Kahler v. Kansas and the Constitutionality of the *Mens Rea* Approach to Insanity

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In 1995, the Kansas legislature adopted what is referred to as the "*mens rea* approach" and abolished the affirmative insanity defense. This approach allows a defendant to be acquitted who lacks the requisite mental state for the crime, without consideration of the defendant's understanding of wrongfulness. In *Kahler v. Kansas*, the U.S. Supreme Court recently held that this restrictive approach does not violate due process and that a state is not required to adopt an insanity test which considers a defendant's moral capacity at the time of the crime. Four other states currently follow the *mens rea* approach, or some form of it. In this article, we first discuss a brief history of insanity defense laws in the United States. We then outline relevant legislative history and precedent in Kansas and other states that have adopted the *mens rea* approach. We next discuss the Supreme Court's reasoning in *Kahler*. The significance of this test is further discussed, including Eighth Amendment considerations. We advocate for continued education of the public, legislators, and the judiciary regarding the use, application, and necessity of an affirmative insanity defense.

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The insanity defense, which excuses defendants with mental illness in specific circumstances from legal responsibility, is one of the more contentious topics in criminal law. While most mental health professionals support its use in certain circumstances, public and legislative opinion has fluctuated over the last century, becoming decidedly less tolerant of these laws, which are often perceived as unjust and misused.[1] By 1950, England and the majority of jurisdictions in the United States had adopted the M'Naughten rule for insanity, which acquitted defendants who by reason of mental disease or defect did not know the nature and quality of the act committed or the wrongfulness of the act.[2] In the 1950s, the American Law Institute (ALI) proposed a new test as part of the Model Penal Code (MPC), which liberalized the test for insanity. The ALI test was a two-prong test that required a defendant to lack either the "substantial capacity to appreciate the criminality of his conduct" or the ability to "conform his conduct to the law" to be found insane, an arguably lower bar than that required by the M'Naughten rule.[3] The ALI test began to replace M'Naughten in many jurisdictions and was the insanity test in half the states and the federal courts by 1980.[2] This remained the case until John Hinckley, Jr., was found not guilty by reason of insanity in 1982 for his attempt to assassinate President Ronald Reagan. A severe backlash against the insanity defense ensued as a result of the Hinckley verdict.

The U.S. Congress subsequently enacted the Insanity Defense Reform Act of 1984. Multiple state legislatures performed "insanity reform" and receded to the more conservative M'Naughten standard, raised the standard of proof required, and shifted the burden of proof to the defendant; some states eliminated the traditional insanity defense altogether, but these states were in the minority.[2] As the dissenting justices in *Kahler v. Kansas* noted, 45 states, the

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federal government, and the District of Columbia retain an insanity defense that allows some inquiry into the defendant's knowledge of wrongfulness of the crime.[4] Only Utah, Kansas, Idaho, Montana, and Alaska do not allow the fact-finder to consider a defendant's appreciation of wrongfulness at the time of the crime in deciding legal insanity (Table 1). These laws have been referred to as the "*mens rea* approach" or "cognitive capacity" laws. Alaska has retained an affirmative insanity defense based on the cognitive prong of M'Naughten; therefore we excluded this state from our discussion.

Mens rea is the requisite mental state for a given crime, which is further defined as a specific level of intent. Most states use the MPC classification to define intent levels such as purposefully, knowingly, recklessly, and negligently (Table 2). Furthermore, the term "cognitive incapacity" refers to a defendant's lack of understanding of what he or she did at the time of the crime, which closely aligns with the cognitive prong of M'Naughten. Moral incapacity, on the other hand, closely aligns with the second prong of M'Naughten and refers to the defendant's inability to appreciate the wrongfulness of his or her conduct. For the sake of clarity, we use the terms "cognitive" incapacity (or the term "*mens rea* approach") and "moral" incapacity to discuss insanity tests in this paper because this is the terminology used in *Kahler* and related Supreme Court decisions. A brief discussion of these cognitive incapacity laws and relevant legislative history follows.

States That Abolished the Insanity Defense

Montana

In 1899, the Montana Supreme Court adopted an insanity test utilizing a combination of the M'Naughten rule and irresistible impulse tests. Due to resulting confusion on how to apply the defense, the state transitioned to a modified ALI test in 1967. In 1979, Montana became the first state to abolish the affirmative insanity defense, replacing it with the *mens rea* approach.[5] The representative who sponsored the legislation, Michael Keedy, was reportedly influenced by the work of anti-psychiatry advocate Thomas Szasz and testified that psychiatrists made "arbitrary and God-like determinations" and "should be removed from the criminal justice process" (Ref. 16, p 137).

Various cases have challenged the constitutionality of Montana's *mens rea* approach. In *State v. Korell* (1984),[17] the Supreme Court of Montana held that the insanity defense is not a fundamental right and that the defendant's due process rights were not violated by the abolition of the insanity defense. Additionally, the court found that trial courts' mandatory consideration of evidence of mental disease or defect at sentencing in instances when *mens rea* is raised prevents imposition of cruel and unusual punishment. In *State v. Cowan* (1993),[18] the defendant similarly challenged his conviction on Eighth and Fourteenth Amendment grounds. The Montana Supreme Court again did not agree, and the U.S. Supreme Court denied Cowan's petition for *certiorari*.[19] Of note, Montana also specifically allows introduction of mitigating evidence at the time of sentencing related to mental disorder and the defendant's inability to "appreciate the criminality" of his behavior.[20,21]

Idaho

In 1982, Idaho was the second state to abolish the insanity defense. The state had utilized the M'Naughten standard for the insanity defense until 1969, when the Idaho Supreme Court mandated that the state utilize the ALI test.[22] Following *Hinckley*, however, the Idaho legislature reconsidered the insanity defense and abolished it, replacing it with Idaho statute 18-207.[6] As in Montana, Idaho also allows for consideration of mental illness at sentencing.[7]

Idaho's law, similar to other states, has been challenged in the state supreme court on due process grounds and has been held constitutional.[23] More recently, a defendant convicted of murdering three of his friends appealed to the U.S. Supreme Court after receiving a similar decision from the Idaho Supreme Court, but the Court denied *certiorari* in 2012 despite *amicus curiae* briefs submitted by the American Psychiatric Association and the American Academy of Psychiatry and the Law.[24]

Utah

Utah's insanity statute followed the ALI standard up until 1983.[25] In light of the Hinckley verdict, the state legislature abolished the insanity statute in favor of a *mens rea* statute.[8] The state also allows for verdicts of "guilty with a mental illness at the time of the offense" and "guilty of a lesser offense with a

Table 1 Statutes in States That Have Adopted the *Mens Rea* Approach

State	Insanity Test	Mitigating Factors at Sentencing	Post-Conviction Opportunities for Treatment
Montana	Evidence of mental disease, disorder, or developmental disability is admissible "to prove that the defendant did or did not have a state of mind that is an element of the offense."[5]	"At the time of the commission of the offense the defendant was suffering from a mental disease or disorder or developmental disability that rendered him unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law."[20]	If the defendant was found to meet the criteria of MCA 46-14-311, "the mandatory minimum sentence" need not apply and the court will commit him to the custody of the director of the department of public health and human services for treatment for a period of time not to exceed the maximum term of imprisonment. The director may transfer the defendant to another correctional, mental health, residential, or developmental disabilities facility that will better serve his needs.[21]
Idaho	"Mental condition shall not be a defense to any charge of criminal conduct," but expert evidence is admissible "on the issue of any state of mind which is an element of the offense."[6]	If the defendant's mental condition is a significant factor in sentencing, the court should consider: Extent of defendant's mental illness Degree of illness/defect and level of functional impairment Prognosis Availability of treatment and level of care required Risk of danger to public posed by defendant "Capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged"[7]	If the defendant is found by clear and convincing evidence to have a severe mental illness that resulted in his inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law that, without treatment, would result in major distress, the court will authorize treatment during the period of confinement or probation. The statute does not specify where this treatment will occur.[7]
Utah	"It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged."[8]	Not applicable	Allows for verdicts of "guilty with a mental illness at the time of the offense" and "guilty of a lesser offense with a mental illness at the time of the offense," which provide for the evaluation of a current mental illness and commitment to a mental health facility as part of the sentence.[9]
Kansas	May raise mental illness to show that the defendant "lacked the culpable mental state required as an element of the offense charged."[10]	The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.[11] The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances. The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.[12]	After conviction, can be committed to the state hospital for up to 120 days while the pre-investigation report is conducted.[13]

Table 2. Model Penal Code Classifications and Examples

Mens Rea Term	MPC Definition[14]	Alternative Adjectives[15]	State of Mind	Examples:
Intentionally or purposefully	A person acts purposefully [with respect to a result] if it is his conscious object . . . to cause such a result	Decides to, desires that, wants to, chooses to	Subjective	A shoots B because A wants to kill B to obtain an inheritance from B
Knowingly	A person acts knowingly if he is aware that it is practically certain that his conduct will cause such a result	Aware that [the harm will occur], almost positive that, virtually certain, understands that	Subjective	A shoots B in the head because A wants to injure B but does not intend that B die
Recklessly	A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that [will be the result of his conduct]	Realizes it is very likely [the harm might occur] but decides to act anyway; is conscious of the likelihood [of the harm] but simply doesn't care	Subjective (Consciously) and Objective (Gross deviation standard of negligence)	A shoots B while playing Russian roulette with a one in six chance of killing B
Negligently	A person acts negligently when he should be aware of a substantial and unjustifiable risk that [will be the result of his conduct]	Carelessly, overlooks, without even noticing	Objective (Reasonable Person)	A shoots into a forest that is normally uninhabited but happens to shoot B

mental illness at the time of the offense," which provide for the evaluation of a current mental illness and commitment to a mental health facility as part of the sentence.[9]

Before *Kahler*, Utah faced one of the most recent challenges to the abolition of the insanity defense in *State v. Herrera* and *State v. Sweezey* (1995), a consolidated case.[26] The defendants argued that Utah's current statute violated not only their due process, but also equal protection afforded under the Fourteenth Amendment. In terms of equal protection, they claimed that the *mens rea* approach "illegally differentiates between mentally ill defendants solely on the content of their delusions" (Ref. 26, p 368), highlighting the difference between believing that one is killing a nonhuman (and would lack *mens rea*) and believing one is killing a human planning to harm that person. The Supreme Court of Utah rejected the defendants' arguments, noting that other states have upheld their *mens rea* statutes when confronted with due process claims. In rebutting the equal protection argument, the majority wrote that there is a rational basis for differentiating between individuals who believe they are harming a human versus a nonhuman. The court also cited a 1983 American Medical Association report supporting the *mens rea* standard. Between 2012 and 2018, Utah's *mens rea* defense has been successfully implemented about once annually.[27] Recently, state representative Carol Spackman Moss introduced HB167 in an effort to re-expand the definition of insanity for defendants charged with first-degree or capital felonies, but the bill failed to pass committee review.[27]

Kansas

In 1884, Kansas recognized M'Naughten as the "cardinal rule of responsibility in the criminal law" (Ref. 28, p 160). This standard remained in use until 1995, when the legislature enacted what is now K.S.A. 21-5209, known as the *mens rea* approach.[10] K.S.A. 21-5209 states: "It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged."[10] Essentially, defendants can only be acquitted by mental disease or defect if they can prove they did not form the *mens rea* for a crime as a result of mental illness. Kansas also allows for evidence of mental state and similar factors to be taken into consideration at sentencing for mitigation purposes.[11–13] There was not a clear catalyst to K.S.A. 21-5209, but advocates for the *mens rea* approach posited that it would result in less jury confusion.[29] Even before *Kahler*, the Kansas Supreme Court, in *State v. Bethel*,[30] had considered whether the statute violated due process and determined that it did not.

Insanity Defense and the U.S. Constitution

Kahler was not the first time the U.S. Supreme Court considered whether a state's insanity defense

was constitutional. In *Leland v. Oregon*,[31] the Court stated that due process did not compel a state to adopt the irresistible impulse test instead of the wrongfulness test. Rather, to violate due process, the rule of law must "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" (Ref. 31, p 798).

Subsequently, in *Clark v. Arizona*,[32] the defendant was charged with shooting and killing a police officer. Mr. Clark raised the insanity defense, which the Arizona legislature had modified some years earlier to eliminate the cognitive prong of M'Naughten, leaving only the moral capacity prong. This defense meant that Mr. Clark would be found not guilty by reason of insanity only if he could prove that he did not know the criminal act was wrong. Mr. Clark offered evidence that he had schizophrenia and paranoid delusions, including that aliens might try to kill him. He sought to introduce evidence that would rebut the prosecution's case regarding his *mens rea* (i.e., that he intentionally or knowingly killed a police officer), but this was denied. Mr. Clark argued that his due process rights were violated because Arizona law did not allow him to submit *mens rea* evidence as it related to his mental state at the time of the crime. The Court held that there is no "particular" insanity test that serves as the "baseline for due process" and that the choice of an insanity test is "substantially open to state choice" (Ref. 32, p 752). The Court held that the Arizona law did not violate due process and noted that cognitively incapacitated defendants are a subset of the morally incapacitated ones. In other words, a person who was unable to understand the nature and quality of the act (i.e., what it was the person was doing) would not be held morally accountable and would be acquitted under Arizona law.

Prior to *Kahler*, the U.S. Supreme Court had denied *certiorari* in cases challenging the *mens rea* approach.[18,24] In contrast, the Nevada Supreme Court held that the legislative abolition of the insanity defense in that state constituted a violation of both the state and federal constitutions.[33] In addition, in the early 20th century, state supreme courts in Louisiana, Washington, and Mississippi struck down as unconstitutional state laws that completely eliminated any form of an insanity defense.[34–36] The Supreme Court's precedent clearly indicated that in only the most extreme circumstances would a state's right to legislate criminal liability be curtailed. Despite this, many eagerly awaited the Supreme Court decision in *Kahler* because the Court had never considered the constitutionality of the restrictive *mens rea* approach, which some viewed as below the "Constitutional floor" or baseline allowed by the due process clause.

Facts and Procedural History of *Kahler*

Karen and James Kahler's marriage began to deteriorate in 2008 after Ms. Kahler began a sexual relationship with another woman. She filed for divorce from Mr. Kahler in January 2009. Mr. Kahler subsequently became progressively more distressed, lost his job, and was publicly arrested for the alleged battery of Ms. Kahler. Later that year, Mr. Kahler entered the home of his mother-in-law, Dorothy Wight. He first shot Ms. Kahler but allowed his 9-year-old son to escape. He then moved throughout the residence, shooting Ms. Wight and his two teenaged daughters. All four victims died. Mr. Kahler was subsequently arrested the next day as he was walking down a country road.[37]

At trial, Mr. Kahler asserted a defense of lack of mental state, as defined in KS.A. 21-5209.[10] Thus, he had to show that he lacked the intent and premeditation to kill his victims. He presented evidence in the form of expert and other testimony that he had severe depression and various personality disorders. A forensic psychiatrist, Stephen Peterson, M.D. testified that at the time of the crimes Mr. Kahler's "capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did" (Ref. 37, p 114). Peterson did not specifically comment on whether Mr. Kahler was capable of forming the requisite intent for the crimes. The prosecution's expert opined that Mr. Kahler was capable of forming the requisite intent.

Ultimately, the jury convicted Mr. Kahler of capital murder and subsequently recommended the death sentence. Under Kansas law, capital cases can be appealed directly to the Kansas Supreme Court. Mr. Kahler did so and raised multiple questions on appeal, the most pertinent being an allegation that Kansas's insanity test, the *mens rea* approach, violated his due process rights because it allows the conviction of a person whose mental illness prevented him from knowing wrongfulness. He also alleged violation of his Eighth Amendment rights, arguing that a person who was severely mentally ill at the time of the crime should not receive capital

punishment. The Kansas Supreme Court rejected both arguments, and Mr. Kahler appealed to the U.S. Supreme Court.[37]

Supreme Court Decision

In a 6–3 decision authored by Justice Elena Kagan, the Supreme Court held that a state's adoption of the *mens rea* approach does not violate due process.[4] More specifically, the Court held that the due process clause does not "compel the acquittal" of a defendant who could not tell right from wrong at the time of the crime (Ref. 4, p 318). Notably, the Supreme Court did not consider Mr. Kahler's claim that the Eighth Amendment requires states to make available the moral incapacity defense, as he had not asserted this specific claim when appealing to the Kansas Supreme Court.

In coming to its decision, the Court asked first whether the *mens rea* approach "offended some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" (Ref. 31, p 798). If the answer was yes, then Mr. Kahler would win his appeal. To answer this question, the Court reviewed historical practice to determine if there was an insanity test in use for so long that it should be considered a fundamental right. The majority found that, prior to M'Naughten in 1843, there was no specific standard of insanity requiring a lack of moral capacity. The Court noted that even with the coming of M'Naughten, states continued to experiment with various insanity tests, and that, even in states that adopted M'Naughten, an ongoing debate ensued regarding the meaning of knowing right from wrong, with 16 states finding this meant legal rather than moral wrongfulness (Ref. 4, p 330). Justice Kagan noted that if the Court sided with Mr. Kahler, they would have to strike down not only the four other states following the *mens rea* approach but the 16 states that interpret M'Naughten to mean appreciation of legal, but not moral, wrongfulness. Ultimately, the Court concluded that "the moral incapacity test has never commanded the day" (Ref. 4, p 331). Justice Kagan wrote, "[J]urists [invoke] . . . a variety of ways to resolve insanity claims. And under our long-established precedent, that motley sort of history cannot provide the basis for a successful due process claim" (Ref. 4, p 327, footnote 8).

The Court also emphasized the role of federalism in its decision. Justice Kagan pointed to precedent established in *Clark v. Arizona*, *Leland v. Oregon*, and *Powell v. Texas*, which reiterated that laws regarding criminal liability are the province of the individual states.[31,32,38] The Court noted that Kansas did not abolish the insanity test, but merely did not adopt the insanity test Mr. Kahler desired. Justice Kagan indicated that Kansas also considers mental illness at the sentencing phase. Considering the facts of the case, she questioned whether Mr. Kahler would be found not guilty under any state's existing insanity standard. Finally, she referenced the "flux and disagreement" in matters related to psychiatry and the law, competing ideas about mental illness even among medical professionals, and controversy surrounding the outer limits of legal culpability (Ref. 4, p 332).

Justice Stephen Breyer wrote the dissent. He argued that Kansas's *mens rea* approach was a violation of due process. Justice Breyer did not advocate for any particular insanity test, noting that the Supreme Court has shown no deference to any specific approach, but insisted that a test which considers moral blameworthiness is a constitutional minimum. Justice Breyer pointed out that many defendants who, because of mental illness, believe their acts morally or legally justified would be found guilty under Kansas' scheme, including individuals with paranoid, religious, and depressive delusions and command auditory hallucinations. He emphasized that mental illness usually does not deprive someone of the ability to form intent but rather impacts the person's "motivations for forming such intent" (Ref. 4, p 344). Justice Breyer distinguished *Kahler* from prior Supreme Court decisions, stating that in those cases the defendants were requesting an expansion of the moral incapacity test (*Leland*) or the state law did not appreciably diminish the moral incapacity test (*Clark*). Finally, Justice Breyer did not find Kansas's consideration of mental illness at sentencing to be a substitute for an affirmative insanity defense. He noted that sentencing was a matter of judicial discretion and defendants could still be exposed to a potential death sentence, such as in *Kahler*.

Discussion

The outcome in *Kahler* was perhaps not surprising given the Supreme Court's precedent emphasizing federalism and states' broad rights to create and implement criminal law, including the choice of an insanity test. Our interpretation is that *Kahler*

represents a Constitutional minimum for an insanity test because if a state prohibited the defendant from putting forward any evidence relating to mental state, the Court would find this unconstitutional. We note, however, that the *mens rea* approach is not an affirmative defense, but merely represents a defendant's standard right to rebut the prosecution's *prima facie* case on every element charged.

We assert that the *mens rea* approach is also unnecessarily restrictive given our understanding of severe psychiatric illness, the impact of psychosis on perception and decision-making, existing data regarding the use and outcome of the insanity defense, and public and legislative misperceptions regarding the insanity defense. Multiple organizations such as the American Psychiatric Association, the American Bar Association, the American Academy of Psychiatry and the Law, and others, submitted amicus briefs in the *Kahler* case asserting similar claims in opposition to the *mens rea* approach.[39,40] The APA also recognized, in their position statement on the insanity defense, that the justice system should have a mechanism to avoid unfairly punishing individuals who "exhibit substantial impairment of mental function at the time" of the criminal act.[41] Furthermore, most states have codified the MPC's *mens rea* classifications (i.e., intentionally, knowingly, recklessly, and negligently) along with strict liability, which of course requires no *mens rea* (Table 2).[14,15,42] The *mens rea* classifications were not intended to be used as an insanity test. In fact, the drafters of the MPC recommended a fairly liberal affirmative insanity test, the ALI approach.[14]

Multiple states underwent insanity law reform after the *Hinckley* verdict. Some have taken this to the extreme, citing public and even scientific opinion. In oral arguments in *Kahler*, Justice Samuel Alito stated that "one in five" Americans have a mental disorder. He then questioned if "60 million plus people" would then be able to "go to the jury" with an insanity defense.[43] Justice Alito's question insinuates that the insanity defense might be applied too broadly to individuals with wide ranging psychiatric diagnoses and therefore over- and misused.

Research, however, has consistently demonstrated that the insanity defense is rarely raised and, when it is, most defendants are ultimately convicted of the alleged offense.[44–47] Recent meta-analytic data indicate that experts opine a defendant is insane in about 14 percent of criminal responsibility evaluations.[47] When insanity is raised at trial, approximately 26 percent of defendants are acquitted.[47] In addition, studies do not support the misperception that individuals found insane are those with any diagnosis in the Diagnostic and Statistical Manual of Mental Disorders. Rather, researchers have consistently found that evaluators are most likely to opine that individuals meet the criteria for the jurisdiction's insanity test when they have a psychotic disorder, and that these individuals are the most likely to be successful in pleading not guilty by reason of insanity.[47–50]

There are also practical concerns about the application of the *mens rea* approach to those defendants with severe psychiatric illness who intended their acts but were not aware of the legal or moral wrongfulness of their acts. The understanding of how best to define and apply *mens rea* to certain crimes has been the subject of considerable and complex debate among legal scholars and legislatures for centuries. Until the MPC of 1962, a confusing array of *mens rea* terms existed in common law, including "maliciously" and "willfully," and reference was made to general and specific intent crimes.[14] The MPC established four *mens rea* mental states plus strict liability in an attempt to simplify and delineate culpable mental states (Table 2). The MPC terms proved to be tremendously influential, and these classifications were adopted, at least in part, by the majority of states. Even though the MPC's *mens rea* classifications have been viewed as an improvement, applying these mental states to specific facts and contexts can be a topic of confusion not only for potential jurors but also for expert witnesses. For instance, the distinction of mental states such as "knowingly" and "recklessly" might pose particular confusion.[14,15]

We next examine how *mens rea* relates to an individual with a severe psychiatric illness such as psychosis. Even a defendant with psychosis generally retains the ability to intend or knowingly perform actions. There are certainly cases, such as dissociation and delirium, in which a person might lose the ability to "intend" to act, but these cases are rare. Legal scholars note that mental state evidence "generally does not suffice to rebut an assertion that the defendant acted knowingly or purposely" because of the broad statutory definitions of these degrees of criminal intent (Ref. 19, p 521).

In *mens rea* jurisdictions, it is also unclear how lesser degrees of intent would be applied to the

defendant with mental illness. For example, a negligent state of mind is based on an objective or reasonable person standard. It is not clear if this "reasonable" person would be one with a persecutory delusion or if the person with mental illness would be held to the same standard as a defendant without mental illness. Alternatively, negligent or lower states of *mens rea* could be used generally to capture defendants who might not possess the higher *mens rea* of "intentionally" or "knowingly." Morse and Bonnie provide the example of a defendant who shoots another believing the person is a rag doll.[51] This defendant would lack the highest *mens rea* (i.e., intentionally and knowingly) because he did not believe the person was a human being. Yet, he could be found guilty of negligent homicide because his belief that the person was a doll was "patently unreasonable" (Ref. 51, p 492).

We also consider whether an Eighth Amendment challenge to a *mens rea* statute would be successful. Justice Lee Johnson of the Kansas Supreme Court wrote a compelling dissent in the *Kahle*r case, analyzing this claim. First, he opined that Constitutional claims involving the death penalty should be subjected to a higher level of scrutiny. Second, he pointed to how those with intellectual disability are viewed as less culpable and therefore not eligible for the death penalty, and questioned how, in light of this, a person with severe psychiatric symptoms at the time of the crime could be regarded as legally culpable and eligible for the death penalty.[37] Though the Supreme Court did not address Mr. Kahler's Eighth Amendment argument, we contend that a defendant who did not know right from wrong because of mental illness and is convicted in a *mens rea* jurisdiction may have a viable Eighth Amendment claim.[52] In such a case, punishment, particularly a death sentence, would be disproportionate and excessive if given to a person who did not understand wrongfulness at the time of the crime.

Proportional punishments are those which are appropriate considering the seriousness of the crime and the individual culpability of the offender.[52] The Supreme Court has established that certain punishments are disproportionate for certain offenders, including the death penalty for juveniles and individuals with intellectual disability (*Atkins*[53] and *Roper*[54]), life without parole for juvenile non-homicide offenders (*Graham*[55]), and mandatory life without parole for all juvenile offenders (*Miller*[56]), because these individuals are less culpable due to impetuosity, deficits in rational decision-making, problems with information processing, and impulsivity. Because of these characteristics, they are also less likely to consider the illegality or long-term consequences of their criminal acts, meaning that even a punishment as severe as death offers little deterrence.[53–56]

Similar to these populations, people with severe mental illness also tend to possess characteristics, such as impulsivity, impaired decision-making, distorted reality perception, and poor judgment, that should diminish culpability in certain circumstances.[57] Nonetheless, every person with a severe mental illness should not be categorically excluded from the death penalty or a severe punishment because a given diagnosis does not equate with severe impairment, a lack of moral understanding, or a lack of rational motive. Rather, the class of defendants to be excluded from such harsh punishments as the death penalty or even life without parole would be those who, as a result of mental disease or defect, lacked, at a minimum, moral capacity at the time of the crime. Such an analysis requires a case-by-case consideration, similar to court determinations as to who is intellectually disabled and thus undeserving of the death penalty[58] and in determining who is eligible to receive life without parole in juvenile homicide cases.[56] In a *mens rea* state, this determination might occur postconviction, but we argue that the state laws as they presently stand do not require consideration of moral culpability at the time of the crime, although Kansas does allow consideration of this factor at sentencing but does not mandate a specific outcome.[11,12]

The *Kahler* Court also pointed to the opportunity to raise the defendant's mental illness and state of mind at the time of the crime at the sentencing stage, which is problematic and is not a substitute for an insanity acquittal and forensic commitment, for several reasons. First, a downward departure in sentencing is at judicial discretion and thus unpredictable. Second, a defendant in a capital case would be exposed to the most severe sentence available, that of death. Third, as Justice Johnson of the Kansas Supreme Court pointed out in his dissent, a juror might view mental illness and the inability to discern wrongfulness as an aggravator rather than a mitigator, assuming the defendant is more dangerous due to his mental illness, and vote for a harsher sentence.

It is also not clear that a person who continues to be actively symptomatic at the time of sentencing would always receive needed treatment before incarceration, though most states appear to have mechanisms for this to occur via guilty but mentally ill (GBMI) laws or other routes. GBMI laws, however, do not protect a defendant from a harsh sentence and are not a substitute for a traditional insanity defense.[59] Even if a person does receive some form of treatment in the correctional system, this is hardly a substitute for the outcome under a traditional insanity acquittal: ongoing treatment and continuity of care in a state hospital, with a primary focus on improved functioning and the avoidance of collateral consequences of a conviction rather than incapacitation and punishment in a correctional system. Even if successful in the *mens rea* defense, a defendant may not avoid a prison sentence and could be found guilty on a lesser charge. For instance, Utah and Alaska explicitly provide that the *mens rea* approach functions as a diminished capacity defense, and the defendant, even if successful in proving a lack of *mens rea* for the instant charge, could still be found guilty but mentally ill on a lesser offense.[9,60]

Conclusion

The *Kahler* decision is of great importance because of its potential to influence states considering insanity reform to adopt a more restrictive approach, namely the *mens rea* test. Legislative histories show that insanity defense reform is often precipitated by high-profile crimes or a general sense from the public that individuals with severe psychiatric disorders are dangerous, malingering, or deserving of harsh retribution for their crimes. We believe that psychiatrists play a central role in the education of the public, legislators, and the judiciary regarding the practical, and perhaps unintended, results of these laws. Psychiatrists should also advocate for laws that take into consideration critical aspects of psychiatric illness, recognizing that laws which convict and sentence a person who has no legal or moral understanding of his or her criminal act do not result in proportional punishment, implicating Eighth Amendment concerns. As stated in *Holloway v. U.S.*: "To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or animal. Our collective conscience does not allow punishment where it cannot impose blame" (Ref. 61, p 666).

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