

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES K. KAHLER, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 18-6135  
 )  
 KANSAS, )  
 )  
 Respondent. )  
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Pages: 1 through 67  
Place: Washington, D.C.  
Date: October 7, 2019

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JAMES K. KAHLER, )

Petitioner, )

v. ) No. 18-6135

KANSAS, )

Respondent. )

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Washington, D.C.

Monday, October 7, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

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on behalf of the Petitioner.

TOBY CROUSE, Solicitor General, Topeka, Kansas;

on behalf of the Respondent.

ELIZABETH B. PRELOGAR, Assistant to the Solicitor

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for the United States, as amicus curiae,

supporting the Respondent.

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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 example. As criminal law evolved, the drafters  
15 moved to more precise mental states. When they  
16 did that, though, they retained the compelling  
17 mechanism to show insanity. We could do that,  
18 the drafters said, because we kept this, this  
19 narrow remnant of common law criminality.

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

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

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

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

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

24 MS. SCHRUP: Yes, it would, Justice  
25 Ginsburg. And I think it would because the

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

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

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

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

22 MS. SCHRUP: Well, I want to rewind a  
23 little bit, Your Honor, because really what  
24 we're talking about is the mechanism to be able  
25 to show that you lack moral capacity. The back

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

12 JUSTICE GINSBURG: My --

13 MS. SCHRUP: -- well --

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

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

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

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

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

1 is moral?

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

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

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

18 JUSTICE ALITO: If the --

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

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

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

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

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

24 So it becomes important to understand  
25 what you mean by mental disorder. And what do

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

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

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

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

1 crime was morally wrong.

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

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

12 JUSTICE KAGAN: Ms. --

13 MS. SCHRUP: -- and --

14 JUSTICE KAGAN: Ms. Schrup --

15 MS. SCHRUP: Yes?

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

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

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

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

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

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

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

1 notwithstanding the judgments of some states  
2 that the time for this has come and gone?

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

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

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

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

25 MS. SCHRUP: I don't think you need to

1 take it into account. I think what the  
2 fundamental principle is, is that the good and  
3 evil principle or the right and wrong principle  
4 as applied to the insane, it's -- it's the  
5 application to the insane that has -- is deeply  
6 rooted in our country.

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

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

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

25 And -- and in the same page, again,

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

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

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

14 What we know is that Mr. Kahler had a  
15 major depressive disorder. He had a qualifying  
16 mental illness. Those facts are in there to  
17 show that there was an entire other category of  
18 evidence that, in combination with that major  
19 depressive disorder, could have been been  
20 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: What -- what would  
11 be 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 Leland in turn  
16 said -- noted the wide disagreement among  
17 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. And  
7 so our test is -- is relatively consistent with  
8 the cognitive capacity test. There's a  
9 volitional, there's a moral test, and then  
10 there's the product test. And so we -- we would  
11 view our test as consistent with the cognitive  
12 test.

13 And if the individual can't formulate  
14 the in -- criminal intent in Kansas, that --  
15 that is a sufficient defense. And that has been  
16 --

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

22 MR. CROUSE: Yeah.

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

1 you're doing?

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

4 JUSTICE SOTOMAYOR: No, no --

5 MR. CROUSE: What I --

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

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

16 But --

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

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

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

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

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

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

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

25 JUSTICE KAGAN: So, General Crouse,

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

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

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

24 And even with regard to -- I think the  
25 hypothetical you have suggested, I think we

1 would have to know whether or not the right  
2 versus wrong test is being defined in a legal  
3 sense or a moral sense.

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

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

22 JUSTICE BREYER: -- that states -- and  
23 you're right, particularly Kansas, do, in fact,  
24 treat he's a dog, the dog told me to do it,  
25 differently. But my question was why?

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

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

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

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

23                   JUSTICE KAGAN: Well, let's put the  
24 Eighth Amendment to the side. Let's say that  
25 this isn't a capital case. All right? Does a

1 state just have to have a way to consider at  
2 sentencing somebody's complete lack of  
3 understanding of the morality of his actions?

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

8 JUSTICE KAVANAUGH: But the --

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

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

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

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

1 Kansas has done here.

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

7 MR. CROUSE: I --

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

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

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

21 JUSTICE GORSUCH: No.

22 JUSTICE SOTOMAYOR: -- which is could  
23 -- could you do away with the mens rea defense?  
24 Could you simply say we in Kansas believe if you  
25 kill someone, regardless of the reasons, if

1 you've done the act, you've committed murder?  
2 Period, end of story. No mens rea defense, no  
3 nothing.

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

10 JUSTICE KAGAN: Could you --

11 JUSTICE ALITO: Well, has that --

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

14 JUSTICE ALITO: -- ever been --

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

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

24 JUSTICE KAVANAUGH: Well, on the --

25 MR. CROUSE: -- individual research on

1 duress --

2 JUSTICE KAVANAUGH: -- the history --

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

10 MR. CROUSE: No. And -- and Kansas  
11 certainly doesn't do that.

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

21 MR. CROUSE: I -- I think I would  
22 agree that the states have -- organized  
23 societies have consistently struggled with how  
24 to define and handle mental illness, but I don't  
25 believe that there has been a baseline that has

1       been established beneath which the states could  
2       go.

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

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

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

22                   MR. CROUSE: Yeah, and I'm not trying  
23      to -- to skip the answer, because I think Kansas  
24      actually included it as part of the guilt phase.  
25      It didn't have a separate insanity defense.

1           So, for example, it came in with a  
2 different definition.

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

6           MR. CROUSE: I -- I -- I don't believe  
7 I was saying that --

8           JUSTICE ALITO: No.

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

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

16          MR. CROUSE: They have.

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

22          MR. CROUSE: The mens rea element  
23 would be consistent in an attempt to commit a  
24 crime, yes.

25          JUSTICE ALITO: So if the mens rea

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

9 MR. CROUSE: That's correct, Justice  
10 Alito.

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

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

20 JUSTICE KAGAN: Would -- would you  
21 agree that historically, if you go back and you  
22 look at the cases, you see this operating in two  
23 categories of cases. One is for insane people,  
24 and one is for what were then called idiots,  
25 right, people who lacked mental capacity?

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

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

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

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

21                   CHIEF JUSTICE ROBERTS: Finish your  
22 question.

23                   JUSTICE BREYER: I'm not sure I want  
24 to.

25                   (Laughter.)

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 MR. CROUSE: Thank you.

4 CHIEF JUSTICE ROBERTS: Ms. Prelogar.

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

8 MS. PRELOGAR: Mr. Chief Justice, and  
9 may it please the Court:

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

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

24 And I'd like to begin, actually, with  
25 the hypotheticals that Justice Sotomayor and

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

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

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

20           In a substantial number of  
21 jurisdictions, he would not be entitled to  
22 invoke the insanity defense. And so to try to  
23 recognize or articulate a theory of moral  
24 culpability, I think, has -- has no roots in  
25 history and would actually raise the possibility

1 of challenging state laws across the nation.

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

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

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

20 This is not like Clark where we found  
21 that the two prongs of the M'Naghten test were  
22 really encompassed in the first. That's what  
23 the problem is for me. There is an essence,  
24 just as there is an essence of compulsion for  
25 duress as a defense mechanism, there is some

1 minor amount that has to excuse criminal  
2 liability.

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

10 JUSTICE SOTOMAYOR: But that's --

11 MS. PRELOGAR: I think that --

12 JUSTICE SOTOMAYOR: -- where we  
13 differ.

14 MS. PRELOGAR: But to the extent that  
15 what --

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

23 Someone who is insane can't even  
24 physically stop themselves.

25 MS. PRELOGAR: And our --

1 JUSTICE SOTOMAYOR: But that's a  
2 different, sort of --

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

9 JUSTICE KAGAN: But, Ms. --

10 MS. PRELOGAR: Which would pull  
11 someone totally outside the realm of --

12 JUSTICE KAGAN: Ms. Prelogar --

13 MS. PRELOGAR: -- criminal  
14 culpability.

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

19 If the defendant doesn't have the  
20 intent to kill, then the defendant is not  
21 culpable for that act. And it has nothing to do  
22 with his insanity or not. And I think that the  
23 question Ms. -- Justice Sotomayor is asking is,  
24 is there something else that's necessary? And  
25 we would leave a lot of flexibility to the

1 states, but that something else is -- is  
2 something that relates particularly to insane  
3 defendants, to, you know, their ability to say,  
4 because I have a mental illness, there has to be  
5 something more.

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

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

21 And I -- I want to pause --

22 JUSTICE KAGAN: But --

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

24 JUSTICE KAGAN: Ms. Prelogar, let's  
25 just say I disagree with this, that when I look

1 back at the history I see lots of cases, Rex v.  
2 Arnold, Billingham, a number of others, which  
3 make it quite clear, I mean, these are all  
4 people who had an intent to kill.

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

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

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

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

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

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

20                  Does -- does Ms. Schrup then win?

21                  MS. PRELOGAR: I don't think so,  
22    because Petitioner still bears the burden of  
23    trying to articulate with precision what that  
24    something more is. And I --

25                  JUSTICE BREYER: You can --

1 MS. PRELOGAR: -- think for this here

2 --

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

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

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

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

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

25 Now, that's the fourth time I have

1 asked that. But I would like to know what you  
2 think about it.

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

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

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

23 A jurisdiction might also think that  
24 looking at considerations of individual  
25 culpability, they don't want an on/off switch

1 for criminal responsibility but, rather, want to  
2 shift those considerations to the sentencing  
3 stage where a judge can take evidence and make a  
4 more nuanced determination of individual  
5 culpability.

6           Ultimately --

7           JUSTICE SOTOMAYOR: How does that stay

8 --

9           MS. PRELOGAR: -- I think that these

10 --

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

18           MS. PRELOGAR: May I answer, Mr. Chief  
19 Justice?

20           CHIEF JUSTICE ROBERTS: Yes.

21           MS. PRELOGAR: There would still be a  
22 question, Justice Sotomayor, of how you define  
23 who is the insane. That's a legal concept.  
24 It's one that's yielded no single formulation.  
25 And I think for this Court to try to articulate

1 a theory of moral culpability could throw into  
2 question state laws across the nation that are  
3 trying to make these difficult judgments.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Ms. Schrup, you have five minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF SARAH SCHRUP ON  
9 BEHALF OF THE PETITIONER

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

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

19 And that gets to the dog or the dog  
20 example. It's completely arbitrary. I don't  
21 know why if you think -- why one defendant who  
22 thinks that a dog, he's shooting a dog, versus  
23 another one who thinks a dog is ordering him to  
24 shoot someone else, makes any difference  
25 whatsoever. The first person is acquitted and

1 let out on the streets and the second is put in  
2 jail and maybe put to death.

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

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

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

25 And, finally, turning back to history,

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

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

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

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

21 If this Court has no further  
22 questions, we would ask you to please --

23 JUSTICE ALITO: Well, I would --

24 MS. SCHRUP: -- reverse the case.

25 JUSTICE ALITO: -- ask you a question

1 if you -- if you've finished your -- your -- the  
2 comments that you want to make.

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

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

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

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

20 JUSTICE ALITO: And how do you  
21 reconcile that with the fact that mens rea does  
22 not vary from crime to crime? So if that was  
23 the understanding of mens rea, that would apply  
24 in every case and there would have to be moral  
25 blame worthiness in every case, not just those

1 where the -- the -- the lack of blame worthiness  
2 is attributable to mental -- to a mental  
3 disorder, however that is defined?

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

8 JUSTICE ALITO: Then it would --

9 MS. SCHRUP: -- intent to harm.

10 JUSTICE ALITO: -- apply across the  
11 board.

12 MS. SCHRUP: It would, with the  
13 exception of --

14 JUSTICE ALITO: It would apply --

15 MS. SCHRUP: -- perhaps --

16 JUSTICE ALITO: -- to the person who  
17 said I assassinated this political leader  
18 because he is an evil person --

19 MS. SCHRUP: Oh.

20 JUSTICE ALITO: -- and he is going to  
21 do evil things.

22 MS. SCHRUP: No, Justice Alito,  
23 because the only people that were -- that this  
24 has traditionally been applied to are the insane  
25 and maybe infants and that's what --

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

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

12 So that is very different. That is  
13 very different than what Kansas has today, which  
14 has no inquiry into that.

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

20 CHIEF JUSTICE ROBERTS: Certainly.

21 JUSTICE ALITO: -- Mr. Chief Justice?

22 (Laughter.)

23 JUSTICE ALITO: That you have to take  
24 into account that people -- that the 18th  
25 Century and early 19th Century understanding of

1       how the human mind works was very different from  
2       what we have today.  There wasn't even any --  
3       any such thing as psychiatry in 1791 and it was  
4       in its infancy in 1868.  Is that wrong?

5                   MS. SCHRUP:  Mr. Chief Justice?

6                   CHIEF JUSTICE ROBERTS:  You may.

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

15                   Thank you.

16                   CHIEF JUSTICE ROBERTS:  Thank you,  
17      counsel.  The case is submitted.

18                   (Whereupon, at 11:09 a.m., the case  
19      was submitted.)

20

21

22

23

24

25

## Official - Subject to Final Review

<b>1</b>	<p><b>acknowledged</b> <sup>[1]</sup> 22:1</p> <p><b>acquittals</b> <sup>[1]</sup> 23:7</p> <p><b>acquitted</b> <sup>[2]</sup> 6:11 61:25</p> <p><b>across</b> <sup>[7]</sup> 48:3 50:18 52:1 54:6,6 61:2 65:10</p> <p><b>act</b> <sup>[9]</sup> 5:16 8:24,25 10:9 44:1 54:21 56:10 61:16 62:23</p> <p><b>action</b> <sup>[1]</sup> 9:15</p> <p><b>action</b> <sup>[1]</sup> 51:18</p> <p><b>actions</b> <sup>[1]</sup> 42:3</p> <p><b>actual</b> <sup>[2]</sup> 10:9 24:14</p> <p><b>actually</b> <sup>[14]</sup> 7:8 11:10 14:4 22:16 35:4 46:24 50:24 51:2,25 55:13 57:1 59:21 62:5,15</p> <p><b>addendum</b> <sup>[1]</sup> 26:11</p> <p><b>adding</b> <sup>[2]</sup> 10:22 33:7</p> <p><b>addition</b> <sup>[1]</sup> 30:1</p> <p><b>additional</b> <sup>[2]</sup> 30:23 44:7</p> <p><b>admit</b> <sup>[1]</sup> 43:11</p> <p><b>admonition</b> <sup>[1]</sup> 29:18</p> <p><b>adopt</b> <sup>[2]</sup> 32:21 51:8</p> <p><b>adopted</b> <sup>[4]</sup> 5:22 24:20 25:11 36:5</p> <p><b>adopting</b> <sup>[1]</sup> 50:13</p> <p><b>adversary</b> <sup>[2]</sup> 32:20 52:11</p> <p><b>advocated</b> <sup>[1]</sup> 27:23</p> <p><b>advocating</b> <sup>[1]</sup> 62:7</p> <p><b>affirmative</b> <sup>[2]</sup> 46:11 47:11</p> <p><b>affirmed</b> <sup>[1]</sup> 30:22</p> <p><b>afoul</b> <sup>[1]</sup> 3:19</p> <p><b>ago</b> <sup>[2]</sup> 29:15,19</p> <p><b>agree</b> <sup>[8]</sup> 36:22 38:5 39:3,7 45:22 48:21 54:3 64:6</p> <p><b>agreement</b> <sup>[1]</sup> 50:21</p> <p><b>ALITO</b> <sup>[49]</sup> 8:21 9:7,12,18,21 10:12 11:16 12:2 18:3,6 19:6,19 20:22 24:20,25 28:15,24 44:11,14 45:3 47:3,8,14,17,25 48:10,11 63:23,25 64:11,12,20 65:5,8,10,14,16,20,22 66:1,15,21,23</p> <p><b>Alito's</b> <sup>[1]</sup> 30:25</p> <p><b>allow</b> <sup>[4]</sup> 22:4,5 40:12 46:5</p> <p><b>allowed</b> <sup>[2]</sup> 25:16 39:18</p> <p><b>allowing</b> <sup>[1]</sup> 8:19</p> <p><b>allows</b> <sup>[1]</sup> 11:11</p> <p><b>alone</b> <sup>[2]</sup> 33:9 56:23</p> <p><b>although</b> <sup>[1]</sup> 63:14</p> <p><b>Amendment</b> 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