant could understand whether his actions were unlawful or whether they were morally wrong. And crucially, these moral or rational defects almost never negate even the narrowest criminal states of mind. "[A] man who commits murder because he feels compelled by demons still possesses the mens rea required for murder."

---

[3] Professor Spring's opposition to the insanity defense reflected his view that affirmative defenses in general "have no place in the criminal law, since . . . an affirmative defense necessarily operates to excuse one who has committed a harmful act with a blameworthy state of mind." Raymond Spring, *The End of Insanity: Common Sense and the Insanity Defense* 59 (1983).

United States v. *Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987).[4]

B. Factual Background

When Kraig Kahler killed four members of his family, he was experiencing overwhelming obsessive compulsions and extreme emotional disturbance, and may have dissociated from reality. He had long suffered from a mixed obsessive-compulsive, narcissistic, and histrionic personality disorder, and had recently lapsed into a severe depression, causing him to reach the point of decompensation. J.A. 84–98.

These disorders are not merely a collection of unpleasant character traits. Rather, they reflect an entrenched mental state often marked by biological and cognitive abnormalities. Frank George, *The Cognitive Neuroscience of Narcissism*, 1 J. Brain Behav. & Cognitive Sci., Feb. 2018, at 1, 6 (noting that narcissists have consistent structural deficits in the anterior insular cortex). Extreme narcissism causes "the distortion of rational judgment," sometimes "to the point of psychosis" or "the outbreak of insanity." Erich Fromm, *The Heart of Man: Its Genius for Good and Evil* 73, 76 (1964). It produces "emotional reactions of escape from frustration by repression, distortion, and denial." Edith Weigert, *Narcissism: Benign and Malignant Forms*, *in* Crosscurrents in Psychiatry & Psychoanalysis 222, 229 (Robert W. Gibson ed., 1967). The "functional impairments associated with personality disorders can be severe and similar to the functional impairments associated with mental disorders" that have historically established legal insanity. Kinscherff, *supra*, at 750. Scholars have thus

---

[4] Montana, Idaho, and Utah have similarly abolished the insanity defense. Mont. Code Ann. §§ 46-14-102, 46-14-311; Idaho Code § 18-207; Utah Code Ann. § 76-2-305; see Add. 24–25.

recognized that "the clinically and scientifically soundest approach, and the jurisprudentially wiser course, is to permit juries and judges to determine whether impairments ascribed, in whole or in part, to a personality disorder are sufficiently impairing to nullify responsibility for a criminal act." See *id.* at 755.

Maintaining a perfect public image was the focal point of Mr. Kahler's disordered personality. He "thrived on . . . self-importance, community prestige, and being perceived as [having] an ideal or perfect marriage." J.A. 92. Although undiagnosed at the time, Mr. Kahler's fixation on his image was only part of a severe obsessive compulsive disorder. Mr. Kahler demonstrated "extreme inflexibility about social mores" and fixated on Karen Kahler's public role as a "trophy wife." *Id.* at 91–92. Karen, for her part, was "very proud, but insecure." *Id.* at 65. She "seemed to act as if she was expected to be the center of attention." *Id.* at 64. Mr. Kahler likewise "imposed stubborn controls [over] his family" members, who "habituated to the routine" for many years. *Id.* at 91. He was obsessively frugal, described by some as a "tightwad" who would, for example, "borrow[] rather than purchase tools." *Id.* at 63. This, too, reflected his obsessive need to manage every aspect of his family. *Id.* at 60–95.

In summer and fall 2008, however, these obsessively enforced routines began to disintegrate. The family moved from Texas to Missouri, where Mr. Kahler had accepted a job as the director of water and light for the City of Columbia. J.A. 213. Karen had begun an affair with a woman just before the move, and it continued and deepened afterwards. *Id.* at 213–14. Mr. Kahler was unable to cope with circumstances in which he was not Karen's "social, psychological, and

sexual center." *Id.* at 93–94. He was subsequently charged with domestic assault, his first brush with criminal law. *Id.* at 131. Service by police of an arrest warrant at a public city council meeting received substantial press coverage. *Id.* at 33. Mr. Kahler believed that Karen had orchestrated this to humiliate him. See *id.* By April 2009, Karen had filed for divorce, and she and the children had left the family home. *Id.* at 214.

His longstanding obsessions overtook him, distorted further by his growing depression. Mr. Kahler's deterioration was obvious to his family, friends, and colleagues. J.A. 43–44. One family friend believed Mr. Kahler had "gone off the deep end." *Id.* at 64. Mr. Kahler reported that he was unable to concentrate at work, and felt as if "he was losing his mind." *Id.* at 65, 80–82.

His behavior became more extreme and unusual. He monitored Karen's communications with her new partner, even bringing in phone records to show his therapist the frequency of their conversations and texts. J.A. 61–62. At one point he drove 150 miles in an attempt to catch her with her lover. *Id.* at 62. He also hired a private investigator to watch them. *Id.* at 70. By fall 2009, his mental illness had so progressed that he was no longer able to perform his duties, and the City of Columbia fired him. *Id.* at 46–47. Having lost the paychecks that assured his control over his life and circumstances, he began storing cash "in a very safe place." *Id.* at 73. Although a therapist warned him that arguing with his wife through his daughters would harm his relationship with them, "he would obsessively try to get information from [them] about [his wife]." *Id.* at 46. He also began objectifying his daughters. Whereas before the strife with Karen, he had effusively praised

his daughters, afterwards he harbored only negative thoughts about them. *Id.* at 70–71, 97. Mr. Kahler's examining psychiatrist concluded that his "persisting extremely harsh, unforgiving, and condemnatory attitude" towards his daughters was "evidence of severe major depression and obsessive-compulsive/ narcissistic personality deterioration." *Id.* at 97.

Mr. Kahler's career was over, his family had fallen apart, and he was facing financial setbacks and insecurity. He had "lost everything in terms of what he thought was important to him." J.A. 45; *id.* at 70–72. His mental state concerned his parents so much that they insisted he move back to their ranch for his own well-being. *Id.* at 30–32.

As Mr. Kahler became more and more depressed, he "externalized the source of all the marital problems" onto Karen and her lover—"blaming only them," and making Karen the "focus[] [of] all of his anger." J.A. 96–97. His obsessive fixation on Karen's betrayal extended to his teenaged daughters, whom he felt had sided with and "bec[o]me their mom." *Id.* at 69; see also *id.* at 97 (reflecting Mr. Kahler's belief that "all [of his daughters'] actions became merely the extension of or equivalent to Karen"). By contrast, Mr. Kahler maintained a relationship with his ten-year-old son, whom he felt had remained aligned with him in the divorce. His obsession with his children's loyalty bred a strong attachment to his son and a "pathological detachment" from his daughters. See *id.* at 85.

At Thanksgiving, Mr. Kahler's son joined his father and grandparents at the family ranch, while Karen and the daughters went to Karen's sister's home. J.A. 214. Mr. Kahler's son was supposed to rejoin his mother and sisters on Saturday, November 28th to take part in the family's tradition of spending the

weekend after Thanksgiving with Karen's grandmother. *Id.* The morning of the 28th, however, Mr. Kahler's son asked for permission to stay with his father instead. *Id.* Karen said no, and so Mr. Kahler's mother drove the boy to meet Karen while Mr. Kahler was out cashing his final paycheck. *Id*. at 214, 73.

A few hours later, Mr. Kahler "snapped." J.A. 72. He drove to Karen's grandmother's home in Burlingame, Kansas. In his vehicle he had three or four rifles and ammunition, along with hunting and camping equipment, all of which he routinely kept in his car. *Id*. at 73. He entered the home and used a rifle to kill Karen, his daughters, and Karen's grandmother. His son ran out the back door and escaped unharmed. *Id*. at 215. Karen's grandmother's LifeAlert device recorded a portion of the shootings, and captured Mr. Kahler exclaiming: "Oh s**t! I am going to kill her . . . G-d damn it!," *id*. at 62, 232, in a tone that indicated disbelief of and dissociation from his actions. See *id*. at 48. Despite ordinarily possessing excellent recall, Mr. Kahler has consistently been unable to remember the events of that night, another symptom suggesting short-term dissociation. *Id*. at 87, 95, 98–99.

Mr. Kahler avoided law enforcement on the night of the shootings. He was arrested the next day, without incident, when police discovered him walking down a country road. J.A. 215.

C. Proceedings Below

Mr. Kahler was charged with capital murder, four counts of first degree murder, and one count of burglary. ROA Vol. 1 p.13; see also J.A. 1. In preparation for his trial, two forensic psychiatrists evaluated him for several months. The two doctors—one serving as the defense's expert and one serving as the

State's—agreed on a great deal. Both experts concluded that Mr. Kahler suffered from obsessive-compulsive personality disorder, major depressive disorder, and borderline, paranoid, and narcissistic personality tendencies. J.A. 74, 84–88, 142–146.

Dr. Peterson, the defense expert, concluded that Mr. Kahler's depression at the time of the shooting was so severe that Mr. Kahler did not make a genuine choice to kill his family members. Rather, Dr. Peterson concluded Mr. Kahler "felt compelled and . . . basically for . . . at least that short period of time completely lost control" of his faculties. J.A. 48. Dr. Peterson found "some suggestion of this" in Mr. Kahler's exclamations from the night of the shootings, which seemed to "recognize[] that he could not stop from killing his family save [his son]." *Id.* at 85; see also *id.* at 48–49. In other words, Mr. Kahler's mental state had been so "severely degraded . . . that he couldn't refrain from doing what he did." *Id.* at 49.

Mr. Kahler proposed instructions on both diminished capacity and insanity as an affirmative defense. The trial court rejected them as prohibited by Kansas law. J.A. 242–44. The jury, instructed that it could consider Mr. Kahler's illness only to determine whether he had the intent to kill, *id.* at 176–77, found him guilty on all counts. *Id.* at 181–90. The same jury returned a death verdict after hearing additional evidence of Mr. Kahler's mental state, and Mr. Kahler was formally sentenced to death in October 2011. *Id.* at 203–04.

Mr. Kahler appealed to the Kansas Supreme Court, raising Eighth and Fourteenth Amendment claims. See J.A. 11–14; Cert. Reply Add. 19. The Kansas Supreme Court rejected Mr. Kahler's constitutional challenges because "the same arguments . . . were considered and rejected" in *State* v. *Bethel*, 66 P.3d

840 (Kan. 2003). J.A. 243–44. *Bethel* had upheld Kansas's *mens rea* approach against a due-process challenge, concluding that the affirmative insanity defense was an invention of the Nineteenth Century, "not so ingrained in our legal system" to rank as fundamental. 66 P.3d at 851. *Bethel* also rejected an Eighth Amendment challenge to the same statute because Kansas law "does not expressly or effectively make mental disease a criminal offense." *Id.* at 852. Having concluded that "a review of those arguments or of *Bethel* [was] not warranted," the court affirmed Mr. Kahler's conviction and death sentence. *Id.* at 244–45.

Justice Johnson dissented, distinguishing *Bethel* because it was not a death penalty case: "At the very least, this court has the obligation to independently analyze whether the procedure of replacing the insanity defense with the mens rea approach undermines the reliability of the jury's determination to impose the death penalty." J.A. 271.

SUMMARY OF ARGUMENT

The Constitution requires states to provide some mechanism to excuse criminal defendants whose mental states render them blameless. A mentally ill person who commits a harmful act with no rational appreciation that it is wrong lacks the essential prerequisite for criminal punishment: "moral culpability." See *Atkins* v. *Virginia*, 536 U.S. 304, 306 (2002). That has been the unwavering judgment of theologians and lawgivers for thousands of years. And Anglo-American law has uniformly given effect to that judgment by making insanity an affirmative defense. Yet Kansas—in a misinformed reaction to a pair of headline-grabbing cases—has departed from this established view by abolishing the insanity defense. In

Kansas, an insane defendant's lack of moral culpability is now irrelevant. All that matters is whether he could form the minimal mental state required to commit the offense, which even very disturbed people generally can do.

This Court does not lightly tread on a state's administration of criminal justice. But when a state oversteps constitutional boundaries, the Court has not hesitated to enforce them. This is such a case. Kansas's abolition of the insanity defense violates both the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition on cruel and unusual punishment.

History is the touchstone for both of these constitutional inquiries. And history shows that "[t]he insanity defense, which dates back as far as the 14th century, is an integral . . . part of Anglo-American criminal law." H.R. Rep. No. 98-577, at 2 (1983). Few if any principles are more deeply rooted in our legal history—or in world history—than the idea that "idiots," "lunatics," or "madmen" are not criminally responsible. These people lack the "ability and duty of the normal individual to choose between good and evil" or between right and wrong, *Morissette* v. *United States*, 342 U.S. 246, 250 (1952), and thus are not fit for criminal conviction and punishment. Just as mental "disabilities in areas of reasoning, judgment, and [impulse] control" can diminish a person's culpability, *Atkins*, 536 U.S. at 306, so too can mental illness. As a result, those afflicted with a mental illness that prevents them from rationally appreciating the wrongfulness of their conduct have never been branded as criminals. That was true in the English common law, at the Founding, and when the Reconstruction Amendments were enacted. The early American courts, like the English courts before them,

focused on whether the defendant was morally culpable. *Infra* § I.A.

Current practice confirms the insanity defense's fundamental nature. Forty-eight U.S. jurisdictions—45 states, the federal criminal-justice system, the military justice system, and the District of Columbia—provide an affirmative insanity defense that encompasses the defendant's lack of moral culpability. Until 1979, *every* U.S. jurisdiction had some form of affirmative insanity defense. As Congress recognized when it adopted the current federal rule, "the insanity defense should not be abolished" because it reflects "that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." H.R. Rep. No. 98-577, at 3, 7–8 (1983). The Due Process Clause thus protects this fundamental principle.

Criminally punishing the insane also violates the Eighth Amendment. That is true both because such punishment was "condemned by the common law in 1789," *Ford* v. *Wainwright*, 477 U.S. 399, 406 (1986), and because a modern proportionality analysis confirms history's judgment: Criminally punishing the insane is cruel and unusual. None of the four accepted penological justifications—retribution, deterrence, incapacitation, or rehabilitation, see *Graham* v. *Florida*, 560 U.S. 48, 71 (2010)—are served by convicting and punishing people who are not blameworthy, cannot be deterred, and require incapacitation and rehabilitation that the criminal justice system cannot provide. *Infra* § I.B.

Kansas's decision to "follow[ ] Montana, Idaho, and Utah to become the fourth state to legislatively abolish the insanity defense," *Jorrick*, 4 P.3d at 617, violates these constitutional principles. *Infra* § II.A. Kansas's "*mens rea* approach" accounts only for in-

tent, not lack of moral culpability. But even severely mentally ill people can form the intent required to commit a crime, even if they do not understand that it is wrong. Thus, in Kansas, so long as a defendant intentionally kills another human being—even if he delusionally believes the devil told him to do it, or that the victim was an enemy soldier trying to kill him—he is guilty of murder. The upshot is that Kansas criminally punishes people who are, by any definition, insane. The Constitution prohibits that result. *Infra* § II.B.

The Court could end its inquiry there, and simply hold that a state may not abolish the insanity defense. It should not be difficult for Kansas to choose one of the formulations used by the federal government or the other states (or by Kansas itself, for decades). But if Kansas demands further guidance, see Br. in Opp. 23–24, the Court can easily provide it. The most common formulation of the insanity defense's moral-culpability principle is one that focuses on the defendant's ability to rationally appreciate right and wrong with respect to his offense. States have ample leeway to tweak this baseline standard in order to better reflect the needs of their citizens. Likewise, states remain free to allocate and adjust burdens and impose procedural requirements for the orderly and fair adjudication of insanity claims. The only thing they cannot do is what Kansas has done here: Abolish the defense entirely.

ARGUMENT

I. THE CONSTITUTION REQUIRES AN INSANITY DEFENSE.

Whether the Court applies the Fourteenth Amendment or the Eighth, and whether it applies a historical analysis or a modern one, the answer is the

same: The Constitution requires some mechanism to excuse a defendant who, because of mental disease or defect, is not morally culpable.

A. The Due Process Clause requires some mechanism to excuse a non-culpable, mentally ill defendant.

The Fourteenth Amendment's 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." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). These principles come from "the teachings of history" and a "solid recognition of the basic values that underlie our society." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1972) (internal quotations omitted) (plurality op.). The Bill of Rights and "in particular" the Due Process Clause were "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy" that drives even the most well-intentioned legislatures. See *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972). Thus, whether they are framed as "deeply rooted" rights, those "implicit in the concept of ordered liberty," or the basic values that protects our country's liberty and justice, *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997), these principles establish a constitutional floor below which the states may not drop. *Duncan* v. *Louisiana*, 391 U.S. 145, 147–48 (1968); see also, *e.g.*, *BMW of N. Am.*, *Inc.* v. *Gore*, 517 U.S. 559, 562 (1996) (due process prohibits "grossly excessive" punitive damages); *Rochin* v. *California*, 342 U.S. 165, 171–72 (1952) (due process prohibits evidence obtained by means that "shock[] the conscience").

Although this Court defers to the states in the administration of criminal justice, see *Medina* v. *California*, 505 U.S. 437, 445–46 (1992), it has a duty to

"ascertain whether [criminal proceedings] offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," *Rochin*, 342 U.S. at 169; see *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("there are constitutional limitations on the conduct that a State may criminalize"). Such crimes, "which deeply stir[] popular sentiment[,] may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact" laws that shortchange the rights of criminal defendants. *Leland* v. *Oregon*, 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting). But if our history and traditions show that the right in question is fundamental, this Court has not hesitated to protect it against state encroachment. This Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice," *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996) (plurality op.), but "[t]he fact that a practice is followed by a large number of states . . . is [also] plainly worth considering," *Leland*, 343 U.S. at 798.

The insanity defense meets this demanding test. Societies have acknowledged insanity as an excuse to criminal liability for thousands of years. And ever since the development of criminal law in England, around the Twelfth Century, the affirmative insanity defense has been the mechanism that effectuates this right. Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004–06 (1932). Many state courts have thus recognized that "legal insanity is a well-established and fundamental principle of the law of the United States" that is "protected by the Due Process Clause[]." *Finger* v. *State*, 27 P.3d 66, 84 (Nev. 2001); see also *People* v. *Skinner*, 704 P.2d 752, 758–

59 (Cal. 1985); *State ex rel. Causey*, 363 So. 2d 472, 474 (La. 1978); *Ingles* v. *People*, 22 P.2d 1109, 1111 (Colo. 1933), *superseded on other grounds*, *People* v. *Hill*, 934 P.2d 821, 825 (Colo. 1997); *Sinclair* v. *State*, 132 So. 581, 582 (Miss. 1931) (per curiam); *State* v. *Lange*, 123 So. 639, 642 (La. 1929); *State* v. *Strasburg*, 110 P. 1020, 1021 (Wash. 1910). These decisions are correct.

1. Ancient civilizations recognized the distinction between the insane and those capable of understanding the moral implications of their actions. In the early Jewish tradition, "madness" was an excuse for otherwise punishable crimes. The first pages of the Torah introduce "knowledge of good and evil" as a central reality of the human condition, *Genesis* 2:9, 2:17, 3:5, 3:22, and at least as early as the Sixth Century B.C.E., the Jewish tradition "distinguished between harmful acts traceable to fault and those that occur without fault." Am. Bar Ass'n, *Criminal Justice Mental Health Standards* 288 n.8 (1989) ("ABA Standards") (citing Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355, 366 (1965)). Such harmful but faultless acts included those committed by persons "incapable of weighing the moral implications of personal behavior, even when willful." *Id.* In the Talmudic literature, those who "lack understanding"—a category that includes minors, deaf-mutes, and "madmen" (*shoteh*)—are held exempt from criminal punishment. Rael Strous, *The Shoteh and Psychosis in Halakhah with Contemporary Clinical Application*, 12 Torah U-Madda J. 158, 167 (2004).

Greek philosophy from at least the Fourth Century B.C.E. likewise "considered the distinction between a

culpable and non-culpable act to be among the 'unwritten laws of nature supported by the universal moral sense of mankind.'" ABA Standards 288 n.8 (quoting B. Jones, *The Law and Legal Theory of the Greeks* 264 (1956)). In his dialogue on the Laws, Plato established an exception to guilt for those suffering from "insanity": "[S]omeone might perhaps do one of these things while insane," or while diseased, or an infant, or the like, in which case "let him pay to the full exact compensation for the injury he has done someone, but let him be released from the other judicial sentences." Plato, *Laws* Book IX, at 258 (*864d–e) (Thomas L. Pangle trans., 1988) (c. 345 B.C.). Even if the insane person had "killed someone," the penalty was one year of exile, rather than execution. *Id.* Likewise, the Sixth-Century legal code of the Byzantine emperor Justinian provided: "There are those who are not to be held accountable, such as a madman and a child, who are not capable of wrongful intention." See David Carrithers, *The Insanity Defense and Presidential Peril*, 22 Society at 23 (July–Aug. 1985).

So too in the Christian tradition. In the Fourth Century, St. Augustine of Hippo wrote of "individuals suddenly unbalanced," who "were found not guilty because of the fact they had done these things unknowingly and not freely, but by the impulse of some force, I know not what." Augustine, *Questions Concerning the Old and New Testament*, Question 2, cited by Colin Pickett, *Mental Affliction and Church Law* 44 (1952). The results in such cases elucidated an early Christian principle of culpability: "How can a man be called guilty who does not know what he has done?" *Id.* Augustine's words evoke those of Jesus himself, praying at the crucifixion: "Father, forgive them; for they know not what they do." *Luke* 23:34.

Daniel Robinson describes St. Augustine as speaking for the Church Fathers, including St. Ambrose of Milan and St. John Chrysostom of Constantinople, in defending "the proposition that the insane cannot justly be punished for their actions." Daniel N. Robinson, *The Insanity Defense as a History of Mental Disorder*, *in* The Oxford Handbook of Phil. & Psychiatry 18, 22–23 (K.W.M. Fulford *et al.*, eds., 2013).

In Islam, likewise, "lunatics . . . have impaired judgment and will and so they cannot be held accountable for their actions." Georgios A. Tzeferakos & Athanasios I. Douzenis, *Islam, Mental Health & Law: A General Overview*, 16 Ann. Gen. Psychiatry 28, 30 (2017). A defendant who "can present some evidence of [his] insanity prior to the time of the offence—which even if not of a strong nature is sufficient to cast doubt on their responsibility— . . . can be relieved of liability and punishment based on the prophetic legal maxim 'to avoid the prescribed punishments (*ḥudūd*) whenever possible.'" Bilal Ali & Hooman Keshavarzi, *Forensic Psychiatry*, *in* Oxford Islamic Studies Online (Oct. 30, 2017).

2. The English common law continued and crystalized these ancient principles. "Legal insanity has been an established concept in English common law for centuries." *Finger*, 27 P.3d at 80. By 1154, when Henry II institutionalized the common law in England, inability to distinguish good from evil was already an excuse to criminal liability. Sayre, *supra*, at 978–80. "During the reign of Edward II (1307–1321), there was a shift toward recognizing insanity as a complete defense, which was perfected by the time of the ascension of Edward III to the throne (1326–1327)." *State* v. *Searcy*, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting) (discussing this history in detail). Thus, the "idea that the insane should

not be punished for otherwise criminal acts has been firmly entrenched in the law for at least one thousand years." Jonas Robitscher, *In Defense of the Insanity Defense*, 31 Emory L.J. 9, 10–11 (1982).

By the Sixteenth Century, insanity was a "well recognized defense[ ]." Sayre, *supra*, at 1004–05; see Robitscher, *supra*, at 11 ("The earliest case in which a jury rendered a verdict of unsound mind apparently occurred in 1505. It is clear nonetheless, that, prior to 1501, prominent jurists considered acquittal to be the appropriate result" of insanity.). Around that time, the insanity defense evolved to embrace whether the defendant was capable of distinguishing good from evil and thus whether he was morally culpable. See Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Calif. L. Rev. 1227, 1228, 1235 (1966). In 1618, for example, the English jurist Michael Dalton wrote: "If one that is 'non compos mentis' [mad], or an ideot, kill a man, this is no felony; for they have not knowledge of good and evill, nor can have a felonius intent, nor a will or minde to doe harm." *Id*. at 1235 (citing Michael Dalton, *The Countrey Justice* 244 (1630)). William Lambard's legal reference book, printed between 1581 and 1610, similarly instructed: "If a mad man or a naturall foole, or a lunatike in the time of his lunacie, or a childe [who] apparently hath no knowledge of good nor e[v]il do kil[l] a ma[n], this is no felonious acte." *Searcy*, 798 P.2d at 928–29 (McDevitt, J., dissenting) (quoting John Biggs Jr., *The Guilty Mind: Psychiatry and the Law of Homicide* 83 (1955)). The law thus followed the maxim that "a madman is only punished by his madness." 1 Edward Coke, *Institutes of the Laws of England* 247a–247b (1853).

By the Eighteenth Century, the "knowledge of good and evil" test was "regularly used" in insanity cases. Platt & Diamond, *supra*, at 1235–36; Sayre, *supra*, at 1005–06 (explaining that the Eighteenth Century law "harks back strongly to the old ethical basis of criminal responsibility" by asking whether the defendant could "distinguish good from evil" and discussing *Rex* v. *Arnold* (1724) 16 St. Tr. 695 (Eng.)).[5] Juries in the Eighteenth Century were instructed to consider, for example, whether a defendant pleading insanity "was able to distinguish whether he was doing good or evil," could "discern the difference between good and evil," or "had enough intelligence to distinguish between right and wrong." Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 Cal. L. Rev. 105, 114–115 (1924) (describing Eighteenth and early Nineteen Century cases).

Blackstone aptly summarized this principle: "[L]unatics or infants . . . are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong." 4 William Blackstone, *Commentaries* *25, *195 (1769). Likewise, English scholar Williams Hawkins wrote that "it is to be observed that those who are under a natural disability of distinguishing between good and evil, as infants

---

[5] *Rex* v. *Arnold*'s "wild beast" test excused a defendant only if he was "totally deprived of his understanding and memory." This was an outlier in the English treatment of insanity. *See* Michael Clemente, *A Reassessment of the Common Law Protections for "Idiots,"* 124 Yale L.J. 2746, 2270–2771 (2015). The nearly contemporaneous case of James Hadfield shows this outlier status of the wild beast formulation. Hadfield's defense—that he should be exonerated despite plainly "intending" to assassinate the King— "would have fallen on deaf ears if the jurors' views of insanity had been consistent with the 'wild beast' test; fortunately for Hadfield, they were not." Norman J. Finkel, *Insanity on Trial* 16 (1988).

under the age of discretion, ideots and lunaticks, are not punishable by any criminal prosecution whatsoever." Crotty, *supra*, at 113 (citing W. Hawkins, *Pleas of the Crown*, I, p.1 (1716)).

These fundamental beliefs about insanity and culpability continued into the Nineteenth Century, though now with additional labels formalizing the affirmative defense that had been percolating in English law for hundreds of years. Courts during this time often chose the terms "right and wrong" in place of "good and evil." See *M'Naghten's Case* (1843) 8 Eng. Rep. 718. Yet "the phrases 'good and evil' and 'right and wrong'" continued to be "used interchangeably and synonymously" during the early Nineteenth Century, both in England and in the United States. Platt & Diamond, *supra*, at 1237 n.59 (describing a California jury instruction from 1871: "A person sometimes insane, who has lucid intervals, or is so far sane as to distinguish good from evil, right from wrong, may commit a crime and be legally held responsible."). Both formulations, however, address the essential question: Whether the defendant is morally blameworthy and thus criminally responsible for the act in question.

M'Naghten's Case likewise solidified the principle that an insane defendant is excused from criminal liability and must be acquitted. Sayre, *supra*, at 1006. Daniel M'Naghten suffered from paranoid delusions that the Tories followed and persecuted him, compelling him to attempt to assassinate Prime Minister Robert Peel in 1843; he was acquitted based on an insanity defense at his trial. The judges laid down this rule: "To establish a defence on the ground of insanity it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the

mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep. 718, 722. Justice Story considered *M'Naghten*'s rule "entirely satisfactory and correct," writing that "the direction of the Court, advising to an acquittal, [cannot] be for a moment deemed exceptionable, since, if a verdict of guilty had been pronounced, the duty of the Court upon the evidence would be plain, to direct a new trial." II Life and Letters of Joseph Story 441 (William W. Story ed., Houghton & Wood 1851). Far from being a "creature of the 19th century," as the Kansas Supreme Court believed, *Bethel,* 66 P.3d at 851, the insanity defense—and the underlying principle of moral culpability—have existed for centuries.

3. Our law has also recognized the insanity defense from the Founding to the present. "In the United States, the early tendency was to follow the law as laid down by the English cases." Crotty, *supra*, at 121. There was thus little departure from the English approach outlined above, and early American courts held that (in Justice Story's words) "insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility." *United States* v. *Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828); see also *United States* v. *Lawrence*, 26 F. Cas. 887, 891 (C.C.D.D.C. 1835) (government acknowledging *Hadfield's Case* as correctly stating the law of insanity and noting that the jury returned a verdict of not guilty by reason of insanity within five minutes); *In re McElroy*, 1843 WL 5177, at *4 (Pa. Sept. 1, 1843) ("When a man is charged with a crime, and labours under total insanity, he is so clearly an irresponsible being, that the law does not consider him a fit subject for punishment, and he must be acquitted."). Timothy Cun-

ningham's 1771 legal dictionary, which Justice Scalia recommended,[6] recorded the "general rule, that ideots and lunaticks, being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever." Clemente, *supra*, at 2788 (quoting Timothy Cunningham, *A New And Complete Law-Dictionary, Or General Abridgment Of The Law, On A More Extensive Plan Than Any Law-Dictionary Hitherto Published*, 2 vols. (2d ed. 1771; 3d ed. 1783)). These authorities reflect the early American view that "[t]o punish an insane man, would be to rebuke Providence." *Roberts* v. *State*, 3 Ga. 310, 328 (Ga. 1847).

As in England, American courts focused on whether the defendant lacked, "as to the act about to be committed, reason enough to distinguish between the right and wrong of *that act*—if he does not know and understand that *that act* is wrong, and that he will deserve punishment for committing it, he is irresponsible." *Roberts*, 3 Ga. at 330; see also *State* v. *Spencer*, 21 N.J.L. 196, 202 (N.J. O. & T. 1846) (asking whether the defendant is "capable of moral action and of discerning between right and wrong"); *People* v. *Kleim*, 1845 WL 4476 (N.Y. Sup. Ct. Jan. 1, 1845) ("The inquiry to be made under the rule of law as now established, was as to the prisoner's knowledge of right and wrong at the time of committing the offense."); *Commonwealth* v. *Rogers*, 48 Mass. 500, 501–02 (Mass. 1844) ("A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing

---

[6] See Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2D 419, 424 (2013).

is wrong and criminal, and will subject him to punishment."); *State* v. *Marler*, 2 Ala. 43, 48 (1841) (an insanity plea requires "that the prisoner was incapable of judging between right and wrong"). This remained true after *M'Naghten*, which became the rule of insanity in many U.S. jurisdictions. See, *e.g.*, *Davis* v. *United States*, 160 U.S. 469, 479–80, 484–85 (1895) (discussing *M'Naghten*'s "deliberate and careful statement of the doctrine" and reiterating the "humane" common-law principle that a person cannot be guilty of murder "unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act"); *Mackin* v. *State*, 36 A. 1040, 1041 (N.J. 1897) (describing the "rule established by M'Naghten's Case" as "completely imbedded in the administration of the criminal law").

These cases reflect the "universal and persistent . . . belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Id.* at 250 n.4. Thus, in *Morissette*, Justice Jackson cited "the ancient requirement of a culpable state of mind" to explain that mere intention—as opposed to an "evil-meaning mind"—is typically insufficient for criminal punishment. *Id.* at 250–51.

These principles remain a bedrock part of our legal system today. Forty-five states, the federal government, the U.S. military, and the District of Columbia all provide an affirmative insanity defense that reflects the defendant's lack of moral culpability. As set forth in the addendum to this brief, eighteen states

and the federal civilian and military justice systems use some version of the *M'Naghten* test. Add. 13–23. Thirteen states and the District of Columbia use a version of the Model Penal Code standard, which similarly provides that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01 (Am. Law Inst. 1985) (brackets in original); see Add. 6–13. Twelve states focus directly on the defendant's moral incapacity—his inability to tell if his conduct is "wrong," *e.g.*, Ariz. Rev. Stat. § 13-502, or "criminal[ ]," *e.g.*, 720 Ill. Comp. Stat. 5/6–2; see Add. 1–6. And New Hampshire and North Dakota use unique formulations that capture the same essential concepts.[7] Add. 23–24. Only Alaska provides an affirmative insanity defense that does not encompass lack of blameworthiness, focusing solely on cognitive incapacity, *i.e.*, whether the defendant could "appreciate the nature and quality of [the] conduct." Alaska Stat. § 12.47.010; Add. 24.

---

[7] New Hampshire asks whether the defendant's crime was a "product of," or caused by, his illness. *State* v. *Cegelis*, 638 A.2d 783, 785 (N.H. 1994). This test encompasses "whether the defendant knew the difference between right and wrong." *Id.* at 786 (approving this instruction). North Dakota asks whether the defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of [his] capacity to recognize reality." N.D. Cent. Code 12.1-04.1-01(1)(a). These two prongs appear to capture roughly the same concepts as the *M'Naghten* prongs, but in the reverse order. See *State* v. *Dahl*, 783 N.W.2d 41, 48 (N.D. 2010); cf. *State* v. *Jensen*, 251 N.W.2d 182, 186 (N.D. 1977) (noting that North Dakota's two prior articulations of this test were "based upon the M'Naghten rule").

In fact, *every* American jurisdiction had an affirmative insanity defense until 1979. *State* v. *Korell*, 690 P.2d 992, 996 (Mont. 1984); cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 549 (2012) ("sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent'"). True, states adopted different formulations of the basic concept, but the practice of allowing (or requiring) the defendant to prove his insanity was universal. No state even tried to abolish the defense until 1910, and those early efforts were promptly held unconstitutional. *Sinclair*, 132 So. at 582; *Lange*, 123 So. at 642; *Strasburg*, 110 P. at 1021.

"Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting). The insanity defense thus "reflects a fundamental legal principle common to the jurisprudence of this country and to the common law of England." *Skinner*, 704 P.2d at 758. And almost every U.S. jurisdiction continues to recognize the defense today as it always existed. Notably, in adopting the current federal defense, which likewise preserves the historic culpability principle, Congress recognized that "the insanity defense should not be abolished" because it reflects "that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment." H.R. Rep. No. 98-577, at 3, 7–8 (1983). "So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the

right to plead it will be unconstitutional and void." *Sinclair*, 132 So. at 584 (Ethridge, J.).

B. The Eighth Amendment prohibits criminally punishing the insane.

Whether viewed through the Founding-era lens or the modern proportionality lens, the Eighth Amendment prohibits a State from punishing a criminal defendant without regard to his ability—as a result of mental illness—to rationally appreciate that his actions are wrong. "[T]here could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act, and . . . such punishment is certainly both cruel and unusual in the constitutional sense." *Sinclair*, 132 So. at 585 (Ethridge, J.).

Although this Court's Eighth Amendment jurisprudence focuses on punishment, the Court has also applied it to prohibit criminal convictions in certain cases, for reasons that apply fully here. See, *e.g.*, *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (holding that conviction for the status of being a drug addict is unconstitutional under the Eighth Amendment); *id.* at 674 (Douglas, J., concurring) ("I do not see how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity."); see also *Parker* v. *Ellis*, 362 U.S. 574, 593–94 (1960) (per curiam) ("Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."). The "status and condition in the eyes of the world, and under the law, of one convicted of crime, is vastly different from that of one simply adjudged insane," *Strasburg*, 110 P. at 1025, and thus an insane person

should not "be branded with the stigma of felony when he was wholly unable to comprehend the nature and quality of the act," *Sinclair*, 132 So. at 583.

1. Criminally punishing the insane would have been cruel and unusual at the Founding.

The Eighth Amendment bans, at a minimum, "those practices condemned by the common law in 1789." *Ford* v. *Wainwright*, 477 U.S. 399, 406 (1986). It also reaches punitive practices that, although formally legal at the founding, "qualified as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123 (2019).

As detailed above, the Founding-era common law did not allow criminally punishing the insane. "It was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities." See *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989), *abrograted on other grounds by Atkins,* 536 U.S. 68; *Sinclair*, 132 So. at 583 (Ethridge, J.) ("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."); see *supra* pp. 20–26. That alone is a basis to find that the Eighth Amendment requires an insanity defense.

Likewise, the Founding generation would have considered it both cruel and unusual to criminally punish the insane. It surely would have been unusual: both England and the Colonies universally recognized the insanity defense. *Supra* pp. 20–26. In fact, the Founding generation believed that the insane should

not be subjected to legal process *at all*. More often than not, "idiocy was addressed on a local level by the idiot's family and community," and so "idiots and lunatics were particularly unlikely to receive formal trials." Clemente, *supra*, at 2781, 2784.

For the same reasons, punishing the insane would have been deemed "cruel," in the sense of "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting." *Bucklew*, 139 S. Ct. at 1123 (quoting 1 S. Johnson, *A Dictionary of the English Language* (4th ed. 1773)). "English common law considered it 'cruel' to execute idiots, lunatics, and the insane." Clemente, *supra*, at 2756. Such punishment was "savage and inhuman," a "miserable spectacle," and "of extreme inhumanity and cruelty." *Id*. at 2756–57. This attitude "carried over to the colonies," which adopted "English common law and custom" on this subject. *Id*. at 2757–58. Again, that is reason enough to find that abolishing the insanity defense violates the Eighth Amendment.

2. Criminally punishing the insane is grossly disproportionate and serves no legitimate purpose.

This Court's categorical-proportionality analysis warrants the same conclusion. Proportionality is central to the Eighth Amendment, which embodies the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham* v. *Florida*, 560 U.S. 48, 59 (2010).

Under this standard, this Court looks first to "objective indicia of society's standards, as expressed in legislative enactments and state practice," *id.* at 61, which are "the 'clearest and most reliable objective evidence of contemporary values.'" *Atkins*, 536 U.S. at

312. Americans today, speaking through their legislatures, overwhelmingly agree with the Ancients and the Founders: An insane person is not criminally culpable. As already explained, 48 U.S. jurisdictions have some form of an affirmative insanity defense that encompasses (at least) lack of moral culpability. *Supra* pp. 26–27; see Add. 1–24. This principle thus reflects a rare convergence of longstanding moral and religious principles with modern ethical and medical judgments.

The Court also gauges proportionality using its own independent judgment, looking to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Graham*, 560 U.S. at 61; see also *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005). As just explained, the Amendment's text and history support the modern consensus. *Supra* § I.B.1.

Likewise, the "culpability of the offenders at issue," "the severity of the punishment in question," and "whether the challenged sentencing practice serves legitimate penological goals," *Graham*, 560 U.S. at 67, all weigh against criminally punishing the insane. A person who cannot rationally appreciate the consequences of his conduct is, by definition, not culpable. Cf. *Atkins*, 536 U.S. at 319 (noting "the lesser culpability of the mentally retarded"). And though the severity of the punishment in question varies with the crime, *any* punishment of a blameless offender is by definition severe.

Finally, none of the four accepted penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, or rehabilitation, see *Graham*, 560 U.S. at 71—are served by criminally pun-

ishing people who cannot rationally appreciate the difference between right and wrong.

First, no retributive value accrues by punishing a person who cannot appreciate that his conduct is wrong. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U.S. 137, 149 (1987). Culpability, in turn, is a moral question that presupposes a rational agent with the capacity to assess his conduct in light of moral and legal authority. See *Ford*, 477 U.S. at 408 (describing "retribution" as "the need to offset a criminal act by a punishment of equivalent 'moral quality'"). "[L]egally responsible or legally competent agents are people who have the general capacity to grasp and be guided by good reason . . . [and] who are generally capable of properly using the rules as premises in practical reasoning." Stephen J. Morse, *Moral and Legal Responsibility and the New Neuroscience*, *in* Neuroethics: Defining the issues in theory, practice, and policy, 37–38 (Judy Illes ed., 2004). Where a person's mental state "is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole," the moral culpability that retribution is supposed to mirror cannot exist. See *Panetti* v. *Quarterman*, 551 U.S. 930, 959 (2007); cf. *Ford*, 477 U.S. at 409 ("[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

Second, deterrence is not served by punishing the insane because it neither deters the defendant himself nor "provides [an] example to others." See *Ford* 477 U.S. at 407. A "deranged person . . . is plainly

beyond the deterrent influence of the law." Model Penal Code § 4.01 cmt. at 166 (Am. Law Inst. 1985). "[T]he same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can . . . control their conduct based upon" the threat of criminal penalties. See *Atkins*, 536 U.S. at 320. Likewise, punishing the insane will not meaningfully deter sane people from committing the same offenses. "It is unlikely that the sane person (or even the insane person who believes himself to be sane) will identify with the insane defendant, and thus the insane cannot be effectively used as a deterrent example to others." Wayne R. LaFave, 1 Substantive Crim. L. § 7.1(c)(4) (3d ed. 2018).

Third, criminal punishment—whether incarceration or execution—is a poor tool for incapacitating the insane. This is so because neither has any necessary relationship to the duration of a person's mental illness and resulting dangerousness. Thus, in some situations the criminal sanction does too little: While incarceration may incapacitate an insane person for a specified term of years, he may remain unwell, and potentially dangerous, after his sentence ends. In other situations, the punishment does far too much. A long-term or permanent sentence is justified on incapacitation grounds only if the defendant will remain dangerous indefinitely, a notion at odds with the reality that mental illnesses are often treatable. This Court remarked in *Graham* that "'incorrigibility is inconsistent with youth.'" 560 U.S. 48 at 73. It is no more consistent with treatable illness.

Fourth, prisons are not equipped to rehabilitate people suffering from severe mental disorders. Those studying the effects of the *de facto* transformation of prisons into providers of mental health services are

virtually united in the conclusion that "across the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs." Human Rights Watch, *Ill-equipped: U.S. Prisons and Offenders with Mental Illness* 1–5 (2003), https://goo.gl/wDAsmW. Efforts to improve mental health services in prisons "face considerable challenges, given the magnitude of the problem in relation to scant resources, the intractability of many prison environments, and the inherent difficulties of delivering effective mental health services within an environment in which security is a constant concern." Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 Crime and Justice 231, 249 (2017); see also Jennifer Bronson & Marcus Berzofsky, Bureau of Justice Statistics, Dep't of Justice, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, *2011-2012* 8–9 (2017) (noting that only "[a]n estimated 36% of prisoners and 30% [of] jail inmates who met the threshold for [serious psychological distress] said they were receiving treatment for a mental health problem").

These problems often manifest themselves in a cycle of punishment for the mentally ill. See *id.* at 9 ("[p]risoners and jail inmates who met the threshold for [serious psychological distress] were more likely than those without [serious psychological distress] to be written up or charged with an assault while incarcerated"). This cycle exacerbates the inmate's illness, particularly where solitary confinement is imposed—as it is for all capital defendants in Kansas. Kan. Dep't of Corr., *Purpose of Administrative Segregation & Appropriate Placements*, § 20-104(I)(B)(16); see also Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Chal-*

lenge for Medical Ethics, 38 J. Am. Acad. Psychiatry L. 104, 104–05 (2010) (noting that "[t]he adverse effects of solitary confinement are especially significant for persons with serious mental illness," that "[t]he stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence," and that "[m]any simply will not get better as long as they are isolated").

By contrast, these penological purposes are well-served by the approach used in nearly every U.S. jurisdiction. These states civilly commit an insane defendant to a mental institution "until such time as [the defendant] has regained his sanity or is no longer a danger to himself or society." *Jones* v. *United States*, 463 U.S. 354, 370 (1983). This approach safeguards the public and ensures that the period of commitment is proportional to the defendant's needs.

C. Either of these constitutional bases prohibits the abolition of the affirmative insanity defense.

In order to resolve this case, this Court need do no more than hold that the Constitution does not permit a state to abolish the mechanism that permits a defendant to show that he is not culpable as a result of his insanity. With blameworthiness as the touchstone, states retain ample leeway to experiment with the formulation of the insanity defense that works best for their citizens and the juries that ultimately must decide whether to hold a defendant accountable for his acts. See *Clark* v. *Arizona*, 548 U.S. 735, 752 (2006) ("[T]he insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.").

In fact, states have encountered little difficulty in doing so. The most common formulation has been

one that asks if the defendant can "appreciate . . . the wrongfulness of his acts." *E.g.*, 18 U.S.C. § 17. Almost every U.S. jurisdiction uses some version of this standard, often in conjunction with other, alternative tests (such as whether the defendant could conform his conduct to the law or could understand the nature of his actions). See Add. 1–24. States can surely offer more protection if they see fit, but they may not disregard the basic notion of moral culpability. They must provide some mechanism, using some standard, that encompasses the bedrock principle that a person whose mental state renders them blameless cannot be held criminally accountable.

For example, states can add or subtract a volitional component, as many have done, including those that apply the Model Penal Code test. Compare, *e.g.*, 11 Del. Code § 401 (focusing solely on the defendant's "substantial capacity to appreciate the wrongfulness of [his] conduct"), with Or. Rev. Stat. § 161.295 (asking whether the defendant could "appreciate the criminality of the conduct or . . . conform the conduct to the requirements of law"). States can also add or subtract a cognitive-incapacity inquiry that asks, like *M'Naghten*'s first prong, whether the defendant could "appreciate the nature and quality . . . of his or her conduct." *E.g.*, Mich. Comp. Laws 768.21a(1). Because "cognitive incapacity is itself enough to demonstrate moral incapacity," it "is a sufficient condition for establishing a defense of insanity, albeit not a necessary one." *Clark*, 548 U.S. at 753.

States are also free to adjust different components of the defense's basic formula. States using a version of the "appreciate the wrongfulness" formulation, for example, remain free to decide what kind of wrongfulness is relevant. A defendant might be unable to understand that his actions are legally wrong, or sub-

jectively wrong, or morally wrong, or wrong in the eyes of society. See Walter Sinnott-Armstrong & Ken Levy, *Insanity Defenses*, *in* The Oxford Handbook of Philosophy of Criminal Law 302–303 (John Deigh & David Dolinko eds., 2011); compare S.C. Code Ann. § 17-24-10(A) (asking whether the defendant could "distinguish moral or legal right from moral or legal wrong"), with Ky. Rev. Stat. Ann. § 504.020 (asking whether the defendant "lacks substantial capacity . . . to appreciate the criminality of his conduct"). And states can and do institute procedural mechanisms to ensure that the individual seeking the defense is qualified to raise it. Cf. *Ake* v. *Oklahoma*, 470 U.S. 68, 82–83 (1985) (if the defendant can "make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense," then the due process right of access to a competent psychiatrist is triggered).

States can also allocate burdens as they see fit. Many states put the burden of proof on the defendant, consistent with the historical and common-sense view that "most men are sane." *Leland*, 343 U.S. at 796. But some states provide that "once any evidence of insanity is introduced, the people have the burden of proving sanity." *E.g.*, Colo. Rev. Stat. § 16-8-105.5. States can also vary the burden itself. Many states and the federal government require the defendant to show insanity by clear and convincing evidence. *E.g.*, 18 U.S.C. § 17(b); Ala. Code § 13A-3-1. Others require only a preponderance. *E.g.*, Iowa Code § 701.4. And if they so choose, states can require the defendant to prove his insanity beyond a reasonable doubt. See *Clark*, 548 U.S. at 769 (a state "may place the burden of persuasion on a defendant to prove insanity . . . whether by a preponderance of the evidence or to some more convincing degree"); *Leland*, 343 U.S. at

798. On the other hand, when the prosecution has the burden, it generally must carry it beyond a reasonable doubt. *E.g.*, *Commonwealth* v. *McLaughlin*, 729 N.E.2d 252, 255 (Mass. 2000).

All of these approaches are permissible. The Constitution merely prohibits a state from abolishing the insanity defense entirely, thus preventing the jury from considering the defendant's blameworthiness at all.

II. KANSAS'S OUTLIER SCHEME VIOLATES THE CONSTITUTION BY ABOLISHING THE INSANITY DEFENSE.

Kansas's "*mens rea* approach" violates the Constitution. Kansas has abolished the insanity defense outright, and its substitute procedure does not vindicate the constitutional principles discussed above.

A. Kansas has abolished the insanity defense.

Kansas has "legislatively abolish[ed] the insanity defense." *State* v. *Jorrick*, 4 P.3d 610, 617 (Kan. 2000). "Mental disease or defect" "is a defense to a prosecution under any statute" only if it negates "the mental state require[ment] as an element of the offense charged." Kan. Stat. Ann. § 22-3220 (2009). It is "not otherwise a defense." *Id.* In Kansas, then, insanity as the law has always understood it—"lack of ability to know right from wrong," J.A. 243—has "disappear[ed] as a separate defense." *Jorrick*, 4 P.3d at 618 (emphasis omitted).

The constitutional principles discussed above require an insanity defense that protects defendants who lack moral culpability because of mental disease or defect. That has been the core of the defense since well before the Founding, and in almost every state,

it still is. See *supra* pp. 20–28. By outright "abolish[ing] the insanity defense," *Jorrick*, 4 P.3d at 617, Kansas has violated the Eighth and Fourteenth Amendments.

B. Kansas's scheme is unconstitutional because it ignores an insane defendant's lack of moral culpability.

Kansas claims that its *mens rea* approach merely "refined the State's insanity defense by channeling evidence of mental disease or defect into the *mens rea* element of a crime." Br. in Opp. i; see *id.* at 9. But that approach is neither substantively nor procedurally equivalent to the affirmative insanity defense.

In Kansas, a defendant's mental state is relevant *only* to whether he could form the intent required to satisfy the offense's elements. Kan. Stat. Ann. § 22-3220 (2009). But while "the circumstances which give rise to a defense of insanity *sometimes* also warrant the conclusion that the defendant did not commit the acts with the mental state required for conviction of the crime charged . . . this is not always the case, for 'the insanity defense is broader than the mens rea concept.'" LaFave, *supra*, § 7.1(b); see also *State* v. *Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989) ("criminal intent or lack thereof is not the focus of the insanity question," which "is and always has been broader"); *accord State* v. *Olmstead*, 800 P.2d 277, 282 (Or. 1990). Thus, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Clark*, 548 U.S. at 796 (Kennedy, J., dissenting); *accord Foucha*, 504 U.S. at 91–92 (Kennedy, J., dissenting); *Mullaney* v. *Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring). Yet Kansas's approach conflates these distinct concepts.

The practical effects are significant. This Court has observed that "the cognitively incapacitated"—those who do not know what they are doing, and so may be unable to form intent—"are a subset of the morally incapacitated." *Clark*, 548 U.S. at 754. And Kansas's *mens rea* approach protects only this smaller subset, not the larger category of morally incapacitated defendants. The effect is to shrink the class of defendants who might be acquitted as a result of mental disease or defect almost to the vanishing point. "Only in the rare case . . . will even a legally insane defendant actually lack the requisite *mens rea* purely because of mental defect." *United States* v. *Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987); *accord* H.R. Rep. No. 98-577 at 15 n.23 (1983); see Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of Abolishing the Insanity Defense*, 87 Cornell L. Rev. 1509, 1522 & n.45 (2002) (explaining that "even the most debilitating mental illness rarely negates the appropriate mental state").

The upshot is that, in many situations where an affirmative insanity defense would "excuse a defendant from customary criminal responsibility," *Clark*, 548 U.S. at 768, Kansas's *mens rea* approach will not. A "man who commits murder because he feels compelled by demons," *Pohlot*, 827 F.2d at 900, or a defendant who believes that "a wolf . . . has ordered him to kill the victim," *Delling* v. *Idaho*, 133 S. Ct. 504, 505 (2012) (Breyer, J., dissenting from denial of certiorari), are both capable of forming the intent required to commit homicide—and thus are not cognitively incapacitated—yet lack the "ability . . . of the normal individual to choose between good and evil." *Morissette*, 342 U.S. at 250. In Kansas, that is irrelevant: These defendants would be guilty. See Rosen, *supra*,

at 261–62 (collecting examples of defendants acquitted under the traditional defense who would be guilty in Kansas).

In short, the same evidence that would lead to an acquittal in almost every other state will lead to a conviction in Kansas. To be sure, that evidence may still be relevant at sentencing. See Br. in Opp. 23–24. But a reduced punishment is a far cry from an acquittal, which avoids the many serious consequences that attend a criminal conviction "apart from the [resulting] sentence." See *Ball* v. *United States*, 470 U.S. 856, 865 (1985); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404–405 (1958). The *mens rea* approach is thus "a jarring reversal of hundreds of years of moral and legal history." ABA Standards 301.

The Kansas Supreme Court's attempts to defend the *mens rea* approach do not withstand scrutiny. The decision below relied heavily on *Bethel*, which rejected due process and Eighth Amendment challenges to Kansas's abolition of the insanity defense. 66 P.3d at 851–52. But *Bethel* wrongly believed that the "affirmative insanity defense is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law." *Id.* at 851; J.A. 243–44. In fact, as shown above, "the law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong." *Delling*, 133 S. Ct. at 504 (Breyer, J., dissenting); *supra* pp. 20–26.

Bethel was also wrong, for the reasons just explained, to say that "the Kansas Legislature has not abolished the insanity defense but rather redefined it." 66 P.3d at 851. That contention is both inconsistent with the principles discussed above and with the Kansas Supreme Court's own repeated recogni-

tion that Kansas has "legislatively abolish[ed] the insanity defense." *Jorrick*, 4 P.3d at 617. The *mens rea* approach prevents a broad swath of mentally ill individuals from presenting a complete defense even if they cannot tell right from wrong.

Finally, *Bethel*'s Eighth Amendment analysis began and ended with whether "punishing a person who committed an offense as a result of mental disease is tantamount to punishing the person because he has a mental disease," and is thus proscribed by *Robinson,* 370 U.S. 660. *Bethel*, 66 P.3d at 852. The court's answer was no, because Kansas law "does not expressly or effectively make mental disease a criminal offense." *Id.* *Bethel* did not consider either the historical or the proportionality analyses discussed above. See *supra* § I.B.

Nor do this Court's precedents permit replacing the historical insanity defense with a *mens rea* approach. In *Clark*, this Court clarified that it has never determined whether Constitution mandates an insanity defense. 548 U.S. at 752 n.20. And the Arizona scheme the court considered in *Clark* preserved "the requirement that the accused know his act was wrong," and thus did not "change the meaning of the insanity standard." *Id.* at 754, 755 n.24. Kansas's scheme does not preserve that requirement, and thus works the fundamental change that was absent in *Clark*. For that reason, Kansas's *mens rea* approach is different from any scheme this Court has considered. And, for all the reasons set forth above, it is unconstitutional.

CONCLUSION

The Court should reverse the decision below and remand for a new trial.

Respectfully submitted,

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
CHIKE B. CROSLIN
GABRIEL SCHONFELD
LUCAS CROSLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP*
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063
s-schrup@law.northwestern.edu

NAOMI IGRA
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104
(415) 772-7495

MERYL CARVER-ALLMOND
CLAYTON J. PERKINS
CAPITAL APPELLATE DEFENDER OFFICE
700 S.W. Jackson Street
Suite 903
Topeka, KS 66603
(785) 291-3207

Counsel for Petitioner

May 31, 2019

* Counsel of Record

ADDENDUM

FEDERAL AND STATE INSANITY-DEFENSE LAWS

Contents	
Moral incapacity jurisdictions	Add. 1–6
Model Penal Code jurisdictions	Add. 6–13
M'Naghten jurisdictions	Add. 13–23
Unique-test jurisdictions	Add. 23–24
Cognitive incapacity jurisdictions	Add. 24
Abolition jurisdictions	Add. 24–25

Category	Statute/case law
Arizona	
Moral incapacity	"A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense." Ariz. Rev. Stat. Ann. § 13–502(A).

Colorado	
Moral incapacity (plus mens rea)	"The applicable test of insanity shall be: (a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; or (b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law." Colo. Rev. Stat. § 16–8–101.5(1).

Delaware	
Moral incapacity	"In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct." Del. Code Ann. tit. 11, § 401(a).
Georgia	
Moral incapacity (plus volitional)	"A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence." Ga. Code Ann. § 16–3–2. "A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime." Ga. Code Ann. § 16–3–3.

Illinois	
Moral incapacity	"A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 Ill. Comp. Stat. 5/6–2(a).
Indiana	
Moral incapacity	"A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35–41–3–6(a).
Louisiana	
Moral incapacity	"If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." La. Stat. Ann. § 14:14

Maine	
Moral incapacity	"A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct." Me. Stat. tit. 17-A, § 39(1).
Ohio	
Moral incapacity	"A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves … that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." Ohio Rev. Code Ann. § 2901.01(A)(14).
South Carolina	
Moral incapacity	"It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(A).

South Dakota	
Moral incapacity	"'Insanity,' the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act, the person was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior." S.D. Codified Laws § 22-1-2(20).
Texas	
Moral incapacity	"It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." Tex. Penal Code Ann. § 8.01(a).
Arkansas	
Model Penal Code	"'Lack of criminal responsibility' means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either: (A) Appreciate the criminality of his or her conduct; or (B) Conform his or her conduct to the requirements of the law." Ark. Code Ann. § 5–2–301(6).

Connecticut	
Model Penal Code	"In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." Conn. Gen. Stat. § 53a–13(a).
District of Columbia	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Bethea* v. *United States*, 365 A.2d 64, 79 (D.C. 1976).
Hawaii	
Model Penal Code	"A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law." Haw. Rev. Stat. § 704–400(1).

Kentucky	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ky. Rev. Stat. Ann. § 504.020(1).
Maryland	
Model Penal Code	"A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to: (1) appreciate the criminality of that conduct; or (2) conform that conduct to the requirements of law." Md. Code Ann., Crim. Proc. § 3–109(a).

Massachusetts	
Model Penal Code	"Where a defendant asserts a defense of lack of criminal responsibility and there is evidence at trial that, viewed in the light most favorable to the defendant, would permit a reasonable finder of fact to have a reasonable doubt whether the defendant was criminally responsible at the time of the offense, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant was criminally responsible. 'In this process, we require the Commonwealth to prove negatives beyond a reasonable doubt: that the defendant did not have a mental disease or defect at the time of the crime and, if that is not disproved beyond a reasonable doubt, that no mental disease or defect caused the defendant to lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.'" *Commonwealth* v. *Lawson*, 62 N.E.3d 22, 28 (Mass. 2016) (citation omitted).

Michigan	
Model Penal Code combined with *M'Naghten*	"It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400 of the mental health code … or as a result of having an intellectual disability as defined in section 100b of the mental health code … that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." Mich. Comp. Laws Ann. § 768.21a(1).
Oregon	
Model Penal Code	"A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." Or. Rev. Stat. § 161.295(1).

Rhode Island	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness or his conduct or to conform his conduct to the requirements of the law were so substantially impaired that he cannot justly be held responsible." *State* v. *Carpio*, 43 A.3d 1, 12 n.10 (R.I. 2012).
Vermont	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks adequate capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law." Vt. Stat. Ann. tit. 13, § 4801(a)(1).

West Virginia	
Model Penal Code	"When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case." *State* v. *Fleming*, 784 S.E.2d 743, 751–52 (W. Va. 2016).
Wisconsin	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. Stat. § 971.15(1).

Wyoming	
Model Penal Code	"A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Wyo. Stat. Ann. § 7-11-304(a).
Alabama	
M'Naghten	"It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." Ala. Code § 13A–3–1(a).

California	
M'Naghten	"In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense." Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 754, 776 (Cal. 1985).
Florida	
M'Naghten	"It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when: (a) The defendant had a mental infirmity, disease, or defect; and (b) Because of this condition, the defendant: 1. Did not know what he or she was doing or its consequences; or 2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong." Fla. Stat. § 775.027(1).

Iowa	
M'Naghten	"A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act." Iowa Code § 701.4.
Minnesota	
M'Naghten	"No person having a mental illness or cognitive impairment so as to be incapable of understanding the proceedings or making a defense shall be tried, sentenced, or punished for any crime; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong." Minn. Stat. § 611.026.

Mississippi	
M'Naghten	"To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing of the act the accused was laboring under such defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing, or (2) if he did know it, that he did not know that what he was doing was wrong." *Parker* v. *State*, No. 2016-CT-01502-SCT, 2019 WL 2223514, at *3 (Miss. May 23, 2019).
Missouri	
M'Naghten	"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he was incapable of knowing and appreciating the nature, quality or wrongfulness of his or her conduct." Mo. Rev. Stat. § 562.086(1).
Nebraska	
M'Naghten	"Under our current common-law definition, the two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong." *State* v. *Hotz*, 795 N.W.2d 645, 653 (Neb. 2011).

Nevada	
M'Naghten	"To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law." *Finger* v. *State*, 27 P.3d 66, 84–85 (Nev. 2001).
New Jersey	
M'Naghten	"A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence." N.J. Stat. Ann. § 2C:4-1.

New Mexico	
M'Naghten (plus volitional)	"In order to support a verdict of insanity under the *M'Naghten* test, the jury must be satisfied that the defendant (1) did not know the nature and quality of the act or (2) did not know that it was wrong. [¶] This rule prevailed in New Mexico until 1954 when this court in *State* v. *White*, 58 N.M. 324, 270 P.2d 727 (1954) made a careful analysis of the authorities and made a limited extension of the *M'Naghten* rule, adding a third ingredient. The court held that if the accused, (3) as a result of disease of the mind 'was incapable of preventing himself from committing' the crime, he could be adjudged insane and thereby relieved of legal responsibility for what would otherwise be a criminal act." *State* v. *Hartley*, 565 P.2d 658, 660 (N.M. 1977).
New York	
M'Naghten	"In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong." N.Y. Penal Law § 40.15.

North Carolina	
M'Naghten	"[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." *State* v. *Thompson*, 402 S.E.2d 386, 390 (N.C. 1991).
Oklahoma	
M'Naghten	"All persons are capable of committing crimes, except those belonging to the following classes: … 4. Mentally ill persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness …." Okla. Stat. tit. 21, § 152. This language is construed to preserve the *M'Naghten* standard. See *Johnson* v. *State*, 841 P.2d 595, 596 (Okla. Crim. App. 1992).

Pennsylvania	
M'Naghten	"Common law M'Naghten's Rule preserved.—Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this Commonwealth on the effective date of this section." 18 Pa. Cons. Stat. § 314(d).
Tennessee	
M'Naghten	"It is an affirmative defense to prosecution 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 or wrongfulness of the defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence." Tenn. Code Ann. § 39-11-501(a).

United States (civilian)	
M'Naghten	"It is an affirmative defense 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 defense." 18 U.S.C. § 17(a).
United States (military)	
M'Naghten	"It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense." *Manual for Courts-Martial United States* (2016 ed.), R.C.M. 916(k)(1).

Virginia	
M'Naghten (plus volitional)	"As applied in Virginia, the defense of insanity provides that a 'defendant may prove that at the time of the commission of the act, he was suffering from a mental disease or defect such that he did not know the nature and quality of the act he was doing, or, if he did know it, he did not know what he was doing was wrong.' … In addition, we have approved in appropriate cases the granting of an instruction defining an 'irresistible impulse' as a form of legal insanity. 'The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.'" *Orndorff* v. *Commonwealth*, 691 S.E.2d 177, 179 n.5 (Va. 2010) (citations omitted).

Washington	
M'Naghten	"To establish the defense of insanity, it must be shown that: (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that: (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) He or she was unable to tell right from wrong with reference to the particular act charged." Wash. Rev. Code § 9A.12.010.
New Hampshire	
Durham	"A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions." *State* v. *Fichera*, 903 A.2d 1030, 1034 (N.H. 2006).

North Dakota	
Unique formulation	"An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs: a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and b. It is an essential element of the crime charged that the individual act willfully." N.D. Cent. Code 12.1-04.1-01(1).
Alaska	
Cognitive incapacity	"In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct." Alaska Stat. § 12.47.010(a).
Idaho	
Abolished	"Mental condition shall not be a defense to any charge of criminal conduct." Idaho Code § 18–207(1).

Kansas	
Abolished	"It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, 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. § 21–5209.
Montana	
Abolished	"Evidence that the defendant suffered from a mental disease or disorder or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." Mont. Code Ann. § 46-14-102.
Utah	
Abolished	"It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged." Utah Code Ann. § 76-2-305(1)(a).