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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this term in Case Number 18-6135,
5 Kahler versus Kansas.

6 Ms. Schrup.

7 ORAL ARGUMENT OF SARAH SCHRUP

8 ON BEHALF OF THE PETITIONER

9 MS. SCHRUP: Mr. Chief Justice, and
10 may it please the Court:

11 For centuries, criminal culpability
12 has hinged on the capacity for moral judgment,
13 to discern and to choose between right and
14 wrong. The insane lack that capacity.

15 This understanding of insanity has
16 persisted since the 1500s and remains the rule
17 in 48 jurisdictions today. But Kansas scrubs
18 moral capacity from its criminal law and runs
19 afoul of the Fourteenth and the Eighth
20 Amendments.

21 Kansas rewrites history in two ways,
22 first by elevating the wild beast test, one that
23 was never used in this country and only rarely
24 in England, and secondly by conflating common
25 law intent, which required a vicious will and

1 was bound up in moral capacity, with the -- what
2 it applies today, a morality-free modern mens
3 rea.

4 As such, Kansas uproots the deeply
5 rooted by eliminating any mechanism to assess
6 whether a defendant's capacity for moral
7 judgment was intact or was irretrievably
8 compromised by mental illness.

9 Now, I'd like to turn briefly to due
10 process first and explain why the moral capacity
11 notion is and always has been fundamental in our
12 system.

13 The model penal code is an excellent
14 exam -- example. As criminal law evolved, the
15 drafters moved to more precise mental states.
16 When they did that, though, they retained the
17 compelling mechanism to show insanity. We could
18 do that, the drafters said, because we kept
19 this, this narrow remnant of common law
20 criminality.

21 In Clark, too, this Court recognized
22 both the presumption of sanity and that evidence
23 of insanity trumps mens rea. This demonstrates
24 the continued need for a mechanism to rebut the
25 presumption of sanity, even when -- even though

1 a defendant harbors the requisite mental state.
2 And it was not only the mechanism that was
3 important in Clark; the substance was too. This
4 Court said Arizona could do that, it could
5 eliminate the first part of the M'Naghten test,
6 because it kept this, the right and wrong
7 principle that subsumes it.

8 So I'd like to now turn back to
9 history because it can be --

10 JUSTICE GINSBURG: Well, before you do
11 that, you're relying on due process. And
12 suppose a state decides it wants to rethink the
13 insanity defense. It looks to other nations for
14 models. And one is what's known as a -- as a
15 judgment of guilty but insane; that is, two
16 determinants are made. Did the defendant do the
17 act with which he is charged? That's the first
18 question. And the second question is, what is
19 the proper incapacitation? So guilty but insane
20 would lead to incapacitation in a mental
21 institution. Guilty and not insane would lead
22 to incarceration in prison.

23 Would such a scheme, if adopted by a
24 state of the United States, violate due process?

25 MS. SCHRUP: Yes, it would, Justice

1 Ginsburg. And I think it would because the
2 conviction itself carries collateral
3 consequences that -- and we have never, as a
4 country, treated the insane as culpable. And
5 that conviction would -- would impose collateral
6 consequences on the insane person who really
7 should be excused.

8 CHIEF JUSTICE ROBERTS: But I -- I
9 would have thought you would want collateral
10 consequences imposed, as I understood your
11 submission, because the idea is that someone
12 acquitted by reason of insanity would not go
13 free but would instead be committed to mental
14 care.

15 MS. SCHRUP: Yes, that's right, Your
16 Honor. But --

17 CHIEF JUSTICE ROBERTS: Well, why
18 wouldn't that -- if that's the consequence of
19 the system Justice Ginsburg was talking about,
20 guilty but insane, I don't understand why that's
21 not exactly the sort of course you're looking
22 for.

23 MS. SCHRUP: Well, I want to rewind a
24 little bit, Your Honor, because really what
25 we're talking about is the mechanism to be able

1 to show that you lack moral capacity. The back
2 end of it, as long as you have the mechanism to
3 show that you lack moral capacity, that you can
4 choose right from wrong or can't do that, then
5 the ultimate result is not all that
6 determinative. If guilty but insane means that
7 you -- if -- if you end up in exactly the same
8 place, then I suppose the label doesn't matter,
9 but what I'm nervous about, actually, is if you
10 have a guilty but insane, some of those statutes
11 in some jurisdictions are you're guilty, you go
12 and get treatment, and then once you are --

13 JUSTICE GINSBURG: My --

14 MS. SCHRUP: -- well --

15 JUSTICE GINSBURG: My hypothetical is
16 the question of where the person is incarcerated
17 is determined second. It has no collateral
18 consequences. You're found to have committed
19 the conduct charged, but because you are insane,
20 you go to a mental institution. So it would
21 take out any collateral consequences that would
22 label you on the criminal side. It's just you
23 -- you have committed the deed that you were
24 charged with, but you were insane; therefore,
25 you go to mental institution. That, you think,

1 would violate due process?

2 MS. SCHRUP: Well, Your Honor, I --
3 you know, to the extent -- so I guess I would go
4 back to history on this. And what we know is
5 that these people were not even subject to
6 prosecution at all. Hawkins, in his Plea of the
7 Crown, said so. But as long as -- the
8 mechanism -- as long as the mechanism for the
9 defendant to present his lack of moral
10 capability at the back end, if the regime
11 protects him in that way.

12 But I also disagree, Your Honor, that
13 the conviction doesn't stigmatize or show that
14 he is guilty. I mean, if you're found guilty,
15 you have that conviction. I do think that the
16 insane need mental treatment. They need
17 commitment.

18 So I guess I'm not -- unless I'm
19 missing your point, I believe it's more about
20 the mechanism and not allowing a conviction of
21 an insane person.

22 JUSTICE ALITO: You're talking about
23 lack of moral capacity. Would it be
24 unconstitutional if a state said that a person
25 is sane if the person knows that the act is

1 illegal, even if the person thinks that the act
2 is moral?

3 MS. SCHRUP: So the right-and-wrong
4 principle, Your Honor, includes both knowledge
5 of legal wrong and knowledge of moral wrong.
6 There's very little light between the two.
7 So --

8 JUSTICE ALITO: Well, I don't know
9 that that's the case. Someone can know that
10 something is illegal but feel very strongly that
11 it is moral. So what -- what's the answer to my
12 question?

13 MS. SCHRUP: Justice Alito, it's not
14 about a belief. It's about a capacity fueled by
15 mental illness. So if a person justifies or
16 believes that they are justified in acting in
17 that way, they are not covered by this baseline
18 standard.

19 JUSTICE ALITO: If the --

20 JUSTICE KAVANAUGH: What's the answer
21 --

22 JUSTICE ALITO: -- person -- I -- I --
23 if -- if the person has the capacity to know
24 that what he did was a violation of the criminal
25 law, and that's the defense that is provided by

1 a state, is that unconstitutional?

2 MS. SCHRUP: No. So long as it
3 encompasses -- it can't just be that you are --
4 that you -- you forget what criminal law is.
5 What Justice Breyer said in the dissent from the
6 denial of cert in Delling was that what legally
7 wrong means -- and it still falls within the
8 right-and-wrong principle, what legally wrong
9 means is that you are unable to comprehend the
10 actual nature of -- of the act such that you
11 believe, for example, that you're falling into a
12 defense.

13 JUSTICE ALITO: Well, there are many,
14 many people who believe, maybe not so much for
15 murder, but certainly for a lot of other
16 offenses, that things that are violations of the
17 law are nevertheless moral.

18 And so if that were the general rule
19 in criminal law, that you cannot be convicted if
20 you -- if you know that -- if you believe that
21 what you've done is moral, that would
22 revolutionize criminal law. And the only
23 element that you are adding to that is that this
24 is caused by a mental disorder.

25 So it becomes important to understand

1 what you mean by mental disorder. And what do
2 you mean by a mental disorder? Do you mean
3 everything that is listed as a mental disorder
4 in the latest edition of the DSM?

5 MS. SCHRUP: Your Honor, it's not
6 about the diagnosis. And you asked what mental
7 capacity means and -- and what mental illness
8 means. I can put it this way: It is as if a
9 person -- it's -- again, it's not about a
10 belief. It's not about justifying. It's about
11 you actually can't tap in to the part of your
12 brain that allows you to choose right versus
13 wrong.

14 And juries have, in 48 jurisdictions,
15 been able to make this distinction regardless of
16 what the diagnosis is.

17 JUSTICE ALITO: Well, what is the
18 answer to my question? Is it sufficient if the
19 person has something that is considered to be a
20 mental disorder in the DSM? And it has been
21 calculated that one in five people in the United
22 States has some mental disorder. So we're
23 talking about 60 plus -- 60 million plus people.
24 All of them could go to the jury on the question
25 of whether they had the capacity to know that

1 what they were doing when they committed the
2 crime was morally wrong.

3 MS. SCHRUP: Justice Alito, they
4 should be given the opportunity to at least try.
5 This shouldn't be legislatively cut off at the
6 knees. There are many mechanisms in place in
7 our trial system, many hoops that they would
8 have to jump through.

9 But if they have a mental disease
10 that's diagnosed, then they should at least be
11 able to get in the door and get evaluated and
12 then proceed --

13 JUSTICE KAGAN: Ms. --

14 MS. SCHRUP: -- and --

15 JUSTICE KAGAN: Ms. Schrup --

16 MS. SCHRUP: Yes?

17 JUSTICE KAGAN: Can I ask you about a
18 premise of your argument? And it's that if we
19 look to history, and if history supports what
20 you say, then we're obligated to go with it now.

21 And I -- I just want to ask how and
22 why that's so, because there are many ways in
23 which understandings of criminal culpability
24 change over the years. And -- and -- and how do
25 we figure out which are the ones that the

1 Constitution requires stay the same now as they
2 were back in the common law or back at the
3 founding or back in 1868, depending on which
4 date you're using, and -- and -- and which ones
5 can change? What -- what -- what do we do?

6 We're not stuck with all of history,
7 are we? So if we're -- if we're not stuck with
8 all of history, why are we obligated to keep
9 this part of it?

10 MS. SCHRUP: Well, Your Honor, because
11 that's the test that this Court has set out for
12 due process. And you could go back as far as
13 you want, but by the 1500s, we know that this
14 was an intact principle.

15 JUSTICE KAGAN: Well, the -- I mean,
16 the test that was set out by this Court for due
17 process, I mean, I could give you some ways in
18 which the criminal law of olden times seems
19 remarkably archaic to us now, marital rape
20 exception, maybe sodomy laws. I'm sure that
21 there are others that I could list.

22 You know, what does due process
23 require we hang onto notwithstanding changing
24 times? And -- and I guess what is criminal --
25 not -- what -- what is -- what does the Due

1 Process Clause require that we hang onto,
2 notwithstanding the judgments of some states
3 that the time for this has come and gone?

4 MS. SCHRUP: Well, we are -- we
5 actually have sort of a perfect complements,
6 Justice Kagan, because we have not only the
7 history that goes back maybe a thousand years,
8 and certainly since the mid 1500s, but we also
9 have the modern practice, a fundamental -- a
10 rule of fundamental fairness currently in
11 operation in 48 of 53 U.S. jurisdictions.

12 So it's not just the history. It's
13 the fact that we look and everyone has retained
14 it or nearly everyone has retained it.

15 JUSTICE GINSBURG: With respect to
16 history, can we take into account the reality,
17 that in the old days at common law, the result
18 of the insanity defense would be you were sent
19 to bedlam, where the conditions were often far
20 worse than in prison? So someone might decide,
21 no, I'm not going to plead insanity, because
22 then I'll end up with an incarceration worse
23 than prison.

24 Do we take that into account in
25 deciding the function of the insanity defense?

1 MS. SCHRUP: I don't think you need to
2 take it into account. I think what the
3 fundamental principle is, is that the good and
4 evil principle or the right and wrong principle
5 as applied to the insane, it's -- it's the
6 application to the insane that has -- is deeply
7 rooted in our country.

8 And where those people -- I mean, in
9 today's time, those people wouldn't be sent
10 there, right? We know after Foucha that this --
11 those people are sent to an institution.

12 So, no, I don't think it's -- it's how
13 they were historically -- where they ended up.
14 They ended up in a lot of places, Justice
15 Ginsburg. Sometimes they ended up there.
16 Sometimes they were released to their families.
17 So --

18 CHIEF JUSTICE ROBERTS: The things
19 that I -- I think is underlying a lot of the
20 debate is the expansive notion of what counts as
21 evidence. In -- in -- in your brief, you say
22 the defendant in this case was -- this is
23 evidence to support his insanity claim, was
24 described by some as a tightwad who would, for
25 example, borrow rather than purchase tools.

1 And -- and in the same page, again,
2 this is evidence that you selected in the -- to
3 put in your brief of his mental disorder, that
4 he thrived on self-importance, community
5 prestige, and being perceived as having an ideal
6 or perfect marriage.

7 Now, maybe that's not the best way to
8 order your life, but if that's what you mean by
9 insanity, you can understand why that might
10 cause some reservations.

11 MS. SCHRUP: Your Honor, Mr. -- Mr.
12 Chief Justice, let me just tell you why those
13 facts are in there and why they're not -- why
14 they're there and that will shed light on it.

15 What we know is that Mr. Kahler had a
16 major depressive disorder. He had a qualifying
17 mental illness. Those facts are in there to
18 show that there was an entire other category of
19 evidence that, in combination with that major
20 depressive disorder, could have been developed.

21 CHIEF JUSTICE ROBERTS: But that he --

22 MS. SCHRUP: But it doesn't --

23 CHIEF JUSTICE ROBERTS: -- borrows
24 tools instead of purchasing them? That sounds
25 like the reasonable option.

1 (Laughter.)

2 MS. SCHRUP: Well, you can't -- Mr.
3 Chief Justice, you can't take that one fact out
4 of context. But the most important thing is, is
5 that juries are able to take the collection of
6 evidence and -- that is presented to them, and
7 decide, they decide whether the person is
8 insane, whether they have the capacity for moral
9 judgment or not.

10 JUSTICE GINSBURG: But what would be
11 put before the jury, that is, what now, what
12 evidence in this record would you point to to
13 show that Kahler was unable to tell right from
14 wrong? What evidence is there that he was
15 unable to make that distinction?

16 MS. SCHRUP: On the current record --
17 which, of course, was not developed with a right
18 and wrong principle -- I would point you to the
19 Joint Appendix at 87 where his expert said that
20 he -- he couldn't rule out short-term
21 disassociation. If you are off-line in that
22 way, he couldn't appreciate right versus wrong.
23 But, again, I'd like to point out that he was --
24 he was not even given the opportunity to put
25 forth that and to develop other evidence that

1 would have shown more forcefully that he didn't.

2 And that's --

3 JUSTICE ALITO: Well, he had the --

4 MS. SCHRUP: -- the same for every
5 defendant.

6 JUSTICE ALITO: He had the opportunity
7 and every incentive to do that at the penalty
8 phase. At the penalty phase, he was able to --
9 to argue I shouldn't get a death sentence
10 because I didn't know that what I was doing was
11 morally wrong.

12 And you'd think that, if the jury
13 believed that, they wouldn't have imposed the
14 death penalty.

15 But they did. And you have to keep in
16 mind what he did. And this is an intelligent
17 man, and he sneaked up on the house, where his
18 wife and her mother and his children were
19 staying. He killed his ex-wife. He killed his
20 ex -- her mother. He executed his two teenage
21 daughters. One of them is heard on the tape
22 crying. He, nevertheless, shot her to death.
23 He spared the son, because he didn't think the
24 son was siding with the mother. And then he ran
25 away and turned himself in the next day.

1 Now, this is the stuff from which
2 you're going to make a defense he didn't know
3 that what he was doing was morally wrong, much
4 less he didn't know what he was doing was
5 legally wrong?

6 MS. SCHRUP: Justice Alito, I'll
7 answer the first part. Sentencing is not a
8 substitute because we know from the briefs that
9 jurors make up their mind at the guilt phase.
10 And, in fact, a dissenting Justice in the
11 opinion below said we should not let what
12 happens at guilt indicate what happens at
13 sentencing.

14 And because that he lacked that, the
15 jury lacked that lens to consider the moral
16 capacity principle, you can't draw any -- it
17 would be speculative to say what the capital
18 jury would have decided.

19 JUSTICE ALITO: But is that realistic?
20 I'm on a jury and I say: Well, now I -- I've
21 convicted this guy. I found him guilty. Having
22 done that, even though I think that he didn't
23 know that what he was doing was morally wrong,
24 I'm going to vote to impose the death penalty.
25 Is that realistic?

1 MS. SCHRUP: It is realistic because
2 we know from the briefs that they -- that jurors
3 are swayed by what they decide at the guilt
4 phase. And if they have lacked the mechanism
5 and the opportunity to look through the lens of
6 capacity for moral judgment, then -- then we
7 can't draw any conclusions about that.

8 Now, the facts are hard in every case
9 and they are hard in this case. But what we're
10 talking about is an opportunity, a mechanism for
11 all defendants, to be able to get into the
12 threshold and let a jury decide --

13 JUSTICE KAVANAUGH: You've referred
14 several times to the jury. And one of the
15 debates that has occurred over the last several
16 decades is the capacity of juries to be able to
17 parse these fine concepts. And one of the
18 things that leading scholars have said is that
19 this may be beyond the capacity of jurors to do
20 in a principled way.

21 So why can't a state say, as Justice
22 Alito points out, we're going to take this away
23 from the jury as a separate defense, put it into
24 mens rea, and then, as Justice Ginsburg points
25 out, have it considered at sentencing? Why is

1 that an unreasonable policy judgment, so
2 unreasonable as to violate due process?

3 MS. SCHRUP: Well, two points, Justice
4 Kavanaugh. First of all, the critiques or the
5 debates were not about abolition. They were not
6 about scrapping the defense entirely. Those
7 should be handled through instructional or --

8 JUSTICE KAVANAUGH: Well --

9 MS. SCHRUP: -- evidentiary
10 mechanisms.

11 JUSTICE KAVANAUGH: Sorry to
12 interrupt, but I think one of the debates was,
13 in fact, about putting it into a mens rea
14 defense as Kansas has done, in part because the
15 concept as a separate defense was too confusing
16 for jurors. And Professor Goldstein pointed
17 that out in his book and that has been part of
18 the debate.

19 So they haven't necessarily abolished
20 the insanity defense. I think that's a bit of a
21 misnomer. They have funneled it into mens rea
22 and then said that it can be considered at
23 sentencing as well.

24 MS. SCHRUP: Justice Kavanaugh, they
25 have abolished. I mean, they -- they've

1 acknowledged they've abolished. And what is
2 present in the mens rea approach is nothing more
3 than what Winship requires. And we know that it
4 is not sufficient because it doesn't allow -- it
5 doesn't allow a jury or -- or the defendant to
6 raise his capacity for moral judgment, which, if
7 you go back through history, was an important
8 component --

9 JUSTICE KAGAN: Ms. --

10 MS. SCHRUP: -- of criminal
11 culpability.

12 JUSTICE KAGAN: Ms. Schrup, do you
13 have any information about how this works in the
14 46 states that have the rule that you prefer?
15 In other words, how often do people raise
16 insanity defenses? How often do juries actually
17 find insanity?

18 If this were in one of the other 46
19 states, how would it operate? But -- or -- or
20 not if this case was. I mean, honestly, you
21 can't say this, but I can. This -- in none of
22 these 46 states, I'm -- I'm -- I'm guessing,
23 would your client be found insane. But what
24 happens in these 46 states? How often are
25 people found insane?

1 MS. SCHRUP: So, Justice Kagan, it's
2 not in the record. I have done some research.
3 I could let you know what I found out if you'd
4 like me to, but it's not contained in the
5 record. But I do know that it is raised in the
6 right-and-wrong states and that there are
7 acquittals every year.

8 JUSTICE GORSUCH: And, counsel, can I
9 just -- one other question about the extent of
10 how far this goes. Obviously, this is a capital
11 case, but how -- how far down the road would you
12 say this defense must be extended as a matter of
13 due process? To all homicides? To all
14 felonies? Where do you think the line would be
15 drawn?

16 MS. SCHRUP: I don't think that you
17 draw the line, Justice Gorsuch, at punishment.

18 JUSTICE GORSUCH: So an insanity
19 defense is required with respect to any criminal
20 complaint, even a regulatory strict liability
21 misdemeanor?

22 MS. SCHRUP: This Court has never --
23 well, so it's our position -- we're making a
24 facial challenge, so it's our position it should
25 be applied everywhere.

1 JUSTICE GORSUCH: Okay.

2 MS. SCHRUP: But this Court has never
3 definitively ruled on the extent of strict
4 liability crimes. I think it could carve that
5 out. But I think what's important are two
6 things, Justice Gorsuch: First of all, this is
7 a rarely used defense. It's invoked in less
8 than one percent of the cases and successful in
9 only a quarter of that. We're not talking about
10 a huge number of people.

11 But for the people that it really
12 matters, there is no mechanism in these states
13 to protect them, to let them be excused or to
14 let the -- a jury consider their actual
15 culpability when they can't tap into their
16 brains in the way other people's -- people can.
17 And I think jurors are able to decide that.
18 They decide the term "reasonableness" all the
19 time.

20 JUSTICE ALITO: If a state adopted the
21 irresistible impulse defense, would that be
22 unconstitutional?

23 MS. SCHRUP: This Court in Leland said
24 that it is not a constitutional floor. So, no.

25 JUSTICE ALITO: No, not whether it's

1 required, but would that be unconstitutional
2 because it does not ask whether the person knew
3 right from wrong?

4 MS. SCHRUP: I think, yes, it would --
5 it would also have to include the
6 right-and-wrong principle.

7 I'd like to turn briefly to the Eighth
8 Amendment. The original public meaning of that
9 term was that it would be cruel and unusual to
10 punish the insane. In 1868, with the
11 Reconstruction, amendments were adopted. Every
12 single jurisdiction had an insanity defense.
13 And even if you rewind back to 1791, it would
14 have been cruel and unusual to punish the
15 insane. They were either handled outside of the
16 legal process or they were allowed to come in
17 and plead and prove insanity.

18 Because the Eighth Amendment was --
19 was intended as a check on sovereign power,
20 states are simply not free to legislatively
21 redefine culpability in a way that is
22 inconsistent with history and long-standing
23 practice.

24 But that is what Kansas has done here.
25 It is an outlier. It prevents people from -- it

1 -- well, by taking away the mechanism, they
2 ensure that insane people will be punished in
3 their borders.

4 JUSTICE GINSBURG: The Kansas Supreme
5 Court didn't reach that question, so you are
6 asking to -- us to decide it as a matter of
7 first impression.

8 MS. SCHRUP: No, Justice Ginsburg.
9 And this -- you know, was vetted at the cert
10 stage, and I would point this Court to the
11 addendum to -- at our cert reply at page 18 and
12 19, because there it's clear that this notion of
13 applying wrongfulness to the insanity defense
14 came up at oral argument, was argued, and in
15 that post-argument memo, counsel said we believe
16 that this issue is presented. We're going to --
17 if you want supplemental briefing, we'll provide
18 it, but we believe it is an issue that is
19 implicit in this Court's ruling.

20 JUSTICE KAVANAUGH: What do you do
21 with the statement of Justice Marshall for a
22 plurality in Powell versus Texas? "Nothing
23 could be less fruitful than for this Court to be
24 impelled into defining some sort of insanity
25 defense -- or insanity test in constitutional

1 terms." I think pointing out the difficulty of
2 us, through the Due Process Clause, wading into
3 this policy debate and figuring out what the
4 line is.

5 MS. SCHRUP: Justice Kavanaugh, that
6 -- and Powell was not an abolition case, first
7 of all. But, secondly, what Justice Powell said
8 there was a reflection of the facts of that
9 case. That case had to grapple with Leland, and
10 the only mechanism or the only test that would
11 have applied in Powell is an irresistible or
12 compulsion-based test.

13 So our standard, the right-and-wrong
14 standard, is below that. And it's not a --

15 JUSTICE KAVANAUGH: But -- but Leland
16 in turn said -- noted the wide disagreement
17 among different tests and said choice of a test
18 involves not only scientific knowledge but
19 questions of basic policy. The whole problem
20 has evoked wide disagreement among those who
21 have studied it, which is true as to this -- as
22 to the Kansas approach as well. There's wide
23 disagreement, but some have advocated for that
24 as well.

25 MS. SCHRUP: Well, Leland also

1 recognized the right-and-wrong principle was the
2 majority test in the majority of jurisdictions.
3 And that holds true today because 48
4 jurisdictions have retained this baseline
5 principle. And we're not --

6 JUSTICE KAVANAUGH: Are -- are all 48
7 constitutional?

8 MS. SCHRUP: If they have the
9 right-and-wrong principle, they are. Yes.

10 JUSTICE KAVANAUGH: Is that a yes?

11 MS. SCHRUP: Yes, I'm sorry.

12 JUSTICE KAVANAUGH: All 48 are
13 constitutional?

14 MS. SCHRUP: Yes.

15 JUSTICE ALITO: Justice Marshall's --
16 Justice Marshall's statement in Powell was not
17 limited in the way that you suggest. It was
18 categorical. And he was joined by Chief Justice
19 Warren, Justice Black, and Justice Harlan in
20 saying that. So they were all wrong at that
21 time?

22 MS. SCHRUP: Mr. Chief Justice?

23 CHIEF JUSTICE ROBERTS: Briefly.

24 MS. SCHRUP: Okay. Justice Alito,
25 it's not that they were wrong; it's just they

1 were talking about a different scenario, a
2 non-abolition case dealing with a test that is
3 north of our standard. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Crouse.

7 ORAL ARGUMENT OF TOBY CROUSE
8 ON BEHALF OF THE RESPONDENT

9 MR. CROUSE: Mr. Chief Justice, and
10 may it please the Court:

11 Petitioner asked this Court to define
12 a rule of insanity and to require the states to
13 implement that rule in its criminal justice
14 proceedings. But, as this Court indicated in
15 Powell, nearly 50 years ago, nothing would be
16 less fruitful than for this Court to select a
17 rigid rule of constitutional law of insanity.
18 And that admonition rings as true today as it
19 did 50 years ago.

20 The first thing I'd like to talk about
21 is that it's not deeply rooted. The right
22 versus wrong test is a relatively recent
23 vintage. The historical basis for it started
24 somewhere around the 1800s; and, therefore, it's
25 not deeply rooted.

1 In addition, the states have had
2 historical and traditional discretion to both
3 define the elements of the criminal law, the
4 defenses that are available in those criminal
5 justice proceedings, and the substantive rules
6 at which those defenses and elements are met.

7 And consistent with that discretion,
8 the State of Kansas has a holistic approach to
9 the mental illness problem starting at the time
10 the criminal justice proceeding is initiated,
11 throughout the guilt phase, as well as in the
12 punishment phase, and continuing on even with
13 regard to the sentence as it's carried out,
14 whether being in a prison or in a mental
15 hospital.

16 These factors confirm that Petitioner
17 has not carried the heavy burden to identify a
18 single rule that is clearly established and
19 required by the fundamental elements of due
20 process. And for that reason, we believe that
21 the state supreme court judgment in Kansas
22 should be affirmed.

23 And so unless there are additional
24 questions this Court would have, I'd -- I'd like
25 to first turn to the answer of Justice Alito's

1 question, and the answer is the right-and-wrong
2 test has multiple components. There is no
3 consistent element or definition of how that's
4 applied in any of the 46 jurisdictions. As our
5 brief points out, there are a host of different
6 factions and different ways in which those
7 elements would be met, and we think that, in and
8 of itself, undermines the constitutional floor
9 that Petitioner seeks --

10 JUSTICE SOTOMAYOR: Mr. Crouse --

11 MR. CROUSE: -- to have us --

12 JUSTICE SOTOMAYOR: I -- I understand
13 what you're saying, but I have a problem
14 because, as I understand the mens rea test, it
15 takes away excusing a person who, from the 15 --
16 1400s, would have been considered a lunatic, a
17 person who hears voices and the voices tell him
18 or her what to do, and they have no volition to
19 fight back.

20 They -- many of them know they're
21 killing somebody. So intent under your mens rea
22 test is met. They absolutely know they're
23 killing someone; they just have no ability to
24 say no. They -- they don't -- they can't
25 because of their either mental illness --

1 lunacy, all of the wild beast things, all of --
2 yes, they have two components, some volition and
3 some not, but for centuries, that concept of no
4 volition, the true lunatic, would get off.

5 Your test doesn't do that.

6 MR. CROUSE: Well, it -- it does. So
7 our test is -- is relatively consistent with the
8 cognitive capacity test. There's a volitional,
9 there's a moral test, and then there's the
10 product test. And so we -- we would view our
11 test as consistent with the cognitive test.

12 And if the individual can't formulate
13 the in -- criminal intent in Kansas, that --
14 that is a sufficient defense. And that has been
15 --

16 JUSTICE SOTOMAYOR: But that's not how
17 I read your charge. I mean, when I read the
18 charge here, it doesn't talk -- you're talking
19 the very language that your adversary is
20 suggesting you should adopt.

21 MR. CROUSE: No.

22 JUSTICE SOTOMAYOR: But it's not part
23 of the mens rea test. The strict mens rea test
24 now is do you intend to -- do you know what
25 you're doing?

1 MR. CROUSE: Do you have criminal
2 intent, that's right. I -- I --

3 JUSTICE SOTOMAYOR: No, no --

4 MR. CROUSE: What I --

5 JUSTICE SOTOMAYOR: -- there's not --
6 yes, you're -- you're adding a volition. But
7 what I'm saying is your -- this test standing
8 alone doesn't do that.

9 MR. CROUSE: So, as I -- I understand
10 Petitioner's test, is they want to ask the
11 question of whether or not the individual knows
12 that it's either legally or morally right versus
13 wrong. What Kansas does is, if you have
14 criminal intent, you are responsible.

15 But --

16 JUSTICE SOTOMAYOR: Well, I think
17 there --

18 MR. CROUSE: -- after conviction then
19 you have the opportunity to assert a right
20 versus wrong test.

21 JUSTICE SOTOMAYOR: Well, but that's
22 the point, which is that issue, which is after
23 conviction. What she's been arguing is that
24 since the beginning of time, both under English
25 law and at the time of the founding, all the

1 states then -- and, frankly, until I think the
2 1970s -- all 50 states didn't make it a subject
3 of sentencing.

4 They made it a reason for why you
5 should be excused from your conduct -- for your
6 conduct.

7 You're saying the same thing with
8 something like duress: I intend to kill
9 someone, but it's because somebody is holding a
10 gun to my head. All 50 states would let you
11 off. But you're now saying it's okay to
12 stigmatize you with a criminal conviction even
13 though, in fact, you may be insane.

14 MR. CROUSE: I'm saying what the state
15 of Kansas has done is it has defined its mental
16 illness defense consistent with what the
17 historical teachings are, dating back to
18 Blackstone, going all the way up to the 1910, I
19 believe it was Professor -- Dean Orville Morris
20 indicated that up until the 19th Century, that
21 being M'Naghten, criminal intent was what
22 handled everything with regard to criminal
23 insanity.

24 JUSTICE KAGAN: So, General Crouse,
25 could you assume for a moment that I disagree

1 with you on the reading of the historical
2 record? And just let's say that the historical
3 record actually -- that there's much more
4 evidence than you are suggesting that a
5 defendant had to have a guilty mind, meaning an
6 understanding that what he was doing was
7 immoral, as well as the inability to form
8 specific criminal intent.

9 And if -- if that's the case, if you
10 look at the -- all the cases and say, you know,
11 case after case after case what they're talking
12 about is something more than criminal intent,
13 what they're talking about is some kind of moral
14 understanding, if that's the case what's your
15 best argument that you should win?

16 MR. CROUSE: So I think I have three.
17 The first one is the existence of strict
18 liability. The second would be the existence of
19 corporate liability. And, third, I think
20 there's just the general understanding that
21 criminal intent has always been separated from
22 moral and -- moral capacity.

23 And even with regard to -- I think the
24 hypothetical you have suggested, I think we
25 would have to know whether or not the right

1 versus wrong test is being defined in a legal
2 sense or a moral sense.

3 And even if so, the states that have
4 adopted the right versus wrong test have
5 variations within them. Some, for example, like
6 the federal government, to my understanding,
7 would require a severe mental illness.

8 JUSTICE KAGAN: You know, I guess I --
9 I understand that there are some variations in
10 the historical record and even in states now,
11 but -- but there are some number of states, a
12 great number, 46 states, 48 states, whatever it
13 is, that go further than you do in terms of
14 saying something more is -- is required than the
15 mere capacity to -- to formulate criminal
16 intent, and that that something more in large
17 measure is some ability to -- to -- to make
18 moral judgments and to distinguish between right
19 and wrong.

20 And, again, let's just assume that --
21 that that's what the historical record said. I
22 know you don't agree with that. But let's
23 assume that that's what the historical record
24 indicated. Could you still win and why?

25 MR. CROUSE: I -- I could because of

1 the nature of this Court's inquiry. This Court
2 has to -- I'm sorry, Petitioner has to satisfy a
3 high burden to identify a particular rule that
4 the absence of which Kansas law would constitute
5 a violation of a deeply-rooted rule. And that
6 simply doesn't exist based upon the very
7 generalities that we've talked about today. So
8 --

9 CHIEF JUSTICE ROBERTS: But it seems
10 that by its nature, if the principle is, as
11 Justice Kagan suggests, hypothetically, if it's
12 historically established that you cannot punish
13 people who don't know the difference between
14 right and wrong, that certainly sounds like
15 something that is rooted in the conscience and
16 would be ranked as fundamental.

17 MR. CROUSE: Well, I -- I think what
18 the -- what the -- and I don't mean to fight the
19 hypothetical here -- but my understanding of the
20 history is that what has been dealt with
21 throughout our time is how to resolve and handle
22 mental illness within the criminal capability
23 system.

24 And what this Court's decision,
25 Arizona versus Clark said, is that there is no

1 fundamental --

2 JUSTICE BREYER: You're not going to
3 get it exactly. I mean, it is a -- it is a
4 nightmare trying to figure out exact standards.
5 I agree with that. But my question, which I
6 just hope you would clarify, because it's -- I'm
7 stumbling on it, imagine two defendants.

8 Both defendants, 1 and 2, are
9 certified by whatever board of psychiatrists you
10 want as totally insane. All right? The first
11 defendant shoots and kills Smith. The second
12 defendant shoots and kills Jones.

13 The first defendant thinks that Smith
14 is a dog. The second defendant knows it's a
15 person but thinks the dog told him to do it.
16 Okay? What's the difference?

17 MR. CROUSE: So I think that's -- the
18 difference is criminal intent in the first
19 situation because, as I understand the
20 hypothetical, the individual intends to commit a
21 crime against a human being.

22 JUSTICE BREYER: I -- I -- I know
23 these are words, you see, I want it looking for
24 something in terms of criminal law or legal
25 purpose or human purpose or whatever that would

1 treat the two -- why treat them differently?

2 One answer you've given, you said it's
3 so hard to figure out. I agree it's hard to get
4 a definition. That's going to be true in both
5 cases.

6 You say criminal, corporate criminal
7 liability, and regulatory offenses. I agree
8 with you, you'd have to carve out exceptions and
9 that is not easy to do. Okay? I've got those
10 points.

11 But I'm looking for something
12 different between the two defendants. The dog,
13 there he is, the dog, he told me to do it. They
14 are both crazy.

15 And why does Kansas say one is guilty,
16 the other is not guilty?

17 MR. CROUSE: So I -- I think that this
18 Court's cases have historically allowed
19 legislative --

20 JUSTICE BREYER: I don't care --

21 MR. CROUSE: -- bodies --

22 JUSTICE BREYER: -- what the cases say
23 at this moment. I've read cases, my law clerk
24 has found 40 instances, going back to Bracton,
25 you know, where it seems to be against you, but

1 I'm not interested in that.

2 I'm interested in a practical,
3 pragmatic purpose, in why the law should treat
4 those two cases differently. Same question,
5 I've just now repeated it three times, and I am
6 listening for your answer.

7 MR. CROUSE: So -- and I apologize for
8 not getting to the answer of your question. I
9 think that the problem is that states have
10 grappled with this and they've made different
11 moral judgments as to who is morally responsible
12 or not. And this Court's cases allow the state
13 legislatures or federal Congress to determine
14 whether that person should be or should not be
15 held responsible.

16 What Kansas does is it identifies
17 those who intend to commit a crime, punishes
18 those.

19 JUSTICE BREYER: You're -- you're
20 telling me --

21 MR. CROUSE: Our -- our -- convicts
22 them --

23 JUSTICE BREYER: -- that states -- and
24 you're right, particularly Kansas, do, in fact,
25 treat he's a dog, the dog told me to do it,

1 differently. But my question was why?

2 MR. CROUSE: Well, I think it's a
3 spectrum as to what the states believe is
4 appropriate.

5 In Delaware, for example, my
6 understanding is that individual would not be
7 convicted, whereas in Illinois that person could
8 be convicted because they know that shooting a
9 human being is legally wrong.

10 JUSTICE KAGAN: Do you think, General
11 Crouse, that you could also eliminate
12 consideration of the moral understanding at
13 sentencing, in other words, take the Justice
14 Breyer example and the dog told me to do it,
15 would it be unconstitutional if your state did
16 not have a procedure for considering that at
17 sentencing?

18 MR. CROUSE: So obviously a different
19 question and I think it also engenders a
20 different test. I think that -- that, if you're
21 considering what is available at the sentencing,
22 for whether it violates the constitution, would
23 implicate the Eighth Amendment.

24 JUSTICE KAGAN: Well, let's put the
25 Eighth Amendment to the side. Let's say that

1 this isn't a capital case. All right? Does a
2 state just have to have a way to consider at
3 sentencing somebody's complete lack of
4 understanding of the morality of his actions?

5 MR. CROUSE: I don't believe that this
6 Court's cases would indicate that the states
7 have to consider the morality at sentencing or
8 any particular time.

9 JUSTICE KAVANAUGH: But the --

10 JUSTICE GORSUCH: How about -- how
11 about the mens rea aspect of that? I -- I -- I
12 just want to follow up on Justice Breyer's
13 question as well, and Justice Kagan. If --
14 would you -- would you accept that at least that
15 is required as a matter of due process, that
16 some inquiry into mens rea is required in these
17 cases? And if so, why? And if not, why?

18 MR. CROUSE: Well, yes, I would accept
19 that carving out strict liability in the
20 corporate liability context.

21 JUSTICE GORSUCH: Why? And how do you
22 reconcile that with our strict liability cases?

23 MR. CROUSE: Well, I -- I think what
24 this Court has done is historically guarded mens
25 rea because that's what separates innocent

1 conduct from criminal conduct. And that's what
2 Kansas has done here.

3 JUSTICE GORSUCH: So you -- you accept
4 that there is a constitutional minimum floor
5 below which the state -- states cannot proceed
6 with respect to mental capacity and insanity;
7 you just suggest that you've met that standard.

8 MR. CROUSE: I --

9 JUSTICE GORSUCH: Is that the -- the
10 nub of the argument, then?

11 MR. CROUSE: I think I would finely
12 parse that a little bit. I would -- I admit
13 that there is a mens rea requirement with regard
14 to how one would define insanity. I don't
15 believe that this Court has identified a floor
16 and suggested that there are variations of ways
17 to handle --

18 JUSTICE SOTOMAYOR: I'm not sure I
19 understand. You accept that states can define
20 strict liability crimes. I don't know if you've
21 answered Justice Gorsuch's --

22 JUSTICE GORSUCH: No.

23 JUSTICE SOTOMAYOR: -- question which
24 is could -- could you do away with the mens rea
25 defense? Could you simply say we in Kansas

1 believe if you kill someone, regardless of the
2 reasons, if you've done the act, you've
3 committed murder? Period, end of story. No
4 mens rea defense, no nothing.

5 MR. CROUSE: Again, I think that is a
6 much more difficult situation, and I -- I -- I
7 think that would present a -- a lot of
8 additional problems for the State of Kansas
9 because of this Court's requirement of having a
10 mens rea baseline.

11 JUSTICE KAGAN: Could you --

12 JUSTICE ALITO: Well, has that --

13 JUSTICE KAGAN: -- get rid of other
14 defenses --

15 JUSTICE ALITO: -- ever been -- has
16 that --

17 JUSTICE KAGAN: -- General Crouse?
18 Could you get rid of other defenses? You know,
19 duress. Could you get rid of the duress
20 defense?

21 MR. CROUSE: Yeah, so -- so I -- I
22 think the same historical analysis that we have
23 undergone with regard to the insanity test is
24 something that we would have to look at. I
25 haven't done the --

1 JUSTICE KAVANAUGH: Well, on the --

2 MR. CROUSE: -- individual research on
3 duress --

4 JUSTICE KAVANAUGH: -- the history --

5 JUSTICE ALITO: You seem very reticent
6 about answering these questions. Has there ever
7 been -- can you cite any -- any state or any
8 legal system, I'll even just limit it to
9 English-speaking countries, that have ever said
10 that killing another person is a strict
11 liability offense?

12 MR. CROUSE: No. And -- and Kansas
13 certainly doesn't do that.

14 JUSTICE KAVANAUGH: On the history
15 that Justice Kagan was asking about, I think
16 your primary answer was that there's been no
17 particular test that is historically rooted.
18 But isn't there a baseline that is historically
19 rooted, above which there have been a variety of
20 tests that have been accepted by the states
21 until, as Justice Sotomayor said, until the end
22 of the 20th century?

23 MR. CROUSE: I -- I think I would
24 agree that the states have -- organized
25 societies have consistently struggled with how

1 to define and handle mental illness, but I don't
2 believe that there has been a baseline that has
3 been established beneath which the states could
4 go.

5 JUSTICE KAVANAUGH: Well, since the
6 early 1800s, at least, to the late 20th century
7 in the United States, didn't every state allow
8 some form of a separate insanity defense at the
9 guilt phase?

10 MR. CROUSE: My understanding is that
11 the treatment of insanity has varied within
12 particular parameters. For example, some states
13 would require an affirmative defense. Kansas,
14 for example, didn't have a separate defense.
15 It --

16 JUSTICE KAVANAUGH: But all
17 separate -- let me just focus on my question.
18 All -- all the states had something separate
19 from the mens rea approach at the guilt phase
20 through the end of the 20th century; isn't that
21 correct as a matter of historical practice? You
22 can still win the case, as Justice Kagan noted,
23 but just to make sure we're on the same page.

24 MR. CROUSE: Yeah, and I'm not trying
25 to -- to skip the answer, because I think Kansas

1 actually included it as part of the guilt phase.
2 It didn't have a separate insanity defense.

3 So, for example, it came in with a
4 different definition.

5 JUSTICE ALITO: I mean, you're saying
6 all states had a separate insanity defense in
7 1791?

8 MR. CROUSE: I -- I -- I don't believe
9 I was saying that --

10 JUSTICE ALITO: No.

11 MR. CROUSE: -- they have separate
12 defenses. I think they handled it differently.
13 Some of them defined it as an affirmative
14 defense. Some of them put it in a separate
15 proceeding.

16 JUSTICE ALITO: Some of them handled
17 it through mens rea, did they not?

18 MR. CROUSE: They have.

19 JUSTICE ALITO: Does mens rea for
20 murder or for any other criminal defense vary
21 from case to case? Is it not the same in every
22 case regardless of whether the person claims to
23 be mentally ill or not?

24 MR. CROUSE: The mens rea element
25 would be consistent in an attempt to commit a

1 crime, yes.

2 JUSTICE ALITO: So if the mens rea
3 element traditionally incorporated a requirement
4 of moral capability -- of moral culpability,
5 that would apply across the board, would it not?
6 Not just to cases where the person says this is
7 -- I -- I had this lack of capacity due to
8 mental illness, but I have it due to political
9 brainwashing or religious fanaticism or any
10 other reason?

11 MR. CROUSE: That's correct, Justice
12 Alito.

13 JUSTICE ALITO: I mean, is that -- was
14 was that the traditional understanding of mens
15 rea?

16 MR. CROUSE: So I don't believe that
17 was consistent with the historical understanding
18 of mens rea. And I think it's also inconsistent
19 with general criminal principles in which we
20 don't look at the motive of the individual
21 committing the crime --

22 JUSTICE KAGAN: Would -- would you
23 agree that historically, if you go back and you
24 look at the cases, you see this operating in two
25 categories of cases. One is for insane people,

1 and one is for what were then called idiots,
2 right, people who lacked mental capacity?

3 So, I mean, but -- but for those
4 people, it came up again and again that, yes,
5 you know, you lack the moral capacity to
6 understand what you're doing and, therefore, the
7 criminal system ought to operate differently on
8 you. Isn't -- isn't that right?

9 MR. CROUSE: So I -- I would push back
10 only in -- in regard to whether or not it was a
11 moral capability. I think, historically, it's
12 looked at a cognitive capability as to whether
13 we could -- can take intent to commit a crime.

14 And I don't think that the moral
15 capacity came in until the M'Naghten era as
16 to -- we asked whether or not someone knew it
17 was right and wrong to commit a crime.

18 JUSTICE BREYER: But it wasn't phrased
19 at that. I mean, it's quite deep, this
20 question. It's like ethics and Aristotle. The
21 wind blew my hand. You don't hold him -- well,
22 I'll save my depth for later.

23 CHIEF JUSTICE ROBERTS: Finish your
24 question.

25 JUSTICE BREYER: I'm not sure I want

1 to.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. CROUSE: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Prelogar.

7 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE RESPONDENT

10 MS. PRELOGAR: Mr. Chief Justice, and
11 may it please the Court:

12 Petitioner bears the burden of
13 establishing that substantive due process
14 principles override the Kansas legislature's
15 judgment in this case in adopting a mens rea
16 test of insanity, and he has not carried that
17 burden.

18 Petitioner suggests that this Court
19 should recognize a theory of moral culpability
20 and impose that uniformly across the states.
21 But the problem with that approach is, both as a
22 matter of history and in contemporary practice,
23 there has been no agreement on the precise
24 circumstances when mental illness should excuse
25 criminal responsibility.

1 And I'd like to begin, actually, with
2 the hypotheticals that Justice Sotomayor and
3 Justice Breyer brought up, because I think that
4 this actually illustrates that even in
5 contemporary jurisdictions today, there is a
6 basic divide on when someone should be entitled
7 to invoke the insanity defense. And this gets
8 to the -- the difference between legal wrong and
9 moral wrong.

10 Even in those jurisdictions that adopt
11 a wrongfulness test, the one that Petitioner is
12 proposing, there is differential treatment of
13 defendants based on whether they could
14 appreciate that their conduct violated the law
15 and constituted a crime or not.

16 So imagine the defendant who hears
17 voices that command him to kill in order to save
18 the human race. He knows that murder is a crime
19 and that he'd be violating the law, but he
20 thinks the action is morally justified because
21 of his mental illness.

22 In a substantial number of
23 jurisdictions, he would not be entitled to
24 invoke the insanity defense. And so to try to
25 recognize or articulate a theory of moral

1 culpability, I think, has -- has no roots in
2 history and would actually raise the possibility
3 of challenging state laws across the nation.

4 JUSTICE SOTOMAYOR: Excuse me. We
5 have -- every state has a duress defense. They
6 all vary. They all have different exceptions.
7 They all have different articulations. There's
8 never been a common one, but all 50 have them.

9 And the essence of it is defined very
10 simply as duress, compulsion. And we give wide,
11 wide, incredible latitude to the states to
12 define those circumstances.

13 I think what your adversary is saying
14 is that making this go simply to intent and
15 taking out some differentiation from the true
16 lunatic who knows it's wrong to kill a person
17 but the TV made him do it, no volition
18 whatsoever to conform his conduct to the law, no
19 ability, I think it's more moral incapacity,
20 rather than capacity. The intent-based defenses
21 don't encompass that in any way.

22 This is not like Clark where we found
23 that the two prongs of the M'Naghten test were
24 really encompassed in the first. That's what
25 the problem is for me. There is an essence,

1 just as there is an essence of compulsion for
2 duress as a -- as a defense mechanism, there is
3 some minor amount that has to excuse criminal
4 liability.

5 MS. PRELOGAR: And, Justice Sotomayor,
6 Kansas here has recognized cognitive incapacity
7 as the way that you excuse criminal
8 responsibility when you're assessing these
9 difficult issues of how mental illness should
10 function to excuse criminal culpability in a
11 criminal justice system.

12 JUSTICE SOTOMAYOR: But that's --

13 MS. PRELOGAR: I think that --

14 JUSTICE SOTOMAYOR: -- where we
15 differ.

16 MS. PRELOGAR: But to the extent that
17 you are --

18 JUSTICE SOTOMAYOR: Because you could
19 know something is against the law and still not
20 have the ability to conform your conduct. If I
21 make a moral choice I could say, if it's only a
22 moral choice, I could say I don't wish to do it
23 because of my morality. Could I physically stop
24 myself? Yes.

25 Someone who is insane can't even

1 physically stop themselves.

2 MS. PRELOGAR: And our --

3 JUSTICE SOTOMAYOR: But that's a
4 different, sort of --

5 MS. PRELOGAR: I absolutely agree it's
6 a different test of insanity. As this Court has
7 recognized, jurisdictions have struggled with
8 this across time and across different places and
9 they've settled on different variants in trying
10 to identify the precise circumstances --

11 JUSTICE KAGAN: But, Ms. --

12 MS. PRELOGAR: Which would pull
13 someone totally outside the realm of --

14 JUSTICE KAGAN: Ms. Prelogar --

15 MS. PRELOGAR: -- criminal
16 culpability.

17 JUSTICE KAGAN: -- what you are
18 suggesting as a test for insanity is not a test
19 for insanity. It's just the usual intent
20 requirement that we apply to all defendants.

21 If the defendant doesn't have the
22 intent to kill, then the defendant is not
23 culpable for that act. And it has nothing to do
24 with his insanity or not. And I think that the
25 question Ms. -- Justice Sotomayor is asking is,

1 is there something else that's necessary? And
2 we would leave a lot of flexibility to the
3 states, but that something else is -- is
4 something that relates -- relates particularly
5 to insane defendants, to, you know, their
6 ability to say, because I have a mental illness,
7 there has to be something more.

8 MS. PRELOGAR: So I don't think that
9 there is something else here. And as this Court
10 has recognized, the guidepost is history. What
11 Petitioner needs to do is come forward with some
12 kind of historical consensus establishing that
13 there's a fundamental principle that Kansas's
14 mens rea approach is violating.

15 And actually the mens rea approach is
16 itself one that was linked to the common law
17 early articulations of insanity. It was long
18 understood that one of the ways you might try to
19 identify that class of individuals who should be
20 declared legally insane as a legal concept was
21 to look at those who didn't have capacity to
22 form criminal intent.

23 And I -- I want to pause --

24 JUSTICE KAGAN: So --

25 MS. PRELOGAR: -- for a moment --

1 JUSTICE KAGAN: Ms. Prelogar, let's
2 just say I disagree with this, that -- that when
3 I look back at the history I see lots of cases,
4 Rex v. Arnold, Billingham, a number of others,
5 which make it quite clear, I mean, these are all
6 people who had an intent to kill.

7 And what the common law was saying was
8 that even though they had the intent to kill,
9 there was going to be a further inquiry into how
10 their insanity limited their moral
11 understanding, that -- their understanding of
12 wrongfulness of their act. So if I think that
13 that's kind of all over the history, how do I
14 find for you?

15 MS. PRELOGAR: Well, I want to make
16 clear that even if you thought this was a novel
17 approach that didn't have roots in history, the
18 Court has many times recognized that outlier
19 states aren't necessarily violating substantive
20 due process.

21 Leland versus Oregon, for example, was
22 a case where Oregon was the only state in the
23 nation that required defendants to prove their
24 insanity beyond a reasonable doubt. So I don't
25 think that that's cause alone to -- to think

1 that somehow this is violating a fundamental
2 principle.

3 And I think, actually, looking at the
4 jury instructions in some of the cases that you
5 mentioned, Justice Kagan, like Rex versus
6 Arnold, the jury was instructed there that the
7 defendant had to be shown to have no
8 understanding or memory such that he could form
9 no intent whatsoever.

10 That is a -- a restrictive test of
11 insanity. It's focused on this same idea of
12 cognitive incapacity --

13 JUSTICE KAGAN: Well, I -- it's --
14 it's -- it's -- it's less helpful to me to go
15 over each case one by one than for you to tell
16 me that if, you know, if I -- what I -- what I
17 think is true is that the history, there's --
18 there's -- there's just a ton that suggests that
19 -- that there was something more than a
20 requirement that the defendant have -- be able
21 to form an intent to kill.

22 Does -- does Ms. Schrup then win?

23 MS. PRELOGAR: I don't think so,
24 because Petitioner still bears the burden of
25 trying to articulate with precision what that

1 something more is. And I --

2 JUSTICE BREYER: You can --

3 MS. PRELOGAR: -- think for this here

4 --

5 JUSTICE BREYER: You can, I mean, that
6 was the point of my question, I think. The law
7 has many, many ways of, in different
8 circumstances, trying to separate out
9 individuals for whom the criminal justice system
10 is just not going to work in terms of
11 preventing, et cetera, the crimes.

12 One, the wind blew my arm. Okay?
13 Two, duress, because in a duress case you're
14 looking to see could the -- could the defendant
15 have done otherwise.

16 With insanity you're close to that.
17 Often it's a question of could the defendant
18 have done otherwise.

19 And even where not, it is is this
20 individual so different from an ordinary
21 individual that it just doesn't make sense to
22 apply the law?

23 Now, if some something like that is
24 going on, then my question, if, in fact, he's
25 the dog, out. Why isn't it? The dog told me to

1 do it.

2 Now, that's the fourth time I have
3 asked that. But I would like to know what you
4 think about it.

5 MS. PRELOGAR: So these are obviously
6 difficult questions, Justice Breyer. They're
7 ones that societies have wrestled with for
8 centuries in trying to balance the medical and
9 moral and legal judgments that go into crafting
10 an insanity rule.

11 This Court has long recognized that
12 states have principal responsibility to do that.
13 And I think that there are various ways states
14 could decide that they want to distinguish
15 between those two defendants.

16 For one thing that cognitive
17 incapacity test which focuses on whether the
18 individual thinks that the person he shot was a
19 dog, might be an easier inquiry for juries to
20 undertake. It might be a more
21 readily-observable sign of mental illness and
22 less likely to lead to confusion about what was
23 actually in the defendant's mind and whether he
24 was considering right versus wrong.

25 A jurisdiction might also think that

1 looking at considerations of individual
2 culpability, they don't want an on/off switch
3 for criminal responsibility but, rather, want to
4 shift those considerations to the sentencing
5 stage where a judge can take evidence and make a
6 more nuanced determination of individual
7 culpability.

8 Ultimately --

9 JUSTICE SOTOMAYOR: How does that stay
10 --

11 MS. PRELOGAR: -- I think that these
12 --

13 JUSTICE SOTOMAYOR: -- consistent with
14 Apprendi, assuming we find that since the
15 beginning of modern thought that there is an
16 irreducible minimum of due process that requires
17 the insane to be not convicted by a judge or put
18 in a mental institution by a judge but by a
19 jury?

20 MS. PRELOGAR: May I answer, Mr. Chief
21 Justice?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MS. PRELOGAR: There would still be a
24 question, Justice Sotomayor, of how you define
25 who is the insane. That's a legal concept.

1 It's one that's yielded no single formulation.
2 And I think for this Court to try to articulate
3 a theory of moral culpability could throw into
4 question state laws across the nation that are
5 trying to make these difficult judgments.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Ms. Schrup, you have five minutes
9 remaining.

10 REBUTTAL ARGUMENT OF SARAH SCHRUP ON
11 BEHALF OF THE PETITIONER

12 MS. SCHRUP: Thank you, Mr. Chief
13 Justice. I'd like to make three quick points:

14 First, the problem with the mens rea
15 approach, to get to Justice Breyer and
16 Sotomayor's point, is that it scrapes out the
17 why, the underlying motivation fueled by mental
18 illness that explains a defendant's act. And
19 that has been a part of our history for
20 centuries.

21 And that gets to the dog or the dog
22 example. It's completely arbitrary. I don't
23 know why if you think -- why one defendant who
24 thinks that a dog, he's shooting a dog, versus
25 another one who thinks a dog is ordering him to

1 shoot someone else, makes any difference
2 whatsoever. The first person is acquitted and
3 let out on the streets and the second is put in
4 jail and maybe put to death.

5 The second piece of this -- and so
6 there's no safety net, basically. What Kansas
7 does, actually, is even more extreme because it
8 limits the kind of mental illness evidence that
9 could come in, and it is essentially advocating
10 -- it -- it never explains why or whether there
11 is any light between the wild beast test and the
12 M'Naghten I test, but either way it is
13 fundamentally different than what we have had
14 historically and what 48 jurisdictions retain.

15 Second, I'd like to turn to my friend
16 on the other side's notion that -- that there is
17 some limits. He actually doesn't suggest
18 anything. And if you look at page 39 and 40 of
19 their brief, basically everything is up for
20 grabs.

21 There can be no mens rea. They can
22 make everything strict liability. Duress,
23 self-defense, all of these defenses are on the
24 line because, according to them, all that's
25 required in Kansas is a voluntary act and

1 intentional.

2 And, finally, turning back to history,
3 it's just not right to say that the right and
4 wrong principle is a 19th Century invention.
5 There is a wall of cases and authorities
6 starting in the 1500s and continuing,
7 uninterrupted, all the way through until 1843
8 when M'Naghten was formed.

9 There's literally scores of cases,
10 here and in England, applying the right and
11 wrong principle.

12 To contrast that with the test that
13 they suggest, which is essentially the wild
14 beast test, that was invoked maybe two or three
15 times. It was a blip.

16 So history favors us. And although
17 due process is a rigorous burden for a
18 petitioner to meet, we satisfy it here because
19 they have taken something out of our fundamental
20 criminal culpability, what we believe as a
21 country, they have scraped it out and they are
22 punishing the insane as a result.

23 If this Court has no further
24 questions, we would ask you to please --

25 JUSTICE ALITO: Well, I would --

1 MS. SCHRUP: -- reverse the case.

2 JUSTICE ALITO: -- ask you a question
3 if you -- if you've finished your -- your -- the
4 comments that you want to make.

5 In your reply brief you say that the
6 state's premise is that insanity was
7 traditionally tied to a lack of mens rea. And
8 you say -- you agree with that, right?

9 MS. SCHRUP: It was tied to common law
10 intent, if we use the term mens rea, but it was
11 tied to common law intent, which is a very
12 different term than what they used, Justice
13 Alito.

14 JUSTICE ALITO: Well, you -- I -- I'll
15 quote you: "The state's premise is that
16 insanity was traditionally tied to a lack of
17 mens rea, true, but mens rea historically
18 required precisely the moral blame worthiness
19 that Kansas law now excludes." So that's your
20 historical position.

21 MS. SCHRUP: That's half of our --

22 JUSTICE ALITO: And how do you
23 reconcile that with the fact that mens rea does
24 not vary from crime to crime? So if that was
25 the understanding of mens rea, that would apply

1 in every case and there would have to be moral
2 blame worthiness in every case, not just those
3 where the -- the -- the lack of blame worthiness
4 is attributable to mental -- to a mental
5 disorder, however that is defined?

6 MS. SCHRUP: If I'm understanding your
7 question, Justice Alito, yes, mens rea, but mens
8 rea historically or common law intent always
9 contained this moral component, this --

10 JUSTICE ALITO: Then it would --

11 MS. SCHRUP: -- intent to harm.

12 JUSTICE ALITO: -- apply across the
13 board.

14 MS. SCHRUP: It would, with the
15 exception of --

16 JUSTICE ALITO: It would apply --

17 MS. SCHRUP: -- perhaps strict
18 liability.

19 JUSTICE ALITO: -- to the person who
20 said I assassinated this political leader
21 because he is an evil person --

22 MS. SCHRUP: Oh.

23 JUSTICE ALITO: -- and he is going to
24 do evil things.

25 MS. SCHRUP: No, Justice Alito,

1 because the only people that were -- that this
2 has traditionally been applied to are the insane
3 and maybe infants and that's what --

4 JUSTICE ALITO: And that's what you
5 are arguing for, a separate insanity defense,
6 and that was M'Naghten. But that's inconsistent
7 with the historical record as you, yourself,
8 understand it, which is that it was tied to mens
9 rea, which is categorical, applies in every
10 single case. What -- what is wrong with that?

11 MS. SCHRUP: Our position is that to
12 the extent it was tied to mens rea, inherent in
13 the notion of mens rea was the ability to choose
14 between right and wrong.

15 So that is very different. That is
16 very different than what Kansas has today, which
17 has no inquiry into that.

18 JUSTICE ALITO: I mean, these 18th
19 Century cases that talk about moral capability
20 or lack thereof in mens rea in the same breadth
21 are hard to understand, but you have to take
22 into account -- may I finish my sentence --

23 CHIEF JUSTICE ROBERTS: Certainly.

24 JUSTICE ALITO: -- Mr. Chief Justice?

25 (Laughter.)

1 JUSTICE ALITO: That you have to take
2 into account that people -- that the 18th
3 Century and early 19th Century understanding of
4 how the human mind works was very different from
5 what we have today. There wasn't even any --
6 any such thing as psychiatry in 1791 and it was
7 in its infancy in 1868. Is that wrong?

8 MS. SCHRUP: Mr. Chief Justice?

9 CHIEF JUSTICE ROBERTS: You may.

10 MS. SCHRUP: I want to answer this
11 succinctly. It's not about what mental illness
12 was or wasn't. It's about how we treated insane
13 people, this narrow group of them. I think
14 everybody knows who they are when they are
15 forced to decide it. And it's about not
16 punishing people who don't know right from
17 wrong.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:09 a.m., the case
22 was submitted.)

23

24

25

Official

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