Seton Hall University
eRepository @ Seton Hall

Law School Student Scholarship | Seton Hall Law

2021

A Plea for Insanity: Why the States Should Permit the Insanity Defense

Robert Ruggiero

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

 Part of the Law Commons

James Kahler (hereinafter "Kahler") was a husband, father, and by all accounts a hardworking law-abiding citizen, who committed one of the most unthinkable crimes: murdering his family.[1] Since it is undisputed that Kahler did indeed commit this heinous act, any rational human being would immediately conclude that Kahler should be locked away, with the proverbial key thrown away. This comment, however, argues the opposite. To be clear, it does not argue Kahler should be free or continue to participate as a member of society without any consequences. Instead, this comment analyzes the mental state of Kahler to determine whether he is morally culpable for the crime based on his ability to understand right from wrong when he killed his family. With the rapidly changing landscape and understanding of mental illness in the United States, Kahler's case has the potential to change the way society views mental illness and its effect on an individual's moral culpability.

The Supreme Court faced a difficult decision in *Kahler v. Kansas,* which could have altered the future of criminal law in the United States if the Court decided abolishing the insanity defense was unconstitutional.[2] The constitutional question the Court faced was whether a United States citizen has a constitutional right to the insanity defense. This question arose from a dispute over a Kansas statute, K.S.A. § 21-5209 (hereinafter "the Kansas statute"), which abolished the insanity defense. In a close 6-3 decision, the Court decided to uphold the constitutionality of this statute.[3]

---

[1] *See infra* Part II.

[2] Amy Howe, *Argument Analysis: Justices Open New Term With Questions and Concerns About Insanity Defense* https://www.scotusblog.com/2019/10/argument-analysis-justices-open-new-term-with-questions-and-concerns-about-insanity-defense/ (October 7th, 2019 3:58 pm) ("Justice Samuel Alito worried aloud that, if the 'general rule' were that a defendant cannot be convicted if he believed that his actions were moral, it would result in a 'revolutionary change' to criminal law.").

[3] Kahler v. Kansas, No. 18-6135, 2020 U.S. LEXIS 1910, at *1 (Mar. 23, 2020) ("The Due Process Clause does not require States to provide an insanity defense that acquits a defendant who could not 'distinguish right from wrong' when committing his crime—or, otherwise put, the Clause does not require States to adopt the moral-incapacity test from M'Naghten's Case. The Court declined to require that Kansas adopt an insanity test turning on a defendant's

This constitutional question is, however, not the only question society must answer. Society must answer whether, regardless of the Court's decision, the insanity defense's abolishment is proper under a moral consideration. While there inevitably exists a distinction between the law and morality, criminal law seeks to maintain only a minor separation between the two.[4] Any society permitting a law punishing one of its members who is not morally blameworthy flirts with incivility.[5] To prevent this incivility, certain theories of punishment exist, which inform society's justification for state sanctioned punishment. These theories of punishment may prove to guide and inform criminal laws that punish an individual whose blameworthiness is in question.

This comment will argue that any State's abolishment of the insanity defense is unjust because, under the criminal theories of punishment, such abolishment effectively allows the state to wrongly punish morally blameless offenders. The wrongdoer's moral culpability comes into question when a mental illness inhibited the wrongdoer's appreciation of the criminal conduct when the crime occurred. This comment will specifically analyze the recent Kansas statute, which abolished the insanity defense.[6] With a close analysis of the circumstances and expert testimony, Kahler *may* not have been morally culpable for the murder of his family due to a serious mental affliction.

Even if Kahler had the ability, or even the mere chance, to utilize the insanity defense, it would not have necessarily vindicated him. Instead, this comment argues that the Kansas statute unfairly prevented Kahler from having the opportunity to admit evidence demonstrating

---

ability to recognize that his crime was morally wrong. Any manifestation of mental illness that Kansas's guilt-phase insanity defense disregards could come in later to mitigate culpability and lessen punishment.").

[4] *Id*. at *61 (Breyer, J. dissenting) ("But the criminal law nonetheless tries in various ways to prevent the distance between criminal law and morality from becoming too great.").

[5] *Id*. (Breyer, J. dissenting) ("[T]o deny that criminal liability . . . is founded on blameworthiness . . . would shock the moral sense of any civilized community.") (quoting Oliver Wendall Holmes, THE COMMON LAW 50 (1881)).

[6] Kan. Stat. Ann. § 21-5209 (2019).

how his mental illness inhibited his reasoning and appreciation of his crimes.[7] While the constitutionality of the Kansas statute may be touched upon indirectly in this comment, it is not the primary focus. Despite the Court's ruling in *Kahler*, the states have an obligation, under the theories of punishment, to allow defendants to use the insanity defense. Additionally, this comment is an appeal to state legislatures, as well as to prosecutors, who are empowered in their official capacity to pursue lenient sentences on defendants whose mental illness inhibited their appreciation of the crime they committed. This comment also makes a plea to the Executive Branch, the Governors on the state level, and the President on a federal level. The law empowers both offices to act as last bastions of mercy by granting clemency to such offenders on death row.

Part II of this comment discusses moral blameworthiness, defined under the theories of punishment, which justify state-sanctioned penalization of individuals who have broken the law. These moral theories present tangible arguments that have traditionally informed Anglo-American lawmakers when they defined the requisite punishment for a crime. This comment will present an overview of the theories of punishment and criminal responsibility, the historical development of the *mens rea* approach, and the history and purpose of the insanity defense to provide this issue some context. Furthermore, the facts and trial proceedings of *Kahler* will demonstrate how these theories relate to and inform the necessary availability of the insanity defense.

Part III discusses why the abolishment of the Kansas insanity defense does not fit within the traditional Anglo-American theories of punishment. If the state sentences a defendant, who

[7] Howe, *supra* note 2 ("[T]he key question is whether a defendant is able to distinguish between right and wrong. People who have a mental disorder should 'be given the opportunity to at least try' to make this showing to a jury.").

may not be culpable for their conduct due to mental illness, to prison, or worse, to death, then the Kansas statute lacks justification under the theories of punishment. Kansas's abolishment of the insanity defense improperly rests on the statute's narrow following of the *mens rea* approach.[8] The statute focuses solely on general intent and ignores the moral blameworthiness/rational choice prong traditionally attributed to *mens rea*.[9]

This narrow understanding of the *mens rea* approach is problematic because it does not consider the emotional stress, distorted thinking, and the myriad of other ways mental illness can irrationally inform the individual burdened with such an affliction when he or she commits a crime. Absent such considerations, a wrongdoer's punishment may be unjust because it does not accurately reflect the wrongdoer's moral blameworthiness due to a compromised mental state. The most appropriate way to rectify Kahler's improper sentencing is by affording him the opportunity to admit evidence demonstrating his mental state and knowledge of right and wrong when he committed his crimes. It should then be up to a jury to decide whether such evidence is plausible.

Part IV of this comment will appeal to State Legislatures and both the federal and state Executive Branches. Regardless of the Court's ruling on the insanity defense's constitutionality, state lawmakers should still maintain their laws permitting the insanity defense, while deterring laws like the Kansas statute. The Court's upholding of the abolishment of the insanity defense should not sway the States, who currently allow the insanity defense, toward abolishing it. This comment is a plea to those forty-six other States to hold their ground.[10] Furthermore, this

[8] *See* discussion *infra* Part III.B.
[9] *See* case cited *infra* note 136.
[10] Montana, Idaho, and Utah are the only other States to have also abolished the insanity defense like Kansas. Jenny Williams, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M'Naughten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense [State v. Bethel, 66 P.3d 840 (Kan. 2003)]*, 44 WASHBURN L.J. 213, 221 (2004).

comment appeals to those States who have abolished the insanity defense, like Kansas, to reconsider their decision.

Finally, as a last resort, the prosecutors should pursue lesser offenses in situations where the defendant may be less morally culpable. At the very least, society should examine whether it is prepared to sentence someone, who may not be morally responsible for the crime committed, to death. And if society is not prepared to allow such individuals to face execution, then it is up to Governors or the President to grant them clemency.

With society's improvements in understanding rational behavior, and the growing concern over the widespread prevalence of mental illness in the United States, the abolishment of the insanity defense is a step backward to a time when society ignored such issues.

Part II

Criminal confinement and sanctions exclusively relate to punishment based on moral blameworthiness.[11] In Part II, an introduction to criminal responsibility and its relationship to the morally blameworthiness prong of *mens rea* will demonstrate why the state may justly punish and deprive liberty from one of its citizens. Under criminal responsibility, it is prudent to discuss the (1) historical development of *mens rea*, and how it evolved into a broadly accepted two-prong test to include (2) moral blameworthiness.

This discussion will demonstrate how the moral blameworthiness prong of the *mens rea* approach is necessary to protect against state sanctioned punishment, which is justified under the modern (B) theories of punishment. These theories of punishment maintain two differing dominant philosophies underlying the purpose for state punishment: (1) utilitarianism and (2)

[11] Paul H. Robinson, *Supreme Court Review: Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. Crim. L. & Criminology 693, 696 ("[C]riminal law would remain committed exclusively to punishment upon moral blameworthiness and civil law would provide protection as needed through non-condemnatory incarceration or supervision.").

retribution. While retribution is the more likely justification for Kahler's punishment,[12] utilitarianism also does not justify the abolition of the insanity defense.

How *mens rea* and its protection against the undeserving punishment will impact Kahler lies in the necessity of the insanity defense. An overview of the (C) insanity defense, including its history, purpose, and evolution will lead to a discussion of (1) Kansas's decision to abolish the insanity defense. Finally, a discussion of Kahler's case (2) *State v. Kahler*, including the facts, trial, and jury decision, will conclude Part II's necessary background information.

A. **Criminal responsibility**

Criminal responsibility necessitates blame when administering punishment, effectively suggesting that punishment is unjust when the individual is not blameworthy.[13] Since punishment relies on the infliction of pain on criminals, the state must justify its right to punish and deprive its citizens of their inherent Anglo-American rights to life, liberty, and property.[14] In order to deprive anyone of their inherent rights, the state must properly determine who it wishes to hold accountable for the wrongful conduct by determining whether the punishment rightfully fits the crime committed.[15] This determination relies on the modern day theories of punishment that inform the state's interest in punishing criminals and to create a fair and just society.[16]

The doctrine of *mens rea* protects against underserving punishment because blameworthiness is an essential aspect for criminal liability.[17] If blameworthiness is absent, then

---

[12] Brief for Respondent, *infra* note 166.
[13] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 3 (Matthew Bender & Company, Inc. ed. 7th ed. 2015) ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy." (quoting Sanford H. Kadish, *Why Substantive Criminal Law -- A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980)).
[14] *Id.*, at 11.
[15] *Id.*
[16] *Id.*
[17] Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 Hastings L.J. 1609, 1619.

state sanctioned punishment is "morally undeserved."[18] Therefore, while Kansas only includes intent to kill as its basis for *mens rea*, the historical development of *mens rea* suggests that moral blameworthiness is an essential element of the approach. Before one may understand the modern theories of punishment, a discussion of the blameworthiness prong of *mens rea* and its development will demonstrate how *mens rea* informs the state's justification for punishment.

1. **Historical Development of the Mens Rea Approach**

The legal system in the United States derives from the Anglo legal tradition in England.[19] Evidence suggests that early Anglo-Saxon law recognized that a "culpable state of mind must accompany harmful conduct in order for criminal liability to exist."[20] Anglo law had its roots in a form of strict liability, where the state would punish a wrongdoer, regardless of premeditative intent, to dissuade reprisal from the victim or the victim's family; however, certain offenses such as homicide or arson required proof of intent.[21] For example, the state may have sentenced to death a citizen who has killed another out of self-defense, but a royal pardon was available to mitigate the sentencing if the killer lacked intent to kill.[22]

A systematic form of punishment had not emerged until the twelfth century, where there occurred a rise in the state's interest in punishing certain harmful acts, rather than just issuing monetary compensation for harm.[23] The emergence of criminal law included the mental element

---

[18] *Id.* ("Stated differently, the objection to punishment in the absence of blameworthiness is that such punishment is morally underserved.").
[19] *Origins of American Law*, LUMEN LEARNING, https://courses.lumenlearning.com/boundless-politicalscience/chapter/origins-of-american-law/ (last visited Sept. 17, 2019).; *See also* Jean K. Gilles Phillips & Elizabeth Cateforis, *Self-Defense: What's a Jury Got to Do with It?*, 57 U. KAN. L. REV. 1143, 1156 (2009) ("While in its infancy, America turned to English common law to lay the groundwork for our legal system.").
[20] *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 651 (1993).
[21] *Id.*, at 652-53.
[22] *Id.*, at 653.
[23] *Id.*, at 645 (stating that this new form of punishing wrongdoers gave rise to the modern-day distinction of criminal law and tort law).

of *mens rea* as a requirement for punitive sanctions to justify this new system of state punishment.[24]

By the end of the twelfth century, Christian canon law greatly influenced the development of this system of criminal law.[25] From its inception, Christian morality emphasized mental culpability and sinfulness.[26] This is not to say that "crime" is synonymous with "sin" in the legal context.[27] Henry Bracton, a cleric and judge, produced highly influential treatises codifying St. Augustine's foundational principle that "justifiable punishment is premised on and proportional to moral guilt."[28] Here, historical evidence indicates that Bracton first suggested the concept of malice within the context of culpability and the guilty mind.[29] Furthermore, he even used words familiar to modern-day criminal law, such as "premeditated" and "wickedly" in his writings.[30] Bracton believed that a crime could not be committed unless the actor possessed the intent to injure.[31]

2. **Moral Blameworthiness**

Bracton suggested that in addition to the intent to injure, the offender's ulterior motives, or purposes, for committing the harmful conduct must be blameworthy to render the offender

---

[24] *Mens rea*, DICTIONARY.COM, https://www.dictionary.com/browse/mens-rea?s=ts (last visited Nov. 11, 2019). The literal translation of *mens rea* derives from the Latin for a "guilty mind;" *Id.*, at 654 ("[F]rom the earliest times attention was directed to a mental element as a requirement for the commission of certain…offenses.").
[25] Gardner, *supra* note 20, at 654.
[26] *Id*. at 651 ("Jesus taught that outward actions are mere evidence of one's moral worth, reinforcing earlier ideas that 'as a man thinketh in his heart, so is he.'").
[27] *Id.*, at 659 ("Bracton clearly did not espouse the view that crime and sin were synonymous…. The malicious executioner commits a sinful act but remains within the law. This is perhaps either because he commits no unlawful act or because policy reasons allow the act in this unique case.").
[28] *Id.*, at 655 ("In the canonist spirit, Bracton wrote that 'it is will and purpose which mark maleficia' and 'a crime is not committed unless the intention to injure exists.'").
[29] Phillips & Cateforis, *supra* note 19, at 1156.
[30] *Id.* (explaining that in writing about arson Bracton used words such as "premediated" and "wickedly").
[31] *Id.* ("Bracton wrote: 'we must consider with what mind (animo) or with what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment.'").

culpable.[32] Moral blameworthiness required that the actor committed the wrongful conduct with "a free, voluntary, and rational choice to do evil."[33] Interestingly, Bracton's theories and written work led him to further take notice of the person who may be suffering from a mental illness and how that may play a role in culpability.[34] Bracton suggested that society should not hold the person suffering from mental illness criminally liable because of that person's lack of reason.[35]

The progression toward the more modern *mens rea* approach was born out of two nineteenth century English cases, *Regina v. Prince* (1875) and *Regina v. Faulkner* (1877).[36] These two cases demonstrated a shift in the understanding of the *mens rea* approach. The single *mens rea* requirement, the intent to do something immoral or criminal, now became a dual requirement, where the second prong, the intention "to do something that might reasonably be expected to lead to the harm of the particular offense charged," emerged to create a two-part test.[37]

This two-part analysis led to a broader understanding of *mens rea* that continued until modern day. In the United States, the American Law Institute (hereinafter "ALI") sought to codify substantive criminal law, and produced the widely influential Model Penal Code (hereinafter "MPC").[38] The MPC sought to modernize criminal law by producing a "logical framework for defining offenses and a consistent body of general principles" relating to criminal

[32] Gardner, *supra* note 26, at 658 (explaining that Bracton's references to "will" and "purpose" support the conclusion that motives must also be blameworthy in addition to intent).
[33] *Id.*
[34] *Id.* at 662.
[35] *Id.* (noting that Bracton excluded "madmen" from criminal liability because they "lack reason" in committing their criminal acts).
[36] *Mens Rea: The Development of Mens Rea,* LAW LIBRARY - AMERICAN LAW AND LEGAL INFORMATION, https://law.jrank.org/pages/1583/Mens-Rea-development-mens-rea.html (last visited Sept. 17, 2019).
[37] *Id.*
[38] *Model Penal Code*, THE AMERICAN LAW INSTITUTE, https://www.ali.org/publications/show/model-penal-code/ (last visited Oct. 25, 2019).

intent.[39] Regarding the initial *mens rea* approach, the common law had often grouped the offenses into specific and general intent; however, criminal law has abandoned this grouping in favor of an elemental analysis.[40] The MPC used the logical conception of an elemental analysis by describing the minimum threshold of culpability as "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."[41] The MPC emphasized "consciousness" and "awareness" to establish culpability.[42]

This brief overview of the *mens rea* approach's development and its evolution into a test, which includes moral blameworthiness, demonstrates its complicated relationship with punishment. Remember, without blameworthiness the state has no justification for punishing one of its citizens.[43] Therefore, by analyzing the theories of punishment the state uses to justify punishment of one of its citizens, the justification for the moral blameworthiness prong of *mens rea* becomes clearer.

B. Theories of Punishment

Despite the concept of "punishment" being generally understood by many cultures, no single collective definition of the term "punishment" actually exists.[44] Nonetheless, two

[39] *Model Penal Code*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/Model%20Penal%20Code (last visited Oct. 25, 2019).
[40] *Mens Rea: The Development of Mens Rea*, *supra* note 26 ("A different level of culpability is required as to different elements of the same offense.").
[41] *See id*; Model Penal Code § 2.02(1).
[42] For example, under § 2.02(2)(a)(i) in defining "purposely", the MPC defines it as a person's "conscious object to engage in conduct of that nature or to cause such a result." In § 2.02(2)(b)(i), "knowingly" is defined as a person being "aware" of his conduct or the existence of the attendant circumstances. Furthermore, "recklessly" and "negligently" are, respectively, defined when the person has "a conscious disregard" for the conduct, or when the person "should have been aware" that the conduct would pose a risk.
[43] See Robinson, *supra* note 11.
[44] DRESSLER, *supra* note 13.

dominant philosophies have traditionally governed the theories of punishment, which underlie society's justification for state sanctioned criminal punishment.[45]

The first philosophy is referred to as *utilitarianism*, whose adherents believe that laws are put in place to "maximize the net happiness of society."[46] More succinctly, those who follow this approach believe human beings act out of their own self-interest, reacting to both pain and pleasure.[47] In the context of criminal laws, society deters its members from carrying out a crime if that member understands and appreciates the existence of risks and repercussions such as detection, conviction, and detention.[48]

The second theory of punishment, more relevant to the *Kahler* case, is referred to as *retributivism*.[49] The retributivist philosophical approach suggests that punishing a member of society is wholly justifiable when deserved.[50] The wrongdoer, as a member of society, rightfully faces deserving discipline from the member's peers when he or she chooses to commit a crime, thereby causing harm toward the rest of society.[51] Retributivism is more relevant to Kahler's case because those supporting the Kansas statute believe Kahler's death sentence is a proper way to make him realize the seriousness of his crimes, and for his peers to affirm judgment upon him.[52]

---

[45] *Punishment: Theories of Punishment*, LAW LIBRARY - AMERICAN LAW AND LEGAL INFORMATION, https://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Nov. 11, 2019).
[46] DRESSLER, *supra* note 13, at 14.
[47] *Id.*
[48] *Id.*
[49] Ethan Bercott, *The Sheriff, The Innocent, and the Assassin's Assassin: How Denunciation Theory Answers an Old Riddle*, 88 MISS. L.J. 91, 111 (2019) ("Two penological theories have dominated mainstream debates over society's moral right to punish.").
[50] DRESSLER, *supra* note 13, at 16.
[51] *Id.*
[52] *See infra* note 182.

This comment shall first examine utilitarianism, before moving on to retributivism. Retributivism's relevance in Kahler's case is clearer by demonstrating the juxtaposition between the two theories of punishment and their overall goals.

1. Utilitarianism

Most scholars generally define utilitarianism as a means to punish the criminal by ejecting the criminal from society, whether that is by imprisonment or death sentence.[53] Fundamentally, a utilitarian believes that a necessary "utility" should exist for the actor to deserve moral punishment.[54] The "utility" approach relies on the belief that a law should distribute punishment equally to the actor's blameworthiness because it will more effectively prevent crimes than a law enacted with the sole purpose to punish.[55]

Utilitarianism has many different iterations, and theorists have mostly classified it into subcategories. The most common types of utilitarianism are incapacitation, general deterrence, specific deterrence, and rehabilitation.[56] Incapacitation may also be referred to as restraint, isolation, or disablement.[57] The goal of incapacitation is to prevent the criminal from causing further harm to society.[58]

The next form of utilitarianism, deterrence, is broken down into two subcategories, general and specific. The goal of general deterrence is to punish the wrongdoer so to deter the rest of society from engaging in similar criminal conduct, by instilling fear in others who may be

---

[53] DRESSLER, *supra* note 13, at 15.
[54] Stephen F. Smith, *Symposium on Overcriminalization: Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 569 ("The fundamental insight here is that there is considerable "utility" in moral "desert" - that a criminal law which distributes punishment according to blameworthiness will more effectively achieve its crime-prevention goals than one that punishes regardless of the moral sentiments of the community.").
[55] *Id.*
[56] DRESSLER, *supra* note 13, at 16.
[57] WAYNE R. LAFAVE, CRIMINAL LAW 27 (Thomson West ed., 4th ed. 2003).
[58] Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified.*, 42 STAN. L. REV. 1149, 1150 (1990).

debating whether or not to violate the law.[59] Simply put, society utilizes the punishment as a warning to other potential wrongdoers and to demonstrate the consequences of criminal acts.[60] Criminal law recognizes specific deterrence as the other form of deterrence, which at times is referred to as individual deterrence.[61] Society uses this form of punishment to deter that exact offender, the person who committed the crime, from engaging in future misconduct.[62]

After deterrence, criminal law recognizes rehabilitation as the other utilitarian goal. This goal is less to instill fear or to deter the offender, rather it is a form of reconciliation to society where the offender will accrue the proper skills and values that will transition that offender from criminal into law-abiding citizen.[63] In some sense, rehabilitation is a way of reform, or correction.[64] This theory of reform relies on the belief that human behavior is the result of identifiable prior causes, and that therapeutic treatment can better effect changes in human behavior.[65]

2. **Retributivism**

Utilitarianism understands punishment to be justified when one *looks forward* to see how such punishment will maximize the future benefit of society.[66] In contrast, retributivism *looks backward* toward the past, focusing on the wrongdoer's state of mind and the crime or crimes committed.[67] Retributivists understand wrongdoers deserve punishment because the wrongdoers

---

[59] *See* DRESSLER, *supra* note 13.
[60] Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 ND J. L. ETHICS & PUB POL'Y 99, 128 (1996).
[61] DRESSLER, *supra* note 13, at 15.
[62] *Id.*
[63] Blecker, *supra* note 58, at 1150.
[64] LAFAVE, *supra* note 57, at 27.
[65] *Id.*
[66] Richard S. Murphy, *The Significance of Victim Harm: Booth v Maryland and the Philosophy of Punishment in the Supreme Court.*, 55 U. CHI. L. REV. 1303, 1310 (1988).
[67] *Id.*

possessed free will.[68] Punishment is given when a societal member has chosen to offend certain shared morals.[69] As a result, that member now owes a debt to society for the harm he or she has caused.[70]

Retributivism is the infliction of pain and suffering on the criminal to the extent the criminal chose to violate societal laws.[71] There is a general consensus among theorists that retributivism is the oldest theory of punishment, connoting humanity's basic tendency to enact revenge or retaliation on another who has caused harm.[72] To retributivists, punishment provides no utilitarian benefit, it only functions as a means toward justice where the offender receives the "just desert of [their] deeds."[73]

In one form of retributive theory, criminals become a stain on society, and thus morally acceptable to hate.[74] Punishment prior to the twelfth-century formation of *mens rea* and the systematic distribution of state punishment illustrate this type of retribution.[75] Another form of retributivism, protective retribution, restores a sense of moral balance that was lost from the wrongdoer's harmful conduct.[76] Under this approach, a harmony or perfect equilibrium exists in society with all members receiving the same benefits and burdens as each other.[77] The

---

[68] Tufik Y. Shayeb, *Behavioral Genetics & Criminal Culpability: Addressing The Problem of Free Will in the Context of the Modern American Justice System*, 19 UDC-DCSL L. REV. 1, 9-10 (2016).
[69] CHRISTOPHER SLOBOGIN, ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 625 (6th ed. 2014).
[70] *Id*.
[71] Blecker, *supra* note 58, at 1150.
[72] LAFAVE, *supra* note 57, at 29.
[73] DRESSLER, *supra* note 13, at 16 (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW 197-8 (W. Hastie translation 1887).
[74] *Id*., at 17.
[75] Gardner, *supra* note 26, at 646-47 (noting that responses to harmful conduct could have taken the form of the blood feud where the law left offenders unprotected against the vengeance of those who suffered by the offenders' misdeeds).
[76] Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1060 (2012).
[77] DRESSLER, *supra* note 13, at 17-8.

wrongdoer owes a debt to society because he or she has taken an unfair advantage of these benefits and burdens from others, destroying society's moral balance.[78]

Finally, another form of retribution that seeks to justify punishment is victim vindication, which suggests the wrongdoer has elevated his or her value above that of the victim.[79] Similar to protective retribution, victim vindication protects a societal moral balance by denouncing the wrongdoer's false "claim" of higher moral worth over the victim.[80] In some sense, this type of retribution is seemingly a bit more revenge focused because there exists a desire for the wrongdoer to suffer like the victim had suffered.[81]

Where assaultive retribution is the least likely justification for punishing Kahler by imprisonment and death, proponents of Kahler's punishment rely both on protective retribution and victim vindication to justify his punishment, especially in the sense of victim vindication where the community agreed Kahler should suffer the death penalty.[82] In Kahler's situation, there lies a distinct issue with these forms of retributive justice pertaining to moral balancing. The descriptions of these forms of retributivism seem to assume mental competency, and that someone like Kahler fully appreciated the committed crimes. In fact, the wrongdoer may have not created a moral imbalance when acting under the influence of an external force, like, for example, a mental illness that impedes the wrongdoer's free will.[83] Therefore, if Kahler's mental illness prevented him from knowingly elevating his worth over that of his victims, or taking an

[78] Adam L. Dulberg, *State v. Robert: Why Mitigation Waivers During Capital Sentencing Undermine Fundamental Justifications of Punishment*, 51 AM. CRIM. L. REV. 483, 501 (2014).
[79] *Id*., at 502.
[80] *Id*.
[81] Dan Markel and Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 Calif. L. Rev. 907, 974 (2010).
[82] *See infra* note 182.
[83] Dulberg, *supra* note 78 ("However, a defendant 'has not derived an unfair advantage if he could not have restrained himself or if it is unreasonable to expect him to behave otherwise than he did.'") (quoting Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 476-79 (1968)).

unfair advantage of the benefits and burdens evenly distributed to all members of society, then these retributive theories should not theoretically apply to Kahler's case.

If Kahler could not have truly appreciated the gravity of his crimes, or his mental incapacity hindered his understanding of "right" and "wrong," then the law should afford him the opportunity to plead insanity under an affirmative defense. To understand the insanity defense's necessity, it is important to comprehend its origins and development to modern day. The following sections will describe how Kansas's abolition of the insanity defense do not coincide with the affirmative defense's original intent, and how its abolition may be unfair to mentally incapacitated wrongdoers.

C. Insanity Defense

Scholars trace the notion of insanity back to antiquity, even as early as second century Jewish law and sixth century Justinian Code in Ancient Rome.[84] Most states use the *M'Naghten* test as the modern approach toward understanding moral culpability, and, in fact, until the mid-1990s, all states, except for New Hampshire, applied this as the affirmative defense of insanity.[85] This approach originated out of a case in England, where Daniel M'Naghten attempted to assassinate the Prime Minister, Robert Peel, but instead mistakenly identified Edward

[84] Jessica Harrison, *Idaho's Abolition of the Insanity Defense—An Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 579 (2015).
"The Product Test," also known as the "Durham Rule," born out of the 1954 case, *Durham v. United States*, is another broadly defined insanity defense test. This standard generally broadens the insanity defense by focusing "on whether the action was the result or product of a mental disease or defect." The Durham Rule had controversial implications and some criticisms included its simplistic questioning techniques of the alleged insane person, its heavy reliance on expert testimony, and its broader medical definition of insanity, which could have led to more acquittals or insanity pleas under other illnesses such as alcoholism. These criticisms led to the adoption of the American Legal Institute's MPC. This test is not very applicable to Kahler's situation, so, even though it is worth mentioning, no further discussion about it is necessary. *See Insanity Defense*, THE NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2993532/ (last visited Sept. 20, 2019); Andrew Garfolo, The Durham Rule, HISTORY OF FORENSIC PSYCHOLOGY, (last visited Nov. 20, 2019), http://historyforensicpsych.umwblogs.org/the-insanity-defense-outline-by-andrew-garofolo/the-durham-rule
[85] Harrison, *supra* note 84, at 582.

Drummond, the Prime Minister's secretary, as Peel, and murdered Drummond.[86] M'Naghten believed Peel had been persecuting him, and, after the police denied M'Naghten protection, he decided Peel's assassination was necessary in a last attempt to save his own life.[87] The jury acquitted M'Naghten, believing his actions to be the result of paranoid schizophrenic delusions that inhibited him from appreciating right from wrong, subsequently sending him to an asylum for the remainder of his life.[88]

Under the *M'Naghten* approach, mental illness is a defense when it impairs the offender's cognition to the point that the offender cannot appreciate right conduct from wrong conduct.[89] Some states broadened the *M'Naghten* approach to include volitional impairment creating the "irresistible impulse" test.[90] This test suggests that at the time of the offense, a person is insane when the wrongdoer acted from an irresistible and uncontrollable impulse, lost the power to choose between right and wrong, or the actor's will was so completely destroyed that those actions are no longer subject to the offender's will and now beyond the offender's control.[91] This is a relatively controversial test because of its broad definition, where some critics are concerned it would increase false insanity acquittals.[92] Furthermore, there exists a fundamental difficulty to tangibly distinguish between the impulses that are controllable from those that are uncontrollable.[93]

---

[86] *Id.*
[87] *Id.*, at 581.
[88] *Id.*, at 582.
[89] Andrew King-Ries, *Arbitrary and Godlike Determinations: Insanity, Neuroscience, and Social Control in Montana*, 76 MONT. L. REV. 281, 288 (2015) ("Mental illness constitutes a defense when the mental illness negates the defendant's cognition of his or her conduct, which occurs when he or she is unable to appreciate the nature of his or her conduct or understand that it is wrong.").
[90] Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1211-12 (2000).
[91] DRESSLER, *supra* note 13, at 349 (first quoting Commonwealth v. Rodgers, 48 Mass. 500, 502 (1844); then quoting Parsons v. State, 81 Ala. 577 (1887); and then quoting Davis v. United States, 165 U.S. 373, 378 (1897)).
[92] *The Irresistible Impulse Test*, US LEGAL.COM, (last visited Nov. 8, 2019), https://criminallaw.uslegal.com/defense-of-insanity/the-irresistible-impulse-test.
[93] *Id.*

Other jurisdictions interpreted the *M'Naghten* test broadly to focus on the actor's ability to recognize the wrongfulness of the act.[94] These adaptions of the *M'Naghten* approach also lead to the MPC test.[95] After the acquittal of John Hinckley (hereafter "Hinckley"), who pled insanity, after attempting to assassinate President Ronald Reagan, the public called for a narrower definition of the insanity defense, and some even campaigned to have it abolished altogether.[96]

1. Kansas and the Insanity Defense

The American public was upset that a jury acquitted Hinckley, who was ultimately released after thirty-five years of psychiatric confinement.[97] The Kansas legislature demonstrated its particular disappointment in the Hinckley acquittal by deciding to redefine its approach toward the insanity defense.[98] In 1995, Kansas abolished the insanity defense altogether,[99] enacting a new statute which states: "[i]t is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."[100] This statute focuses solely on intent to kill and disregards the wrongfulness inquiry put forth by the *M'Naghten* ruling.[101]

---

[94] Slobogin, *supra* note 90, at 1212.
[95] *Id.* ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality wrongfulness of his conduct or to conform his conduct to the requirements of the law." (quoting Model Penal Code § 4.01(1) (1962)).
[96] *Id.*, at 1214.
[97] Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1839-40 (2016).
[98] Williams, *supra* note 10 at 221.
[99] *Id.*
[100] Kan. Stat. Ann. § 21-5209 (2019).
[101] Williams, *supra* note 10, at 222-23.

Evidence regarding the defendant's mental state is no longer admissible under the Kansas statute abolishing the insanity defense.[102] Furthermore, the jury does not consider the question of the defendant's cognition, or overall sanity, at the time the defendant committed the wrongful act.[103] The excuse is only present if the defendant can prove that the mental disease or defect prevented any formulation of the intent to commit the criminal act in question.[104] Only three other states in addition to Kansas have abolished the insanity defense: Montana, Idaho, and Utah.[105] All of these States' higher courts have held that the *mens rea* intent to kill approach is constitutional, and that the court should not consider the insanity defense a fundamental principle of law.[106]

In contrast, other states have actually held that the insanity defense is a fundamental principle of law due to its historical development.[107] In fact, some justices in the States who abolished the insanity defense have acknowledged in their dissents that the court should consider the insanity defense as a fundamental principle of law.[108] The important general distinction between states that recognize the insanity defense and those that do not occurs in their differing interpretations of *mens rea*.[109]

For example, Nevada understands "wrongfulness" to be an essential part of the *mens rea* approach and defines *mens rea* as a concept where the offender has the "intent to act knowing

---

[102] *Id*., at 223.
[103] *Id*.
[104] *Id*.
[105] *Id.*, at 225.
[106] *Id*.
[107] *See* Finger v. State, 117 Nev. 548, 569, 27 P.3d 66, 80 (2001) (holding that historical practice overwhelmingly supports the conclusion that legal insanity is a fundamental principle).
[108] *See e.g.*, State v. Herrera, 895 P.2d 359, 371 (Utah 1995) (Stewart, J., dissenting) ("Today's majority opinion and the statute it sustains represent a monumental departure from, and rejection of, one of the most fundamental principles of Anglo-American criminal law that has existed for centuries."); State v. Korell, 690 P.2d 992, 1005-06 (1984) (Sheehy, J., dissenting) ("If the criminal act is the product of mental aberration, and not of a straight-thinking cognitive direction, it would seem plausible that society should offer treatment, but if not treatment, at least not punishment.").
[109] State v. Bethel, 66 P.3d 840, 848 (2003).

that the act is wrong."[110] In contrast, Kansas, Idaho, Montana, and Utah do not consider the offender's knowledge of the wrongful act to be an inherent element of a crime, including a specific intent crime.[111] Regarding murder, these latter four states also do not consider "knowing the wrongfulness" of the murder as an essential element of this particular crime.[112] Therefore, it seems that knowledge, or appreciation, of the act's wrongfulness is the essential difference in the *mens rea* definitions of the States that acknowledge the insanity defense and those that have abolished it altogether.

2. State v. Kahler

Kahler's facts and court analysis demonstrate why the narrow *mens rea* approach, which excludes moral blameworthiness and wrongful inquiry, ultimately is contrary to the socially accepted notions of punishment. In 2008, Kahler, a director of the public utilities department, lived happily with his wife, Karen, a personal trainer, and three children in Weatherford, Texas.[113] Those who knew Kahler, described him as a proud father and that his family was the most important aspect of his life.[114] In the summer of 2008, Kahler took a new job in Columbia, Missouri, intending his wife and children to follow him in the Fall of that year.[115]

Prior to his departure, Karen approached Kahler, informing him about her desire to engage in an experimental sexual relationship with another female co-worker.[116] Kahler consented to his wife's new relationship, believing it would end once his family moved to Missouri.[117] Instead, the affair continued, which led to a physical altercation between Kahler and

[110] *Id*., at 849.
[111] *Id*., at 848-49.
[112] *Id*., at 849.
[113] State v. Kahler, 410 P.3d 105, 113 (2018).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

Karen, prompting her to file for divorce in January 2009.[118] A subsequent altercation took place in March of that year and Karen filed a battery complaint against Kahler, which led to a widely publicized arrest.[119] After the arrest, Karen moved out of their home, taking with her their three children.[120] The strain from the recent occurrences began to affect his work, and in August 2009 Kahler lost his new position in Missouri.[121] After his dismissal from work, Kahler decided to return to Kansas and moved in with his parents on their ranch in Meridian.[122]

On Thanksgiving 2009, Kahler's son Sean joined him at the Meridian ranch, while Karen and her two daughters spent Thanksgiving with Karen's mother in Derby, Kansas.[123] Sean enjoyed his time at the ranch with his father enough to ask his mother if he could stay at the ranch; however, Karen decided against Sean staying and, without Kahler's knowledge, picked Sean up from the ranch before he was supposed to leave for the holiday weekend.[124]

That evening, Kahler showed up at the grandmother's home in Derby, shot and killed Karen, his daughters, and his mother-in-law, but he did not attempt to harm Sean, who fled to a neighbor's house to call the police.[125] The police found Kahler the next morning and he surrendered without incident.[126]

Prosecutors charged Kahler with capital murder, and at trial his defense team introduced an expert witness to support the argument that Kahler lacked the mental state "required as an element of the offense charged."[127] Furthermore, experts, both for the prosecution and defense,

---

[118] *Id.*
[119] State v. Kahler, 410 P.3d 105, 113 (2018). The arrest was publicized because Kahler held a public position.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id*.
[125] State v. Kahler, 410 P.3d 105, 113 (2018).
[126] *Id*.
[127] Brief for Am. Psychol. Ass'n, et al. at 13-14, as Amici Curiae Supporting Petitioner, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135).

had agreed that Kahler demonstrated signs of major depressive disorder, and obsessive-compulsive, borderline, paranoid, and narcissistic personality tendencies.[128] The defense expert also independently found Kahler to have possible "short-term dissociation," and that he suffered compulsive and impulsive behavior that made him feel compelled to commit the crimes without the ability to refrain from it.[129] Furthermore the defense expert, a psychiatrist, testified that Kahler had "lost touch with reality due to a serious mental disorder."[130] Despite the testimony of the expert witnesses and the agreement that Kahler suffered from mental illness, the Kansas statute prevented Kahler from demonstrating that his mental illness inhibited him from distinguishing right from wrong at the moment he committed the shootings.[131] As a result, a jury convicted Kahler of capital murder, subsequently sentencing him to death, where he currently continues to reside on death row.[132]

Part III

The Kansas statute is contrary to the traditional theories of punishment, discussed above, because when the state sentences a morally blameless defendant incapacitated by mental illness, to prison or to death, it goes beyond the scope of the state's power to punish its citizens. First, the court should allow Kahler at least the (A) opportunity to plead insanity and leave that evidence up to a jury to decide his mental sanity based on the facts. Second, denying Kahler of this opportunity improperly rests on (B) the Kansas statute's narrow following of the *mens rea* approach. Since the Kansas statute focuses solely on general intent to kill and ignores the moral blameworthiness, or rational choice, prong traditionally attributed to the *mens rea* approach, the

[128] *Id.*
[129] *Id.*
[130] Stephen Morse and Ricard Bonnie, *Insanity and the Supreme Court*, WALL STREET JOURNAL, October 7, 2019, at A17.
[131] Brief for Am. Psychol. Ass'n, et al., *supra* note 127.
[132] Kahler, 410 P.3d at 114.

result is an (C) unjust sentencing under the theories of punishment. This unjust sentencing is examined and supported by discussions of (1) Kahler's moral blameworthiness, (2) utilitarianism and the criminal process, and (3) retributivism and the criminal process.

A. **The Opportunity to Plead Insanity**

Despite the constitutionality of the Kansas statute, States should not follow Kansas's abolishment of the insanity defense under a moral theory of law. Furthermore, since the typical test for insanity is whether Kahler had the ability to "know or appreciate *why* the conduct was wrong," denying him the opportunity to at least admit this type of evidence is fundamentally unfair and unjust.[133] Ultimately, only the insanity defense alone can provide defendants, whose mental illness diminishes their capacity to know right from wrong at the time of the crime, justice, because their lack of culpability exculpates them from blame and punishment.[134] Even if a new trial is ordered and the court allows Kahler to use the insanity defense, he could still be convicted; however, the insanity defense would have afforded him the fair chance to establish that mental illness inhibited his appreciation of his crime's wrongfulness. [135]

B. **Kansas's *Mens Rea* Approach is Too Narrowly Applied**

In Kansas, a defendant's intent to kill is only relevant as far as it directly relates to *mens rea*.[136] Furthermore, under Kansas law, the question of whether the defendant had the mental capacity to know right from wrong at the moment of the crime, is irrelevant.[137] For example, if the defendant thought the person he or she strangled was actually a lemon being squeezed, then this thought process inhibited by a mental illness would be admissible because the defendant

---

[133] *See* Morse & Bonnie, *supra* note 130.
[134] *Id.*
[135] *Id.*
[136] Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 261 (1999).
[137] *Id.*

intended to squeeze a lemon, not strangle a person.[138] In contrast, if the defendant intended to strangle the person with an intent to kill, but only because of some delusion, then such evidence is not admissible because this question relies on the defendant's sanity.[139]

Given this distinction, it seems inappropriate to solely focus on the defendant's intent to kill, while not considering the knowledge prong of *mens rea* (moral blameworthiness), because doing so assumes mental illness precludes the defendant's intent.[140] Rather, a defendant may still be capable of having the required intent while also suffering from a serious mental illness, which could inhibit the defendant's ability to know right from wrong.[141] Intent to kill and insanity are not mutually exclusive.[142]

The focus on intent to kill unfairly punishes someone who does not understand or appreciate the nature of the crime, which runs contrary to the goal of punishing offenders who are *responsible* for their criminal conduct.[143] Put more succinctly, criminal responsibility is premised on the idea of free will, and the insanity defense allows society to distinguish between those who have committed a crime under their own free will and those whose free will has been diminished by mental illness.[144]

The American Bar Association states that the central defining feature of criminal law's traditional treatment of persons with mental disorders is the assessment of the defendant's moral blameworthiness.[145] Depriving judges and juries the ability to assess the moral blameworthiness

---

[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 262 (1999).
[143] *Id.*
[144] *See* DRESSLER, *supra* note 13, at 342.
[145] Brief for The Am. Bar Ass'n at 6, as Amici Curiae Supporting Petitioner, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135).

of a defendant betrays any sense of humane judgment.[146] Moral blameworthiness is a crucial part of *mens rea* because, even though the offender may have intended to commit the harmful act, the offender may not have understood or appreciated that the act was morally wrong.[147] The element of understanding or appreciating the criminal conduct is "an indispensable predicate for criminal punishment."[148]

C. **K.S.A. § 21-5209 Leads to an Unjust Sentencing under the Theories of Punishment**

The essential issue regarding morality and the insanity defense is whether the state can justify punishing a mentally ill person when that serious mental illness may have undermined the offender's ability to appreciate the crime committed.[149] The moral basis of the insanity defense is that no member of society can face punishment "without desert and no desert without responsibility."[150] Criminal responsibility is based on "cognitive competence," and the actor who lacks that competence is not deserving of the punishment.[151]

The capacity to be rational and the capacity to act with a sense of self-control are understood to be the two essential elements of responsibility.[152] The cognitive capacity aspect is seen in the *M'Naghten* test, whereas the control test is seen in the irresistible impulse test.[153] The two are combined in the MPC, which asks whether the offender lacked the ability "to appreciate the criminality (wrongfulness) of actions or to conform conduct to law."[154]

---

[146] *Id.*, at 6.
[147] *Id*.
[148] *Id*.
[149] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 780 (1985).
[150] *Id.*, at 783.
[151] *Id.*
[152] *Id.*, at 782.
[153] *Id.*, at 806-7.
[154] *Id.*

Nonetheless, it is important to prevent the insanity defense from covering all people who have a mental defect or illness that prohibits rationality or self-control.[155] Society could in some ways use its common sense, and ask itself whether the offender acted with such extreme irrationality or behaved in a manner so far outside the societal standard that such conduct is clearly recognized as abnormal.[156] Nevertheless, since the societal definitions of permissible rationality or self-control are somewhat too dynamic to rely on this common sense test, the insanity defense is best understood under a theory of definable morality by focusing on the mentally ill person's moral blameworthiness.[157]

1. Kahler's Moral Blameworthiness

A moral blameworthy agent is one who has the capacity to make moral judgments and may appreciate his or her conduct in relationship to those judgements.[158] Society's understanding of what constitutes "morally wrong," "evil," or "bad," derives from a corruption of this ability to make a moral judgment and appreciate moral concern.[159] The individuals who lack the capacity to make such moral judgements, or those who cannot appreciate this moral corruption, logically should not deserve blame.[160] As noted above, without the requisite blame, the punishment cannot, therefore, be justifiable.[161]

The qualification of moral blameworthiness plays a crucial role in understanding the necessity of the insanity defense, and why Kansas's abolishment of the defense creates a path to

---

[155] Morse, *supra* note 149, at 821.
[156] *Id.*
[157] *Id.* (stating that the definition and assessment of any degree of rationality and compulsion are too fuzzy and subjective to permit even the illusion of precision and while the criteria for responsibility should not be amorphous, it can neither be rigidly specific).
[158] Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1518 (1992).
[159] *Id.*
[160] *Id.*
[161] *See* Robinson, *supra* note 11.

potentially unjust state-sanctioned punishment. The Kansas statute is incompatible with the Anglo-American legal tradition and the "commonly-accepted rationales for punishment."[162] Additionally, the statute is an outlier by modern legal standards as well.[163] This statute creates high stakes consequences for persons who are mentally impaired or insane because, without the insanity defense, these defendants have a greater chance of facing conviction, imprisonment, and death when they otherwise should have been committed to a mental health institution.[164]

The utilitarian arguments for incapacitation, rehabilitation, and deterrence (both general and specific) fail for several reasons.[165] Indeed, incapacitation is satisfied through civil commitment; however, the argument that prison confinement is equally efficient because the prison staff may adequately treat the defendant along with the general population is seemingly tenuous at best.[166] Furthermore, it is doubtful that that same prisoner can effectively continue the same treatment in civil confinement after the defendant's prison term has finished, given the detrimental effects prison would have on an already mentally ill person.[167]

Prison treatment is not the same as that of a mental institution, because jails or prisons suffer from underfunding, architectural limitations, and operational constraints that restrict the necessary personalized care that mental institutions offer.[168] Furthermore, while prisoners may receive mental health treatment while incarcerated, prisons generally lack a comprehensive

[162] Brief for The Am. Bar Ass'n, *supra* note 145, at 4.
[163] Brief for Nat'l Ass'n of Crim. Def. Law. at 5, as Amici Curiae Supporting Petitioner, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135).
[164] Brief for The Am. Bar Ass'n at 4, as Amici Curiae Supporting Petitioner, *Kahler*, 139 S. Ct. 1318 (2019) (No. 18-6135).
[165] *See* DRESSLER, *supra* note 13.
[166] Brief for Respondent, Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135).
[167] *Id.*
[168] *See generally* Risdon N. Slate and W. Wesley Johnson, *Criminalization of Mental Illness: Crisis and Opportunity for the justice system* pg. 261-77 (2008); *See also* Reply of Petitioner at Kahler v. Kansas, 139 S. Ct. 1318 (2019) (No. 18-6135) ("Kansas's attempt to show a rehabilitative purpose ignores the reality of mental healthcare in prison and the rehabilitative benefits of dedicated treatment facilities.").

survey of mental health services, which lead to a lack of broad prison policies regarding mental health patients, slow response time to an individual suffering from a mental health crisis, and a lack of developmental treatment standards for ill patients.[169] Currently in the United States, approximately 6%-12% of those in jail and about 16%-24% of those in prison suffer from a serious mental illness, while there are three to five times as many individuals with mental illness in prisons than in mental hospitals.[170] The insanity defense is a means to prevent the mentally ill individual from facing the harshness of prison, while receiving the appropriate care and treatment for the mental defect.[171] Therefore, with these numbers steadily increasing, without the insanity defense, more individuals with mental illness will be subject to the harsh realities of prison without proper treatment.[172]

2. Utilitarianism and the Criminal Process

Some may argue that the criminal process works to help mentally ill individuals realize their actions were wrong; however, this argument incorrectly assumes that the mentally ill offender competently appreciated the offender's harmful and morally wrong conduct.[173] In Kahler's case, rehabilitation is useless because his sentence is death.[174] While imprisonment likely has minimal positive rehabilitative outcomes on severely mentally ill prisoners, no tangible rehabilitative form of punishment exists for those on death row.[175]

---

[169] *Id*., at 276.
[170] SLOBOGIN, *supra* note 69, at 640
[171] *Id*.
[172] *Id*.
[173] Brief for Respondent, *supra* note 166, at 67 ("The criminal process may help some mentally ill individuals come to understand that their actions were wrong, even if they did not realize it at the time".).
[174] *See* case cited *supra* note 113.
[175] *Arguments in Favor of Capital Punishment*, BBC, http://www.bbc.co.uk/ethics/capitalpunishment/for_1.shtml (last visited Nov. 9, 2019) (noting that the death penalty does not rehabilitate the prisoner and then return them to society, but does give the prisoner the opportunity to repent, express remorse, and spiritually rehabilitate to prepare themselves for an afterlife).

Likewise, deterrence fails as a form of just punishment because it again wrongly assumes the offender has the capability to make a rationally calculated decision to avoid further punishment after imprisonment.[176] In Kahler's case, specific deterrence is not applicable because of his death sentence, which denies him any chance of reclaiming his freedom.[177] General deterrence may be applicable to prevent other citizens to commit a similar crime.[178] Nonetheless, the population suffering from a mental illness like Kahler would not have the capacity to appreciate the consequences of such actions, nor would they understand that they too could face the same severe punishment as Kahler.[179]

3. Retribution and the Criminal Process

Under the theory of retribution, the Kansas statute acknowledges that the intentional killing of someone cannot make the defendant entirely blameless, even if the defendant did not know the killing was wrong.[180] Those enacting the Kansas statute understood retribution to act as a way of "securing a moral balance in society" by sentencing Kahler to death.[181] Under this logic, the death sentence would force Kahler to appreciate "the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim[s], to affirm its own judgment" of his moral blameworthiness.[182]

---

[176] Reply of Petitioner, *supra* note 168, at 27.
[177] DRESSLER, *supra* note 13, at 15.
[178] *Id*.
[179] Brief for Am. Psychol. Ass'n, et al., *supra* note 127, at 42; *See also* ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE AND THE END OF EXECUTIONS 100-101 (2002) ("Taken from his cell for his death walk, the prisoner asked guards to save the piece of pecan pie left on his tray for when he returned…minutes later, on the hospital gurney in the death chamber he helped executioners find a vein for the IV because… 'he thought they were doctors come at last to save him.'").
[180] Brief for Respondent, *supra* note 166, at 63-4.
[181] DRESSLER, *supra* note 13, at 17-18 (explaining that protective retribution is defined as a citizen who commits a criminal act has destroyed the balance of society because he or she has gained more benefits then the burdens allotted by society and must repay that debt).
[182] Brief for Respondent, *supra* note 166, at 64 (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).

Nonetheless, moral balancing or victim vindication demonstrates dubious justice when the criminal's mental illness distorts the awareness of the crime.[183] Kansas fails to acknowledge that an insane person cannot understand the gravity of the crime.[184] The essential aspect of the retribution theory is that "a criminal sentence must be directly related to the personal culpability of the criminal offender."[185] If Kahler cannot understand the nature or gravity of the crime, then this form of punishment does not bring a moral balance to society.[186] In some ways it may bring an imbalance because society is punishing an individual who is morally blameless and would, therefore, relegate the mentally ill offender to a lesser level of worth than those who are mentally sound.

Part IV

While the Kansas statute may permit a mentally ill individual to face execution, certain discretionary measures exist within the state's power to maintain justice when criminal law and morality are at odds.[187] For this reason, this comment appeals to the State Legislatures to maintain their current laws allowing the insanity defense, and they should continue to deter laws that may seek to abolish the insanity defense.

Furthermore, federal and state prosecutors should recognize when, and when not, to charge individuals with a severe mental disorder to the fullest extent of the law by using their power of prosecutorial discretion. This appeal for discretion in the prosecution of an individual

[183] Panetti v. Quarterman, 551 U.S. 930, 958-59 (2007) (finding a prisoner's awareness of the State's rationale for an execution is not equal to the prisoner's rational understanding of it).
[184] Reply of Petitioner, *supra* note 168, at 27.
[185] Tison v. Arizona, 481 U.S. 137, 149 (1987).
[186] *See* Ryan, *supra* note 76.
[187] Kahler, U.S. LEXIS 1910, at *61 (Breyer, J dissenting) ("Sometimes the criminal law seeks to keep its strictures roughly in line with the demands of morality through grants of discretion that will help it to reach appropriate results in individual cases, including special instances where the law points one way and morality the other. Thus, prosecutors need not prosecute…Executives may grant clemency.").

who may not be blameworthy due to mental incompetency extends to all states, including the four states that still have laws abolishing the insanity defense. In fact, perhaps this appeal is even more necessary for those four states.

This comment also appeals to both the federal and state Executive Branches, which have been granted the distinguished power of clemency. Furthermore, if a defendant was unable to plead insanity and a court sentenced the defendant to death or life imprisonment, the Executive Branch should consider its power to grant clemency to this individual. This act of clemency would not necessarily grant the mentally ill individual his or her freedom, but they should be properly confined and treated for their illness instead of facing execution or imprisonment with the general population.

Finally, to reiterate that this appeal for discretionary state action will not set wrongdoers free, or lead to an increase in superfluous insanity pleas, statistics demonstrating the insanity defense's use and success will demonstrate that the use of the insanity defense is rare. Both its usage and success rates show that it is rare and difficult to accomplish.[188] For these reasons, defense teams may not pursue the defense, or they may enter into a plea agreement or quasi-plea agreement with the prosecution when necessary.[189] Therefore, appealing to prosecutorial discretion and executive clemency would be more justifiable because its usage is so rare.

A. **Prosecutorial Discretion**

American law has traditionally afforded prosecutors the weighty responsibility of deciding the appropriate charges they may bring against the criminal defendant.[190] Prosecutors

[188] SLOBOGIN, *supra* note 69, at 639-40.
[189] *Id*.
[190] THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 259-60 (Hugo Adam Bedau ed., Oxford University Press 1997).

have the capacity to offer plea bargains or decline to charge the defendant altogether.[191] In between these two extremes exists the prosecutor's power to be lenient by offering lesser sentences the legislature has authorized.[192] Under the federal sentencing guidelines, prosecutor's ability to seek lesser charges than those authorized by law distinctively hinges on whether the offender has accepted responsibility for the crime, which usually takes place in the form of a guilty plea.[193] With over ninety percent of cases resolved with guilty pleas, mostly through plea bargaining, prosecutors utilize their discretion as a common form of providing individualized justice rather than it being a rare exception.[194]

The prosecutor officially has an obligation to pursue justice and to punish the wrongdoer to the extent deserved; however, society's morality and reason still binds the prosecutor's promise to enact justice in an official capacity.[195] Put simply, despite the prosecutor's official promise to punish wrongdoers, that punishment cannot extend passed what is morally permissible.[196]

One key element to keep in mind is that when legislatures enact statutes and draft criminal laws, they do so conscious of prosecutorial leniency.[197] This conscious regard for prosecutorial leniency leads to the enactment of stricter laws that have a tendency to over criminalize.[198] Where the judiciary may have the ability to limit the legislatures tendency to over criminalize, it is still bound to statutory intent and legislative supremacy in defining crime.[199]

---

[191] *Id.*
[192] Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 853 (2007).
[193] *Id.*
[194] *Id.*
[195] Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 65 (2012).
[196] *Id.*
[197] *Id.*
[198] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 1, 59-61 (forthcoming Dec. 2001), SSRN-id286392.
[199] *Id.*

Furthermore, the prosecutor's discretion to bring or reduce charges limits the judiciary's power to curb overcriminalization.[200]

The judiciary has immense input and power in establishing the future of criminal law, particularly regarding the abolishment of the insanity defense; however, the ultimate power in guiding the future of criminal law resides in the legislative branch.[201] Since the Court decided the abolishment of the insanity defense in Kansas is constitutional, it would behoove the lawmakers in the other forty-six states to hold ground and realize the moral justification for such a defense. The responsibility to maintain the insanity defense also falls on the prosecutors as it will ultimately be up to their discretion on how hard they will go after a potentially insane individual that may lack the requisite blameworthiness.

B. **Clemency**

An additional appeal to the executive branch exists in the form of clemency. Where prosecutors may be capable to enact their power to be lenient in bringing certain charges, the Executive Branch has the power to grant clemency, perhaps most justified when the convicted mentally ill offender faces the death penalty.[202] The law defines clemency as the power to reduce the defendant's punishment.[203] The Executive Branch, made up of the Governor or a Board on a state level, and the President on the federal level, are the only offices that hold such power.[204] Clemency can take place in the form of a pardon, or the government's ability to

---

[200] *Id*.
[201] *Id*. at 60.
[202] *Clemency*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/facts-and-research/clemency (last visited Apr. 9, 2019).
[203] *Justice in America Episode 18: What Happened to Clemency*, THE APPEAL (Mar. 6, 2019), https://theappeal.org/justice-in-america-episode-18-what-happened-to-clemency/.
[204] *Id*.

absolve a defendant of legal guilt, and a commutation, where the executive branch may mitigate or reduce the defendant's sentencing.[205]

For example, the Governor of Kansas has the authority to commute Kahler's death sentence to one of life in prison. Since the Court ruled the Kansas statute to be constitutional, upholding his death sentence, then the last bastion of hope for Kahler comes in the form of clemency. Commutation, however, is extremely rare and would likely be very controversial in Kahler's case given the circumstances of his crime.[206]

This is not to say Kahler absolutely deserves to have his death sentence mitigated because he is definitely morally blameless. The main danger in abolishing the insanity plea is that Kahler's level of blameworthiness is unclear because the Kansas statute prevents him from offering such evidence in his defense.[207] Without the ability to offer this evidence, the risk of sending someone who is not morally blameworthy to death is much greater than it should be. Therefore, clemency, like prosecutorial discretion, is a means to prevent the injustice of putting to death someone who may not be morally blameworthy.[208]

C. **The Insanity Defense is Rare**

The availability of the insanity defense does create a concern that anyone can claim to be insane. Theoretically, the insanity defense's availability opens up the opportunity for defendants to use it as a means to exonerate them from their criminal conduct.[209] Nonetheless, when

---

[205] *Id*.
[206] Rachel E. Barkow, *Clemency and the Unitary Executive* 22 Public Law & Legal Theory Research Paper Series Working Paper No. 14-38, 2014).
[207] *See* Howe, *supra* note 2.
[208] *See* DRESSLER, *supra* note 13. I want to emphasize that Kahler may be morally blameworthy given the heinous crime he committed, and his sentence may be justified. But his story may not be the whole picture given the Kansas law that prevents the insanity defense. Does society want to put someone to death without being 100% sure of his or her guilt? It is a question worth analyzing, especially with a life, and even future lives, hanging in the balance.
[209] Howe, *supra* note 2 (citing Justice Alito's concern that Kahler's proposed rule would add that the defendant's belief be caused by a mental disorder, and if one in five people in the United States has some mental disorder, then that would mean many people would be able to raise an insanity defense if Kahler prevailed).

actually applied, the insanity defense does not innately create a scenario where any mentally ill defendant may hide behind it to excuse them of fault.[210] Defendants rarely utilize the insanity defense, and in the United States less than one in one-hundred defendants have actually pled insanity.[211] Seventy percent of defendants who have pled insanity usually withdraw the plea when an expert declared them to be legally sane.[212]

Insanity pleas are likely rare because of the increase in cost, complexity, and length of the case.[213] The defense must obtain experts, who will spend time with the defendant, review past medical records, and then testify.[214] The increased cost and complexity of such cases are serious deterrents for pursing the defense, especially if the risk of failure is great.[215]

With only fifteen to twenty-five percent of cases consisting of an insanity plea ending in an acquittal, the statistics demonstrate that the insanity defense is more of a rarity then a normality.[216] Furthermore, the insanity defense is not a "get-out-of-jail" card, instead the court releases only one percent of the acquittals immediately, and those who succeed on the insanity plea remain in the hospital for an average of three years.[217] The deterrents listed above are enough to ease any fears that the existence of the insanity defense will cascade into an increase

---

[210] *Id*. (comforting Justice Gorsuch's concern of the insanity defense's broad application by stating the insanity defense is used in only one percent of the cases and only successful in one quarter of those cases).
[211] *Insanity Defense: Insanity defense statistics, Problems with NGRI, Guilty but Mentally Ill*, PSYCHOLOGY ENCYCLOPEDIA, https://psychology.jrank.org/pages/336/Insanity-Defense.html (last visited Nov. 2, 2019).
[212] *Id*.
[213] Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U.L. REV. 965, 972 (1996); *See e.g.* Commonwealth v. Christy, 540 Pa. 192, 203 (1995) (stating that indigent defendants are entitled to have cost-free access to psychiatric experts only in "very limited circumstances" where the defendant's sanity at the time of the offense was to be a significant factor at trial);
Rob Tindula, *The Rarity of the Insanity Defense*, HUFFPOST.COM, https://www.huffpost.com/entry/the-rarity-of-the-insanit_b_8683958 (updated Dec. 2, 2015).
[214] Tindula, *supra* note 213.
[215] *Id*.
[216] Scott O. Lilienfeld & Hal Arkowitz, *The Insanity Verdict on Trial: The Insanity Defense, Rarely Used, is Widely Misunderstood*, SCIENTIFIC AMERICAN, https://www.scientificamerican.com/article/the-insanity-verdict-on-trial/ (Jan.1, 2011).
[217] *Id*.

in insanity pleas as a way to skirt justice and gain freedom.[218] Ultimately, it is a very rare exception demonstrating that society will hold those responsible legally accountable for their criminal conduct and vice-a-versa.[219] Therefore, given the rarity of its use, the insanity defense's abolishment serves very little practical purpose, and likely only further impedes justice rather than achieves it.

Conclusion

This comment examined the theories of punishment and how these theories inform state sanctioned punishment. Within the Anglo-American tradition, punishment is justified when there is blame, but if the individual lacks the requisite blameworthiness, then punishment is unjustified. The level of blameworthiness relies on *mens rea*, which has ultimately two interpretations. One interpretation focuses solely on intent to kill, and the other delves one step further by analyzing the moral blameworthiness or wrongfulness of the offender's actions.

The tension of these two interpretations are at the core of the Kansas statute, which adopted a narrow *mens rea* interpretation. The Kansas statute ignores the moral blameworthiness or wrongfulness *mens rea* prong. This interpretation, therefore, has led to the total abolishment of the insanity defense in Kansas, resulting in the controversial ruling in *Kahler*. This comment suggests it is necessary for the remaining State Legislatures to maintain the insanity defense under the moral legal theories of punishment despite the Court's ruling on its constitutionality. Furthermore, this comment makes a plea to prosecutors to be lenient when charging mentally ill offenders, whose illness may have inhibited their capacity to appreciate their criminal conduct. Additionally, the Executive Branch, whether that be the Governor on a state level, or the President on a federal level, has the power to grant clemency in these types of

[218] *Id*.
[219] *Id*.

cases. It is important they understand the potential injustice of sentencing someone to death who may not be morally blameworthy of the offense.

It is understandable for society as a whole to want to right a wrong, to bring justice back to those that have been immeasurably injured by criminal conduct. And yet society must ask at what cost? What responsibility do we as members of a shared community have to those who are not culpable for the wrongdoing? Retribution for the sake of inflicting harm on an individual who may be morally blameless betrays the purpose of state sanctioned punishment and is, therefore, not true retribution. Instead, it appears to act as something more akin to vengeance or revenge. The insanity defense tempers those innate predilections and prevents further injustice. Punishing an individual who may not be morally blameworthy may only cause a chain reaction of endless revenge, and society will indeed find itself losing its understanding of what true justified punishment means.

Therefore, in *Kahler*, the Kansas statute's improper focus on intent to kill does not reflect the true purpose of retribution or the state's justification for punishment. The Kansas statute imprudently disregards the moral blameworthy prong, allowing blameless actors to face punishment reserved for culpable offenders. Regardless of the Supreme Court's decision, the affirmative defense of insanity is critical to maintain a fair criminal justice system, and its abolition betrays the very basic tenets of the Anglo-American legal traditions of criminal punishment.