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Avoiding the Question: The Court's Decision to Leave the Insanity Defense in State Hands in Kahler v. Kansas

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I. INTRODUCTION

"[T]he devil himself knoweth not the mind of men."[1] Just like our understanding of the mind, the insanity defense is hazy.[2] The states have taken widely different approaches to it, with some questioning whether it is even constitutionally required at all.[3] The debate has centered around what evidence of insanity due process requires a court to consider.[4] Can defendants show that irresistible impulses or underlying medical conditions drove them to act?[5] Are defendants limited to proving their mental conditions left them incapable of forming a crime's mens rea, or can a court consider whether they were capable of thinking through the morality of their choice?[6]

In *Kahler v. Kansas*,[7] Kahler appealed his conviction for murdering his two daughters, ex-wife, and her mother to the Supreme Court on the grounds that Kansas's statute violated due process both by eliminating the insanity defense altogether and removing the inclusion of the moral-capacity test.[8] The majority concluded this statute did not abolish the defense because it still allowed for evidence of insanity in determining requisite intent and also permitted broader evidence of insanity at sentencing.[9] The Court further concluded the moral-incapacity test is unnecessary to Kansas law because it is not "so 'ingrained in our legal system' as to make it fundamental."[10] Therefore, states are free to devise their own formulations of the insanity

1. Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting) (quoting fifteenth-century Chief Justice Brian in describing how our varying tests of culpability and insanity stem from our limited understanding of the mind).

2. *See* Clark v. Arizona, 548 U.S. 735, 751–52 (2006) (acknowledging the insanity defense's "varied background"). The medical definition of insanity is subject to the same debate and evolution as the legal definition because of science's ever-expanding, yet incomplete, knowledge. *Id.* at 752. This becomes relevant to the defense when psychologists and psychiatrists are introduced as expert witnesses. *Id.*

3. *See id.* at 750–52 (discussing the various traditional Anglo-American approaches to finding insanity when an insanity defense is asserted).

4. *See Leland*, 343 U.S. at 798 ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . .").

5. *See Clark*, 548 U.S. at 749–50.

6. *See id.* at 749; 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, 18 (2007).

7. 140 S. Ct. 1021 (2020).

8. *Id.* at 1026–27.

9. *Id.* at 1030–31.

10. *Id.* at 1037.

defense.[11]

This Note will further investigate how the Court reached the correct holding that Kansas's statute does not violate the Due Process Clause.[12] Part II gives historical background of the evolution of the insanity defense and its varied application.[13] Part III recounts Kahler's story and the procedural history leading up to this opinion.[14] Part IV analyzes how the majority reached its conclusion and the counterarguments presented by the dissent.[15] Part V concludes by acknowledging this case will add to state freedom in formulating insanity defenses, but that its actual impact is uncertain because the Court avoided answering whether states can eliminate the defense altogether.[16]

II. HISTORICAL BACKGROUND OF THE INSANITY DEFENSE

The Fourteenth Amendment's Due Process Clause provides that states cannot take an individual's right to "life, liberty, or property without due process of law."[17] A state law involving the insanity defense only violates due process if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[18] Historical practice guides this analysis.[19]

The defense's long and contested history is rooted in Islamic, Hebrew, and Roman law, and numerous different insanity tests were formulated in the common law, starting with the thirteenth-century "wild beast" test.[20] In Anglo-American history, four distinct strains of the test emerged: cognitive incapacity, moral incapacity, volitional incapacity, and product-of-mental-illness.[21] The cognitive and moral-incapacity tests comprise the two-pronged

11. *See id.*

12. *See infra* Parts II–IV.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. U.S. Const. amend. XIV; *see* Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 462 (2008) (highlighting that the Due Process Clause is key in assessing whether an affirmative insanity defense is constitutionally required).

18. Leland v. Oregon, 343 U.S. 790, 798 (1952) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

19. *See id.*

20. *See* Fradella, *supra* note 6, at 13.

21. Clark v. Arizona, 548 U.S. 735, 749 (2006). The volitional-incapacity test looks for an uncontrollable impulse and the product-of-mental-illness test questions whether the defendant acted as result of mental illness or defect. *Id.* at 749–50.

M'Naghten test of insanity created in 1843.[22] The first prong acquits defendants if they were unable to form the crime's requisite mens rea because they could not understand what they were doing, while the second prong acquits defendants even if they formed the necessary mens rea as long as they were unable to appreciate that their actions were wrong.[23] Although the *M'Naghten* test is the most widely accepted test of insanity, the states have developed a myriad of different tests using the four strains.[24] Some of these formulations resulted from several states and the federal government narrowing their insanity defenses in the aftermath of public outrage at John Hinckley's acquittal by reason of insanity in 1982 for his attempted assassination of President Reagan.[25] Alaska, Kansas, Idaho, Montana, and Utah adopted a mens rea approach, where defendants in these five states can only claim insanity during trial by establishing they were unable to form the crime's necessary mens rea due to an inability to understand their actions.[26]

In ruling on a similar defense, the Court in *Powell v. Texas*[27] declined to acknowledge the "chronic alcoholism" defense to public drunkenness, affirming state power within broad limits to define criminal responsibility.[28] The Court recognized rigid adherence to constitutional formulas impeded balancing the many concepts involved in determining criminal responsibility and society's ever-changing views on morality, ethics, and medicine.[29] Likewise, in *Leland v. Oregon*, the Court evaluated whether Oregon must replace its moral-incapacity test with the volitional-incapacity test to comply with due process.[30] The Court acknowledged that although science had vastly advanced from the time of *M'Naghten*, scientific development had not

22. Fradella, *supra* note 6, at 15, 18.

23. *See id*. at 18.

24. *See Clark*, 548 U.S. at 749–52 (noting the federal government and seventeen states use *M'Naghten*, one state uses only *M'Naghten*'s cognitive prong, ten states recognize just the moral-incapacity prong, fourteen states combine volitional and moral-incapacity tests, three states join both *M'Naghten* prongs with the volitional-incapacity test, and only one state uses the product-of-mental-illness test).

25. *See* State v. Herrera, 895 P.2d 359, 361 (Utah 1995) (explaining what events led to the amending of Utah's insanity-defense law); Raymond Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 42 (1997).

26. Kahler v. Kansas, 140 S. Ct. 1021, 1026 n.3, 1037 (2020).

27. 392 U.S 514 (1968).

28. *See id.* at 517, 536–37 (highlighting many of the same concepts at play in the insanity defense, such as the doctrines of actus reus, mens rea, insanity, mistake, justification, and duress).

29. *Id.* at 536–37, 545, 548.

30. *See* Leland v. Oregon, 343 U.S. 790, 800–01 (1952).

progressed enough to merit forcing states to remove the moral-incapacity test from their laws.[31] Further, determining what knowledge evinces criminal responsibility by choosing a test of sanity goes beyond science and into the realm of basic policy.[32] Justice Frankfurter echoed this conclusion in his dissent, agreeing that the government should not require states to use one specific test given our incomplete understanding of sanity.[33]

Similarly, in *Clark v. Arizona*, the Court held Arizona's statute that eliminated the cognitive-incapacity prong and only tested moral capacity did not violate due process.[34] The Court highlighted the many differing ways states devise their insanity-defense tests through various implementations of the four strains, showing history does not clearly defer to *M'Naghten* so as to make it a fundamental principle under due process.[35] The Court concluded, "it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[36]

III. FACTS

Karen Kahler filed for a divorce from James Kahler in early 2009.[37] She then moved out of their home, taking their nine-year-old son and teenage daughters with her.[38] During the following months, James Kahler became increasingly troubled.[39] Events culminated over Thanksgiving weekend when he drove over to Karen's grandmother's home, where he knew his family was staying.[40] Upon opening the backdoor and seeing Karen with his son, he shot her twice but let his son escape.[41] He then shot Karen's grandmother and both of his daughters.[42] None of his four victims survived, and Kahler gave himself up to the police the following day.[43]

Kahler was then charged with capital murder.[44] Before trial, he argued

31. *See id.*
32. *See id.*
33. *Id.* at 803 (Frankfurter, J., dissenting).
34. *See* Clark v. Arizona, 548 U.S. 735, 742 (2006).
35. *See id.* at 749–52.
36. *Id.* at 752.
37. Kahler v. Kansas, 140 S. Ct. 1021, 1036 (2020).
38. *Id.*
39. *Id.* at 1026–27.
40. *Id.* at 1027.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

that Kansas's approach to the insanity defense was unconstitutional under the Due Process Clause because it eliminated the moral-incapacity test.[45] The trial court denied this claim, leaving Kahler with only the option of proving at sentencing through psychiatric or other testimony that his severe depression resulted in his inability to form the requisite level of intent for murder.[46] The jury convicted him of capital murder, and despite the court permitting him to introduce additional evidence and arguments of mental illness at sentencing for mitigation, the jury still imposed the death penalty.[47] Kahler appealed, once more arguing Kansas's treatment of the insanity defense was unconstitutional, but the Kansas Supreme Court rejected this argument.[48] Kahler then appealed his conviction to the Supreme Court.[49]

IV. ANALYSIS OF THE OPINION

A. Justice Kagan's Majority Opinion

The Supreme Court correctly declined to force Kansas to incorporate the moral-incapacity test in *Kahler v. Kansas*, because Kansas considers a defendant's mental health both at trial and sentencing, and historical practice does not mandate one particular test, leaving states free to enact their own insanity defense rules.[50]

45. *Id.* Kansas's statutory law replaced its prior insanity defense with the following: "It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." Kan. Stat. Ann. § 21-5209 (2021).

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

47. *Id.*

48. *See id.* (relying on *State v. Bethel*, 66 P.3d 840 (2003), which held that that there is no particular formulation of the insanity test so ingrained as to make it fundamental, and states are therefore not required to adopt one particular version).

49. *See id.* The Court barred Kahler's attempt to claim that the Eighth Amendment required the moral-incapacity test because he did not raise it below. *Id.* at 1027 n.4. For a case where a defendant successfully raised this claim but lost the argument, see *State v. Korell*, 690 P.2d 992, 1001–02 (Mont. 1984).

50. *See Kahler*, 140 S. Ct. at 1037.

1. Does Kansas's statute abolish the insanity defense?

The Court agreed with Justice Breyer's dissenting opinion that courts have been using insanity to exculpate criminals for centuries.[51] Diverging from the dissent, the Court concluded Kansas's atypical approach to the insanity defense does not violate the broad principle of relieving criminal responsibility due to mental illness or defect for two key reasons.[52] First, the law allows defendants to present evidence at trial of cognitive inability to possess a crime's mens rea.[53] Second, defendants can present any evidence of mental illness at sentencing for mitigation, including testimony falling under the other three strains of the test; practically this means that defendants like Kahler—who could not present evidence of moral incapacity at trial—receive the same treatment as defendants in states where moral incapacity can acquit.[54] Thus, contrary to Kahler's claim, Kansas had not abolished the insanity defense.[55] However, in coming to this conclusion, the Court purposely avoided settling the bigger issue of whether states may eliminate the insanity defense altogether, as the Court did in *Clark*.[56]

2. Does due process require the moral-incapacity prong?

Once the Court concluded Kansas did not eliminate the insanity defense, Kahler had to overcome the high bar of proving through historical practice that the moral-incapacity test rises to the level of being "fundamental," contrary to *Clark*'s holding.[57] The Court acknowledged some common-law commentators preferred a mens rea approach while others looked to morality, and focused on common-law giants Henry de Bracton, Edward Coke, and

51. *See id.* at 1030, 1040 (referencing many of the same common law jurists the dissent relied on).

52. *See id.* at 1030–31.

53. *Id.* at 1030.

54. *Id.* at 1031.

55. *Id.* at 1031.

56. *Id.* at 1030, 1031 n.6; Clark v. Arizona, 548 U.S. 735, 752 n.20 (2006) ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require."). The Idaho, Kansas, Montana, and Utah Supreme Courts considered this question when hearing insanity-defense cases in mens rea approach jurisdictions; each court found that although the Supreme Court had never completely settled this issue, precedent indicates due process does not require an affirmative defense of insanity. *See* State v. Searcy, 798 P.2d 914, 918 (Idaho 1990); State v. Bethel, 66 P.3d 840, 851 (Kan. 2003); State v. Korell, 690 P.2d 992, 999, 1002 (Mont. 1984); State v. Herrera, 895 P.2d 359, 364 (Utah 1995); *see also* Spring, *supra* note 25, at 44 (noting that three Supreme Court Justices wrote in dicta that the Constitution does not require an independent insanity defense and the Court denied certiorari on a case involving this issue). But for cases finding state laws that completely eliminated the defense violated due process, see Sinclair v. State, 132 So. 581, 581–82 (Miss. 1931) and State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910).

57. *Kahler,* 140 S. Ct. at 1032; *see Clark*, 548 U.S. at 756.

Matthew Hale in its analysis.[58] Bracton compared insanity to wild animals who cannot possess the intent to injure in his wild beast test; Coke described insanity as being so devoid of mind or discretion that possessing the requisite mens rea was impossible; and Hale characterized insanity as being unable to act with felonious intent.[59]

While noting that some cases focusing on cognitive capacity did reference moral capacity, the Court found these cases centered more around defendants' ability to think than whether they thought their acts were moral.[60] The Court further concluded that even when the question of morality arose in these cases, moral incapacity was just another way to show cognitive incapacity, because if defendants could not understand their acts were wrong, they could not have formed criminal intent.[61] Alternatively, other common-law cases of the period that did not use the mens rea test also did not fully utilize the moral-capacity approach, including it as a part of everything considered instead of as a definitive test.[62] The Court concluded "[t]aken as a whole, the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule. And without that, they cannot support his proposed constitutional baseline."[63]

The 1843 *M'Naghten* test of insanity was the first substantive step towards widespread incorporation of moral-capacity evaluation.[64] However, *Clark* demonstrated through the states' varied iterations of the insanity defense that no formulation rises to the level of being a fundamental principle required by due process.[65] Additionally, many states that adopted the moral-incapacity

58. *Kahler*, 140 S. Ct. at 1032. For additional support, the Court could have used the same historical evidence presented in *Bethel*, 66 P.3d at 847, and *Korell*, 690 P.2d at 999, that prevailing criminal law did not recognize insanity as a separate defense for acquittal until the nineteenth century, and insanity's traditional role was to pardon, not acquit, the insane.

59. *See Kahler*, 140 S. Ct. at 1032.

60. *See id.* at 1033.

61. *See id.*; *see also Clark*, 548 U.S. at 753–54 ("[C]ognitive incapacity is itself enough to demonstrate moral incapacity."). Because the cognitive test is a subset of the moral-incapacity test or the prongs are often construed as equivalent, removing one part of *M'Naghten* or the other is a method of streamlining the test for the jury. *See id.* at 754–55, 755 n.24; *see also* Spring, *supra* note 25, at 45 ("By focusing on *mens rea* jury confusion should be eliminated or at least reduced substantially.").

62. *See Kahler*, 140 S. Ct. at 1034 (finding it difficult to distinguish whether early common-law cases such as *Hadfield's Case* prioritized morality with this "throw[] everything at the wall" approach and limited explanations by judges).

63. *Id.*

64. *See* Fradella, *supra* note 6, at 18.

65. *See Clark*, 548 U.S. at 753.

test have interpreted it as meaning the ability to know an act was illegal instead of the capacity to recognize it was wrong, thereby treating defendants differently than traditional moral-incapacity tests.[66] Therefore, requiring the moral-incapacity test would not only force the five states that use the mens rea approach to change their laws, but also the sixteen states that interpret moral capacity as understanding the illegality of an act, again proving *M'Naghten* has never received unified acceptance.[67] The *M'Naghten* dissension ultimately reinforces our limited comprehension of insanity and the idea that handling this complex issue is best left in the flexible hands of the states, which can better balance competing principles, public policy, and our evolving understanding than can a static constitutional requirement.[68]

B. Justice Breyer's Dissent

Alternatively, Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, contended Kansas did not merely redefine the insanity defense, but destroyed it altogether by removing the moral-incapacity prong, thus violating due process.[69] Kahler's case demonstrates the conceptual difference between the two prongs.[70] For example, in a two-pronged jurisdiction, both a defendant who thinks the victim is a dog or a defendant who thinks a dog told him to shoot the victim would be acquitted, but under Kansas's law only the first defendant would be exculpated.[71] Justice Breyer argued that although *M'Naghten* is the most prominent approach to insanity, it is not constitutionally required and merely describes the fundamental idea that those acting as wild beasts or infants due to mental illness are not morally accountable for their actions.[72] Justice Breyer found support for this principle in early common-law jurists and commentators, including several of the sources the majority used.[73] Bracton, Coke, and Hale all described the mentally ill as akin to "brute animals" or "infants," but did not explicitly

66. *See Kahler*, 140 S. Ct. at 1036. For example, whether defendants who understand the criminality of their actions but believe themselves morally justified can use the insanity defense turns on this difference. *See id.*

67. *See id.*

68. *See id.* at 1037.

69. *Id.* at 1038 (Breyer, J., dissenting). The majority could have precluded this argument by answering the long-debated question whether due process requires an independent insanity defense. *See supra* note 51 and accompanying text.

70. *See Kahler*, 140 S. Ct. at 1038 (Breyer, J., dissenting).

71. *See id.*

72. *Id.* at 1039.

73. *Id.* at 1032, 1040–41.

connect these ideas to morality.[74] Thus, Justice Breyer attempted to fill in this gap by supplanting these jurists' statements with some of their other remarks, other commentators' theories, and his own reasoning.[75] William Blackstone provided a stronger basis for Justice Breyer's stance because Blackstone not only linked the lunacy/infancy comparison to morality by writing that both states render a person unable to commit a crime unless the he or she was capable of distinguishing right from wrong, but holding that the inability to tell right from wrong is a requirement of establishing a legal excuse.[76] Multiple others jurists and English treatises also directly made this connection.[77]

The majority accused the dissent of cherry-picking these sources by ignoring evidence of a focus on mens rea and intent, concluding that Bracton, Coke, and Hale ultimately focused on cognitive capability.[78] In sum, the historical background presented by the dissent is just not enough to surmount the high bar the Court affirmed in *Leland* of being a "fundamental" principle.[79] However, the dissent pointed out many of the Court's common-law authorities described the mentally ill as lacking a crime's requisite mens rea and contended that the meaning of mens rea has narrowed, propagating that it originally not only included intent, but also encapsulated moral blameworthiness.[80] Justice Breyer referenced several common-law cases and jury instructions demonstrating this idea as the "prevailing view of the law" at the time, adding that common-law jurists discussed moral agency in almost every treatise and case, as did early American law.[81] He acknowledged that although the majority is correct in saying other cases of the common-law period were less precise in defining criminal responsibility, these cases still

74. *See id.* at 1040–41.

75. *See id.*

76. *See id.* Blackstone also determined a crime "requires both a 'vitious will' and a 'vitious act.'" *Id.* (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 21 (1769)).

77. *Kahler*, 140 S. Ct. at 1041–42 (including scholars such as William Lambard, William Hawkins, George Collinson, and Leonard Shelford).

78. *Id.* at 1032–33; 1033 n.8 (majority opinion).

79. *See* Leland v. Oregon, 343 U.S. 790, 798 (1952).

80. *See id.* at 804–06.

81. *Kahler*, 140 S. Ct. at 1042–44; *see* Phillips & Woodman *supra* note 17, at 463–70 (recounting that Saint Augustine most likely created mens rea terminology in 597 A.D., and moral blameworthiness began to take a part in mens rea in the thirteenth century due to Bracton's influence, that it became ingrained in English criminal law by the eighteenth century, and that it is preserved in the doctrines of excuse).

back the concept that guilt requires more than simply intent.[82] Although an interesting concept, this idea still lacks the necessary concreteness to defeat contested historical precedent, the high standard of *Leland*, or the deference to the states that *Clark* so highly valued.[83]

Although Justice Breyer seemingly admitted early in the dissent that the moral-incapacity standard is not constitutionally mandated, he later tried to argue it was a "thoroughly embedded" principle throughout history and that *M'Naghten* became "the predominant standard."[84] He acknowledged the states' many iterations of the test, but claimed they were designed "to expand, not contract, the scope of the insanity defense," supporting this idea using *Sinclair v. State* and *State v. Strasburg* as examples of courts finding statutes abolishing the insanity defense unconstitutional.[85] However, as noted by the Supreme Courts of Utah and Kansas, these cases are a poor comparison to statutes like Kansas's because instead of merely restricting the kind of evidence or the stage at which it is brought, these state laws precluded all evidence of insanity, even that negating mens rea.[86]

In a last defense of *M'Naghten*, Justice Breyer argued that interpreting moral incapacity as the inability to know if something is illegal does not change the test because "the hair-splitting distinction between legal and moral wrong need not be given much attention."[87] Ironically, this distinction resembles the conceptual difference between the two prongs that he worked so hard to validate.[88] Additionally, Justice Breyer cited experts who theorized that jurisdictions without the moral-incapacity prong convict many more "obviously insane" defendants because mental illness more often alters motivations for completing an act than the ability to form intent.[89] He also

82. *Kahler*, 140 S. Ct. at 1044.

83. *See supra* text accompanying notes 57–59; *Leland*, 343 U.S. at 798; Clark v. Arizona, 548 U.S. 735, 752 (2006); *see also Kahler*, 140 S. Ct. at 1032 n.8 (explaining that "the joint presence of references to *mens rea* and moral understanding in other common-law sources involving insanity" shows that these concepts are not equal, and concluding that the historical record is much more clouded than the dissent claims).

84. *Kahler*, 140 S. Ct. at 1030 n.5, 1039, 1045; *see also Leland*, 343 U.S. at 801 ("Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions."). *But see* State v. Herrera, 895 P.2d 359, 364 (Utah 1995) (reading *Leland* overall as not requiring any specific formulation instead of as mandating some traditional form of the insanity test).

85. *Kahler*, 140 S. Ct. at 1045–46.

86. State v. Bethel, 66 P.3d 840, 847–48 (Kan. 2003); *Herrera*, 895 P.2d at 366.

87. *Kahler*, 140 S. Ct. at 1046 (quoting State v. Crenshaw, 659 P.2d 488, 494 (Wash. 1983)).

88. *See supra* text accompanying note 66. In a similar comparison, the majority hypothesized that jurisdictions using the moral-wrong standard—as opposed to others that use the legal-wrong standard—will come to alternative outcomes in cases where defendants understood their actions were legally wrong but felt they were morally justified. *See Kahler*, 140 S. Ct. at 1036.

89. *Kahler*, 140 S. Ct. at 1048.

argued that although the insanity defense is subject to evolving and competing principles, society's moral code and the concept of moral blameworthiness are the foundation of the defense.[90] Finally, he also validly pointed out that eliminating the moral-incapacity prong to better jury understanding is unreasonable as juries have been using the *M'Naghten* test for centuries, and he also remarked that "Kansas's sentencing provisions do nothing to alleviate the stigma and the collateral consequences of a criminal conviction."[91] However, here the Court's primary role in deciding whether this state law should be invalidated is not to determine whether this statute is unreasonable or goes against public policy, but to determine if it is unconstitutional.[92]

V. IMPACT AND CONCLUSION

Kahler joins the decisions of *Leland* and *Clark* in adding to state freedom to formulate tests of insanity and opens the door for more states to join Kansas and the other four states that have eliminated the moral-incapacity test.[93] While it is still early to discern all of the ramifications of adopting such a law, researchers conducted a study in Utah two years after the state adopted a mens rea approach and found lawyers and evaluators were either uninformed about the change or disregarded it.[94] Researchers also performed a more in-depth study in Montana after it adopted this new formulation, showing many defendants who could have been found not guilty by reason of insanity prior to the new law were instead institutionalized before trial and the courts

90. *See id.* at 1047. For a competing view, see State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910) (noting the ingenuity of the argument that criminal law has advanced beyond viewing defendants through the lens of moral responsibility to now recognizing most criminals act as a result of hereditary or environmental influences and are not free moral agents).

91. *Kahler*, 140 S. Ct. at 1049–50; *see also* Sally Satel, *What The Supreme Court's Decision Reveals About The Flaws In The Insanity Defense*, FORBES (Mar. 27, 2020, 2:46 PM) ("[A] lenient sentence doesn't justify a wrongful conviction."). *But see* State v. Korell, 690 P.2d 992, 1002 (Mont. 1984) (arguing that the policy of protecting society is a higher priority and allowance for additional evidence of mental condition at sentencing mitigates stigma).

92. *See* State v. Herrera, 895 P.2d 359, 362 (Utah 1995).

93. *See supra* Part II.

94. *See* Spring, *supra* note 25, at 46. Another study tracked the results of states returning to a two-pronged *M'Naghten* formulation, concluding that this statutory change had little effect on the number or success rate of insanity defenses raised because juries view the defense skeptically, use their own understanding of insanity, and rely on personal senses of justice. *See* Fradella, *supra* note 6, at 25–26, 38; *see also* Spring, *supra* note 25, at 46 (remarking that practically speaking, juries focus more on individual defendants and their crimes rather than on the specific test of insanity when making decisions).

dismissed their cases.[95]

Ultimately, the *Kahler* decision is not as weighty as it may appear, because the Court avoided the bigger issue of whether states can abolish the independent defense of insanity altogether.[96] This holding merely reiterates that states have the freedom to determine their own tests, but must allow at least some evidence of insanity.[97] The Court declined to draw a firm line as to how much evidence of insanity courts must allow, instead choosing to focus on the relatively much simpler issue of Kansas's specific law.[98] In so doing, the Court has allowed the states to retain their traditional power to create laws that evolve with medical and societal standards, but has also left open the door open for states to chip away at the defense until some of Justice Breyer's fears are realized and settling this issue becomes essential.[99]

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95. *See* Spring, s*upra* note 25, at 46. Data behind this conclusion showed "1) the number of cases in which a defense based on mental disease or defect was utilized increased slightly; 2) the percentage of convictions in such cases increased markedly (from 39 percent to 55 percent); 3) the number of acquittals based on mental incapacity dropped from 32 percent to 3 percent; and, 4) the number of cases in which charges were dismissed increased from 20 percent to 33 percent." *Id*.

96. *See supra* note 51 and accompanying text; *see also* Kimberly Strawbridge Robinson & Jordan S. Rubin, *Insanity Defense Claims Curbed by High Court in Murder Case (2)*, BLOOMBERG L. (last updated Mar. 23, 2020 5:09 PM), https://news.bloomberglaw.com/us-law-week/kansas-wins-u-s-supreme-court-dispute-over-insanity-defense (reporting that Kahler's attorney found it "'difficult to predict the broader implications of the decision' because the Court was only construing Kansas law").

97. *See supra* Section IV.A.1.

98. *See* Robinson & Rubin, *supra* note 96 (commenting that the Justices were initially going to answer whether states can eliminate the defense, but "at least in theory" ruled more narrowly).

99. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020); *see also* Fradella, *supra* note 6, at 548–49 (contending the number of mentally ill prisoners increases as the insanity defense narrows).

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