

Rationality Was Lost on the United States Supreme Court in Its *Kahler* Decision

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In its recent *Kahler* decision, the U.S. Supreme Court ruled that Kansas' abolition of the state's insanity defense was constitutional. It did so by framing the matter as a choice between the state's *mens rea* defense and a moral capacity defense, then mischaracterizing the *mens rea* defense as a type of insanity defense. In analyzing the two approaches, the Court missed the fundamental importance of rationality in criminal mental responsibility, a constitutional requirement for other criminal competencies, and a condition well described in the Court's *Panetti* ruling. The Court's acceptance of the abolition of a special insanity defense is a public policy in the direction of further criminalizing and punishing rather than providing prompt and proper treatment to those with serious mental illness, at a time when increasing modern research demonstrates the success of insanity acquittee dispositions with improved treatment and management resulting in lower rates of relapse and criminal recidivism.

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The law does not expect people to perform functions that are beyond their capability. A number of functions cannot be performed until the individual has demonstrated legal competence, such as by obtaining a driver's license to operate a motor vehicle or a medical license to practice medicine. Other competencies are assumed unless the person has been legally determined to lack such competencies, such as competency to stand trial or to handle one's affairs. Where the specific tasks involve some independent capacity to think, such as the competence to make medical decisions or to stand trial, the capacity to think rationally can be critical.

Although the ideological and philosophical origins of the insanity defense are ancient,¹ prior to the 12th century criminal intent was not an element of a criminal offense in English law.² The first published insanity standard was that of Henry de Bracton in

the 13th century: "An insane person is one who does not know what he is doing, is lacking in mind and reason and is not far removed from the brutes" (Ref. 3, p 1016). This first standard did not express a moral capacity, only a cognitive/rational capacity (i.e., lacking in mind and reason). Judge Tracy used a similar standard in the *Arnold* case of 1724 five centuries later.⁴ The "good and evil test" of 1581, forerunner of a right and wrong test, was based upon rational incapacity (i.e., ". . . for they cannot be said to haft any understanding will").⁵ The standard applied in the *Hatfield* trial of 1800 excused the defendant on the basis of the criminal act having been a product of a delusion, without reference to awareness of whether the act was wrong. This was a test of rational capacity, which was supported by defense attorney's Erskine's argument that ". . . it is the REASON OF MAN that makes him accountable for his actions; and that the deprivation of reason acquits him of crime" (Ref. 6, p 1310, emphasis in original).

The M'Naughten Rule of 1843 included moral capacity "or . . . that he did not know he was doing what was wrong" (Ref. 7, p 722), but both functional prongs of this rule were based upon the predicate of rational incapacity: "the party accused was laboring

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under such a defect of reason from disease of the mind” (Ref. 7, p 1843). In contrast to the first functional prong (i.e., “did not know the nature and quality of the act he was doing”), the cognitive capacity concept of the U.S. Supreme Court in *Kahler*,⁸ the moral capacity (see below) relied on a “rational” capacity that was less narrow and restrictive than such cognitive capacity alone, yet included the defect of reason of psychosis.

In the first half of the 20th century, an insanity defense with the M’Naughten standard was essentially the law of the land in the United States. In the latter half of the century, half of the states replaced this with the standard of the American Law Institute (ALI), with its cognitive and volitional prongs.⁹ The so-called cognitive prong of the ALI standard can be considered as in line with rational capacity, especially with its qualifier “lacks substantial capacity . . . to appreciate the criminality/wrongfulness of his conduct”⁹ The second (or volitional) prong is an inability “to conform his conduct to the requirements of the law.”⁹ Both of these disjunctive functional criteria must be the “result of mental disease or defect.”⁹ Several states later changed their insanity standard back to M’Naughten without the volitional standard but excluded antisocial personality disorder by the “Second Paragraph” of the ALI¹⁰ standard: “The terms ‘mental disease or defect’ do not include abnormality manifested only by repeated or otherwise antisocial conduct.”⁹

The *mens rea* of a crime, whether specific or general, is simply the statutorily required mental component of the crime.¹¹ Like the criminal act itself (the *actus reus*), the specific *mens rea* (e.g., criminal intent) must be proven by the prosecution beyond a reasonable doubt. Although this may seem a demanding standard, prosecutors are afforded much latitude in the use of circumstantial evidence, and the trier-of-fact may have little trouble arriving at a conclusion. In practice, a steeper hill to climb is the task of the defense to establish lack of intent (or lack of *mens rea*) due to a mental disorder. In most U.S. jurisdictions, a special affirmative insanity defense enables the defense to present a more complete explanation of the defendant’s mental disorder and how the disorder impaired the defendant’s capacity to have the guilty mind (or *mens rea*) required to have committed the offense. Unlike its position concerning other criminal competencies, the U.S. Supreme Court in *Kahler v. Kansas*⁸ did not consider rationality to be a

required aspect of the requisite *mens rea* when it found the abolition of a special affirmative insanity defense in Kansas to be constitutional. The Court simply did not consider rationality *per se*.

The Court’s Opinion in *Kahler*

Kahler v. Kansas concerned the defense in a domestic homicide case. Karen Kahler moved out of the home with her two adolescent daughters and nine-year-old son in 2009 when she filed for divorce from James Kahler. James Kahler became increasingly distraught over the ensuing months. He drove to Karen’s grandmother’s home, where Karen and the children were residing, and entered through the back door. He first shot Karen, allowing his son to escape. Moving through the house, he then shot Karen’s grandmother and his two daughters successively. All four died. The following day he surrendered to police and was charged with capital murder.⁸

Kansas law states that “[i]t 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 offense charged.”¹² According to this statute, “[m]ental disease or defect is not otherwise a defense.” A defendant can then present evidence of “any mental illness” as evidence that he “did not have the intent needed to commit the charged crime” (Ref. 8, p 1025). Mr. Kahler filed a pretrial motion in which he argued that Kansas had “unconstitutionally abolished the insanity defense” and thereby allowed the conviction of a “mentally ill person ‘who cannot tell the difference between right and wrong’” (Ref. 8, p 1027), and this violated the Fourteenth Amendment’s Due Process Clause. The trial court denied this motion, and the jury convicted Mr. Kahler of capital murder. At the sentencing hearing, the jury imposed the death penalty.

On appeal to the Kansas Supreme Court, Mr. Kahler argued that Kansas’ approach to his claims was unconstitutional. Citing an earlier precedential decision, the Kansas Supreme Court rejected his argument and maintained that the insanity defense is not so “ingrained in our legal system as to count as ‘fundamental’” (Ref. 8, p 1027, citing *Kahler v. Kansas* (2018),¹³ which in turn quoted from its decision in *State v. Bethel*¹⁴). Therefore, “[d]ue process does not mandate that a State adopt a particular insanity test” (Ref. 14, p 851).

In turning to the U.S. Supreme Court, Mr. Kahler asked the Court to decide whether the Due Process Clause requires an insanity defense that allows acquittal if the defendant could not “distinguish right from wrong” at the time of the crime. In other words, does the Due Process Clause require states to “adopt the moral-incapacity test from *M’Naughten*” (Ref. 8, p 1027), that is, “whether his illness rendered him ‘unable to understand his action [was] wrong’” (Ref. 8, p 1025, citing *Clark v. Arizona*,¹⁵ p 2709). The Supreme Court held that the Due Process Clause does not require states to adopt the moral incapacity test from *M’Naughten*.

The Court’s Opinion

Writing for the majority, Justice Kagan held that due process does not require states to adopt an insanity test that depends on the defendant’s recognition of the moral wrongfulness of the crime. Although Kansas abolished its special affirmative insanity defense, the state nonetheless provided the defendant with a mental defense, a *mens rea* defense, whereby the defendant could present evidence to disprove the mental state required by the specific offense. Moreover, after conviction a defendant in Kansas is also afforded the opportunity to present evidence of mental illness at sentencing that could raise reason to find him “not fully culpable and to lessen his punishment” (Ref. 8, p 1026). Such evidence could also convince the court that the defendant is in need of psychiatric care and transfer him to a “mental health facility rather than a prison” (Ref. 8, p 1026). In this way a defendant, who in another state may have been acquitted on the basis of insanity, could end up in the “same kind of institution” (Ref. 8, p 1026).

The Court presented from *Clark*¹⁵ four “strains” of insanity defense standards in the United States. The cognitive capacity standard is where the defendant did not know what he was doing when he committed the offense. The moral capacity standard is met where the defendant did not understand that his act was wrong. The volitional capacity standard is met where the defendant’s mental illness rendered him unable to control his criminal behavior. Finally, the product-of-mental-illness test can be excusing if the defendant’s criminal act resulted from his mental illness.⁸

Although Kansas no longer has a moral capacity standard, it nonetheless has a cognitive capacity test that is embodied in its *mens rea* defense, which the

Court likened to the “nature and quality” prong of the *M’Naughten* standard: “As everyone here agrees, Kansas law thus uses *M’Naughten*’s ‘cognitive capacity’ prong—the inquiry into whether a mentally ill defendant could comprehend what he was doing when he committed a crime” (Ref. 8, p 1026). “Kansas has an insanity defense negating criminal liability” (Ref. 8, p 1030) in the form of the cognitive capacity defense by which the defendant can disprove the criminal mental state that defines the crime.⁸

Mr. Kahler argued, citing the U.S. Supreme Court’s rule in *Leland v. Oregon*,¹⁶ that the moral incapacity standard is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (Ref. 8, p 1030). Moreover, the moral incapacity standard is the “single canonical formulation of legal insanity” and thus irreducible “baseline for due process” (Ref. 8, p 1030, citing *Clark*,¹⁵ p 2722). Citing this same rule, the Court stated, “. . . a state rule about criminal liability—laying out either the elements or the defenses to a crime—violates due process only if it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’” (Ref. 8, p 1027, citing *Leland*,¹⁶ p 798). The Court concluded that the Kansas approach did not offend such a principle and did not violate due process. The Court arrived at their conclusion by applying this standard and examining “historical practice” (Ref. 8, p 1027, citing *Montana v. Egelhoff*,¹⁷ p 2013).

The majority cited several early common law commentators such as de Bracton, whose so-called wild-beast test focused more on whether the defendant “had the ability to do much thinking at all” (Ref. 8, p 1033). If the defendant cannot think enough to form an intention, he cannot be guilty. From the Supreme Court’s analysis, the *M’Naughten* test “disaggregated the concepts of cognitive and moral incapacity, so that each served as a standalone defense” (Ref. 8, p 1035).

The Supreme Court further emphasized the diversity of different insanity standards used by the 50 states and observed that several no longer require a moral capacity component.⁸ Five states have laws like that of Kansas, and another 16 states’ laws would also be found to be unconstitutional if the Kansas law were found to violate due process for want of the moral capacity standard. The latter would be due to the fact that these 16 states required that the

defendant be unable to understand that the act was criminal, not that it was morally wrong, to qualify for the insanity defense.

The Dissent

The dissenting opinion, written by Justice Breyer and joined by two other justices, Ginsberg and Sotomayor, found the opposite. “Seven hundred years of Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law itself, convince me that Kansas’ law offends . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (Ref. 8, p 1038, citing *Leland*,¹⁶ p 798, citing *Snyder v. Massachusetts*,¹⁸ p 105).

Breyer cited the four leading common law jurists, as had the majority: de Bracton, Coke, Hale, and Blackstone. Each “linked criminality to the presence of reason, free will, and moral understanding” (Ref. 8, p 1040). de Bracton, author of the first wild-beast test of insanity, described the “madmen” who cannot be found criminally responsible as being “without sense and reason and lack[ing] *animus*” (Ref. 8, p 1040, citing de Bracton,³ pp 324, 424). Sir Matthew Hale based criminal liability on “understanding and liberty of will” (Ref. 8, p 1041, Ref. 19, pp 14–5). Lambard in 1581 (Ref. 5, p 218) and Hawkins in 1716 (Ref. 20, § 1, p 2) found that criminal responsibility rested on the ability to distinguish good from evil, which in turn required “understanding.” Coke agreed on the need to be able to discern right from wrong (Ref. 8, p 1040). Sir William Blackstone in the 18th century explained that “[p]ersons suffering from a ‘deficiency in will’ arising from a ‘defective or vitiated understanding’ were not [criminally] chargeable for their own acts” (Ref. 8, p 1040, citing Blackstone,²¹ p 24). Similar to such landmark common law cases, treatises by English legal scholars adopted the same view that the insanity standard hinges on the defendant’s capacity to distinguish good from evil or right from wrong and to act with a free will or as a free agent and with moral understanding.¹

The dissent noted that, in the landmark case *Rex v. Arnold* (1724), the court stressed that Justice Tracy instructed the jury: If a defendant is “deprived of his reason, and consequently of his intention, he cannot be guilty” (Ref. 8, p 1042, citing *Arnold*,⁴ p 764). From this, the majority had concluded that the *Arnold* court “adopted a modern *mens rea* test” (Ref.

8, p 1042). Yet the immediately preceding passage more clearly established Judge Tracy’s meaning: the questions for criminal responsibility include whether the defendant “could not distinguish between good and evil and did not know what he did” (Ref. 8, p 1042 citing *Arnold*,⁴ p 764). “If a man be *deprived of his reason, and consequently of his intention, he cannot be guilty . . .*” (Ref. 8, p 1042, citing *Arnold*,⁴ p 764, emphasis in original).

Citing contemporary mental health law authorities Slobogin²² and Morse,²³ the dissent stated that examples of a defendant having killed a person under the belief that the victim was a dog, thereby negating criminal intent to kill a person, are rare, “. . . because mental illness typically does not deprive individuals of the ability to form intent. Rather, it affects their *motivations* for forming such intent” (Ref. 8, p 1048, emphasis in original).

In *Clark v. Arizona*,¹⁵ the U.S. Supreme Court upheld Arizona’s new insanity standard, which had eliminated the first part of the M’Naughten rule but maintained the second. In the *Kahler* case, Kansas asked if Arizona can eliminate the first part of M’Naughten, the ability to know the “nature and quality of the act,” why cannot Kansas eliminate the second part concerned with moral incapacity (Ref. 8, p 1049, citing *Clark*,¹⁵ pp 747–8). The minority’s answer was that the “[e]vidence that the defendant did not know what he was doing would also tend to establish that he did not know that it was wrong” (Ref. 8, p 1049, paraphrasing *Clark*,¹⁵ pp 753–4). Moreover, Arizona, unlike Kansas, did not eliminate the insanity defense, limited as it was.

With regard to the opportunity that Kansas allows a defendant to present evidence of mental illness at sentencing, the dissent maintained, “[O]ur tradition demands that an insane defendant should not be found guilty in the first place” (Ref. 8, p 1049).

Rationality and Criminal Responsibility

The argument in *Kahler*, as framed by the U.S. Supreme Court, was not whether abolition of the insanity defense unconstitutionally violated the Due Process Clause; rather it was whether the unavailability of a moral capacity test violates the Due Process Clause. The Court found that Kansas has a *mens rea* defense whereby a defendant can present evidence of mental illness to negate criminal intent. Without concluding what, if anything, would be constitutionally required for due process, the Court found that a

moral capacity standard was not required. It seems the Court was presented with a dichotomous choice: moral capacity, advocated by the defendant and several *amici curiae* briefs, versus cognitive capacity alone, wherein cognitive capacity can be limited to the specific *mens rea* of the offense charged, typically meaning the requisite criminal intent (i.e., the only mental defense in Kansas). A third option, one that should be seen as well rooted in the traditions and consciousness of our people, was not considered: rational capacity.

At first glance, the *Kahler* majority opinion appears to have adopted the classification of insanity defenses presented in *Clark*, but this impression obfuscates the critical, substantial differences in both conceptualization and application of the two classifications. The *Clark* classification, in the opinion written by Justice Sotomayor (who in *Kahler* joined the dissenting minority), was truly one of insanity defense standards. In departure from this, *Kahler* extended the application of the *Clark* cognitive capacity to a *mens rea* defense and thereby conflated a *mens rea* defense with the first functional prong of the M'Naughten rule, lumping them together as one "cognitive capacity." In *Clark*, however, the Court, although distinguishing the two capacities in its classification, observed that many (but not all²⁴) courts find the cognitive and moral capacities to be equivalent (Ref. 15, p 2723). Within this conceptualization, the narrowest cognitive prong of M'Naughten involves rationality. But the *Kahler* Court, in contrast to its view in *Clark*, unequivocally excluded moral capacity from cognitive capacity. In arguing against the moral capacity argument made by the defendant, the dissent, and multiple *amici curiae*, the majority dismissed the psychological, legal, and moral importance of psychotic motivation and of rational incapacity, which Morse²⁵ described and supported as the fundamental traditional and modern defect that allows acquittal on the basis of mental disorder.

If the U.S. Supreme Court overlooked rationality as necessary to criminality, it also did not define rationality or reason. Definitions vary widely and include the vague and simple ability to think as well as the higher, more specific capacity to think logically. The Court's own explanation of rationality in *Panetti*²⁶ would be the most appropriate in this context of criminal mental responsibility. Black's Law Dictionary provides the following definition of reason: "A faculty of the mind by which it distinguishes

truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from proposition" (Ref. 27, p 1431). Lacking this level of reason would be more consistent with the *Panetti* irrationality criterion than the near inability to think at all criterion of the *Kahler* decision.

In philosophy, concepts and terminology are different from common usage but pertain to criminal mental responsibility: "In its primary sense, rationality is a normative concept that philosophers have generally tried to characterize in such a way that for any action, belief, or desire, if it is rational, we ought to choose it" (Ref. 28, pp 772–3). Two categories of rationality are recognized, instrumental and theoretical. Instrumental rationality corresponds to instrumental capacity, the ability to carry out an act to achieve one's goal. This is essentially the cognitive capacity of *Kahler*, i.e., the capacity of criminal intent. Theoretical rationality is where a belief is irrational if it conflicts with what one should know. Where the irrational belief is a delusion, theoretical irrationality is, for purposes of criminal responsibility, what is considered irrational or, in our terminology, lacking in rational capacity.²⁸

Rationality in Criminal Competencies

Criminal and civil competencies are intended to ensure that individuals can do what they are expected to do; people are not expected to perform tasks that they cannot do. The U.S. Supreme Court emphasized the importance of rationality for specific functions that a defendant may need to perform in judicial processes involving trial and sentencing. Even if most states did not explicitly require rationality at the time of the Court's *Dusky*²⁹ decision, and even if most state laws today, long after *Dusky*, do not explicitly require rationality,³⁰ the U.S. Supreme Court introduced rationality into the two-pronged common law standard for competence to stand trial by way of its model, which is known as the *Dusky* standard for competence to stand trial: "the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him" (Ref. 29, p 402). Even if the defendant has a factual understanding of the proceedings, his understanding can still be irrational and render him incompetent if he believes, for example, that the judge is a Martian alien disguised as a judge

who intends to have him transported to the planet Mars. It is reasonable to assume that, in states which have not incorporated the term "rational" into their competency statute, the trial courts would consider rationality, as they typically do, when deliberating whether a defendant is competent to stand trial.³⁰

Likewise for criminal sentencing, in particular the imposition of the death penalty, the U.S. Supreme Court requires more than just the person's awareness that the sentence would lead to death. In 1986 in *Ford v. Wainwright*,³¹ wherein the Court required competence to be executed, it indicated that the defendant must be aware of the trial court's rationale in imposing the death penalty. Eventually, in *Panetti v. Quarterman*, the Court in 2007 required a more substantial understanding of the nature of the death penalty and why it is being imposed. In a word, the Court's word, the defendant's understanding must be "rational" if the defendant is to be considered competent to be executed.²⁶ Although the Court did not formulate a standard for execution competence in this decision, it provided a meaningful description of what is meant by rationality for the purpose of execution competence.

Scott Louis Panetti had killed his parents-in-law, held his wife and daughter hostage, and then surrendered to police. The U.S. Supreme Court cited testimony of an expert witness who apparently illustrated how lack of rationality may have rendered Mr. Panetti incompetent for execution. Space does not allow for iteration of the Court's description of the quality and extremity of irrationality that could render a defendant incompetent for execution. For this account of the nature of Mr. Panetti's psychosis and how his delusions, especially his delusion that his execution was spiritual warfare, distorted his understanding of the reason for his execution, the reader is referred to the opinion itself. The Court concluded, "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it" (Ref. 26, p 2862). Moreover, this qualifying irrationality is due to a severe mental disorder, "not a misanthropic personality or an amoral character," but rather, "a psychotic disorder" (Ref. 26, p 2862).

In *Panetti*, the U.S. Supreme Court noted the reliance of a fundamental purpose of criminal punishment, retribution, on rational competence. Whether "retribution is served" is called into question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and

punishment has little or no relation to the understanding of those concepts shared by the community as a whole" (Ref. 26, p 2861). If retribution is a fundamental purpose of punishment, it is as well a fundamental purpose and justification for the finding of criminal guilt. Therefore, if rational competence is required for imposition and execution of capital punishment, rational competence to have committed the offense should be no less important. The Supreme Court has established the necessity of rational competence in support of the criminologic purposes of retribution and secondary deterrence, i.e., deterring others by example from committing the same offense, for capital punishment. Mental criminal responsibility without rational understanding is oxymoronic, unreasonable, and inconsistent with the Supreme Court's own understanding of the meaning of retribution, as the Court well explained in *Panetti*.

Even as they support an insanity standard based upon moral capacity, mental health law authorities,^{22,23,32-34} mental health,³⁵ and law³⁶ organizations emphasize that the requisite moral capacity must be based upon rationality. This position was well represented among the several *amici curiae* briefs submitted in *Kahler*.³⁴⁻³⁶

The Court Misapplied Principles of Fairness

Having misdefined a *mens rea* defense as an insanity defense from which rationality was removed, the U.S. Supreme Court misapplied trial and execution competencies to justify the abolition of a special insanity defense. The Court argued that fairness was afforded the defendant, even without what most would consider an insanity defense, because the defendant was allowed to present evidence of mental illness at a competency hearing or at the sentencing hearing for execution. Although all three types of competency (trial, criminal responsibility, and execution) are supported by the requirement for due process, these three determinations serve different purposes, have different criteria, and pertain to different times. The determination of one type of criminal competence does not equate to the determination of the other types of criminal competencies. Thus, the majority's contention that the defendant's opportunities to argue for trial and execution incompetence compensates for his not having an actual insanity defense available is more obscuring than clarifying of the three types of competency. The more important point, lost on the Court, is that

criminal competencies require rationality, and criminal competencies should logically include competence to commit a crime.

I have argued against expanding the insanity defense to include psychopathic disorders out of concern for, among other reasons, the insanity defense's (even for psychotic disorders) being under attack and at risk of abolition.³⁷ Public policy takes relevant scientific information, then sets the threshold in the form of normative standards as to when impairment of the will or rationality is of sufficient quality and degree to qualify for the insanity defense.³⁸ For well over half a century, the U.S. Supreme Court has deferred to the states to set their own insanity standards. Unsurprisingly, states continued to evolve different insanity standards. The Court in *Kahler* then used this diversity to suggest that there is little consensus in public policy as to what if any standard should be required. With regard to psychopathic disorders, the Court seemed to find inconsistency in that states' insanity standards prohibit psychopaths, who may because of their disorder be unable to recognize that their crimes are immoral, from raising the insanity defense (Ref. 8, Fn 12, p 1036). But the "irrationality" of the psychopath is not the essentially psychotic irrationality that the Court itself found disqualifying for execution.

In emphasizing the diversity of insanity defenses and thereby diminishing their importance, the U.S. Supreme Court overlooked the unifying factor of rationality in criminal responsibility. The Court distinguished criminal understanding from moral understanding of wrongfulness in state insanity standards, yet in either case it is the irrational incapacity to know or appreciate that the act was wrong. The criminal wrongfulness is another species of moral incapacity, not to be equated to a strictly *mens rea* awareness, as the Court seems to have done. Defendants who lack "criminal moral capacity" may or may not know what act the criminal law prohibits; what they irrationally do not know is that their acts violated the law. Thus, a delusional belief that one was acting in self-defense could qualify as lacking either criminal or personal moral capacity. In either case, it is the psychotic irrationality that is the fundamental and widely appreciated defect that renders a defendant criminally incapacitated.

If the U.S. Supreme Court were not so hyper-focused on the diverse aspects of insanity standards among the states, it might have noticed a common

requirement, explicit or not, in all insanity defenses, even those without a "moral" component: profound disturbance in rationality, not simply unawareness of what physical act the person was performing. The Court's neglect of rationality was selective for criminal mental responsibility.

Disposition of Insanity Acquittees

The U.S. Supreme Court found that the lack of an insanity defense involving some modicum of rationality does not offend fundamental fairness. According to *Kahler*, a person could be adjudicated guilty of a criminal act committed despite an extremely pathological thought process the person could not control. The Court rendered this opinion when rationality, even more so than moral capacity requiring rationality, is so obviously rooted in contemporary insanity jurisprudence and scholarly legal commentary as well as historical tradition. Without adequate explanation, one cannot help but wonder if unexpressed concerns were involved in the Court's acceptance of abolition without considering rationality. Such concerns may have also influenced the Kansas legislature, and perhaps three other state legislatures, to have abolished the state's insanity defense in the first place.

The first concern is the public policy context, wherein abolition of the insanity defense is but one step in several over recent decades that promote criminalization of those with serious mental illness. Custodial prison care is more economical than intense inpatient mental health services. Other public policies that, in effect, favor punishing rather than providing an acceptable standard of treatment for such individuals include those that result in a decreasing availability of intermediate and long-term hospital beds, limited outpatient and community mental health services, and unavailability of hospital beds for incarcerated criminal defendants and sentenced prisoners. Arizona's recent defense/verdict of "guilty and insane,"³⁹ allowing for imprisonment following hospital treatment, together with the four states that abolished their insanity defenses, would be another example of punishing rather than appropriately treating individuals with serious mental illness.

Understandable is the public and political concern that mentally ill offenders who are acquitted as not guilty by reason of insanity and are not imprisoned, but hospitalized and eventually released, could discontinue their medicines, experience a relapse of

their mental disorder, and commit other crimes. What has received too little attention in media is the remarkable success of insanity restoration programs, which include a spectrum of mental health services, including, as needed, treatment in a secure hospital for an adequate period to permit substantial improvement, graduated step-down procedures to less secure placements, and conditional release with close supervision and proactive community treatment. Measures demonstrating success include fewer postdischarge rehospitalizations, fewer revocations of conditional release, and lower rates of criminal recidivism.⁴⁰⁻⁴⁵ Rehospitalization due to relapse is less common in these programs than following brief civil hospitalization in the community, and criminal recidivism is far lower than that observed in offenders who are released from prison.⁴⁰⁻⁴⁵ Therefore, with modern treatment and management programs for insanity acquittees, the risk to the community is substantially less than if the same offenders had been found guilty and sent to prison without the possibility of an insanity defense.

Conclusions

The earliest insanity standards in Anglo-American jurisprudence, based on the primitive understanding of mental illness at the time, described extraordinarily extreme conditions and compared them to the mental capacities of wild animals. Eventually criminal responsibility would require a sufficiently functional will (i.e., the intentional/decisional faculty), which in turn required rationality (i.e., thought processes that are sufficiently organized and grounded in reality).³⁸ As a minimum requirement for criminal mental responsibility, rationality is found in the M'Naughten and ALI standards for insanity, and the vast majority of states use one or the other or a modification of one or the other as their insanity standard. Although professional organizations and mental health authorities may argue for an even broader standard, the vast majority accept, as a basic minimum, the necessity of rationality.

In framing this as a choice between a *mens rea* defense alone and an insanity defense based upon moral capacity, the U.S. Supreme Court all but overlooked the fundamental and time-tested core element of rationality, which it had found constitutionally required for other types of criminal competencies. Not to be missed in this disappointing decision is that, just as states may restrict or even abolish their insanity defense, they also remain free to retain their

insanity defense and, with this, the moral integrity of criminal law as well as the possibility for improved mental health outcomes for insanity acquittees and community safety.

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