No. 18-6135

In the Supreme Court of the United States

JAMES K. KAHLER,
Petitioner,

v.

KANSAS,
Respondent.

ON WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

BRIEF OF *AMICI CURIAE* LEGAL HISTORIANS AND SOCIOLOGISTS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are four of the leading experts on the insanity defense and Anglo-American legal history. *Joel P. Eigen*, the lead contributor to this brief, is Emeritus Charles A. Dana Professor of Sociology at Franklin & Marshall College, where he focuses on mental derangement and criminal responsibility, juvenile justice, and capital punishment. Eigen has been teaching and writing about the insanity defense and related issues throughout his career. Eigen published *Witnessing Insanity: Madness and Mad-doctors in the English Court*, the first systematic investigation of the evolution of medical testimony in British insanity trials from its beginnings in 1760 to 1843, when the insanity rules were formulated during the trial of Daniel M'Naghten.

Thomas A. Green is John Philip Dawson Professor of Law, Emeritus, of the University of Michigan Law School, where he focuses on the history of criminal law and teaches English and American legal history. He is the author of *Freedom and Criminal Responsibility in American Legal Thought* (2014) and *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (1985). Green served for twenty-five years as the editor of *Studies in Legal History* and is a past president of the American Society for Legal History.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. Both parties have consented to its filing of this brief.

Richard D. Moran, Professor of Sociology at Mt. Holyoke College, is a criminologist who focuses his research on the insanity defense, capital punishment, and the history of the electric chair. In 1981, Moran published *Knowing Right from Wrong: The Insanity Defense of Danial McNaughtan*, the first detailed study of the modern insanity defense. He has also authored numerous professional articles and reviews, testified before the Massachusetts Legislature and at Congressional Judiciary Committee Hearings, and served as a commentator for National Public Radio's Morning Edition, and written op-eds for the Boston Globe, Washington Post, Los Angeles Times, Philadelphia Inquirer, Chicago Tribune, Christian Science Monitor, New York Times, and Newsweek.

Andrew Scull is Distinguished Professor at the University of California, San Diego. He is the author of a number of scholarly books and articles relating to the history of insanity. His articles have appeared in leading journals in a variety of disciplines, including British Journal of Psychiatry, Psychological Review, European Journal of Sociology, and Medical History.

Amici believe this case raises important questions about principles of criminal responsibility, the integral role of the insanity defense in Anglo-American law, and the inadequacy of the "mens rea alternative" to the traditional affirmative defense. Their teaching and research on the subject have given them a unique appreciation of the historical and doctrinal significance of the affirmative defense.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fourteenth Amendment protects those principles deemed "fundamental

to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). 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 (1977) (internal quotations omitted). Therefore, this Court's "primary guide" in determining whether a principle "is fundamental is, of course, historical practice." *Montana* v. *Egelhoff*, 518 U.S. 37, 43 (1996).

Nothing could be more fundamental to American justice than the insanity affirmative defense. For thousands of years, societies have debated the question of insanity and criminal responsibility. In the fifth and sixth centuries, B.C., Hebrew scholars and Greek philosophers considered the distinction between culpable and nonculpable acts to be among the "unwritten laws of nature supported by the universal moral sense of mankind." B. Jones, *The Law and Legal Theory of the Greeks* 264 (1956); Anthony Platt & Bernard 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).

The insanity defense, likewise, has been in the marrow of Anglo-American criminal jurisprudence for hundreds of years. "For over four centuries, Anglo–American law has held that there can be no criminality when there is a total defect of understanding or a loss of the ability to comprehend reality." *State* v. *Herrera*, 895 P.2d 359, 375 (Utah 1995) (Stewart, J., dissenting). And "[a]ll civilized nations have recognized that it was futile and useless to undertake to punish a person who is non compos mentis for any act." *Sinclair* v. *State*, 132 So. 581, 584 (Miss. 1931).

When, in 1843, the *M'Naghten Rules* were articulated in London, they were only the latest expression of the centrality of moral context to criminal punishment: Did the defendant appreciate (not just "know") the nature and consequences of his actions? American states (including Kansas) quickly adopted the *M'Naghten Rules*, in large part because the question of "knowing right from wrong" in its various versions was already a part of American jurisprudence. The endurance of the insanity defense up to the present day can perhaps best be explained by a judge who, in 1787, instructed the jury of the need to assess whether the accused acted with knowledge of good and evil; a question that was not "only true in point of law [but of] justice, humanity, and reason." Tr. of Francis Parr (Jan. 15, 1787), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?id=t17870115-1-person10&div=t17870115-1#highlight (last visited June 5, 2019).

"The underlying premise of our political and legal institutions is that men and women are moral agents, free to choose between right and wrong." *Herrera*, 895 P.2d at 376. The Bill of Rights and the Declaration of Independence are premised on that fundamental proposition, as is our criminal law. See *id.* "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." *Morissette* v. *United States*, 342 U.S. 246, 250 n.4. (1952). It is for that reason that "[o]ur collective conscience does not allow punishment where it cannot impose blame." *Holloway* v. *United States*, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

As shown below, "[t]he law does not now, and has not for centuries, premised criminality solely on an intent to commit a criminal act when extenuating circumstances justify or excuse the act and negate moral wrongfulness." *Herrera*, 895 P.2d at 376. The Court should so recognize and hold that the Eighth and Fourteenth Amendments prohibit the legislative abolition of the insanity defense.

ARGUMENT

I. ISSUES OF INSANITY AND CRIMINAL LIABILITY HAVE BEEN DEBATED SINCE ANTIQUITY

The mad, like the poor, have always been with us. Since antiquity, physicians, philosophers, and theologians have sought to define the elements of madness. Also enduring since antiquity has been a debate concerning the legal exposure of the mad. Were they "punished enough by [their] very madness," see 1 *The Digest of Justinian* 821.11 (Alan Watson trans., Univ. Pa. Press 1985) (c. 533 A.D.), or were they the proper subject of the laws of God and man?

The first and most enduring way that humans set themselves on a moral course for justice was to recognize the dichotomy of "good and evil" and the need to choose wisely. This notion, of course, appears in the Book of Genesis. Tempted by the serpent, Adam and Eve ate from the tree of the knowledge of good and evil and were promptly banished from the Garden of Eden. Although *knowledge of good and evil* can take on a range of meanings, central to any interpretation is punishment warranted by human choice.

As a result, scholars have long referred to Adam and Eve's lapse not as an act of defiance but as a "mor-

ally significant act." Anthony Platt & Bernard L. Diamond, *The Origins of the Right and Wrong Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1228 (1966). Thus, King Solomon beseeched God to grant him "an understanding mind to govern the people, that I may discern between good and evil." 1 *Kings* 3:9. And in the Book of Hebrews, righteousness was described as those "who have their faculties trained by practice to distinguish good from evil." *Hebrews* 5:14.

Early Hebrew scholars focused on the question, *Are all humans capable of making the choice between good and evil?* Based on this inquiry, Hebrew law differentiated between intentional and unintentional harm. Platt & Diamond, *Origins of Right and Wrong*, at 1227–28. This distinction threw into sharp relief the offenses committed by two classes of offenders deemed beyond the capacity to choose: children and the insane. See George Horowitz, *The Spirit of Jewish Law* 167–70 (1933). Neither group was required by law to compensate the victims of their purported offenses. See *The Babylonian Talmud, Baba Kamma* 501–02 (I. Epstein ed. 1935) (c. 500).

Early Greek philosophy also focused on the legal remedies for those deemed insane. Plato's view was to "[l]et their kinfolk take care of them," rather than subjecting them to punishment. Plato, *Laws* Book XI, at 934 (Thomas L. Pangle trans., 1988) (c. 345 B.C.). Plato also considered the dichotomy of intentional vs. unintentional killings—concluding that calculated killings should be punished more severely than those done in the heat of passion. *Id*. at 867. Humans, according to Plato, possess free choice, "which makes us, and not Heaven, responsible for the good and evil in

our lives." Platt & Diamond, *Origins of Right and Wrong*, *supra*, at 1229 (quoting Plato, The Republic 350 (F.M. Cornford trans., 1945)). This sentiment endures through Dante, Shakespeare, and beyond. See Dante Alighieri, *The Divine Comedy: Purgatorio* Canto 16, 66–84; William Shakespeare, *Julius Caesar* act 1, sc. 2, 140–41.

Aristotle also inquired into the mind of the accused by speculating on the forces that constrain the capacity for choice. In *Nicomachean Ethics*, for instance, he surveyed a range of mental states that mitigate the capacity for deliberate choice. "A person is morally responsible if," he wrote, "with knowledge of the circumstances and in the absence of extreme compulsion, he deliberately chooses to commit a specific act." Platt & Diamond, *Origins of Right and Wrong*, *supra*, at 1229 (quoting Aristotle, *The Nicomachean Ethics* 58 (Ross transl. 1954) (c. 384 B.C.E.)). Thus, children and the insane were excluded from the ranks of the morally responsible.

As to insanity, Aristotle focused on knowledge of the events surrounding the act and of the likely consequences of the act, see *id.*, suggesting today's affirmative defense of "mistake of fact," Nigel D. Walker, *The Insanity Defense Before 1800*, 477 Annals Am. Acad. Pol. & Soc. Sci. 25, 26 (1985). One who profoundly confused the nature and likely result of his acts did not make a deliberate, willful choice appropriate for punishment.[2]

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[2] One element of Aristotle's thinking—and that of other ancient philosophers—became the defining feature of nineteenth-century courtroom testimony: the presence of delusion. Joel P. Eigen, *Mad-doctors in the Dock: Defending the*

Later, the Romans sought to distinguish intentional from unintentional crimes, weighing elements of willful harm (dolus) and malice (culpa) in determining the seriousness of an offender's transgression. The earliest expression of Roman law's approach appears in Justinian's *Digest*, a compendium of juristic writings on Roman law compiled by order of the Byzantine emperor Justinian I in the sixth century. Preface to *The Digest of Justinian*, *supra*. The *Digest* included the words of Modestinus (a celebrated Roman jurist from the third century) that "if a madman commit homicide he is not covered by the [law] because he is excused by the misfortune of his fate." Walker, *Insanity Defense*, *supra*, at 26 (quoting *Digest* 821.11). Under Roman law, without the *capacity* to contemplate evil and to choose to inflict harm, the accused is "not covered by the law" and thus could not be criminally punished.[3] John Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 317 (1894).

Diagnosis 29–49 (2016). First articulated by Hippocrates, Hebrew scholars and Greek philosophers associated fear with a "shadow on the mind," *Galen On the Affected Parts* 93 (Rudolph E. Siegel trans. & ed. 1976)—a phrase that would be heard millennia later at the trial of Daniel McNaughten, see discussion *supra* Section II.E.

[3] The insane were not the only offenders deemed beyond the reach of law. The fourth-century philosopher St. Augustine of Hippo wrote that children were protected by "their profound ignorance . . . [a] complete want of reason to impel them in the direction of either right or wrong." 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

These sources paved the way for Anglo-American law to recognize the injustice of punishing those individuals who, because of their mental state, were ignorant of their actions and could not choose between good and evil.

II. MORAL RESPONSIBILITY FOR CRIMES EMERGED AS A BEDROCK PRINCIPLE OF ANGLO-AMERICAN JURISPRUDENCE

Influenced by Western religious ideas, the attribution of criminal responsibility changed dramatically during the thirteenth century. Originally, culpability might well have followed something close to strict liability—"the doer of the deed was responsible whether he acted innocently or inadvertently." Wigmore, *supra*, at 317. By the end of the twelfth century, however, the criminal law began to shift from blood feud and vengeance to question what makes an act morally blameworthy. See Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 975–82 (1932). The concept of *mens rea*—the "guilty mind" or "wrongful intent"—became an essential element of a crime. See Robert H. Dreher, *Origin, Development and Present Status of Insanity as a Defense to Criminal Responsibility in the Common Law*, 3 J. H. Behav. Sci. 47, 49–52 (1967); Joel P Eigen, *Witnessing Insanity: Madness and Mad-doctors in the English Court* 35 (1995).

This consideration was relatively straightforward in most criminal trials; intention could logically be inferred from the accused's action. But there were (as there is today) particular classes of offenders whose intention was more challenging to discern—namely, the

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Calif. L. Rev. 1227, 1232 (1966) (quoting Augustine, *On the Forgiveness of Sins and Baptism* Book I, Ch. 66–67).

very young and the very deranged. To instruct juries on how to assess culpability in trials that featured either class of defendant, judges began asking a variation of one question: *Did the accused appreciate the difference between good and evil?*

This section provides a brief history of the insanity defense in Anglo-American jurisprudence, showing that lawgivers at each turn—from thirteenth-century England to nineteenth-century America—have exculpated those who, because of their mental illness, could not act with the requisite moral culpability.

A. The common law concept of *mens rea* sets the stage for defenses based on lack of moral culpability

While a system of absolute liability may have initially characterized Anglo-Saxon law, that came to an end after the Norman Conquest of 1066. See Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 J. Crim. L. & Crim. 627, 629–30 (1939). The Norman kings started a centuries-long effort to centralize what had been shire-specific legal codes into a common law applicable to all the king's subjects. See Eigen, *Witnessing Insanity, supra*, at 35.

One of these legacies was their incorporation of the canon law's position on moral guilt. *Id.* In the eyes of ecclesiastics—who, for the most part made up the Norman judiciary—moral responsibility was fundamental to criminal punishment. *Id.* The transgressive act itself was, of course, not inconsequential, but shorn of the determination to act with malice, the act itself carried little legal significance. *Id.* By the later twelfth century, royal jurisdiction over felony had become dominant, and canon law influence had made itself felt. Historians have considered this era to constitute

the formative decades of the common law's approach to the "mental element" in culpability. *Id*. In time, the sinfulness of the wrongdoer came to be characterized as evil intent—*mens rea*. See Chesney, *supra*, at 629–34.

England's first written survey of common law in the king's courts, *On the Law and Customs of England* (c. 1235), commonly known as *Bracton*, explicitly addressed the *mens rea* element of criminal offenses. Authored in part by Henri de Bracton (King Henry II's chief legal scribe and deacon of the Exeter Cathedral), the treatise incorporated the religious doctrine of *moral* accountability into *legal* responsibility. See Eigen, *Witnessing Insanity*, *supra*, at 35. *Bracton* based the common law's notion of intent on the Latin principle *voluntas nocendi*—"the will to harm." Walker, *Insanity Defense*, *supra*, at 28 (quoting *Bracton*). The treatise states that "a crime is not committed unless the will to harm be present . . . . [I]n misdeeds, we look to the will and not the outcome." Norman J. Finkel, *Insanity on Trial* (1988) (quoting *Bracton*).

Drawing on Justinian, Bracton then described the blameless as those who are "not much above the beasts, who lack reasoning." Walker, *Insanity Defense*, *supra*, at 28. That is because the faculty that had long distinguished humans from other species had either not had time to form (infancy) or had been effaced by mental distraction (insanity). See 1 Nigel D. Walker, *Crime and Insanity in England*, *The Historical Part* 40 (1968).

Although infancy and insanity defenses began taking shape during this period, a fully articulated affirmative defense would await centuries, see discussion *infra* Section II.B. *Id*. at 25–26. From the thirteenth through sixteenth centuries, juries could not acquit

based on insanity—they were bound to try based on the physical evidence of the crime. See Sayre, *supra*, at 1004–05. But, from the outset of the criminal trial jury (c. 1220), juries could—and did—bring in special verdicts of insanity (stating "*non per feloniam sed per insaniam*"), which almost invariably led to a royal pardon. See Naomi Hurnard, *The King's Pardon Before A.D. 1307* (1969).

B. The insanity defense takes shape in the centuries before the *M'Naghten Rules*

In 1505, the Yearbooks of Henry VII announced that "[a] man was accused of the murder of an infant. It was found that at the time of the murder the felon was of unsound mine [*de non saine memoire*.] Wherefore it was decided that he should go free . . . ." Walker, *Crime and Insanity*, *supra*, at 26 (alteration in original) (quoting Yearbooks of Henry VII, 21 Michaelmas Term, plea 16 (1505)). This appears to be the first recorded acquittal of a jury by reason of insanity. See *id.* at 27; Kathryn J. Fritz, Note, *The Proposed Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?,* 22 Am. Crim. L. Rev. 49, 50 n.9 (1984).

Judicial commentaries on trials from this era confirm this trend. Sir Edward Coke (1552–1634)—a celebrated English judge, jurist, and politician—wrote in 1603 that "[n]o felony or murder can be committed without a felonious intention and purpose." 2 *The Reports of Sir Edward Coke* 124 (George Wilson ed. 1777). Judge Michael Dalton reported that, "if one that is '*non compos mentis*' or an ideot, kill a man, this is no felony; for they have not knowledge of good or evill, nor can have a felonius intent, nor a will or minde to doe harm." Platt & Diamond, *The Origins of Right and Wrong*, *supra*, at 1235 (quoting Michael Dalton, *The Countrey Justice* 244 (1630)).

Jurists Lord Matthew Hale (1609–1676) and William Blackstone (1723–1780) continued Coke's work. For instance, Hale argued that individuals who could not reason were incapable of understanding the nature of their actions and were unable to choose to do evil. See 1 Sir Matthew Hale, *History of the Pleas of the Crown* 14–15 (1736) ("where there is a total defect of the understanding, there is no free act of the will"). Borrowing from Coke and Hale, Blackstone similarly opined that "[i]n criminal cases, . . . idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." 4 William Blackstone, *Commentaries* *24 (1765–1769).

The *Old Bailey Sessions Papers*, a cache of archival documents,[4] confirms that these principles guided judges and juries in early modern England. Eigen, *Witnessing Insanity*, *supra*, at 7–8. Indeed, they show that in the decades before the *M'Naghten Rules*, judges *routinely* instructed jurors to acquit those who lacked capacity to understand that what they were doing was wrong. *Id* at 31–35. For instance, in a 1787 trial, a judge gave the following instruction: "[A] man who is so far disordered in his mind, as to be utterly

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[4] Beginning in 1678, enterprising printers recognized the decidedly morbid fascination that Londoners displayed in the life or death drama that was daily on offer at Old Bailey, the city's central criminal court. See generally John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 263, 271–272 (1983). Sending shorthand writers into the Old Bailey, the editors offered narrative accounts of the day's criminal trials, particularly the interrogation of witnesses and the judge's framing of the evidence for the jury's deliberation.

incapable of distinguishing between right and wrong, good and evil . . . is not responsible for those actions; he in truth is not a moral agent." Tr. of Francis Parr (Jan. 15, 1787), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?id=t17870115-1-person10&div=t17870115-1#highlight (last visited June 5, 2019). This determination, he reminded the jurors, was "certainly true in point of law, as well as justice, humanity, and reason." *Id*.

Another judge from this time period similarly instructed the jury as follows:

> The defence of insanity or disorder of mind where it is carried to a sufficient degree, is a defence for all crimes whatever, from the highest to the lowest . . . . [I]n order to amount to that, it is necessary that the disorder of the mind should be such as takes away from the party all moral agency and accountability; such as destroys in them, for the time at least, all power of judging between right and wrong . . . .

Tr. of Samuel Burt (July 19, 1786), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?div=t17860719-31 (last visited June 5, 2019).

These instructions are, of course, different from the question, *Did the accused know the nature of what he was doing?* That a defendant could execute the separate elements of a crime says nothing about whether he was capable of distinguishing right from wrong. It did not address the question of *moral* agency, which juries were reminded to consider repeatedly by Anglo-

American judges. See Eigen, *Witnessing Insanity*, *supra*, at 7–8.

Even the most notorious insanity trials of the eighteenth century—of Edward ("Mad Ned") Arnold in 1723, which provided the "wild beast" test, and of Earl Ferrers in 1760—included the critical "right from wrong" question. Eigen, *Witnessing Insanity*, *supra*, at 39–41. Although those cases are well known due to their political context,[5] it is the quotidian insanity trial at the Old Bailey as set forth in the *Old Bailey Sessions Papers* that underscores how commonplace and fundamental the question was to assigning criminal responsibility. See *Id.*

C. *Hadfield* in 1800 extends the insanity defense to those who, because of their delusions, intended to commit crime

Had common law courts been presented with only those who, because of mental illness, did not know what they were doing, moral accountability would have been somewhat easy to adjudicate. More difficult, however, were cases of offenders who clearly intended

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[5] Mad Ned Arnold was tried and convicted of shooting Lord Onslow, a nobleman aligned with King George I, despite a servant testifying that Arnold repeatedly complained that Lord Onslow was bewitching him with devils and imps. See Finkel, *supra*, at 12. Earl Ferrers, an English nobleman, was tried and convicted at the House of Lords for killing a servant. *Id.* at 13. To the extent those cases have "been cited to demonstrate how strictly the criteria of insanity were applied by criminal courts[,] . . . [i]n fact they could hardly have been less typical." Walker, *Crime and Insanity*, *supra*, at 53. In any event, the case of James Hadfield ensured that the "wild beast" test remained an outlier. See discussion *infra* Section II.C.

to commit the crime but were driven to do so by their delusions. Eigen, *Mad-doctors in the Docksupra* note 2*,* at 35–36. In these cases, the court (or the jury) had to decide whether the accused should still be held criminally responsible.

The definitive answer came with the trial and acquittal of James Hadfield in 1800. See generally Richard Moran, *The Origins of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 Law & Society Rev. 487 (1985). Hadfield fought as a soldier in Northern France during the Napoleonic Wars. See Eigen, *Witnessing Insanity*, *supra*, at 50. After suffering eight saber wounds to his head, he was left for dead. See Moran, *The Origins of Insanity*, *supra*, at 493. Miraculously, he recovered and returned to London—where he fell under the spell of a millenarian cult that convinced him that his death at the hands of the state would so closely resemble Christ's crucifixion that it would usher in the Second Coming. See Eigen, *Witnessing Insanity*, *supra*, at 50. One evening, Hadfield hid in the Drury Lane Theatre and waited for King George III to ender the Royal Box. Moran, *The Origins of Insanity*, *supra*, at 493. As the king rose to acknowledge the audience singing *God Save The King*, Hadfield turned, faced his target, and shot—just narrowly missing him. *Id*. Hadfield was wrestled to the ground by a nearby police officer—his sergeant in the army—who recognized and identified him immediately. *Id*.

Hadfield's chances for acquittal were not promising. His acts were clearly intentional. He carefully planned the shooting; he knew he had a loaded firearm in his hand; he took his time to gain the best shot; and he knew that his action was illegal. Indeed, the illegality

of the act was precisely why he chose to do it: He was seeking an execution by the state.

But his court-appointed attorney, Thomas Erskine (eventually to become the Solicitor General), masterfully argued that Hadfield's mental illness was precisely the type of madness protected by the law. According to Erskine, delusions that are "unaccompanied by frenzy or a raving madness [are] the true character of insanity." Moran, *Origins of Insanity*, *supra*, at 503 (quoting *Hadfield* trial transcript). The "disease of insanity," he explained, occurs "if the 'premises from which they reason' are uniformly false, and cannot be shaken even with the clearest evidence." *Id.* Erskine then carefully connected Hadfield's diagnosis to the crime, stipulating that the crime had to be the "immediate, unqualified offspring of [the] disease." Moran, *Origins of Insanity*, *supra*, at 503. And in Hadfield's case, it was. The judge "suggested" acquittal by reason of insanity, and the jury agreed. See Walker, *Crime and Insanity*, *supra*, at 78 ("It was suggested to the jury that they should acquit the accused . . . and this they duly did.").

Unlike *M'Naghten*, Hadfield's acquittal did not trigger an eponymous set of rules to be followed in future jury deliberations.[6] See *infra* Section II.E. Erskine's accomplishment, however, was far more significant: he successfully showed that a cool, calculated,

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[6] It did, however, cause Parliament to pass the Criminal Lunacy Bill, which required juries going forward to enter a special verdict of "Not Guilty on the Grounds of Insanity," thereby triggering a set procedure for the indefinite detention of mentally ill offenders. Walker*, Crime and Insanity*, *supra*, at 78.

and *intentional* act could be the act of a madman morally undeserving of criminal conviction. *Hadfield* also showed that the prior standard— "knowing right from wrong"—could not be limited to knowing *legal* wrong, but must also extend to knowing a *moral* wrong. Hadfield knew shooting the king was legally wrong; he did it precisely because he wanted to ensure his own execution. But Hadfield perceived the world through a lens so profoundly distorted that for him, the act was not morally wrong. Rather, to his deluded mind, it was manifestly right (indeed, *imperative*) to kill the king, so that Christ could return and ensure peace for all mankind.

D. Between 1800 and 1843, moral guilt solidifies as a necessary component to conviction

In the decades following *Hadfield*, delusion became the most commonly invoked insanity diagnosis at the Old Bailey. See Eigen, *Mad-doctors in the Dock*, *supra* note 2, at 80–83. So-called "mad-doctors" became increasingly frequent witnesses at trial, often displacing lay testimony—e.g., a neighbor's character testimony or descriptions given by on-scene witnesses—who were less likely to recognize circumscribed insanity. See Eigen, *Witnessing Insanity*, *supra*, at 120–22. When explained to the courtroom, the necessary implications of paranoid fears and fantasies challenged the jury to find the defendant's actions intentional but blameless. If one believed that Satan will take one's children and consign them to a burning cauldron in Hell, what furiously evil parent would *not* kill the children first to save them from falling into the devil's hands? Delusion, the jury learned, carried an irresistible spur to action. See *id*. at 136–43.

Delusions, however, were not the only form of insanity post-*Hadfield*. Between 1800 and 1843, Old Bailey juries listened as numerous pathological conditions were said to undermine a person's ability to form a "will to harm." *Id.* at 68–81. Following the English publication of Philippe Pinel's medical text in 1806—which introduced the concept of *manie sans délire*, insanity *without* cognitive disarray—jurors were forced to consider the legal significance of a clear-thinking madness, where only volition itself was diseased.[7] See Phillipe Pinel, *A Treatise on Insanity* 15–56 (D.D. Davis transl. 1806); see, *e.g.*, Tr. of John Hollingsworth (Sept. 14, 1840), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?div=t18400914-2316 (last visited June 5, 2019) (verdict of not guilty on insanity grounds after doctor testified his belief that the accused was "labouring under a blind influence, which he considers he has no power to counteract, and that he is morally not guilty, because he says, 'I cannot help it.'").

An Old Bailey jury considered just that question in Edward Oxford's 1840 trial for treason. Prosecuted for firing two pistols at Queen Victoria, Oxford's insanity defense had nothing to do with delusion. See Richard Moran, *The Punitive Uses of the Insanity Defense: The Trial for Treason of Edward Oxford (1840)*, 9 Int.

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[7] For example, a person afflicted with a condition like irresistible impulse, monomania, and moral insanity (i.e., a derangement of how one ought to feel towards one's children, spouse, or other relatives) would feel compelled to act but also retain an awareness of having destroyed the lives of their nearest and dearest. See James Prichard, *A Treatise on Insanity and Other Disorders Affecting the Mind* 12, 95 (1835).

J. Law & Psychiatry 171, 179–82 (1986). He did not, for instance, argue that he believed the Queen was plotting against him or that her death would save his fellow Londoners. Instead, Oxford's defense relied on a novel form of impairment—a discrete derangement of volition itself, a "lesion of will"—to show his conduct was not willful. As a medical witness testified, "A propensity to commit acts without apparent or adequate motive under such circumstances is recognized as a particular species of insanity, called . . . *lesion* of the will." Tr. of Edward Oxford (July 6, 1840), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?div=t18400706-1877 (last visited June 5, 2019).

Critical to Oxford's diagnosis, and thus his defense, was the complete absence of a motive. He could not provide any reason at all for shooting at the Queen. And, despite putting himself at risk of execution, Oxford he made no attempt to elude detection and freely admitted to committing the shooting. See Moran, *Punitive Uses, supra*, at 172. One of the five medical witnesses for the defense, Dr. Hodgkin, a lecturer on morbid anatomy, explained that Oxford's "lesion of will" meant more than a simple loss of self-control, but instead constituted a "morbid propensity" that "was the result of [a mental] disease." Tr. of Edward Oxford (July 6, 1840), Old Bailey Proceedings, Online, https://www.oldbaileyonline.org/browse.jsp?div=t18400706-1877 (last visited June 5, 2019).

The judge reminded the jurors that, having concluded that the pistols were loaded, their next task was to decide the issue of insanity. A man is not responsible for his crime, they were told, "if he is *non compos mentis*, or not able to distinguish between

right and wrong." *Id*. He then suggested that they find the accused insane and mentioned that the Queen would "prefer it if mercy was shown." *Id*. The Old Bailey jury agreed, finding him "NOT GUILTY, being Insane To be detained during Her Majesty's pleasure." *Id*.

E. The *M'Naghten Rules* formalize the necessity of moral guilt for a crime

Oxford's recognition of insanity absent wholesale delusion solidified the notion that moral guilt was a necessary component of conviction. But it was not until after the 1843 trial of Daniel M'Naghten that the requirement of "knowing right from wrong" was codified as the legal standard for the insanity defense.

M'Naghten murdered the secretary to the British Prime Minister, Sir Robert Peel, in a botched attempt to assassinate the prime minister himself. See Richard Moran, *Knowing Right from Wrong: the Insanity Defense of Daniel McNaughtan* 1 (1981). M'Naghten's defense rested on an overwhelming persecution delusion: he was convinced that Peel had sent assassins to kill him. Walker, *Crime and Insanity*, *supra*, at 90–91. To support his claim, Britain's most well-known asylum superintendents and private mad-doctors testified on M'Naghten's behalf. See Eigen, *Witnessing Insanity*, *supra*, at 154–55. According to one, M'Naghten's acts "flowed immediately out of that delusion . . . the impulse was so strong that nothing short of a physical impossibility, would prevent him from performing any act which his delusion might impel him to do." Tr. of Daniel M'Naghten (Feb. 27, 1843), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=def1-874-18430227&div=t18430227-874#highlight (last visited June 5, 2019) (testimony of surgeon William

M'Clewer). Another explained that "the commission of the act [was] placed beyond his moral control." *Id*. (testimony of surgeon Aston Key).

The jury acquitted M'Naghten, finding him "not guilty on the grounds of insanity." *Id*. The decision immediately came under fire, causing the House of Lords to request all fifteen common law judges submit to questions concerning the principles underlying the insanity defense. See Moran, *Knowing Right from Wrong*, *supra*, at 2. The answers became known as the *M'Naghten Rules*, and juries in subsequent insanity trials were instructed on them:

> [To] establish a defense on the grounds of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was labouring 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***.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843) (emphasis added). Under the *M'Naghten Rules*, even if jurors were satisfied that the accused could understand the nature of his acts (e.g., that he was shooting a gun to kill), they must still acquit upon finding that he did not know those acts were morally wrong.

The *M'Naghten Rules* came to dominate Anglo-American criminal law. See Moran, *Knowing Right from Wrong*, *supra,* at 2. But they did not represent the sea change people now ascribe to them. Rather, the *M'Naghten Rules* merely codified centuries of Anglo-American jurisprudence under which only defendants

who understood the difference between right and wrong could be held criminally responsible.

Accordingly, the States' wholesale adoption of the *Rules*—including in Kansas, see *State* v. *Mahn*, 25 Kan. 182, 185–86 (Kan. 1881)—was not surprising. Early American writings on criminal law were mostly appropriated from Coke, Hale, and Blackstone, see Platt & Diamond, *Origins of Right and Wrong*, *supra*, at 1248—all of whom discussed notions of moral blameworthiness as the basis for criminal punishment, see discussion *supra* Section II.B. And the necessity of the accused "knowing right from wrong" had already been articulated in American jurisprudence for nearly a hundred years. See *id*. at 1256–57 & app. tbl. 2 (noting that out of eleven insanity cases between 1816 to 1838, all but one instructed on "right and wrong," "good and evil," or a similar test focused on knowledge of "moral turpitude"; the other case did not explicitly refer to any test).

For instance, a jury in an 1816 arson case was instructed to consider "whether, at the time [the defendant] committed the offence, he was capable of distinguishing good from evil?" *Id.* at 1252 (quoting *Ball's Case*, 2 City-Hall Recorder 85 (N.Y.C. 1817)). And in a Pennsylvania trial five years before *M'Naghten*, the judge instructed the jury that, if they "believed that the prisoner was, at the time of committing the act charged, 'incapable of judging between right and wrong, and did not know he was committing an offence against the laws of God and man,' it would be their duty to acquit." *Id.* at 1255–56 (quoting *Commonwealth v. Miller*, 1 Phrenological J. 272 (1838)).

Although a number of states have since modified the M'Naghten rule, every American jurisdiction retained some form of affirmative insanity defense until 1979. See *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984). Today, forty-eight U.S. jurisdictions—forty-five 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. See Br. for Pet. Add. 1–24. It matters little whether the M'Naghten Rules themselves continue to serve as the formal criteria for an insanity defense. What matters is that the overwhelming majority of states still ask the same question Anglo-American judges have asked juries for centuries: Whether the accused understood the difference between right and wrong?

Kansas's decision to abolish the death penalty runs contrary to this bedrock principle of Anglo-American jurisprudence. "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 . . . ." *Sinclair*, 132 So. at 584 (Ethridge, J.). It therefore violates the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause.

CONCLUSION

Consistent with the ancient societies that pre-dated it, 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 *morally* 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. Kansas's decision to abolish the insanity defense is a historical aberration that runs contrary to the bedrock principle of moral responsibility that grounds the American legal system. The Court should correct Kansas's error.

Respectfully submitted.

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