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

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
LUCAS CROSLOW
CHIKE B. CROSLIN
GABRIEL SCHONFELD
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005

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

MERYL CARVER-ALLMOND
CLAYTON J. PERKINS
CAPITAL APPELLATE DEFENDER OFFICE
700 JACKSON, SUITE 903
TOPEKA, KS 66603

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF

Although Kansas opposed certiorari because it "has not abolished the insanity defense," Opp. 7, it has largely abandoned that claim. And wisely so, as the "*mens rea* approach" has long been viewed as "abolishing . . . the 'insanity defense.'" Resp. Br. 28 (quoting Warren E. Burger, *Psychiatrists, Lawyers, and the Courts*, 28 Fed. Probation 3, 9 (June 1964)). Kansas now insists that states are free to banish moral culpability from the criminal law altogether. On this view, Kansas can apparently criminalize any conduct based on any state of mind—or no state of mind at all. In turn, the state says, the mentally ill are entitled to no more scrutiny of their moral culpability than anyone else—which is to say, none.

This argument ignores the historical and continuing role of blameworthiness in criminal law. From the beginning, the insane were exonerated not because they could not act intentionally, but because they lacked moral understanding. That remains true today, even as the law has moved toward a different *mens rea* model. Kansas's contrary position has startling implications, not only for the insanity defense but for other ancient defenses like self-defense and infancy, and for criminal law more broadly. The Court should reject that extreme position and hold that states may not abolish the insanity defense's moral-culpability principle.

I. ABOLISHING THE INSANITY DEFENSE VIOLATES DUE PROCESS.

A. The insanity defense's moral-culpability principle is deeply rooted.

Kansas argues that the "right and wrong insanity test is not deeply rooted" and its "*mens rea* approach"

is. Resp. Br. 19–32. The state's premise is that insanity was traditionally "tied to a lack of *mens rea*." *Id*. at 17. True—but *mens rea* historically required precisely the moral blameworthiness that Kansas law now excludes. And that same principle has undergirded the insanity defense throughout history.

1. The early legal thinkers Kansas invokes show its error. For example, although Bracton believed "'madmen' should not be punished because they lacked *mens rea*," Resp. Br. 21, he explained that "a crime is not committed unless the intent to injure (*voluntas nocendi*) intervene[s]," because "desire and purpose distinguish evil-doing." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 985 (1932). Thus, for Bracton, "*mens rea* was more than simply a requirement that a criminal actor intentionally engage in prohibited conduct"; it required "bad motive" too. Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 658–59. And Bracton's treatment of children and the insane—as nonculpable because they possess "innocent design" and "lack reason," respectively, *id*. at 662—similarly reflects that "exculpation [was] premised . . . on the actor's inability to make rational choices between good and evil." *Id*. at 661–62.

Coke, as Kansas quotes, said that crime requires "felonious intent and purpose." Resp. Br. 21; *Beverley's Case*, 4 Co. Rep. 123b, 76 Eng. Rep. 1118 (1603). But then, as today, "felonious" denoted "villainy, wickedness, sin, crime"; "ill will, evil intention." *Felonie*, Middle English Dictionary, *available at* https://tinyurl.com/y6admdy4 (defs. 2 & 3); see *Staples* v. *United States*, 511 U.S. 600, 618 (1994).

Likewise, Kansas's claim that Hale "says nothing about right and wrong or good and evil," Resp. Br. 22,

overlooks his repeated mentions of "*animo felonico*"—the same felonious intent Coke discussed. An insane person "ought to be acquitted; for by reason of his incapacity he cannot act *felleo animo*." 1 Sir Matthew Hale, *History of the Pleas of the Crown* 36 (1800). And Hale, like Bracton, thought that the "criminal irresponsibility of the insane person can be gauged by the same measuring rod as the criminal irresponsibility of the child." Sayre, *supra*, at 1006. In both cases, it was not enough for them to intend their actions; they had to "understand[]" them. See *id.*

So too with Blackstone. The very passage Kansas quotes (at 22) lays out his canonical statement that "to constitute a crime against human laws, there must be, first, a *vicious will*; and, secondly, an unlawful act consequent upon such *vicious will*." 4 William Blackstone, *Commentaries* *21 (spelling modernized) (emphasis added). Blackstone emphasized that "where there is no discernment, there is no choice," so that a person with a "defect of understanding" presents a "case[] in which the will does not join the act." *Id.* Thus, "lunatic[s] or infant[s] . . . are incapable of committing any crime; unless in such cases where they show a *consciousness of doing wrong*." *Id.* at *25, *195–96 (emphasis added).

Moral culpability thus played a key role in legal insanity from the beginning. Indeed, English authorities on insanity referred explicitly to knowledge of good and evil as early as the late 1500s. Pet. Br. 21; *contra* Resp. Br. 23. And Kansas does not cite a single insanity case close to the Founding that does *not* use these (or similar) terms. Resp. Br. 23–26.

Kansas also misunderstands the cases it does discuss. Kansas presents *Rex* v. *Arnold* and Earl Ferrers's case as representative of the common-law approach. Resp. Br. 23–24, 24 n.2. But Kansas's own

authority explains that these cases "could hardly have been less typical." 1 Nigel Walker, *Crime and Insanity in England: The Historical Perspective* 53 (1968). Conversely, Kansas paints *Hadfield* as an outlier. Resp. Br. 24 n. 2. Yet *Hadfield* merely articulated what was already implicit (and sometimes explicit) in the common-law concept of *mens rea*: Mere intention, without moral understanding, was not enough to convict. Legal Historians & Sociologists *Amicus* Br. 15–18. In any event, the insanity tests in *Hadfield*, *Ferrers*, and *Arnold* all referred to the defendant's ability to tell right from wrong.

Bellingham's Case, in the passage Kansas quotes, speaks of a man "deprived of all power of reasoning, so as not to be able to distinguish whether [his act] was right or wrong." Resp. Br. 25. The question in *Bellingham*, where the insanity defense failed, was the same as in *Arnold*, where it succeeded: whether the defendant, though he pulled the trigger *deliberately*, did so with the requisite *moral* purpose.

Finally, the Old Bailey reports were not obscure. *Contra* Resp. Br. 25. Lawyers, government officials, and judges used them in "cases involving difficult legal issues." The Proceedings of the Old Bailey 1674–1913, *The Value Of the Proceedings as a Historical Source*, https://www.oldbaileyonline.org/static/Value.jsp (last visited Aug. 29, 2019). And Kansas's attempt to distinguish these cases relies on the same error explained above. "[A]n *independent* right-and-wrong test" of insanity was not needed, because the concept went hand-in-hand with the requisite "*felonious and criminal* intention." Resp. Br. 26 (emphasis added).

In short, the common law uniformly deemed the insane noncriminal because they lacked moral culpability—not because they could not act intentionally.

This principle was often framed in terms of "*mens rea*," but "'*mens rea*' as used here suggests . . . a morally blameworthy state of mind." Joshua Dressler, *Understanding Criminal Law* 116 (3d ed. 2001).

2. Kansas attacks *M'Naghten* at length, disputing its "historical[] ground[ing]" and broad acceptance. Resp. Br. 26–36. But Mr. Kahler does not ask this Court to constitutionalize *M'Naghten*, or any specific formulation of the moral-incapacity standard. In any event, Kansas's criticisms are incorrect.

M'Naghten was "not a statement of new law," but "merely an official pronouncement of the contemporary state of the insanity defense." H.R. Rep. No. 98-577, at 33 (1983). Kansas's contrary argument not only misunderstands the history just discussed, but also ignores early American cases holding that if the defendant "had not sufficient understanding to know right from wrong, and was in a state of insanity, it would be an excuse." *Cornwell* v. *State*, 8 Tenn. 147, 155 (1827); see also *State* v. *Marler*, 2 Ala. 43, 48 (1841) (describing *Bellingham*'s "judging between right and wrong" instruction as "undoubted law"); *Hazard* v. *Hazard*, 11 F. Cas. 925, 926 (C.C.D. Vt. 1820) (an insane person cannot "discriminate between fidelity and a violation of duty" or "right and wrong"); Pet. Br. 25–26.

Likewise, Kansas is wrong to claim that *M'Naghten* was a novelty because it focused on the defendant's understanding of his "specific conduct" instead of morality generally. Resp. Br. 36. In fact, the "great weight of authority" supported the rule that when a defendant "wants, as to the act about to be committed, reason enough to distinguish between the right and wrong of *that act* . . . he is irresponsible." *Roberts* v. *State*, 3 Ga. 310, 330 (1847); see also *Commonwealth* v. *Rogers*, 48 Mass. 500, 502 (1844) (defendant

must be unable to "distinguish between right and wrong, as to the particular act he is then doing" (footnote omitted)).

Nor is Kansas correct that *M'Naghten* never gained wide acceptance. Although Kansas emphasizes academic criticism and especially the failed push for a federal *mens rea* approach (at 26–32), it cannot dispute that *M'Naghten* quickly became "completely imbedded in the administration of the criminal law" in this country. *Mackin* v. *State*, 36 A. 1040, 1041 (N.J. 1897); see *Davis* v. *United States*, 160 U.S. 469, 479–80, 484–85 (1895). Still today, nearly every U.S. jurisdiction uses (at least) a moral-incapacity standard drawn from *M'Naghten* directly or indirectly (through the Model Penal Code).

The point is not that *M'Naghten* has any talismanic power. Rather, *M'Naghten* took hold because it reiterated longstanding legal principles that accord with powerful moral intuitions. Indeed, Congress rejected the federal abolition effort on which Kansas places so much weight because the moral-incapacity test—unlike the *mens rea* approach—preserves "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 4–8.

3. Kansas exaggerates the variation in insanity standards over time and across jurisdictions. To start, Kansas rattles off a half-dozen other tests that courts or scholars have put forward. Resp. Br. 32–34. But these tests are all one-offs or outliers that never challenged the moral-incapacity test's dominance, either in England or here.

Kansas also overstates the variation among moral-incapacity formulations. It says there are "two different right-and-wrong tests" because some states

ask whether the defendant could appreciate the wrongfulness of his actions, and others ask if he could appreciate their criminality. Resp. Br. 34. But there is little daylight between these inquiries. See *United States* v. *Brawner*, 471 F.2d 969, 992 n.40 (D.C. Cir. 1972) (en banc) ("We are not informed of any case where a mental illness left a person with capacity to appreciate wrongfulness but not a capacity to appreciate criminality."). In adopting these alternative formulations, the Model Penal Code's drafters explained that "few cases are likely to arise in which the variation will be determinative." Model Penal Code § 4.01, explanatory note. Whether framed in terms of "criminality" or "wrongfulness," this inquiry gets at the same basic question: Could the defendant "apprehend the significance of his actions in some deeper sense," *id.*—could he understand that he should not do what he did?

In short, almost every other U.S. jurisdiction still asks, as the common law required, whether the defendant could "make rational choices between good and evil." Gardner, *supra*, at 662. Kansas does not.

B. Kansas has abandoned moral culpability in criminal law, with startling implications.

Although Kansas overlooks the historical meaning of *mens rea*, it correctly observes that *mens rea* today generally does not require moral culpability, and that some crimes create strict liability. On that basis, Kansas contends that it is free to jettison the moral element of legal insanity too. But neither the modern *mens rea* regime nor the existence of strict-liability crimes saves Kansas's approach. Rather, these doctrines underscore the shaky foundations and sweeping consequences of its position.

1. Most criminal offenses today do not explicitly incorporate moral culpability. After a long process of refinement culminating in the Model Penal Code, state criminal laws generally "identify specific states of mind required for the commission of particular offenses." Gardner, *supra*, at 667. Kansas law, drawn from the Code, thus defines scienter in terms of intent, recklessness, or negligence, rather than Blackstone's vicious will. See Kan. Stat. Ann. § 21-5202(a); Resp. Br. 7.

But this shift undermines Kansas's position. If the insanity defense were merely about negating *mens rea*, states and the federal government would have adopted Kansas's *mens rea* approach to insanity in tandem with the modern scienter regime. After all, if culpability were now irrelevant to criminality, there would be no need for a moral-culpability defense. Yet that is not what happened. Even as the states and Congress moved away from the traditional "felonious intent," they uniformly *retained* the concept of blameworthiness in doctrines of excuse—defenses like insanity and infancy. The Model Penal Code reflects this distinction. Although the Code adopted a "careful delineation of mental states" that went beyond the traditional "evil mind," see *Dixon* v. *United States*, 548 U.S. 1, 7–8, 16 (2006), it kept the insanity defense's moral-culpability principle. Compare Model Penal Code § 2.02(2), with *id.* § 4.01(1). The same is true in federal criminal law and in almost every other state.

This is not mere happenstance. The Code, Congress, and the states have overwhelmingly retained the insanity defense's moral-culpability principle, even as they moved toward "narrower mental state requirements," because a defendant must "be able to apply societal standards of right and wrong" to be fit

for punishment. H.R. Rep. No. 98-577, at 36. When an able-minded adult intentionally commits a harmful act, the state may properly impute to him the culpability that criminal law has always required. See Jerome Hall, *General Principles of Criminal Law* 18 (2d ed. 1960) (arguing that "the harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent") (quoted in Norman J. Finkel, *Insanity on Trial* 243 (1988)). The same is not true of a person whose motivations and intentions are distorted by mental illness. Legal Historians & Sociologists *Amicus* Br. 9–10. But this essential question—whether mental illness motivated a person to act irrationally, if still voluntarily—plays no role under the *mens rea* approach.

So too with criminal recklessness or negligence. It is unjust and unrealistic to expect a person who cannot tell right from wrong to conform his conduct to a reasonable-person standard. For these defendants, who lack the "ability . . . of the normal individual to choose between good and evil," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952), the insanity defense's moral-culpability principle remains a vital protection.

Likewise, the existence of "strict liability . . . regulatory crimes" does not support Kansas. *Contra* Utah *Amicus* Br. 15–16. This Court has recognized these offenses in "limited circumstances" and expressed doubt that they can be punished as felonies with harsh sentences. See *Staples*, 511 U.S. at 607, 616–18; H.R. Rep. No. 98-577, at 6, 36. And the Court has often reemphasized "the importance of showing what Blackstone called 'a vicious will.'" *Rehaif* v. *United States*, 139 S. Ct. 2191, 2196 (2019). This requirement ensures that the criminal law punishes "those who understand the wrongful nature of their act." *Id.*

Thus, the fact that states may create a "limited" class of strict-liability crimes for able-minded individuals, see *Staples*, 511 U.S. at 607, 617, does not mean they can abolish the insanity defense for all crimes, let alone for "inarguably immoral" crimes like murder. Cf. Utah *Amicus* Br. 16.

2. Kansas, however, says that moral culpability is not "necessary for criminal culpability." Resp. Br. 45. This position has startling implications.

For one thing, although Kansas claims it "has not forbidden evidence of insanity altogether," *id.* at 9, that is not quite right. Kansas allows evidence of mental disease or defect *only* "as it specifically relates to the requisite *mens rea* of the offense." *State* v. *Bethel*, 66 P.3d 840, 845 (Kan. 2003). So, if an offense requires intentional action, a defendant might try to show that he did not know what he was doing. But for an offense requiring only recklessness or negligence, mental-state evidence is irrelevant and thus inadmissible. That is because these forms of "*mens rea*" are "not, strictly speaking, a state of mind"; they are a "failure to act as a reasonable person would act." Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. Crim. L. & Criminology 1075, 1080 n.9 (1997). Indeed, evidence that the defendant cannot understand the nature or consequences of his actions will simply *confirm* that he did not act like a reasonable person. And of course evidence of mental state is irrelevant to strict liability. Kansas thus excludes evidence of insanity in whole categories of criminal cases—a result the state neither acknowledges nor defends. See *Martin* v. *Ohio*, 480 U.S. 228, 233–34 (1987) (finding no due process violation where the defendant could "show herself to be blameless" by presenting self-defense evidence, but noting that barring such evidence would "plainly run afoul" of due

process); *State* v. *Curry*, 543 N.E.2d 1228, 1231 (Ohio 1989) (holding that "insanity may be a defense to any crime regardless of" the *mens rea* required); *State* v. *Strasburg*, 110 P. 1020, 1021–24 (Wash. 1910) (en banc) (striking down a law barring "evidence tending to prove" insanity).

More broadly, Kansas apparently deems itself free to criminally punish any act without regard for blameworthiness. On this view, Kansas could also abolish other ancient common-law defenses like self-defense and infancy. A person who shoots someone in self-defense "voluntarily and intentionally kill[s] another human being," which is all Kansas requires. Resp. Br. 40. If no more is required, the "basic right [of self-defense], recognized by many legal systems from ancient times to the present day," *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010), is just a matter of legislative grace. Likewise, because infancy historically excused a child who lacked "sufficient capacity to understand the wrongfulness of his act," *State* v. *Nickleson*, 14 So. 134, 135 (La. 1893); *Commonwealth* v. *Mead*, 92 Mass. 398, 399 (1865), making culpability irrelevant to criminality would permit a state to punish a small child like an adult felon. Cf. H.R. Rep. No. 98-577, at 7 (finding "no rational basis for distinguishing" the culpability of the insane and children).

Finally, Kansas and the State *Amici* claim an apparently unlimited power to create strict-liability crimes, without regard for the limits of the public-welfare offense. See Resp. Br. 39; Utah *Amicus* Br. 18. The Court should reject this effort to eliminate culpability from the criminal law and again confirm the "basic principle" that "those who [cannot] understand the wrongful nature of their act" are not criminals. *Rehaif*, 139 S. Ct. at 2196.

C. This Court's precedents do not support abolition.

Kansas says this Court's cases confirm that "the Due Process Clause does not mandate a particular insanity test." Resp. Br. 37. True. But *Clark* v. *Arizona*, this Court's last word on the subject, held that "the insanity rule . . . is *substantially* open to state choice," not that it is entirely open. 548 U.S. 735, 752 (2006) (emphasis added). After concluding that "due process imposes no single canonical formulation of legal insanity," *id.* at 753, the Court analyzed Arizona's test. The Court decided that no "constitutional minimum" was "short-changed" by dropping *M'Naghten*'s cognitive-incapacity prong, because "cognitive incapacity is itself enough to demonstrate moral incapacity," and thus Arizona retained the historical moral-culpability inquiry. *Id.* at 753. This analysis would have been pointless if the Court concluded that states can abolish the insanity defense outright—a question the Court instead reserved. *Id.* at 752 n.20.

Given *Clark*, Kansas's heavy reliance on *dicta* and separate opinions in much older cases is misplaced. See Resp. Br. 37–40. None of those cases questioned the centrality of the moral-incapacity standard or addressed an attempt to abolish the insanity defense altogether. *E.g.*, *Foucha* v. *Louisiana*, 504 U.S. 71, 97 (1992) (Kennedy, J., dissenting) ("consistent with both federal criminal law and the law of a majority of the States, petitioner was found not guilty" because he was "incapable of distinguishing between right and wrong"); *Powell* v. *Texas*, 392 U.S. 514, 545–46 (1968) (Black, J., concurring) (warning that the defendant's rule might disturb the dominant "'right from wrong' test of insanity"); *Leland* v. *Oregon*, 343 U.S. 790, 800–01 (1952) (noting that "[k]nowledge of

right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions" and refusing to "eliminate the right and wrong test" in favor of the irresistible-impulse test).

Further, while these opinions rightly counsel against a rule that would "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold," *Powell*, 392 U.S. at 537 (plurality opinion), Mr. Kahler does not urge such a rule. Holding merely that states may not abolish the moral-culpability principle does not dictate whether any given diagnosis supports the insanity defense—either generally or in any specific case—or what sort of evidence is required. It simply reaffirms a core *legal* principle: People who cannot understand the wrongfulness of their acts are not criminals. Scientific advances cannot undermine that principle because "'insanity' is a legal conclusion, not a medical diagnosis." Resp. Br. 18.

D. The policy arguments for abolition are mistaken.

Kansas and its *amici* offer various policy arguments for abolition. These were not Kansas's actual reasons. Pet. Br. 2–5. And even if the due-process inquiry accounts for these policy justifications, that principle has limits. Just as a state could not abolish "the constitutional safeguard of proof beyond a reasonable doubt" because it confuses jurors or leads to fewer convictions, see *In re Winship*, 397 U.S. 358, 368 (1970); *Leland*, 343 U.S. at 802–03 (Frankfurter, J., dissenting), it could not abolish the insanity defense for the same reasons, see *United States* v. *Freed*, 401 U.S. 601, 608 (1971) (the fact that a law "was a convenient law enforcement technique did not save it" from violating due process).

1. Kansas claims (at 41–42) that a moral-culpability standard presents intractable "linedrawing" problems, and the United States predicts (at 12–13) that juries would "have difficulty" applying this test. The Kansas Legislature and Congress apparently disagree. Kansas's pattern capital-sentencing jury instruction directs the jury to consider "the degree of moral culpability or blame," J.A. 194, which would be odd if jurors could not understand this concept. And the standard the United States attacks as "unworkable" is the one federal courts have used, at Congress's direction, for decades. Indeed, neither tries to show that juries are actually less confused by the novel *mens rea* approach than by the long-standing insanity defense. And the defense's long history suggests the opposite.

In any event, "the *mens rea* test, dependent as it is on the use of the phrase 'mental disease or defect,' may be said to suffer from some of the same vagueness problems." S. Rep. No. 97-307, at 105 (1981). The *mens rea* approach also creates bizarre workarounds, increasing incompetency findings and dismissals as lawyers and judges try to accommodate its strictures. See Lisa A. Callahan et al., *The Hidden Effects Of Montana's "Abolition" Of The Insanity Defense*, 66 Psychol. Q. 103, 115–16 (1995). And while the United States (at 13) criticizes the insanity defense for "considering mental illness as an all-or-nothing limitation on criminal liability," the *mens rea* approach does the same. A defendant's mental state either negates the requisite *mens rea*, or it doesn't. Kansas and its *amici* merely point to challenges that, in truth, will arise in *any* mental-illness case.

The Court should also reject the suggestion that the right-or-wrong test is not flexible enough to account for medical advances, or too flexible to channel the

"vagaries of psychiatry" into a reliable determination of guilt. Utah *Amicus* Br. 20. Rather than scrapping the centuries-old moral-incapacity principle altogether, states can and should use evidentiary rules and jury instructions to address these concerns, as courts have always done.

2. Kansas next crafts a parade of horribles, saying that "terrorists," "white supremacists," and "euthanasia doctors" would be excused under the moral-capacity test because they all "believe that their actions are morally justified," and some of them may "suffer from some degree of mental illness." Resp. Br. 40–41. That is a strawman. The law never recognized, and Mr. Kahler does not urge, a free-standing defense for anyone who feels "morally justified." See H.R. Rep. No. 98-577, at 36 (noting that a "purely political belief in the rectitude of conduct that society condemns would not give rise to an excuse"). And the insanity defense is not satisfied merely by "some degree of mental illness." It requires a mental disease or defect that renders the defendant unable to rationally appreciate that his actions are wrong.

Kansas and the State *Amici* similarly contend that recognizing the moral-incapacity standard will "hobble" law enforcement by "exempting psychopaths . . . from criminal liability." Utah *Amicus* Br. 22; see Resp. Br. 42–43. This claim is puzzling. Nearly every U.S. jurisdiction—including the federal government and 12 of the 16 State *Amici*—already uses a moral-incapacity test. Yet law enforcement continues to function. And whether individual psychopaths—or any psychopaths at all—satisfy the moral incapacity test is a medical and factual question, not a legal one. Cf. *State* v. *Ferrell*, 656 So. 2d 739, 745 (La. App. 1995) (describing expert testimony that although the defendant "was a psychopath and exhibited no re-

morse for his actions, he did know right from wrong"). In any event, a defendant acquitted based on insanity is not released onto the streets, but civilly confined for as long as necessary. See *Jones* v. *United States*, 463 U.S. 354, 370 (1983).

3. Kansas next argues that "it is not clear why mental illness should be treated differently than other factors that influence human behavior," like extreme poverty. Resp. Br. 41–42; see U.S. *Amicus* Br. 11–12. The short answer is that lawmakers and theologians have for millennia deemed the insane—together with children—uniquely nonculpable. Pet. Br. 18–28; *Morissette*, 342 U.S. at 250–51, 250 n.4. The longer answer is that this argument draws a "morally irrelevant comparison" that "confuses causation with excuse." Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 779, 789 (1985). Extreme deprivation may lead a person toward crime, but he still "possess[es] minimal rationality and [is] not compelled to offend." *Id*. at 790. By contrast, a person who "commits a crime in response to motivations produced by severe mental disorder" is driven by a "nonculpable lack of rationality." *Id*. at 789–90.

4. Finally, restricting consideration of an insane defendant's culpability to sentencing, see U.S. *Amicus* Br. 13, is no substitute for a proper defense. For one thing, culpability is really a binary guilt-phase concept; a sentencing-phase assessment of the defendant is broader and more amorphous. Phyllis Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 27 (1997) (arguing that the term "culpability" should be reserved for trial). Considering moral culpability only at sentencing is, at best, an "indirect" way to get at a ques-

tion that should be addressed at the guilt phase. See *Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary United States Senate*, 97th Cong. 268 (1982) (test. of Dr. Allan Beigel, American Psychiatric Association). For another, this approach burdens a morally blameless defendant with the stigma and collateral consequences of a conviction, see Pet. Br. 29–30, and—given mandatory-minimum sentences—probably with a severe punishment as well. None of this accords with the fundamental principle that the insane are excused from liability because they do not deserve blame. See Stephen J. Morse, *Excusing and the New Excuse: A Legal and Conceptual Review*, 23 Crime & Just. 329 (1998).

II. ABOLISHING THE INSANITY DEFENSE VIOLATES THE EIGHTH AMENDMENT.

A. Mr. Kahler's Eighth Amendment challenge is squarely before this Court.

When it granted certiorari, this Court "necessarily considered and rejected" Kansas's argument that Mr. Kahler failed to preserve the issues raised in his petition. *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Nothing has changed since then.

Mr. Kahler presented a broad constitutional attack on Kansas's *mens rea* approach: "Kansas has unconstitutionally abolished the insanity defense and in its stead enacted an unconstitutional partial mental illness defense." J.A. 11. He cited due process concerns, but also invoked this Court's Eighth Amendment cases. *Id.* at 11–14. He quoted extensively from *Atkins* and *Ford* to support the same overarching proposition he advances now: Abolishing the insanity defense is unconstitutional. *Id.*; *Braniff Airways, Inc.* v. *Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 599 (1954) (considering an

issue "sufficiently presented" even though it was "inexplicit"). His additional argument that "the death penalty is categorically disproportionate for defendants with a severe mental illness" (Issue VIII) did not somehow narrow his broader argument that it is "unconstitutional to abrogate the insanity defense" (Issue IV). Cert. Reply Add. 18–19. His outline of the "historical insanity defense" applied equally to both. *Id.*

Mr. Kahler raised "the same arguments" the Kansas Supreme Court also passed on in *Bethel*—which explicitly resolved Fourteenth and Eighth Amendment challenges to abolition of the insanity defense in a non-capital case. J.A. 243–44; *Bethel*, 66 P.3d at 851–52; see also J.A. 270–71. And when the court concluded that his sentence was not cruel and unusual, it necessarily determined that his conviction was not either. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) ("If the necessary effect of the judgment is to deny the claim, that is enough.").

B. Abolishing the insanity defense is a cruel and unusual innovation in punishment.

Kansas's assertion that a conviction cannot be punishment conflicts with *Robinson* v. *California*, 370 U.S. 660 (1962), and with historical sources establishing that any assignment of guilt to an insane person is a disproportionate departure from longstanding punitive practice. Before and at the Founding, "lunaticks" were not considered culpable at all. Convicting someone whose mental illness renders him blameless is therefore an innovation that falls within the original meaning of the phrase "cruel and unusual punishment." Stinneford *Amicus* Br. 2, 24–28; Pet. Br. 30–32.

Kansas's "*mens rea* approach" also serves no penological purpose. Kansas says that its regime furthers retribution because a criminal sentence will help the defendant "recognize at last the gravity of his crime." Resp. Br. 49–50. This claim ignores that insane defendants *by definition* cannot understand the gravity of their actions, and thus lack the "personal culpability" that is the "heart of the retribution rationale." *Tison* v. *Arizona*, 481 U.S. 137, 149 (1987). Kansas's claim about deterrence similarly overlooks that the insane do not follow a rational thought process that might enable them to avoid punishment by calculated choice. See *Kansas* v. *Hendricks*, 521 U.S. 346, 362–63 (1997); Philosophy Profs. *Amicus* Br. 7–8. That is true even where they can form sufficient intent to act "voluntarily." See Am. Psych. Ass'n *Amicus* Br. 25–30. As for incapacitation, Kansas's argument that it is hard to tell when an insane person is no longer dangerous merely underscores that any incapacitation goals served by criminal punishment are better served by civil commitment, where confinement can be tailored to the defendant's ongoing needs and risks. And Kansas's attempt to show a rehabilitative purpose ignores the reality of mental healthcare in prison and the rehabilitative benefits of dedicated treatment facilities. See Pet. Br. 35–36; ACLU *Amicus* Br. 11–14.

Nor does Kansas rebut Mr. Kahler's showing that its approach is categorically disproportionate. Instead, it argues that the *mens rea* approach comports with evolving standards of decency because it treats the mental ill "[l]ike everyone else." Resp. Br. 53–54. But that is the problem. The Eighth Amendment requires the state to treat someone "who has 'lost his sanity'" *differently* from everyone else. *E.g.*, *Madison* v. *Alabama*, 139 S. Ct. 718, 722 (2019). And with

good reason. The law has long recognized that the insane are *not* like everyone else, because—even when they can act intentionally—they cannot rationally choose between doing good and doing ill. See Philosophy Profs. *Amicus* Br. 6–12; Criminal & Mental Health Law Profs. *Amicus* Br. 5–8. Kansas has thus discarded a centuries-old tool for assessing blame, and as a result imposes categorically disproportionate punishment.

III. KANSAS'S CONSTITUTIONAL VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Kansas fails to show that its constitutional violation was harmless beyond a reasonable doubt. Resp. Br. 55–57.

There is evidence that Mr. Kahler was incapable of meaningful moral decisionmaking with respect to his actions. Dr. Peterson explained that Mr. Kahler regarded his family not as people, but as objects on which to project blame for his life's collapse. In his dissociated fog, "virtual[ly] all blame" for "harm[ing] him" lay on his family, and Mr. Kahler himself was "blameless." J.A. 87, 89; see also *id.* at 44, 80, 87, 89, 97, 99. Dr. Peterson's offhand notation on "[d]iminished [c]apacity" versus "NGRI" is immaterial. *Contra* Resp. Br. 55. Those concepts—which are legal conclusions, not medical diagnoses—had not existed in Kansas law for years.

To the extent there is not more record evidence on this point, that is Kansas's fault; it prohibits any mental-illness evidence unrelated to *mens rea*. The state nevertheless claims that Mr. Kahler had to proffer such evidence—relying on a statute requiring an evidentiary proffer to preserve claims of "erroneous exclusion of evidence." Resp. Br. 56; Kan. Stat.

Ann. § 60-405. That rule did not obligate Mr. Kahler to develop and proffer evidence barred by a 15-year-old statute the state high court had already upheld against a constitutional challenge. *Bethel*, 66 P.3d at 851–52. And under a different rule, he could have explored the interplay between his serious depressive state and his pre-existing personality disorders to show that he could not appreciate the wrongfulness of his actions. See Pet. Br. 6, 9–11; J.A. 76–79 (Dr. Peterson suggesting additional "important areas for inquiry" and "retest[ing]"). Likewise, the United States is wrong to say (at 28) that Mr. Kahler never claimed such incapacity. See J.A. 13 (Mr. Kahler did not act with "moral culpability" because of his disabilities in "reasoning" and "judgment").

Under these circumstances, barring the jury from considering Mr. Kahler's moral capacity at the guilt phase was not harmless. This is not mere instructional error on "uncontroverted" evidence. Cf. *Neder* v. *United States*, 527 U.S. 1, 18 (1999). Although the jury heard considerable and conflicting evidence on Mr. Kahler's mental state, the presentation would have been very different under a constitutional regime. And the jury lacked an adequate instructional lens through which to examine the evidence it did hear. In short, both the evidence and the instructions at the guilt phase would have been very different. There is no basis to conclude beyond a reasonable doubt that the jury would have convicted Mr. Kahler no matter what.

That the jury could consider culpability at the penalty phase does not carry the state's burden to prove harmlessness. During the penalty phase, the jurors considered mental illness and culpability along with a host of other, unrelated mitigating circumstances. J.A. 194–96. And while the jurors were told to "con-

sider and weigh" this evidence, they were not required to give it any particular effect. J.A. 192. They were also told that it "do[es] not . . . excuse the offense." J.A. 194. The result of this unstructured, kitchen-sink inquiry tells us nothing about how a properly instructed guilt-phase jury would have evaluated Mr. Kahler's moral incapacity on a different record. A finding of harmlessness here would amount to "pure speculation—[this Court's] view of what a reasonable jury would have done" on a full record with proper instructions. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (per curiam). That is improper.

CONCLUSION

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

Respectfully submitted,

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
LUCAS CROSLOW
CHIKE B. CROSLIN
GABRIEL SCHONFELD
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005

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

MERYL CARVER-ALLMOND
CLAYTON J. PERKINS
CAPITAL APPELLATE DEFENDER OFFICE
700 JACKSON, SUITE 903
TOPEKA, KS 66603

Counsel for Petitioner

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* Counsel of Record