# THE FIGHT AGAINST THE INSANITY DEFENSE: EXAMINING THE LEGISLATIVE RATIONALE BEHIND THE MENS REA APPROACH AND THE POTENTIAL LONG-TERM CONSEQUENCES OF ITS USE

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## I. INTRODUCTION

In many ways, the twenty-first century has been a period of positive development when it comes to the treatment of mental illness.[1] Regarding both actual psychological understanding and societal awareness, great progress has been made in allowing society to be more accommodating to the mental health community.[2] Unfortunately, this general trend is not without setbacks, especially when it comes to the complicated interactions between mental illness and the criminal justice system. In attempting to uphold justice and protect society as best as possible, the criminal justice system has consistently had trouble factoring in the potential impact of mental illness when it considers whether an individual is culpable for wrongful actions. Historically, the insanity defense and its subsequent adoption by legislatures in all fifty states was an attempt to acknowledge and address this shortcoming.[3] In this light, codifying the insanity

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[1] While studies have shown that society still has to improve many of its approaches to mental health issues, a 2014 Harvard University study found some areas of improvement since the 1990s. Particularly when it comes to treatment, "greater public awareness, more effective diagnosis, less stigma, more screening and outreach programs, and greater availability of medications," have all contributed to more positive outcomes overall. *The Prevalence and Treatment of Mental Illness Today*, 22(5) HARV. MENTAL HEALTH LETTER 4, 4–5 (Nov. 2005).

[2] *See id.* at 5.

[3] *See* Jessica Harrison, *Idaho's Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 580–85

defense was a legislative means to offer mentally ill defendants an opportunity to have a judge or jury consider the role that mental illness may have played in the defendant's alleged crime and decide whether justice warranted a guilty verdict in light of that consideration.[4]

In recent decades, however, many legislators have reevaluated whether this defense truly benefits society as a whole.[5] Seemingly in response to concerns about the insanity defense's overall effectiveness in protecting society, a handful of states across the country have sought to pull away from the traditional method of accommodating mental illness.[6] Within the four states that have so far taken this path, legislators have enacted a series of statutes reforming the way mental health evidence can be used at trial.[7] These states now allow for a defense on the basis of mental illness only where the illness can be shown to have precluded the defendant from forming the state of mind required for their alleged crime—a formulation of the insanity defense known as the "mens rea approach."[8] If the prosecution is nonetheless able to prove the required mens rea, mental health evidence can then only be considered by a judge after a guilty verdict is entered and sentencing proceedings have

(2015).

[4] The insanity defense is sometimes considered a "justification" defense in that it can lead a defendant to be found not guilty due to the influence of the mental illness. This acquittal occurs even if the state has proven all elements of the offense beyond a reasonable doubt. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1517 (2002).

[5] Legislators on both the federal and state level have enacted various types of reforms to address the perceived shortcomings of the insanity defense. These reform efforts include changing evidentiary rules to prevent "ultimate issue" expert testimony, shifting the burden of persuasion for the defense from the state to the defendant, and the institution of the "Guilty But Mentally Ill" plea in which a defendant's mental illness is acknowledged but they are still subject to criminal sanctions. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 375, 381–83 (1999).

[6] Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J. L. & PUB. POL'Y 253, 256 (1997).

[7] *See, e.g.,* MONT. CODE ANN. § 46-14-102 (Lexis 2019); IDAHO CODE § 18-207(1) (2020); UTAH CODE ANN. § 76-2-305 (Lexis 2020); Kahler v. Kansas, 140 S. Ct. 1021, 1025-26 (2020).

[8] Nusbaum, *supra* note 4, at 1519–21.

begun.[9]

While the mens rea approach has only been adopted by four states, this Comment will seek to examine the effects that its adoption has had, and continues to have, on the many who suffer from mental illness within those jurisdictions. Instead of discussing the legality or constitutionality of the approach, this Comment will consider its effects and the underlying beliefs that have led legislatures in Montana, Utah, Idaho, and Kansas to move away from the traditional insanity defense. There is evidence to suggest that the adoption of the mens rea approach by these four legislatures has harmed mentally ill individuals by both confirming mental health stereotypes and reforming the criminal justice system in a manner that has put the mentally ill at an even greater disadvantage. The overall goal of this exploration is to further inform legislative debate in these four states, and in any future state seeking to adopt the mens rea approach. The hope is that this Comment will provide legislators with a better understanding of the potential consequences involved with the mens rea approach.

Part II of this Comment will focus on the history of the insanity defense leading up to the adoption of the mens rea approach. It will explore how state legislatures originally viewed the defense and how that view began to shift, resulting in the mens rea reforms. Part II will also break down the individual statutes that were ultimately enacted by the four states that adopted the mens rea approach. Part III will examine the *Kahler v. Kansas*[10] opinion and discuss the implications that arose from the Supreme Court's decision to uphold the constitutionality of the mens rea approach. Part IV will go into depth regarding the individual views that justified these legislative reforms and examine the evidence that supports or contradicts them. Part V will examine how the mens rea approach puts these views into practice and the consequences that are evidenced to have resulted. Finally, Part VI will reiterate how the apparent reality of these consequences should make legislatures cautious, necessitating further consideration about whether reforms like the mens rea approach are truly beneficial or whether they

[9] *See, e.g.,* Kahler v. Kansas, 140 S. Ct. 1021, 1025-26 (2020).

[10] Kahler v. Kansas, 140 S. Ct. 1021 (2020).

should be abandoned.

## II. LEGISLATIVE TREND

The significance of a defendant's ability to understand the morality of their actions has deep roots in the western legal tradition.[11] Some of the first foundations of the insanity defense come from accounts of thirteenth-century trial proceedings where an English judge instructed a jury to consider the defendant's capacity to reason during their deliberations.[12] Initially, this defense was not used to prevent a guilty verdict and instead involved a post-conviction plea for a royal pardon.[13] The philosophy behind this was that mental illness can so severely interfere with an individual's ability to reason that they could not be assigned the same moral blameworthiness, and therefore legal fault, as someone who fully understood their actions.[14]

It was this initial concern—that mental illness could transform a traditional guilty verdict into an unjust outcome—which led to the official creation of the M'Naghten test and encouraged its adoption by legislatures in all fifty states.[15] Under the M'Naghten test, an individual is not responsible for his or her criminal actions if, due to a mental illness, the individual did not know "the nature and quality of the act he or she committed," or he or she did not "know that the act was wrong."[16] The widely adopted M'Naghten test was the standard insanity defense used across the country for over a century before states began questioning its ability to properly achieve just outcomes.[17]

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[11] Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J. L. & PUB. POL'Y 7, 13–14 (2007).

[12] *Id.*

[13] *Id.*; *see also* Harrison, *supra* note 3, at 580 (referring to a 1723 English court holding that stated a defendant could only make use of a defense of insanity if he was "totally deprived of his understanding and memory so as to not know what he is doing, no more than an infant, a brute, or a wild beast.").

[14] Harrison, *supra* note 3, at 579.

[15] *See* Harrison, *supra* note 3, at 581–82.

[16] Fradella, *supra* note 11, at 16–17.

[17] *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html (last visited Feb. 6, 2022).

The shift toward new approaches to the insanity defense began in the 1950s and 1960s with new tests being theorized and debated upon by both state legislators and judges.[18] The first widely adopted reform to the traditional defense was the Model Penal Code Test ("ALI").[19] Following the path of previous reform efforts, the ALI construction was created to be less restrictive and more accessible than the M'Naghten test.[20] This is because, under the ALI standard, a defendant can be acquitted if, due to a mental illness, they lacked "substantial capacity" to appreciate the wrongfulness of their actions or they were unable to conform their behavior to the law.[21] By 1998, almost half of state legislatures either explicitly adopted or otherwise approved of the ALI test as a replacement for the M'Naghten standard.[22]

The ALI reform to the insanity defense was one of many reform actions taken during the 1960s, 1970s, and 1980s, in which legislatures sought to further protect the civil rights of the mentally ill.[23] Despite this trend toward more accessible policies, legislators in other states began supporting more restrictive efforts.[24] Instead of acting out of a belief that mentally ill defendants needed more accommodations, some legislators began acting out of a concern that the M'Naghten test was too

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[18] *Id.*

[19] Borum & Fulero, *supra* note 5, at 377; *see also From Daniel M'Naughten to John Hinckley, supra* note 17 (outlining that prior to the creation of the ALI approach, the U.S. Court of Appeals for the D.C. Circuit rejected the M'Naghten test in 1954, creating the Durham rule. This rule was an attempt to allow more scientific evidence of mental illness to be considered, with the rule holding that "a defendant could not be found criminally responsible 'if his unlawful act was the product of mental disease or mental defect.'").

[20] Borum & Fulero, *supra* note 5, at 377.

[21] Since its creation, the ALI test has become the most widely adopted form of the insanity defense outside of the M'Naghten test. Borum & Fulero, *supra* note 5, at 377.

[22] *From Daniel M'Naughten to John Hinckley, supra* note 17.

[23] In addition to the more expansive test for the insanity defense, many state legislatures also enacted statutes in response to judicial decisions regarding indefinite confinement of mentally ill individuals. These state legislatures began reforming their laws to provide for more protective procedures, like the periodic reassessment of individuals confined to a mental health facility after being found not guilty for reason of insanity. *See From Daniel M'Naughten to John Hinckley, supra* note 17.

[24] *From Daniel M'Naughten to John Hinckley, supra* note 17.

permissive.[25] These legislators argued that the traditional insanity defense posed a threat to the public because it allowed individuals who should have been held accountable to reenter society without facing punishment for their crime.[26]

This increased focus on mental illness' supposed threat to public safety reflected similar shifts in thinking among segments of the U.S. population, feeding legislative efforts to restrict how and when the insanity defense could be used.[27] For example, in a series of surveys conducted in Wyoming following the trial of John Hinkley, "large segments of community residents (90%), college students (94%), legislators (87%), police officers (91%), state hospital aides (94%), state hospital professionals (54%), and mental health center professionals (49%) agreed with the statement: 'Too many people escape responsibility for crimes by pleading insanity.'"[28]

Of these efforts to protect the public, many involved relatively slight changes to the procedural uses of the insanity defense.[29] This included Congress' passage of the Insanity Defense Reform Act, which amended the Federal Rules of Evidence to prevent mental health experts from testifying as to the "ultimate issue" as an expert witness.[30] In seventeen states,

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25 *From Daniel M'Naughten to John Hinckley, supra* note 17.

26 Montana's former Assistant Attorney General John Maynard justified his state's adoption of a mens rea reform in a prepared statement to the U.S. Senate by including an anecdote of how a defendant went about faking insanity so they could use the insanity defense and be released. This, along with concerns that defendants were not being held accountable, are examples of the concerns that individuals within the Montana state government had over the potential consequences of a less restrictive insanity defense. *See Insanity Defense in Federal Courts: Hearing on H.R. 6783 and Related Bills Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 97th Cong 240–41 (1982) [hereinafter Statement of John Maynard]. These concerns were also presented by other members of Congress during debates regarding federal legislation introduced to restrict the insanity defense. For example, former U.S. Attorney General Edwin Meese supported abolishing the defense because it would "'rid . . . the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes.'" Rosen, *supra* note 6, at 256.

27 Rosen, *supra* note 6, at 255–56.

28 Rosen, *supra* note 6, at 255–56 (citing Richard A. Pasewark et al., *Opinions About the Insanity Plea*, 8 J. FORENSIC PSYCHOL. 63, 67 (1981)).

29 Borum & Fulero, *supra* note 5, at 380–82.

30 The ultimate issue rule prevents expert witnesses from explicitly testifying "that a criminal defendant is or is not insane." In the M'Naghten context, this

this desire also led legislatures to shift the burden of persuasion for the insanity defense from the prosecution to the defendant.[31] For other state legislatures, however, mere procedural changes were not enough to protect the public and larger reforms were undertaken.[32]

Since 1975, thirteen state legislatures have adopted the guilty but mentally ill ("GBMI") plea as an alternative to the insanity defense.[33] GBMI was not a replacement for the previous forms of the insanity defense, but it theoretically granted jurors an alternative path to acknowledge a defendant's mental illness without necessarily providing an acquittal.[34] Proponents of GBMI believed that it would preserve the overall purpose of the insanity defense while allowing blameworthy defendants to receive prison sentences instead of being directly released or civilly committed following an acquittal.[35]

The legislatures in four states, however, found the GBMI verdict did not sufficiently address the supposed failings of the traditional insanity defense or the threat that it posed to the public.[36] Rather than adopting a GBMI option and otherwise

prohibition would allow an expert to testify about the defendant's mental illness but prevent them from directly stating that the defendant did not understand the nature and quality of the act or did not know that the act was wrong. *See* Borum & Fulero, *supra* note 5, at 381.

31 Borum & Fulero, *supra* note 5, at 381.

32 Borum & Fulero, *supra* note 5, at 382.

33 Borum & Fulero, *supra* note 5, at 382–83; *see* Fradella, *supra* note 11, at 28–29.

34 Fradella, *supra* note 11, at 28–31.

35 In practice, very few defendants found guilty but mentally insane actually received treatment, as most states did not guarantee that these individuals would be handled differently from other guilty defendants. In many ways, it was the fact that this defense did not produce outcomes that were significantly different from a traditional guilty verdict that led to the GBMI plea not being widely accepted. Fradella, *supra* note 11, at 28–31.

36 *See* INGO KEILITZ & JUNIUS FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS, 13–14 (1984) (quoting State Senator Thomas E. Towe, a chief sponsor for Montana's mens rea statue, and David H. Leroy, former Idaho Attorney General, who explained that the purpose of their states adopting the mens rea approach was to prevent criminals from going "scot-free," and to remove a defense that engendered distrust among the populous). In addition to the mens rea approach, Arizona adopted the guilty except insane ("GEI") approach which also replaced their traditional insanity defense. Under this approach, a person who is found GEI is still legally guilty but they are exempt from criminal punishment. For more information about the elements of this alternate

maintaining the insanity defense, these legislatures enacted the mens rea approach through a series of statutory reforms that directly limited when any such defense could be used.[37] Under the mens rea systems adopted by these states, mental health evidence could only be introduced during a trial to contest the mens rea element of the crime.[38] After a guilty verdict is reached, the defendant can once again make use of mental health evidence to influence judicial discretion during sentencing.[39] Using this structure, the legislatures in these states significantly decreased the number of mentally ill individuals who could successfully obtain an acquittal due to their condition.[40]

In the four states that adopted the mens rea approach, and particularly in Montana and Idaho, there is evidence to suggest that the severe reduction in the use of the defense was the goal that legislators had in mind when enacting the approach.[41] Officials in states that championed these reforms, like Idaho Attorney General David H. Leroy, expressed beliefs that restricting the defense would:

> eliminate the average citizen's frustration with the complicated, cumbersome, obstructive, and illogical process which the mental defense has become in the courtrooms of modern America. The spectacle of psychiatric battles, extended trial costs in time and dollars, questionable verdicts, and cynical comments by experts have highlighted the

construction, *see* Fradella, *supra* note 11, at 31–32.

[37] *See* Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. UNIV. L. REV. 965, 982-89 (1996); *see also* Nusbaum, *supra* note 4, at 1515.

[38] Nusbaum, *supra* note 4, at 1521; *see also, e.g.,* MONT. CODE ANN. § 46-14-102 (Lexis 2019); IDAHO CODE § 18-207(1) (2020); UTAH CODE ANN. § 76-2-305 (Lexis 2020); Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).

[39] *See* Nusbaum, *supra* note 4, at 1567.

[40] Statistical information indicates that in the decades following Montana's adoption of the mens rea approach, only 1% of defendants were able to use the defense to achieve an acquittal, making this defense much more restrictive than its previous form of the insanity defense. *See* Buitendorp, *supra* note 37, at 988.

[41] KEILITZ & FULTON, *supra* note 36, at 13–14; *see also* Statement of John Maynard, *supra* note 26, at 235 (stating that there had been no successful uses of the insanity defense since the adoption of the mens rea approach in a statement to Congress praising and justifying the adoption of the reform).

> "insanity" of the insanity defense. The result has been that millions of law-abiding citizens have acquired a disrespect for the practicality and results obtained in our legal system.[42]

Whether out of a concern for how the traditional insanity defense had previously been applied or due to a view that psychological experts and evidence did not belong in the criminal justice system, these legislators acted to curtail the role of the insanity defense to protect their citizenry.[43]

As for Utah and Kansas, while there is little direct insight into the motives behind legislators who supported these reforms, evidence suggests that safety concerns regarding the accessibility of the defense played a visible role in the debate regarding their enactment.[44] For example, during Kansas's legislative debates over the mens rea approach, family members of victims killed by defendants who were subsequently found not guilty for reasons of insanity ("NGRI") testified regarding the unreliability of psychiatric testimony, which is central to the defense, as well as the distrust that existed regarding the sincerity of the defense's use by defendants.[45] Even without knowing what particular beliefs led to these statutory reforms, the continued use of this approach by these legislatures is also notable. Whether or not these legislators set out to reduce a defendant's ability to acquit

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[42] KEILITZ & FULTON, *supra* note 36, at 13–14; *see also* Gilbert Geis & Robert Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 74 (1985); *see also* Brief of the Idaho Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting the Petitioner at 11, Kahler v. Kansas, 140 S. Ct. (2019) (No. 18-6135) ("To justify the decision to abolish the defense, Montana relies on the claim that abolition furthers 'goals of protection of society and education.'").

[43] *See* Geis & Meier, *supra* note 42, at 74–75; *see also* Statement of John Maynard, *supra* note 26, at 237-38.

[44] While the Kansas legislators were not very forthcoming with their specific beliefs regarding the defense, some have pointed to the series of bills that were proposed in the state legislature to restrict the use of the insanity defense leading up to 1995, as well as the actual adoption of the mens rea approach, as evidence that the state legislators either shared or were responding to the public's anxiety about the defense. Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. BAR ASS'N 38, 44–45 (1997).

[45] *See* Brief for Lynn Denton et al. as Amici Curiae Supporting Respondent at 13–14, Kahler v. Kansas, 140 S. Ct. 1021 (2020).

themselves by introducing mental health evidence, at the very least, it has been an acceptable side effect of the mens rea approach's continued use.

It should also be noted that the mens rea approaches taken by these four states are not identical. Montana, the first state to adopt the mens rea approach, removed the language in its criminal statutes that provided the insanity defense as an available affirmative defense.[46] In its place, the Montana legislature added language that stated: "[e]vidence that the defendant suffered from a mental disease or 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."[47] This new statutory language, along with reforms to Montana's mens rea terminology that occurred around the same time, requires defendants to present any mental health evidence in the context of how it affected the knowingness or purposefulness of the defendant's actions.[48] Additionally, at the defendant's request following a guilty verdict, Montana's approach requires judges to evaluate whether they believe the defendant suffered from a mental illness and to include that consideration in sentencing decisions.[49]

Unlike Montana, Idaho took a more straightforward approach by passing a law that explicitly declared that "[m]ental condition shall not be a defense to any charge of criminal conduct."[50] The Idaho statute goes on to clarify that this restriction does not apply to the defendant's use of mental health evidence to negate a crime's mens rea element.[51] The Idaho state legislature also amended its sentencing guidelines, similar to

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46 *See* Buitendorp, *supra* note 37, at 984.

47 MONT. CODE ANN. § 46-14-102 (Lexis 2019).

48 Critics of this approach argue that even if defendants are allowed to use mental health evidence to inform mens rea it is largely ineffective because mental health evidence cannot easily fit into a discussion of whether someone acted purposefully or knowingly. They suggest that in a potential case where a defendant attacked a victim due to voices in their head telling them to kill, such evidence would not necessarily lead to acquittal because, regardless of the influence that imaginary voices had on the defendant, the actions could still be considered purposeful. *See* Buitendorp, *supra* note 37, at 984–89.

49 MONT. CODE ANN. § 46-14-311 (Lexis 2021).

50 IDAHO CODE ANN. § 18-207 (West 2021).

51 *Id.*

Montana, to allow judges to consider evidence of a mental condition during sentencing.[52] Furthermore, Idaho added a provision in their sentencing procedures that empowers judges to authorize the mental health treatment of a defendant during the period of confinement if: (1) there is clear and convincing evidence that the defendant had a diagnosable mental illness; (2) the defendant would deteriorate without treatment; and (3) treatment is available.[53]

After Idaho, Utah was the third state to enact similar reforms in 1984.[54] Similar to Montana and Idaho, Utah adopted an approach in which evidence of mental health is only permissible to show that the defendant lacked the mental state required as an element of the offense charged.[55] Unlike Montana and Idaho, however, Utah only allows the admission of mental health evidence when a defendant argues for mitigation of a penalty in capital felony cases or special mitigation of the degree of a criminal homicide or attempted criminal homicide charge.[56] These new restrictions effectively limit the ability to introduce mental health evidence to "a very narrow class of extremely mentally ill defendants."[57]

The final state to replace a traditional insanity defense with the mens rea approach was Kansas, whose legislature put such a system in place in 1995.[58] Similar to Utah, Kansas achieved this

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[52] *Id.* at § 19-2523.

[53] *Id.*

[54] State v. Herrera, 895 P.2d 359, 361 (Utah 1995)

> When John Hinckley was found not guilty by reason of insanity for shooting President Ronald Reagan and Press Secretary James Brady, public outrage prompted Congress and some states to reexamine their respective insanity defense laws. As a result, in 1983 Utah abolished the traditional insanity defense in favor of a new statutory scheme.

[55] UTAH CODE ANN. § 76-2-305 (Lexis 2021).

[56] *Id.*

[57] *Herrera*, 895 P.2d at 363.

[58] Kahler v. Kansas, 140 S. Ct. 1021, 1039 (Breyer, J., dissenting). In 1994, Arizona made a major amendment to their insanity defense, but instead of adopting the mens rea approach, Arizona removed the M'Naghten prong that considered the ability to form the requisite intent and allowed the use of the defense when, due to mental illness, a defendant is unable to understand that the criminal action was wrong. *See* ARIZ. REV. STATE. ANN. § 13-502 (2009); *see also* Clark v. Arizona, 548 U.S. 735, 748–49 (2006).

reform almost entirely with a single statute that asserts, "[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 crime charged. Mental disease or defect is not otherwise a defense."[59] The Kansas statute limits defendants to argue only that their mental illness prevented them from forming the necessary mens rea element, leaving defendants with no other method for which mental illness can produce an acquittal.[60] This effectively funnels almost all evidence of mental illness to the sentencing stage of a trial, preventing the majority of this evidence from being considered until after an individual has been convicted.[61] This forces the defendant to rely on judicial discretion regarding how that evidence will be used.[62] It is also this specific Kansas statute that was under review when the Supreme Court upheld the constitutionality of a state's ability to make use of the mens rea approach in *Kahler v. Kansas*.[63]

## III. KAHLER V. KANSAS

The *Kahler* case arose from a tragic incident that occurred on Thanksgiving weekend in 2009 when James Kahler entered the home of his ex-wife's grandmother with several rifles and killed his ex-wife, her grandmother, and his two teenage daughters.[64] Kahler allegedly had a history of obsessive-compulsive personality disorder, major depressive disorder, and narcissistic personality disorder, all of which required Kahler to maintain a rigid routine.[65] After Kahler's wife filed for divorce and moved out of their home with their three children, Kahler's routine was disrupted, causing him to lose his job as his mental state reportedly deteriorated.[66] He became obsessed with the

59 KAN. STATE. ANN. § 21-5209 (West 2021).

60 *Kahler*, 140 S. Ct. at 1026.

61 Transcript of Oral Argument at 21, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

62 *See id.*

63 *Kahler*, 140 S. Ct. at 1037.

64 *Id.* at 1027.

65 Eric Roytman, *Kahler v. Kansas: The End Of The Insanity Defense?*, 15 DUKE J. CONST. L. & PUB. POL'Y 43, 45 (2020).

66 *Id.*

idea that his ex-wife and two daughters were the sole cause of his failures.[67] The murders occurred after Kahler's ex-wife insisted that their son spend Thanksgiving weekend at her grandmother's home, refusing Kahler's request for his son to stay with him an extra day.[68] Following the killings, Kahler surrendered to the police and was charged with capital murder.[69]

Before his initial trial, Kahler filed a motion arguing Kansas' restrictive approach to the insanity defense violates his due process rights under the Fourteenth Amendment.[70] Kahler argued that due process requires states to acquit a defendant who could prove to a jury that they were unable to "tell the difference between right and wrong."[71] The trial court denied this motion, allowing Kahler only to present evidence that his depression prevented him from forming the necessary intent for murder.[72] After finding Kahler guilty of committing multiple murders, the jury further deliberated on whether to impose the death penalty, and ultimately sentenced Kahler to death for his crimes.[73]

Upon review, the United States Supreme Court upheld Kahler's conviction as well as the Kansas law.[74] It found that historic legal tradition did not suggest that a particular form of the insanity defense had become "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[75] In reaching the conclusion that the insanity defense and its scope are not part of the national legal tradition, the Court pointed to the existence of multiple tests for establishing legal insanity and a perceived lack of consensus among the psychological and medical community regarding those tests.[76] This has since opened the door for states to accept whatever form of the insanity defense they believe will offer the best balance between

67 *Id.*

68 *Id.* at 46.

69 *Kahler*, 140 S. Ct. at 1027.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Kahler*, 140 S. Ct. at 1037.

75 *Id.* at 1027, 1038.

76 *Id.* at 1037 ("Across both time and place, doctors and scientists have held many competing ideas about mental illness.").

public safety and justice, while also allowing for the possibility of even more restrictive reforms in the future.

The Court also noted that it did not believe the mens rea reforms enacted by Kansas and the other three legislatures constituted an abolition of the insanity defense.[77] By allowing evidence of mental illness to be considered during the determination of competency before a trial, during the determination of mens rea at trial, and during the sentencing phase after trial, the Court believed that Kansas was simply shifting when mental health evidence could be considered.[78] In interpreting the challenged law in this manner and ultimately upholding it, the Court also affirmed what it interpreted as the traditional role of states in defining their criminal defenses.[79] With this affirmation, it is now even more important that state legislatures carefully separate truths regarding mentally ill individuals from stereotypes, placing the responsibility for deciding whether to provide or deny the use of this crucial defense primarily in the hands of state legislators.

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77 *See id.* at 1031–32.

78 *Id.* at 1026 (expressing a view that this approach is equivalent to full acquittal because the judge still has the discretion to sentence a defendant to treatment in a mental health facility rather than prison if they deem it appropriate); *see id.* ("In that way, a defendant in Kansas lacking, say, moral capacity may wind up in the same kind of institution as a like defendant in a State that would bar his conviction."); *see also* Transcript of Oral Argument at 18, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) (asserting that Kahler had every opportunity and incentive to introduce expert testimony about his mental illness at the punishment phase of his trial); *but see* Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. AM. ACAD. PSYCHIATRY L. 488, 493 (2013) (stating that the use of mental health evidence at sentencing is not the equivalent of a full insanity defense because sentencing occurs after blame has already been asserted, and sentencing is discretionary which means that there is nothing preventing mental health evidence from being an aggravating factor rather than a mitigating factor).

79 *Kahler*, 140 S. Ct. at 1047–48

> [S]ometimes the law attempts to maintain this balance by developing and retaining a "collection of interlocking and overlapping concepts," including defenses, that will help "assess the moral accountability of an individual for his antisocial deeds." . . . As we have recognized, the "process of adjustment" within and among these overlapping legal concepts "has always been thought to be the province of the States."

Additionally, the Supreme Court's reasoning also appeared to accept, or at the very least failed to address, many of the underlying beliefs and assumptions that have been raised in the legislative debates over the mens rea approach.[80] This can be seen most clearly in some of the questions asked during oral arguments.[81] Specifically, Justice Alito expressed various concerns surrounding the consequences of using diagnoses from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") to define mental illness under an insanity defense.[82] Relying on the estimate that upwards of twenty percent of the U.S. population could be diagnosable under the DSM, Justice Alito feared that allowing anyone with such a disorder to assert the insanity defense would lead to overuse.[83] Whether or not this would be the case, by framing his fear in this manner, Justice Alito is reflecting the view that defendants will take any opportunity to exploit the defense and undermine the criminal justice system as a result.[84] Justice Alito's concern can be interpreted as a dismissal of the idea that a mental health expert could make an accurate evaluation of a defendant's capacity to reason, independent of a DSM diagnosis.[85] Furthermore, this is the same general concern that led some legislators to support the adoption of the mens rea approach in the first place.[86]

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[80] *See* Transcript of Oral Argument at 10–12, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) (expressing concern that a more liberal interpretation of what constitutes insanity and mental health evidence could potentially lead to an explosion in the usage of the insanity defense); *see also* Rosen, *supra* note 6, at 256 ("According to former Attorney General William French Smith, 'There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage and then have the door opened for them to return to the society they victimized.'").

[81] Transcript of Oral Argument at 11–12, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

[82] *See id.*

[83] *See id.*

[84] *Id.* at 10.

[85] *See id.* at 10–11 (dismissing Kahler's attorney's response, indicating that this concern is somewhat unfounded, as an evaluation of a mental health expert in an insanity defense case focuses on the defendant's capacity to reason independent of a DSM diagnosis). Justice Alito seems to disregard the idea that a mental health expert would be able to look beyond that diagnosis and accurately determine whether someone actually has the mental incapacity that the insanity defense is meant to protect. *See id.*

[86] *See* KEILITZ & FULTON, *supra* note 36, at 13–14*; see also Insanity Defense in*

## IV. ARGUMENTS FOR ABOLITION

In moving forward with this analysis of the insanity defense, it is important to understand the major arguments that have arisen in legislative debates regarding the mens rea approach. Now that the Supreme Court has affirmed the constitutionality of this approach, more focus needs to be given to the consequences of the continued and possible expanded use of the mens rea approach. Specifically, it is important to explore what arguments may have arisen to justify legislative acceptance of the mens rea approach and whether those arguments have merit. The most common arguments made against the insanity defense are the beliefs that: the unreliability of mental illness evidence will taint the criminal justice system; defendants often fake mental illnesses to make use of the defense; the insanity defense is useless because insane defendants are untreatable and should be exiled from society; and the insanity defense poses a danger to the public because it allows the release of dangerous individuals from prison.[87]

### A. *Evidence of Mental Illness Will Taint the Criminal Justice System*

Taken from the most high-profile uses of the insanity defense, members of the public and some legislators, like former Idaho Attorney General David H. Leroy, have come to believe that the process of using the insanity defense is "complicated, cumbersome, obstructive and illogical."[88] Others, like one

*Federal Courts: Hearing on H.R. 6783 and Related Bills Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 97th Cong. 463 (1982) (statements of Mike Greely, Att'y Gen. of Montana)

> The science of psychiatry embodies a complex set of ideas that seem to preclude a courtroom consensus on the issue of insanity. Psychiatrists and psychologists themselves are often affected in their findings by their personal philosophies as much as they are by measurable data. They often become advocates in a courtroom, disputing even the widely accepted fundamental principles upon which their science rests.

[87] Rosen, *supra* note 6, at 258 ("With regard to mental illness, people believe that psychiatric testimony is unreliable given that defendants can and do pretend to have a mental disease or defect.").

[88] KEILITZ & FULTON, *supra* note 36, at 13 (quoting former Idaho Attorney General David H. Leroy).

respondent of a study that surveyed various opinions of Idaho legislators, have expressed a belief that the insanity defense has become so distorted that "the plea had become 'laughable.'"[89] To these legislators, the insanity defense is less of a way to achieve just outcomes and more of an opportunity for psychological officials to make what one Montana State legislator, Michael Keedy, referred to as "arbitrary and God-like determinations" that have no place in a courtroom.[90]

For the most part, mental health evidence is seen as inherently subjective, and the courtroom battle of psychological experts is seen as a confusing spectacle that makes the evidence less trustworthy.[91] The "battle of the experts" concept refers to the belief that psychiatric experts rarely agree at trial and that successful use of this defense simply requires defendants to pay for a more convincing expert than the opposition.[92] Further supporting this is a belief that "if psychiatrists are paid enough, they will say anything about a defendant's sanity."[93] By viewing the insanity defense through this lens, it becomes a legal loophole that can only be leveraged by defendants wealthy enough to hire experts with impressive credentials.[94] As a legal loophole, rather than an objective defense, the insanity defense undermines the supposed objectivity and equality of the criminal justice system.[95] As Montana's Assistant Attorney General John

89 Geis & Meier, *supra* note 42, at 79.

90 Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 137 (1984); *see also* KEILITZ & FULTON, *supra* note 36, at 13–14.

91 Rosen, *supra* note 6, at 259–60; *see also*, Geis & Meier, *supra* note 42, at 75 (quoting an assertion from Idaho's solicitor general stating that the central flaw of the insanity defense was "its scientific unreliability"); Alexander D. Brooks, *The Merits of Abolishing the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 128 (1985) ("These illnesses now include disorders that may have significance for psychiatric treatments or research, but that tend to be misleading for use by the law as a basis for excusing offenders from responsibility for crime.").

92 *See* Brooks, *supra* note 91, at 130.

93 Scott K. Elmore, The Insanity Defense: Public Opinion and the Public's Tendency to Implicate Mental Illness in High-Profile Crimes 54 (2015) (PsyD dissertation, Alliant International University, Irvine) (ProQuest).

94 Rosen, *supra* note 6, at 258.

95 Nusbaum, *supra* note 4, at 1551 (noting that Montana State Legislator Michael Keedy cited a fear that the defense was perverting the criminal justice system as his motivation for introducing the legislation that served to enact Montana's mens rea system).

Maynard stated when defending Montana's reform efforts in front of Congress:

> To modify the insanity defense is not to take a step backward, but rather to understand more about the limits of psychiatry. We know now that juries understand accountability; their determinations of accountability should not be undermined or confused by "experts" who do not share a consensus about the fundamental theories they employ.[96]

In addition to the battle of the experts, proponents of abolition and the mens rea approach also believe that the very nature of psychological evidence makes it antithetical to the criminal justice process.[97] Seemingly, this is because of the amorphous and subjective nature of mental disorders.[98] Mental illness is often impossible to see on the surface, which means that judges and juries are unable to see evidence of it for themselves and have to trust the evaluation of a mental health expert.[99] This creates problems because not only do members of the public have skepticism regarding the competence of such experts, but legislators also do not seem to trust juries to decide whether the testimony provided by those experts should be believed.[100] This distrust serves to inject uncertainty into a criminal justice system that is reliant on societal confidence in its ability to achieve just

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96 Statement of John Maynard, *supra* note 26, at 241.

97 *See* Brooks, *supra* note 91, at 128 ("These illnesses now include disorders that may have significance for psychiatric treatments or research, but that tend to be misleading for use by the law as a basis for excusing offenders from responsibility for crime."); *see also* Statement of John Maynard, *supra* note 26, at 237–41.

98 *Utah Legislative Survey—1983*, 1984 UTAH L. REV. 115, 158 (1984) ("Focusing on the issue of intent will eliminate much of the mystique and confusion created by the inexact science of behavioral psychology.").

99 Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1408 (1997).

100 Statement of John Maynard, *supra* note 26, at 237; *see also* Bender, *supra* note 90, at 137 n.30.

outcomes.[101]

To the credit of these legislators, the concerns regarding the way the public perceives psychiatric experts and mental health evidence are not without merit.[102] Studies suggest that there has been a growing sense of distrust in the reliability of the insanity defense and the testimony of mental health experts.[103] Unfortunately, it appears that legislators in these states have accepted these views without questioning the underlying assumptions feeding this distrust. For example, Montana's former Attorney General has previously asserted his belief that "[p]sychiatrists and psychologists themselves are often affected in their findings by their personal philosophies as much as they are by measurable data."[104] Contrary to this belief, however, forensic evaluations made by psychological experts generally do not rely on their intuition and subjective beliefs.[105]

More often, such evaluations involve personality, neuropsychological, and intelligence testing to determine the capacity of the defendant to properly reason between right and wrong.[106]

Additionally, despite its occurrence in some of the more high-profile insanity defense cases, the battle of the experts is neither as contentious nor as common as many would believe.[107] In most states, prosecutors usually do not contest the assertion of the insanity defense by a defendant.[108] In the rare cases that they

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101 *See* Geis & Meier, *supra* note 42, at 74; *see also Utah Legislative Survey—1983*, *supra* note 98, at 154.

102 *See* Rosen, *supra* note 6, at 258.

103 *See* Rosen, *supra* note 6, at 258 ("With regard to mental illness, people believe that psychiatric testimony is unreliable given that defendants can and do pretend to have a mental disease or defect.").

104 Statement of John Maynard, *supra* note 26, at 237.

105 While not commonly used in every forensic psychological evaluation, the use of more objective forensic instruments is widespread enough to be considered the norm, and it is believed that this usage will continue to become more common as graduate programs train students in their use. It should, however, still be noted that as of 1999, certain groups, like psychiatrists, used these tests much less than other evaluators. *See* Jocelyn A. Lymburner & Ronald Roesch, *The Insanity Defense: Five Years of Research (1993–1997)*, 22 INT'L J. L. & PSYCHIATRY 213, 219–20 (1999).

106 Lymburner & Roesch, *supra* note 105, at 220.

107 Rosen, *supra* note 6, at 260.

108 Rosen, *supra* note 6, at 260 ("[P]rosecutors agreed to insanity in [ninety-two

do, research suggests that the disagreement primarily occurs when the attorneys argue over whether the legal definition has been met with the mental health experts generally agreeing in their psychological evaluations.[109] Even if this were the case, however, one would have to ask why this disagreement between psychiatric experts inspires such distrust when legislators are not raising similar concerns about conflicting testimony provided by doctors or other expert witnesses.

### B. *Defendants Commonly Fake the Insanity Defense*

A second belief, and one that has been repeatedly referenced by legislators and other politicians, is the idea that many defendants who attempt to use the insanity defense are faking insanity to escape personal responsibility.[110] Many detractors of the insanity defense rely on this argument because they believe that there are no real consequences that would prevent a sane defendant from attempting to claim insanity.[111] The fear of widespread faking is also supported by the aforementioned fact that mental illness often has no visible symptoms and can only be proven by psychological evaluation.[112] This lack of observable proof, along with distrust directed at psychiatric experts, supports the idea that sane individuals constantly raise the insanity defense with at least a few of them ultimately succeeding

percent] of all the cases in which [the insanity defense] was raised.").

109 Rosen, *supra* note 6, at 260; *see also* Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY L. 5, 12 (1996) ("On the average, there is examiner agreement in [eighty-eight] percent of all insanity cases.").

110 *See, e.g.,* Statement of John Maynard, *supra* note 26; Rosen, *supra* note 6, at 256; Perlin, *supra* note 99, at 1407 ("The fear that defendants will 'beat the rap' through fakery, a millennium-old fear which has its roots in a general disbelief in mental illness, and a deep-seated distrust of manipulative criminal defense lawyers invested with the ability to dupe jurors into accepting spurious expert testimony."); Gina Aki & Ronald Craig, *Exploring the Relationship Between Knowledge of the Insanity Defense and Popular Media*, 31 SOCIO. VIEWPOINTS 61, 62 (2017) (noting that among the common themes presented in the popular show Law & Order was the use of mental illness as an escape from personal responsibility).

111 *See* Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 12; *see also* Aki & Craig, *supra* note 110, at 62 (finding evidence that a lack of portrayals in crime-themed programming regarding the consequences of an NGRI plea may have led to a belief that there is no risk to the use of the insanity defense).

112 Perlin, *supra* note 99, at 1408.

in their gambit.[113] This conclusion is then further reinforced within the minds of some legislators due to anecdotal evidence, like that provided by the aforementioned John Maynard who supported the necessity of Montana's reform by describing a defendant who was found mentally ill during an evaluation but was later discovered to possess "a note that listed detailed instructions on how to convince a psychiatrist that 'they were crazy.'"[114]

Despite these concerns, however, evidence suggests that feigned insanity has never really been a common occurrence in any state or with any form of the insanity defense.[115] Studies have indicated that mental health experts who use appropriate diagnostic tools can accurately determine if an individual is faking a mental illness.[116] Studies also suggest that, rather than defendants being able to feign insanity during mental health examinations, over two-thirds of insanity pleas are dropped because those experts make findings inconsistent with successful insanity defense pleas.[117] This indicates that the instances of psychological experts being tricked by sane defendants may be the exception rather than the rule, calling into question the dire nature of the insanity defense's supposed threat to public safety.

Another key point to take note of is that there are definite consequences for attempting an insanity defense, which likely prevents many individuals from faking insanity in the first place.[118] The most straightforward of these consequences is that a person asserting the insanity defense is subject to two

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113 Elmore, *supra* note 93, at 54; *see also* Rosen, *supra* note 6, at 256 ("Congressman John Myers [from Indiana] contended that the defense provided a 'safe harbor' for criminals who bamboozle a jury into thinking they should not be held responsible.").

114 *See* Statement of John Maynard, *supra* note 26, at 240 (sharing an anecdote of an instance where a defendant had been found with a note that contained detailed instructions on how to convince a psychiatrist that one had a mental illness).

115 Perlin, *supra* note 99, at 1409.

116 Whether due to improvements in psychological testing or flaws found in the studies that originally cast doubt on the abilities of mental health experts, recent studies indicate that psychologists are accurate in their evaluations. *See* Perlin, *supra* note 99, at 1410.

117 Lymburner & Roesch, *supra* note 105, at 226.

118 *See* Perlin, *supra* note 99, at 1412.

stigmatizing labels; in the eyes of the public, these defendants are viewed as both insane and criminal.[119] The stigmatizing effect that those labels can have on a defendant leads many people, including some defendants with legitimate mental illnesses that could mitigate their culpability, to avoid raising the insanity defense when it is available.[120]

Additionally, defendants who raise the insanity defense but fail to meet its evidentiary burden suffer further negative effects.[121] On average, research suggests that defendants who raised the insanity defense but were ultimately found guilty served longer sentences than defendants facing similar charges who did not seek the defense.[122] Overall, this evidence conflicts with legislative assertions and casts doubt regarding what some politicians, like former United States Attorney General William French Smith, have called,

> [a] doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage and then have the door opened for them to return to the society they victimized.[123]

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[119] *See* Michelle Leigh West, Triple Stigma in Forensic Psychiatric Patients: Mental Illness, Race, and Criminality 27 (2015) (Ph.D dissertation, City University of New York); *see also* Sareen K. Armani, *Coexisting Definitions of Mental Illness: Legal, Medical, and Layperson Understandings Paving A Path For Jury Bias*, 26 S. CAL. REV. L. & SOC. JUST. 213, 224 (2017) ("[N]egative usages of the word 'insane' have become negatively associated with the word itself, so that in the courtroom, the mere utterance of the words 'legally insane' primes a web of other negative words and thoughts in the juror' minds.").

[120] Perlin, *supra* note 99, at 1412 ("[I]t is much more likely that seriously mentally disabled criminal defendants will feign sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases.").

[121] Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 12.

[122] Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 12.

[123] *See* Rosen, *supra* note 6, at 256; *see also* Geis & Meier, *supra* note 42, at 75 (citing responses to a questionnaire distributed to legislators in Idaho).

### C. *The Insanity Defense Releases Dangerous Individuals Back into the Public*

A third belief, and perhaps the one that has been most frequently referenced in legislative debates, is the idea that the insanity defense threatens the public by allowing dangerous individuals to avoid prison and rejoin society where they can cause further harm.[124] The public, however, overestimates how often the defense is raised and its overall success rate, underestimates how quickly those found NGRI are released, and incorrectly distrusts the ability of medical professionals to accurately determine whether individuals pose a danger to themselves or others.[125]

Just like the other major beliefs, empirical data calls into question this view of the insanity defense as a revolving door for dangerous criminals.[126] For one, people heavily overestimate the use of the defense, with some studies indicating that "[t]he public's estimate is actually [forty-one] times greater than the actual plea rate of 0.9%."[127] This low usage is further exemplified by the fact that the actual success rate of the defense is relatively low as well.[128] Even more, defendants who are found NGRI are often not released back into society as some would suggest.[129] States that allow the insanity defense have procedures for

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124 *See* Rosen, *supra* note 6, at 256; *see* Geis & Meier, *supra* note 42, at 79.

125 Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 11–12; *see also* Elmore, *supra* note 93, at 15.

126 *See* Rosen, *supra* note 6, at 258–59.

127 Elmore, *supra* note 93, at 53.

128 One study that examined eight states found that the average acquittal rate was twenty-six percent. Elmore, *supra* note 93, at 53 (reporting findings from a 1994 study that showed participants' estimates of insanity defense success rates were eighty-one times greater than the actual success rate). It is important to note, however, that the percentage was skewed by states like Washington, where the success rate of the defense was eighty-seven percent because most insanity pleas occurred with the consent of the prosecution. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334–35 (1991) [hereinafter Callahan et al., *An Eight-State Study*].

129 Morse & Bonnie, *supra* note 78, at *494*; *see also* Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 12 ("A comprehensive study of California practice showed that only one percent of insanity acquitted defendants were released following their NGRI verdict and that an additional four percent were placed on conditional release, the remaining 95 percent being hospitalized.").

individuals found NGRI to automatically face civil commitment proceedings, which would send NGRI defendants to secure mental health facilities instead of allowing them to immediately reenter society.[130] Furthermore, civilly committed defendants, on average, spend roughly the same or significantly more time in mental health facilities than they would have otherwise spent in prison.[131]

Another key piece of the concern surrounding the danger posed by the insanity defense is the distrust among legislators for psychiatric experts.[132] Montana state legislator Michael Keedy, in particular, noted the contribution that these beliefs made in his support of restricting the insanity defense when he asserted that psychological conclusions were "arbitrary and God-like determinations."[133] Distrust, like that exemplified by Keedy, is somewhat understandable, as some historical studies indicate that psychiatric experts are unable to accurately determine which patients pose a danger to society.[134] However, after reanalyzing these historical studies and conducting further research with updated methodology, it has become clear that medical professionals are more accurate at determining how dangerous these patients are than many had previously believed.[135] As was the case with the other major beliefs regarding the insanity defense, this again calls into question the rationales used by legislators to support the mens rea approach.

### D. *The Insanity Defense is Useless Because Insanity is Untreatable*

The last major belief that commonly underlies support for the mens rea approach is the idea that a defendant's goal of seeking treatment rather than punishment for individuals with mental illness is useless because treatment is largely ineffective.[136]

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130 Morse & Bonnie, *supra* note 78, at 494.

131 *See* Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 12.

132 Statement of John Maynard, *supra* note 26, at 237; *see also* Bender, *supra* note 90, at 137 n.30.

133 Bender, *supra* note 90, at 137.

134 Elmore, *supra* note 93, at 15.

135 Elmore, *supra* note 93, at 15.

136 *See* Armani, *supra* note 119, at 218; *See also* Colleen M. Berryessa, *Judicial*

In general, this belief is supported by two views. The first view is that the insanity defense provides defendants with incentives to "stay sick," which makes treatment less effective.[137] As previously asserted by Montana State Senator Thomas Towe, who was a chief sponsor for Montana's mens rea reforms:

> [A]llowing a person who has committed a crime to go scot-free without any punishment for his crime makes treatment for his underlying mental illness more difficult. Instead of helping him to understand the seriousness of his actions, the insanity defense allows him to feel he is above the law and ignore the gravity of his actions. This makes his treatment more difficult.[138]

The second view is that mentally ill individuals are untreatable and committing them to a mental health facility, where they may be released sooner in comparison to prison, is an unnecessary risk.[139] Both of these views culminate in the fear that defendants who are released after civil confinement will re-offend because the treatment they received will not have changed their behavior.[140]

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*Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC'Y REV. 202, 206 (2019).

137 Perlin, *Myths, Realities, and the Political World*, *supra* note 109, at 14; *see also* KEILITZ & FULTON, *supra* note 36, at 13.

138 KEILITZ & FULTON, *supra* note 36, at 13.

139 *See* Armani, *supra* note 119, at 218

> [M]edia misrepresentations usually imply that those with mental illnesses can never recover. They are often shown as static characters, creating the impression that even with therapy, it is impossible to get better. If they do get better, the extent to which they are generally shown to recover is mere stabilization, rather than full integration into society with jobs and a social circle.;

*see also* Bender, *supra* note 90, at 137 n.30 (noting that the sponsor of Montana's mens rea legislation subscribed to the belief that there was no such thing as mental illness or psychiatric treatment).

140 This assumption underpins many statements made by politicians and is likely supported by a belief that either they were not mentally insane in the first place or the nature of the individual's mental illness is such that they are just as dangerous after having spent time in a psychiatric facility as they were going in*, see* Geis & Meier, *supra* note 42, at 79 ("Legislators also stressed that they were concerned that dangerous offenders were being released from mental institutions

Unfortunately, the belief that mental illness treatment is ineffective has some truth to it, as treatability is affected by a self-fulfilling prophecy.[141] When it comes to treating mental illnesses, the process is highly susceptible to the individual's own beliefs.[142] A defendant who is constantly told that their condition is untreatable will likely have lower self-esteem and lower healthcare utilization, leading to higher incidents of negative treatment outcomes.[143] After all, a person who does not believe they can improve will not see the point in taking full advantage of the opportunities provided to them and, as a result, will not receive the full benefits of those opportunities.[144] Perpetuating this doubt, either through direct legislative approval or indirectly through the continued support of the mens rea approach, has consequences that legislatures need to acknowledge and take into account when considering the mens rea approach in the future.[145]

## V. THE NEGATIVE EFFECTS OF ABOLITION

In addition to considering the underlying beliefs behind these reforms to the insanity defense and examining what supporting efforts based on those beliefs might mean, it is also important to consider the actual consequences of the new systems that are being put into practice. In substantively changing their insanity defenses to match the beliefs underpinning the mens rea approach, these legislatures have created systems that themselves act to strengthen the stigma against the mental health community. In protecting the public from defendants who may or may not be mentally ill, and in addressing the supposedly destabilizing effect that mental health testimony has on the

without first having served the amount of time that would have been imposed on them had they been deemed guilty of the criminal act."); *see also* Rosen, *supra* note 6, at 256 (quoting former Massachusetts governor who, in arguing against the insanity defense, said of defendants using the insanity defense, "Do you want people who commit these terrible murders to be out in a year, two, three, walking streets again?"). This again assumes that such individuals will either be directly released back into society or receive treatment during those years and upon release be just as likely to harm others as they were before.

141 Armani, *supra* note 119, at 221.

142 Armani, *supra* note 119, at 221.

143 Armani, *supra* note 119, at 221.

144 Armani, *supra* note 119, at 221.

145 Armani, *supra* note 119, at 221.

criminal justice system, the mens rea approach has made it almost impossible to introduce mental health evidence to avoid guilt.[146] Furthermore, the mens rea approach has also made it more likely that a mentally ill defendant will receive a more restrictive sentence and will be subjected to worse treatment outcomes through incarceration.[147]

### A. *More People Are Found Guilty Under the Mens Rea Approach*

At its core, the mens rea approach has been a legislative response to a belief that it is necessary to restrict how and when mental health evidence should be introduced during a trial.[148] To protect public safety, which is believed to be threatened by the defense, state legislatures have effectively removed all but one way in which mental health evidence could be used to avoid a guilty verdict.[149] Once a trial has begun, the reformed systems allow defendants only to present evidence of mental illness to negate the intent requirement of a crime, which is very difficult to successfully do.[150] This difficulty stems from the fact that using

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[146] *See* Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J. L. & MED. 471, 480–82 (1983).

[147] *See* Berryessa, *supra* note 136; *see also* E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 14–18 (2014), https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

[148] *From Daniel M'Naughten to John Hinckley, supra* note 17. Even without testimony from Kansas state legislators, the fact that the adoption of the mens rea approach was preceded by attempts to adopt other restrictive reforms to the insanity defense indicates that such a restriction was at least one reason that the legislature adopted the mens rea approach. *See also* Spring, *supra* note 44, at 45.

[149] *See* Morse & Bonnie, *supra* note 78, at 491-93; *See also* Cobun, *supra* note 146, at 495

> When mental illness is considered, it can affect the sentencing disposition in two ways: it might justify a lesser sentence, or it might suggest special treatment. A post-conviction imposition of special treatment limits the state's options. Any special treatment must be accorded within the criminal system-the choice of civil commitment is no longer available. Moreover, the sentencer's choice of disposition may be constricted by minimum prison requirements, or even stipulated by determinate sentencing statutes.

[150] Morse & Bonnie, *supra* note 78, at 491.

mental health evidence to suggest a defendant was incapable of forming the requisite mental state of a crime is primarily effective with specific intent crimes, but far less effective when the requisite mens rea requirement is general intent or criminal negligence.[151] This means that while the mens rea system now used by these four states may be effective for defendants charged with murder, it will be ineffective if a prosecutor decides to downgrade the charge to negligent homicide, placing defendants at a severe disadvantage.[152]

For example, consider the hypothetical situation where a defendant is charged with intentional homicide for shooting and killing a person that the defendant firmly believed to be a bear.[153] Since intentional homicide requires the defendant to have acted intentionally, the defendant may be able to successfully use the mens rea approach to achieve an acquittal because he would be able to argue that he did not intend to shoot a human being.[154] On the other hand, if the defendant's charge is downgraded to negligent homicide, the prosecution is required to prove that a reasonable person in the defendant's position would have been aware that they were shooting a human being and any evidence that the defendant suffered from a severe delusion would be irrelevant.[155] From there, the defendant would be unable to introduce evidence of mental illness to avoid conviction because it would only be considered after the defendant was convicted and the sentencing phase had begun.[156]

The mens rea approach has made achieving acquittal, which was already an uphill battle with the traditional form of the defense, impossible for defendants with all but the most severe mental illnesses and facing all but the most severe criminal charges.[157] Studies conducted in the wake of Montana's adoption

151 *See* Cobun, *supra* note 146, at 480-81.

152 Morse & Bonnie, *supra* note 78, at 492.

153 Nusbaum, *supra* note 4, at 1524 n.51.

154 Nusbaum, *supra* note 4, at 1524 n.51.

155 Nusbaum, *supra* note 4, at 1524 n.51.

156 Kahler v. Kansas, 140 S. Ct. 1021, 1026 (2020).

157 *See* Lisa A. Callahan et al., *The Hidden Effects of Montana's "Abolition" of the Insanity Defense*, 66 PSYCHIATRIC Q. 103, 107, 116 (1995) [hereinafter Callahan et al., PSYCHIATRIC Q.] (comparing the thirty-eight NGRI verdicts during the three years prior to the reform with six NGRI verdicts during the first six years following

of the mens rea approach show that while the number of defendants who raised the insanity defense did not change following the reform, the insanity defense's success rate sharply declined.[158] While this may have admittedly been the goal that the legislature had in mind when enacting these reforms, the fact that some of these individuals would have avoided a guilty verdict and been provided treatment under the traditional insanity defense cannot be ignored.[159]

Furthermore, these studies also indicated an additional "hidden outcome" of mens rea reforms by noting that, overall, more mentally ill defendants were being released without imprisonment or hospitalization.[160] The study hypothesized that without a reliable method to recognize that a defendant's mental illness mitigated their culpability, more defendants were being found incapable of standing trial ("IST").[161] As civil commitment proceedings were not statutorily required to commence following an IST acquittal, more mentally ill defendants were ultimately being released directly back into the general public.[162]

### B. *Sentencing Under the Mens Rea Approach*

In addition to affecting the success rate of the mental illness defense, legislative beliefs also appear to have negatively affected sentencing outcomes for mentally ill defendants in these four states.[163] This is because legislators took much of the responsibility for evaluating mental health evidence out of the hands of jurors and shifted that responsibility to judges.[164] This occurred out of a belief that jurors were unable to properly evaluate the defense, allowing too many dangerous individuals to be released without any punishment.[165] In making judges

the reform).

158 *See id.* at 116.

159 *See id.* at 115–16.

160 *See id.*

161 *See id.* at 116.

162 *See id.* at 116.

163 *See* Berryessa, *supra* note 136, at 205–06.

164 *See* Berryessa, *supra* note 136, at 205–06; *see also* Kahler v. Kansas, 140 S. Ct. 1021, 1031 (2020).

165 *See* Geis & Meier, *supra* note 42, at 74; *see also Kahler*, 140 S. Ct. at 1031 ("[S]entencing is the appropriate place to consider mitigation: [t]he decisionmaker

responsible for these evaluations, politicians, like former Idaho Attorney General David Leroy, hoped that this "would remove confusion from the courtroom as lay jurors try to determine the very complex issues surrounding that determination."[166]

Unfortunately, research suggests that this shift has created a problem because judges generally impose more restrictive sentences in response to mental health evidence than they otherwise would impose in cases where mental health evidence is not introduced.[167] While not true for every case in every jurisdiction, the overall trend regarding these harsher sentences appears to exist and would only become increasingly prevalent in a mens rea system that relies upon judicial evaluations.[168] These more restrictive sentences are largely a result of judges holding the same underlying beliefs that influenced legislators in adopting the reforms; namely, that mentally ill defendants pose a danger to society and that treatment is ineffective for such individuals.[169] For example, in a survey examining judicial

there can make a nuanced evaluation of blame, rather than choose, as a trial jury must, between all and nothing.").

166 Geis & Meier, *supra* note 42, at 74; *see also* KEILITZ & FULTON, *supra* note 36, at 14 (quoting David Leroy who also stated that, if "[p]roperly understood, the Idaho statute eliminates confusion, substitutes a simple and constitutional method of determining guilt or innocence, moves the issue of a defendant's need for mental treatment to the judge's discretion at sentencing, and better protects the rights of society, the victim, and the defendant.").

167 This conclusion is based on survey data collected from judges in an effort to see how their sentencing processes are affected by perceptions of defendants. These studies show that evidence of mental disorders can result in more restrictive sentences due to a perception that such individuals are more dangerous. *See* Berryessa, *supra* note 136, at 205–06 (citing Shayne Jones & Elizabeth Cauffman, *Juvenile Psychopathy and Judicial Decision Making: An Empirical Analysis of an Ethical Dilemma*, 26 BEHAV. SCI. & L. 151–165 (2008)).

168 Berryessa, *supra* note 136, at 206.

169 Shayne Jones & Elizabeth Cauffman, *Juvenile Psychopathy and Judicial Decision Making: An Empirical Analysis of an Ethical Dilemma*, 26 BEHAV. SCI. & L. 151, 159 (2008)

> The findings from the current study suggest that a hypothetical defendant who is both labeled with psychopathy and ascribed as possessing psychopathic traits is perceived as less amenable to treatment and recommended for more restrictive placements than a youth with no diagnosis. Also, an adolescent who is labeled with psychopathy, described as possessing psychopathic traits, or labeled and described as psychopathic is perceived by judges as representing more of a danger to the community.;

stereotyping about mental illness, one judge responded to a question about how a defendant's mental disorder may affect the judge's sentencing consideration by asserting that:

> There are some people that have a diminished capacity [due to mental illness] . . . they are the ones who're getting to the most trouble and cause the most problems in our community, and it's not entirely fair to lump them in the same category with somebody who would consciously choose to do an evil act. But on the practical side of things, even if we shouldn't say that they're bad people, we need to make sure that society is safe from them because they are an increased danger.[170]

As for treatability, this is linked to more restrictive sentences because receiving treatment is viewed as going hand-in-hand with a defendant's ability to eventually become a safe and contributing member of society.[171] In response to that same survey regarding judicial stereotyping, a second judge stated that:

> [i]t is what it is and I still would just look at the danger to the community and the chance for . . . medication and rehabilitation . . . protecting the community is always of the utmost importance . . . . It's something that we use in considering whether to release someone back into the community.[172]

Evidence suggests that judges who believe that recovery is unlikely are more willing to impose harsher prison sentences with longer periods of confinement because judges may think to themselves "nothing that I do in terms of treatment is going to change their behavior."[173] This is ultimately the same concern expressed by legislators regarding their view of the insanity

*see also* KEILITZ & FULTON, *supra* note 36, at 13–14.

170 Berryessa, *supra* note 136, at 220–21.

171 Berryessa, *supra* note 136, at 223.

172 Berryessa, *supra* note 136, at 223.

173 Berryessa, *supra* note 136, at 222.

defense as a fast track for mentally ill defendants to be released back into society where they will cause further harm.[174]

The fact that these are similar underlying beliefs is important and cannot be ignored. While it has not been concretely studied, it is reasonable to fear that these judicial assumptions may be strengthened by legislatures providing these views with a sense of authorization and acceptance through their adoption of policies based upon them. After all, the accuracy of these beliefs is being validated by their use in justifying a reformation of the insanity defense. Whether this legislative belief was explicitly accepted, in the case of Montana and Idaho, or implicitly supported by states continuing to use and defend the mens rea approach, the mere possibility of this effect should warrant some caution.

### C. *Deepening Structural Stigma*

While not directly caused by the changes enacted by these state legislatures, it is also important to note that longer and more frequent prison sentences, which may occur from the reliance on judicial sentencing, are made even worse for individuals with mental illness because of structural stigma within the criminal justice system.[175] Structural stigma is a term that refers to the inequities and injustices found within society and institutions that restrict the freedoms of specific populations.[176] In the context of mental illness, structural stigma plays an

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174 *See*, Rosen, *supra* note 6, at 258–59; s*ee also* Geis & Meier, *supra* note 42, at 79.

175 *See* TRACY PUGH ET AL., COMM. ON THE SCI. OF CHANGING BEHAV. HEALTH SOC. NORMS, STRUCTURAL STIGMA AND MENTAL ILLNESS 6 (2015), https://sites.nationalacademies.org/cs/groups/dbassesite/documents/webpage/dbasse_170045.pdf

> Structural stigma is apparent in several areas related to the criminal justice system, including laws and policing policies that make [people with mental illness ("PMI")] vulnerable to arrest; the adjudication processes that PMI are less equipped to navigate than people without [mental illness]; the lack of [mental health] treatment services and support for PMI within the criminal justice system; and the decreased likelihood PMI face in being disentangled from the criminal justice system compared to people without [mental illness].

176 *Id.* at 2.

important role because of the way the criminal justice system was designed.[177] Mentally ill individuals that find themselves within the criminal justice system often struggle because it was neither designed nor properly equipped to accommodate their differences.[178]

Individuals with mental illness generally serve longer portions of their sentences than other prisoners because they are less likely to be approved for parole and are more likely to break prison rules, which prevents them from receiving sentence reductions for good behavior.[179] Additionally, even when they manage to follow the rules, mentally ill individuals are often denied the opportunity for early release simply because many community programs that supervise parolees do not want to be responsible for them.[180] It is simply a reality that, on average, the criminal justice system treats prisoners with mental illness more harshly than those without.[181] These differences can then result in harmful narratives when legislators use statistics, like the increase in the average time served by mentally ill individuals, without considering their proper context to support conclusions such as the belief that the insanity defense should be removed so that the state can "rid . . . the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes."[182]

## VI. CONCLUSION

In the end, even though the issue of the mens rea approach's constitutionality has been largely settled by the Supreme Court, further discussion of the mens rea approach is still warranted. Beyond the question of whether state legislatures *can* adopt or continue to support such reforms is the question of whether state legislatures *should* adopt such reforms. While the insanity

177 *Id.* at 6.

178 *Id.*

179 TORREY ET AL., *supra* note 147, at 14; *see also* Virginia Aldigé Hiday & Padraic J. Burns, *Mental Illness and the Criminal Justice System*, *in* HANDBOOK FOR THE STUDY OF MENTAL HEALTH 478, 493 (Teresa L. Scheid & Tony N. Brown eds. 2d. 2010).

180 *See* Hiday & Burns, *supra* note 179, at 493.

181 *See* Hiday & Burns, *supra* note 179, at 490–93.

182 Rosen, *supra* note 6, at 256.

defense may not be widely adopted, it is an extremely important defense for those individuals who rely upon it. The insanity defense is also in many ways a lightning rod that seems to draw upon and further strengthen particular stigmas directed at the mental health community.[183] By accepting a form of the insanity defense that is heavily steeped in the perceptions that mental illness is synonymous with dangerousness, that mental illness is untreatable, and that mental illness is incompatible with criminal justice, legislators are sending a message that they agree with these views to both society as a whole and the mental health community.[184]

Even without considering these stigmatizing consequences, at the very least there are enough indications that the claims used to support these legislative efforts are flawed to warrant caution and further study.[185] Until more detailed research can be conducted to examine these apparent issues, state representatives debating the insanity defense and other mental health issues must consciously consider the effect that the aforementioned assumptions and prejudices may have on their reasoning. Doing this could prevent state legislators from unintentionally acting in ways that would harm an already disadvantaged and politically marginalized portion of the American public.[186]

[183] A study of eight states indicated that the insanity defense was raised in approximately 0.93% of felony cases, *see* Callahan et al., *An Eight-State Study*, *supra* note 128, at 334; *see also* Brief of 290 Criminal Law and Mental Health Law Professors as Amici Curiae Supporting Petitioner, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

[184] Rosen, *supra* note 6, at 256.

[185] *See, e.g.,* Rosen, *supra* note 6, at 262 ("By the time KAN. STAT. ANN. § 22-3220 was approved in 1995, Dr. Henry Steadman and Michael Perlin had already published data that directly addressed and disproved the conventional wisdom surrounding the insanity defense."); Perlin, *supra* note 99, at 1382.

[186] *See* West, *supra* note 119, at 78–79.