A CALL FOR CONSTITUTIONALIZING THE AFFIRMATIVE INSANITY DEFENSE

Mia C. Larson[*]

Abstract

This Note sheds light on varied insanity defense formulations which fail to adequately protect the constitutional rights of people deemed legally insane. An emerging trend has arisen whereby states adopt alternative approaches to legal insanity focused solely on the mental state of a criminal offender at the time the offender committed a crime. Rather than operating as an excusal from criminal liability, this alternative approach offers insanity as mitigating evidence to be used at the sentencing phase of trial. The result is that a person deemed not guilty in a state employing the affirmative defense could be deemed guilty in a state employing an alternative defense. Mere inquiry into an offender's mental state takes no account of the offender's cognitive capacity to appreciate the moral wrongfulness of the offending conduct. A person who lacks moral blameworthiness in the same way as a child or wild animal is not properly the subject of punishment under American criminal law. The Supreme Court has repeatedly addressed the issue of whether states are constitutionally required to employ an affirmative insanity defense. Most recently, in *Kahler v. Kansas*, the Court answered this question in the negative. This Note focuses on the inadequacies of alternative insanity defenses and advocates for treating the affirmative insanity defense as a constitutional baseline for due process of the legally insane.

* Mia C. Larson earned her Bachelor of Arts and Juris Doctor degrees from the University of Florida in 2018 and 2021, respectively. Mia now practices as a labor and employment attorney at Buchanan Ingersoll & Rooney in Tampa, Florida.

INTRODUCTION

On March 23, 2020, the United States Supreme Court issued its opinion in *Kahler v. Kansas*,[1] a case about Kansas's treatment of a criminal defendant's claim of legal insanity.[2] The Court held that the U.S. Constitution's Due Process Clause does not compel the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing a crime.[3] The Court upheld the Supreme Court of Kansas decision against wholly exonerating a defendant whose mental illness prevented him from recognizing his criminal act as morally wrong.[4]

In a dissenting opinion, Justices Breyer, Ginsburg, and Sotomayor argued that any test for legal insanity which fails to account for moral culpability violates the due process clause.[5] This Note argues the same, specifically calling for nationwide recognition that a culpability-based, affirmative insanity defense should be the constitutional baseline for due process. States should be constitutionally prohibited from legislatively abolishing the affirmative insanity defense. Instead, states should redefine definitions of insanity, standards for admissible evidence, and standards for judging culpability of defendants deemed legally insane.

This Note is divided into two main parts. Part I examines the history of the insanity defense and the various forms it has taken in states over time. Part II explores potential alternatives to abolishing the affirmative insanity defense that are more narrowly tailored to the goal of preventing excessive exoneration of defendants who meet accepted standards of moral culpability.

I. APPROACHES TO LEGAL INSANITY

The primary moral issue regarding the insanity defense is whether a defendant possesses the mental capacity for conventional guilt and criminal responsibility for offenses committed under defective reasoning

1. 140 S. Ct. 1021 (2020).
2. *Id.* at 1023.
3. *Id.* at 1024–25.
4. *Id.* at 1024.
5. *Id.* at 1038.

caused by mental illness.[6] The notion that individuals deemed legally insane should not be punished for otherwise criminal acts has been firmly entrenched in the law for much of American history.[7] The Supreme Court's landmark decision in *Morrissette v. United States*[8] recognized that to constitute guilt for most offenses (excluding strict liability crimes, for example) there must be not only a wrongful act, but also criminal intention.[9] The insanity defense operates to exonerate individuals whose criminal intentions are products of mental illness, rather than of moral turpitude.

More recently, the Supreme Court stated in *Atkins v. Virginia*[10] that, because of disabilities in areas of reasoning, judgment, and impulse control, individuals with mental disabilities do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.[11] In Justice Breyer's words, "[s]even hundred years of Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law itself, [show] that Kansas' law 'offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[12]

While the Supreme Court has never declared the affirmative insanity defense to be a constitutional right, every state provided an extrinsic defense of legal insanity prior to 1979.[13] Many state legislatures have since made efforts to abolish or reform the traditional affirmative insanity defense.[14] After becoming the fourth state to legislatively abolish the affirmative insanity defense, Kansas became the state of interest in a case where the United States Supreme Court granted certiorari to address the constitutional ramifications of such legislative action.[15] Under Kansas's new provision, "a criminal defendant's mental disease or defect is relevant to his guilt or innocence only insofar as it shows that he lacked the intent defined as an element of the offense."[16]

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6. Clark v. Arizona, 548 U.S. 735, 773 (U.S. 2006).

7. Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 10 (1982).

8. 342 U.S. 246 (1952).

9. *Id.* at 275–76.

10. 536 U.S. 304 (2002).

11. *Id.* at 306.

12. Kahler v. Kansas, 140 S. Ct. 1021, 1038 (2020) (Breyer, J., dissenting) (citing Leland v. Oregon, 343 U.S. 790, 798 (1952)).

13. Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1518 (2002).

14. *Id.* at 1519.

15. *Id.* at 1520.

16. *Kahler*, 140 S. Ct. at 1039 (Breyer, J., dissenting).

The substantial discretion states possess over defining the substance of their criminal law makes an analysis of alternatives to the traditional approach to legal insanity necessary.[17] Leeway notwithstanding, the Court has acknowledged there is a constitutional baseline for protection against incarceration for legally insane individuals,[18] and there may be alternative approaches to an outright abolition of the insanity defense that serve the competing interests of society, defendants, and juries.

A. *Traditional Insanity Defenses*

Traditionally, protection for the legally insane was provided through an affirmative defense. The affirmative insanity defense protects vulnerable populations who lack moral culpability for actions committed because of mental illness, and it is the only formulation of an insanity defense which incorporates moral culpability to protect even individuals who possess intent to commit a wrong. The traditional insanity defense recognizes that elements of offenses may not be precise enough to exonerate all who ought to be freed from criminal liability.[19] States employing the affirmative defense approach treat legal insanity in the same manner as duress, self-defense, and infancy: the defense is used as an excuse or justification for otherwise criminal conduct.[20]

The affirmative insanity defense took root in the 1843 case *R v. M'Naghten*,[21] in which a defendant indicted for conspiracy to murder the Prime Minister was acquitted on the basis of insanity.[22] The *M'Naghten* defense states that

> 1) A person is not responsible for criminal conduct if, at the time of the offense;
>
> 2) the defendant suffered from a mental disease or defect;
>
> 3) that caused the defendant either:
>
> (a) not to know the nature and quality of the act he or she committed; or
>
> (b) knowing the quality or nature of the act, nonetheless not to know that the act was wrong.[23]

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17. Montana v. Egelhoff, 518 U.S. 37, 71 (1996) (5-4 decision) (Ginsburg, J., concurring).

18. *Kahler*, 140 S. Ct. at 1039 (Breyer, J., dissenting).

19. Harlow M. Huckabee, *Mental Disability: Evidence on Mens Rea Versus the Insanity Defense*, 20 W. STATE L. REV. 435, 441 (1993).

20. *Id.*

21. 8 Eng. Rep. 718 (H.L. 1843).

22. 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, 15–16 (2007).

23. *Id.* at 16–17.

Under this approach, if a defendant's mental illness prevents the defendant from knowing what he or she is doing, or if it prevents him or her from knowing that what he or she is doing is wrong, the defendant cannot be held criminally liable for his or her actions.[24] "So, if a jury believes [a defendant] was suffering from a delusional state, and if the facts as he believed them to be in his delusional state would justify his actions, he is insane and entitled to acquittal."[25] The affirmative insanity defense is the only version of insanity protection which permits acquittal regardless of whether the elements of a crime have been proven beyond a reasonable doubt.

Critics of the affirmative insanity defense argue that "it fails to identify accurately those who should be excused, . . . it deflects concern from the plight of the many" disordered "jail and prison inmates" in need of treatment, and it does not lead to superior treatment for individuals acquitted by reason of insanity than could be achieved through incarceration.[26] Other critics believe that legal recognition of insanity can be accomplished without maintaining a separate defense.[27] Despite this criticism, forty-six states, the federal government, and the District of Columbia currently employ some form of an affirmative insanity defense for criminal defendants. This signifies a national consensus that criminal responsibility should not attach to the acts of insane persons who lack moral culpability.[28] Indeed, such a national consensus against the practice of abolishing the affirmative insanity defense should have led the *Kahler* Court, in keeping with its own precedent, to find that such abolishment violates the Eighth Amendment.[29]

While the process for analyzing a due process claim under the Fourteenth Amendment is addressed in a later section, it is worth noting here that the history and tradition of almost every state providing an affirmative insanity defense since at least as early as 1843 is a strong indicator that the defense is a fundamental right protected by due process. Abolishing the insanity defense impedes a right honored by longstanding American traditions and the fundamental notion of culpability in the American criminal justice system. Thus, the alternatives examined below all fall below the constitutional baseline which the affirmative insanity defense alone protects.

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24. R. Michael Shoptaw, Comment, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1109 n.33 (2015).

25. Finger v. State, 27 P.3d 66, 85 (Nev. 2001).

26. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 794 (1985).

27. *Id.*

28. Stephen M. Leblanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity* Defense, 56 AM. U.L. REV. 1281, 1313 (2007).

29. Graham v. Florida, 560 U.S. 48, 61 (2010).

B. *Mens Rea Approach*

Montana, Idaho, Utah, and Kansas have legislatively abolished the insanity defense,[30] and substituted alternative procedures for considering a criminal defendant's mental condition at the time of an offense.[31] This approach, commonly referred to as the "mens rea" approach, generally provides that evidence of mental disease or defect is admissible to disprove the mens rea element of an offense,[32] but the lack of ability to know right from wrong is no longer an affirmative defense.[33] States have primarily offered policy reasons for this legislative change. For example, legal scholars suggest that by focusing on mens rea, jury confusion can be eliminated or at least substantially reduced because the jury will no longer evaluate issues extraneous to the elements of an offense.[34] Instead, jurors will be given an instruction defining the crime and its mental state component, and jurors will be told that any evidence they may hear relating to the mental condition of the defendant is to be considered on that issue alone.[35]

State supreme courts have reached varying determinations on the issue of whether the mens rea approach itself is unconstitutional. For example, in *State v. Korell*,[36] the Montana Supreme Court rejected due process challenges to the state legislature's abolition of the insanity defense in favor of the mens rea approach.[37] The Montana court noted that the Supreme Court has never afforded constitutional protection to any particular formulation of the insanity defense.[38] In contrast, the Nevada Supreme Court concluded in *Finger v. State* that legal insanity is a fundamental principle of the criminal law of this country and found the Nevada legislature's attempt to abolish the insanity defense unconstitutional and unenforceable.[39] Thus, the mens rea approach is a particularly controversial reformulation of the insanity defense.

Proponents of the mens rea approach believe that responsibility can be considered primarily within the confines of the state's prima facie case, and argue that volitional and cognitive consequences of mental disorder can be fairly handled by the actus reus and mens rea doctrines of criminal liability.[40] As the United States Supreme Court acknowledged

30. State v. Bethel, 275 Kan. 456, 462 (2003).
31. *Id.* at 464.
32. *Id.* at 462.
33. *Id.* at 472.
34. Raymond Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 45 (1997).
35. *Bethel*, 275 Kan. at 463.
36. 213 Mont. 316 (1984).
37. *Id.* at 334.
38. *Id.* at 327.
39. Finger v. State, 27 P.3d 66, 84 (Nev. 2001).
40. Morse, *supra* note 26, at 801.

in *Clark v. Arizona*, the mens rea insanity test functions by allowing a defendant to admit evidence of mental disease or defect to rebut the prosecution's evidence of the requisite mental state for an offense.[41] However, critics of the mens rea approach argue that the approach ignores the true effects of mental disorder on behavior because even the most severe mental disorders rarely negate the requirements of an act and the appropriate mental state.[42]

A common illustration of this dilemma is found in the illustration of the man who strangles his wife believing he is merely squeezing a lemon.[43] The lemon-squeezing man will be acquitted if he persuades a jury that he truly believed his wife was a lemon at the time he strangled her.[44] "But if the same defendant was spurred to kill by voices, by a prolonged depression, or by an uncontrollable rage associated with a tumor or other organic damage, he [w]ould be convicted."[45] In such situations, the mens rea approach discriminates against types of disorders like manic-depressive illnesses, which affect more than one percent of the American population.[46] Employing an insanity defense that is inherently discriminative directly contradicts the history and tradition of protecting individuals who lack moral culpability from criminal prosecution in the American legal system. The mens rea approach fosters an unconstitutional denial of equal rights to people depending on the form and function of their mental illnesses.

Perhaps the most significant departure the mens rea approach takes from the affirmative insanity defense is that it treats legal insanity as a mitigating factor for consideration at sentencing, so insanity is no longer a separate and independent exculpatory defense.[47] Thus, "[s]ince the prosecution has the burden of persuasion with reference to the elements, the defendant can have the benefit of the mental disability evidence without having the burden of persuasion."[48] The mens rea approach governs four states' approaches to legal insanity and it was the approach recommended by the United States Department of Justice many years ago. And yet, Congress has expressly rejected it.[49]

The practical considerations involved in replacing an affirmative defense with a sentencing practice suggest that the mens rea approach is neither the most logical nor a constitutional method of exculpating legally

41. Clark v. Arizona, 548 U.S. 735, 769 (2006).

42. *Id.*

43. Heathcote W. Wales, *An Analysis of the Proposal to Abolish the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 689 (1976).

44. *Id.* at 690.

45. *Id.*

46. *Id.*

47. Huckabee, *supra* note 19, at 442.

48. *Id.*

49. *Id.*

insane defendants. The mens rea approach to insanity fails to offer protection to defendants who need it most: those whose mental illnesses prevent them from possessing the requisite culpability to justify criminal punishment. The Supreme Court clearly stated in *Morrissette* that before there can be a crime, there must be culpability.[50] States have interpreted this requirement to encompass both legal and moral culpability. The mens rea approach to insanity expressly precludes the operation of any defense for individuals possessing mere legal culpability. The approach fails to account for a defendant's moral culpability and should therefore be unconstitutional.

C. *Irresistible Impulse Test*

In response to claims that *M'Naghten* focused inappropriately on a defendant's cognitive capacity and ignored the volitional and affective components of behavior, several courts have adopted what is known as the "irresistible impulse" test for insanity.[51] Under this test, a defendant is entitled to acquittal if the defendant's mental disorder caused the defendant to experience an "irresistible and uncontrollable impulse to commit the offense, even if he remained able to understand the nature of the offense and its wrongfulness."[52] The "irresistible impulse" concept was recognized by the Supreme Court's 1997 opinion in *Kansas v. Hendricks*, in which Justice Breyer found a defendant's abnormality was akin to insanity for purposes of confinement, and thus constituted a sort of irresistible impulse by which the state could classify the defendant as mentally ill.[53]

Criticism of the irresistible impulse test stems from the phrase "irresistible impulse," which strongly implies that only sudden acts of behavior will qualify as irresistibly impulsive.[54] However, "[s]ome courts have construed the control test broadly, concluding that long periods of brooding behavior might lead to a loss of control sufficient to satisfy the [irresistible impulse] standard."[55] In light of such interpretations, critics have also argued that the irresistible impulse test "is too broad, allowing defendants to escape the consequences of behavior that they knew to be wrong at the time."[56] Thus, the defense of legal insanity is made "available to psychopaths, to neurotics, perhaps to all who commit

50. Morrissette v. United States, 342 U.S. 246, 275–76 (1952).

51. 3 Mental Disability Law: Civil and Criminal § 14-1.2.3 (2021).

52. *Id.*

53. *Id.*

54. Chet Kaufman, Comment, *Should Florida Follow the Federal Insanity Defense?*, 15 FLA. ST. U. L. REV. 793, 804 (1987).

55. *Id.*

56. *Id.*

crime."[57] Critics of the irresistible impulse test have reached opposite conclusions due to variations inherent in applying a single impulse-based test for legal insanity.[58]

The irresistible impulse test is often presented in addition to the *M'Naghten* standard.[59] Jurors are instructed to acquit by reason of insanity if they find the defendant was suffering from a mental disease or defect which kept the defendant from controlling his or her conduct at the time of the offense.[60] The jury must make this finding even if it concludes that the defendant knew what the defendant's actions were and that they were wrong.[61] Thus, the irresistible impulse test is unique from other approaches to defining insanity in that it does not turn on any evaluation of the defendant's moral culpability for the offense. Nonetheless, attempts to broaden *M'Naghten* by incorporating impairments in defendants' ability to control their behavior are limited to a few states. This test is unlikely to become prevalent in the United States because of the well-founded criticisms previously detailed. Therefore, while the irresistible impulse test may have some utility when used in conjunction with an affirmative insanity defense, the test does not serve as an adequate replacement to the insanity defense altogether.

D. *Durham Rule*

Durham v. United States[62] set forth another test for legal insanity in 1954, which states that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."[63] The *Durham* test is commonly known as the "product" rule for insanity.[64] Unsurprisingly, this test never gained widespread acceptance in either the federal or state courts.[65] The primary reason offered by the few states which adopted the *Durham* rule is that the mind of the man is a "functional unit," and a far broader test than that set forth by *M'Naghten* and the irresistible impulse tests is appropriate.[66] Indeed, Durham was the first modern, major break from the *M'Naghten* approach, and the *Durham*

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57. Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 308 (1998).

58. *Id.*

59. Anne Damante Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1153 (1990).

60. *Id.*

61. *Id.*

62. 214 F.2d 862 (D.C. Cir. 1954), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

63. *Id* at 874–75.

64. Brusca, *supra* note 59, at 1153.

65. *Id.* at 1153–54.

66. 3 Mental Disability Law: Civil and Criminal § 14-1.2.4 (2021).

rule instantly became the topic of a flood of scholarly commentary and rigorous criticism.[67]

The *Durham* rule led to an influx of expert witnesses whose testimony largely narrowed the jury's role as fact-finders.[68] Further, because the number of criminal acquittals rose under the *Durham* rule, many critics viewed it as having the effect of abolishing the notion that insanity is a limited excuse.[69] Under that reasoning, the *Durham* rule was viewed as permitting excuses from criminal responsibility for all mentally ill persons, regardless of either the type or degree of impairment caused by mental illness.[70] Outside of courts in the District of Columbia, the *Durham* rule never gained widespread acceptance beyond the psychiatry world, and it was not perceived as an adequate application of science to the formulation of an insanity defense.[71] Ultimately, the D.C. Court of Appeals abrogated the *Durham* test for legal insanity in 1972 in *United States v. Brawner*, which adopted a formulation of insanity based on standards suggested by the American Law Institute in its 1962 Model Penal Code.[72] This test, as abrogated, does not provide an alternative to the affirmative insanity defense.

E. *Model Penal Code Affective Test*

The Model Penal Code's test for legal insanity is usually referred to as the ALI/MPC Affective test. This test provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[73] Importantly, the defendant's "conduct must include a 'voluntary act' or an omission to engage in a voluntary act that the defendant is physically capable of performing."[74] Voluntary acts generally have three key elements: "(1) an internal event, or volition; (2) an external, physical demonstration of that volition; and (3) a causal connection between the internal and external elements."[75] Under the

67. *Id.*

68. Gerald Robin, *The Evolution of the Insanity Defense*, 13 J. CONTEMP. CRIM. JUST. 224, 229 (1997).

69. Fradella, *supra* note 22, at 20.

70. *Id.*

71. Jessica Harrison, *Idaho's Abolition of the Insanity Defense—An Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 583 (2015).

72. United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972).

73. MODEL PENAL CODE § 4.01(1) (AM. L. INST. 1962).

74. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 275 (2002).

75. *Id.* at 275–76 (citing Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1194 (1990)).

MPC Affective test, liability cannot be based on "mere thoughts," involuntary acts, or physical conditions.[76]

Despite explicitly formulating a voluntary act requirement, the Affective test does not define what constitutes a mental disease or defect. Instead, the code section includes a provision that purposefully excludes those who suffer from antisocial personality disorders from being considered to have a mental disease or defect.[77] The MPC test effectively modifies *M'Naghten* by replacing *M'Naghten*'s focus on pure cognitive knowledge of the wrongfulness of one's acts with a less stringent test requiring that the defendant lacks the substantial capacity to appreciate the wrongfulness of the conduct.[78] As a result, mental health experts and juries may "consider the defendant's moral, emotional, and legal awareness of the consequences" of the offending behavior, in recognition that there are "gradations of criminal responsibility and that the defendant need not be totally impaired to be absolved of such responsibility."[79]

The ALI/MPC formulation of legal insanity has received criticism by scholars, lawyers, and psychiatrists for ultimately including a version of the irresistible impulse test.[80] "These critics argued that an irresistible impulse was [] just an impulse that was not, in fact, resisted."[81] Allowing volitional impairment to qualify as the basis for a criminal excuse was perceived by some as "inconsistent 'with a criminal justice system premised on free will.'"[82] The MPC Commentaries have also conceded that the distinction between voluntary and involuntary acts "can be vague and troublesome[.]"[83] Nonetheless, numerous states and one federal circuit eventually adopted the ALI/MPC insanity defense formulation.[84] States that adopt the MPC Affective test maintain that "a focus on what is voluntary need not 'inject into the criminal law questions about determinism and free will.'"[85]

While the MPC approach has been relatively popular among states, legal scholars have opined that the approach needs to be reassessed because it is based on outdated psychoanalytic research that has been seriously undermined.[86] These critics believe that the MPC Advisory Committee members who formulated the Affective approach were

76. MODEL PENAL CODE § 2.01 cmt. 1 (AM. L. INST. 1985).
77. *Id.* § 4.01.
78. *Id.*
79. Robin, *supra* note 68, at 230 (1997) (citing United States v. Freeman, 357 F.2d 606 (1966)).
80. Fradella, *supra* note 22, at 23.
81. *Id.*
82. *Id.*
83. Denno, *supra* note 74, at 290.
84. Robin, *supra* note 68, at 231.
85. Denno, *supra* note 74, at 273.
86. *See id.* at 306.

influenced by Freudian psychoanalytic theory.[87] Moreover, much of the new science regarding conscious and unconscious processes developed after the MPC concluded its research on the voluntary act requirement.[88] Thus, there appears to be a growing consensus towards revisiting the MPC Affective approach and perhaps reformulating the voluntary act requirement to better reflect modern psychological and physiological research.

Currently, there is no test formulated for insanity other than the affirmative defense which provides adequate protection for individuals who lack moral culpability. As Justice Breyer stated in the *Kahler* dissent, "our [American] tradition demands that an insane defendant should not be found guilty . . . ."[89] The affirmative insanity defense, which turns on moral culpability, is the only method to achieve this result and ensure exoneration of individuals lacking moral culpability. Therefore, the affirmative insanity defense should be treated as the constitutional baseline to ensure individuals deemed legally insane receive due process under the law.

II. THE AFFIRMATIVE INSANITY DEFENSE AS A CONSTITUTIONAL BASELINE

As demonstrated, several approaches to legal insanity have risen and fallen out of popularity over the course of American history. Much of the current discord surrounding legal insanity focuses on whether an affirmative insanity defense, considered extraneous to the elements of the offense charged and offering an excuse for otherwise criminal conduct, is a fundamental right protected by federal due process. The states employing a mens rea approach to insanity (Idaho, Utah, Montana, and Kansas) have legislatively abolished the affirmative insanity defense, and made it so the evidence of mental disease or defect is only admissible at the sentencing phase of trial to disprove the mens rea element of the prosecution's case-in-chief.[90] The Supreme Court has never before declared that the affirmative insanity defense is a fundamental right, and recently stated in *Clark v. Arizona*[91] that "no particular formulation has evolved into a baseline for due process protection."[92] The Court may, and should, overrule that statement by declaring the affirmative insanity defense to be protected by the Fourteenth Amendment. An overview of substantive due process methodology shows that there is a fundamental

87. Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332, 338–39 (1971).

88. Denno, *supra* note 74, at 306.

89. Kahler v. Kansas, 140 S. Ct. 1021, 1049 (Breyer, J., dissenting).

90. Shoptaw, *supra* note 24, at 1111–12.

91. 548 U.S. 735 (2006).

92. *Id.* at 737.

right based on the history, traditions, and modern proportion of the United States employing an affirmative insanity defense.

A. *Substantive Due Process*

In 1997, the Supreme Court in *Washington v. Glucksberg*[93] described its substantive due process methodology as a two-part analysis.[94] The Court stated, "substantive due process requires a 'careful description' of the fundamental liberty interest that is 'deeply rooted' in the 'history and tradition' of the United States."[95] In *Glucksberg*, challengers to Washington's physician-assisted suicide ban defined their liberty interest as "the right to choose a humane, dignified, death."[96] However, the Court defined the interest more narrowly as "a liberty interest . . . by a mentally competent, terminally ill adult to commit physician-assisted suicide."[97] Bearing that careful description in mind, the Supreme Court conducted a thorough investigation into the existence of a tradition regarding assisted suicide.[98] The Court looked to Anglo-American common-law tradition, legal scholars throughout history, colonial legal practices, and early American statutes.[99] Ultimately, the Court held that there was not a fundamental right to physician-assisted suicide, and therefore any statutory ban of such practices need only pass rational basis review.[100]

The Court announced substantial changes to its substantive due process methodology in *Lawrence v. Texas*,[101] where it heard a challenge to an anti-sodomy statute for the second time in less than twenty years and overturned its previous decision in *Bowers v. Hardwick*.[102] "Whereas the substantive due process analysis in *Glucksberg* had focused on carefully defining asserted fundamental rights, the analysis in Lawrence was characterized by its emphasis on defining fundamental rights based upon 'broad statements.'"[103] The *Glucksberg* analysis required the *Bowers* challengers to define the liberty interest as the right to engage in homosexual sodomy.[104] However, under the Court's broader characterization in *Lawrence*, the Court recognized a fundamental right for individuals to engage in private intimate sexual conduct.[105] Where a

93. 521 U.S. 702 (1997).
94. *Id.* at 720–21.
95. Shoptaw, *supra* note 24, at 1113.
96. *Glucksberg*, 521 U.S. at 722.
97. *Id.* at 708.
98. *Id.* at 710–19.
99. *Id.* at 711–16.
100. *Id.* at 728.
101. 539 U.S. 558 (2003).
102. 478 U.S. 186 (1986); Shoptaw, *supra* note 24, at 1115.
103. *Id.*
104. *Bowers*, 478 U.S. at 191.
105. *Lawrence*, 539 U.S. at 578.

right is declared fundamental, any statute which infringes upon that right must be narrowly tailored to achieve a compelling state interest, and the Court in *Lawrence* found that there was no interest which could justify the state's intrusion into the personal and private life of an individual.[106]

Under the *Lawrence* framework and the Court's analysis in *Clark v. Arizona*, there is a fundamental right to a traditional, affirmative insanity defense.[107] The liberty interest can be broadly defined as the right to receive protection for actions taken resulting from a mental illness that precludes moral culpability. If the Court deems an affirmative insanity defense that turns on a finding of culpability to be a fundamental right, then any attempt by states to limit evidence of insanity must be analyzed with strict scrutiny.[108] Under the strict scrutiny standard, the state would be required to show that its action is necessary to further a compelling state interest or that its action is narrowly tailored to further a compelling state interest.[109] With regard to the mens rea approach, it is unlikely that a state can prove that legislatively abolishing the affirmative insanity defense is narrowly tailored to further a compelling state interest. Indeed, an outright abolition is far from narrow, and the state's interests in reducing abuse of the insanity defense are based on a misunderstanding of how often the affirmative insanity defense is invoked at all, much less successfully invoked.

B. *Redefining Insanity*

A primary issue faced by those who advocate for treating the affirmative insanity defense as a fundamental right is precisely defining legal insanity. Every justification for the affirmative insanity defense is premised on the notion that an individual should not be convicted if he or she believes that his or her action is moral, and a mental disorder causes this belief.[110] Given that one in five people in the United States has some form of mental disorder,[111] the definition of legal insanity must be construed narrowly to ensure fair use of the affirmative insanity defense. The Mayo Clinic defines mental illness as referring to a wide range of mental health conditions including depression, anxiety disorders, schizophrenia, eating disorders and addictive behaviors.[112] If this

106. *Id.*

107. Clark v. Arizona, 548 U.S. 735 (2006).

108. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutin*y, 40 VT. L. REV. 285, 295 (2015).

109. *Id.*

110. *See* Robitscher & Haynes, *supra* note 7.

111. Mental Illness, *Symptoms & Causes*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/mental-illness/symptoms-causes/syc-20374968 [https://perma.cc/N82D-GPAG] (last visited Nov. 4, 2019).

112. *Id.*

definition sufficed for legal insanity, then an alcoholic who shoots and kills his or her spouse could be exculpated by claiming he had too much to drink. This result is neither in accordance with traditional approaches to insanity nor a rational solution to the issue at hand. Thus, any form of mental illness that does not rise to the level of insanity is not a defense to guilt.[113]

Some proponents of the affirmative defense argue that all individuals falling under the Mayo Clinic's definition of insanity "should be given the opportunity to at least try" to convince a jury they lacked the capacity to know their commission of a crime was morally wrong.[114] Under this framework, the number of cases involving insanity considerations would increase and judicial efficiency would be hampered. A more precise and effective definition of legal insanity would focus on a defendant's ability to distinguish fantasy from reality, and it would ask whether the individual suffers from psychosis or uncontrollable impulsive behavior. For example, the MPC insanity defense "assumes a voluntary or conscious act and is directed at *substantial impairments to the capacity for free choice* arising from *mental disorder*."[115]

Perhaps focusing on the definition of insanity is premature for states that follow a mens rea approach and thus do not employ any definition of legal insanity at all. In those states, an offender who "accurately perceives what he is doing but is powerless to exercise moral judgment" will be convicted.[116] Thus, underlying the issues in *Kahler* regarding the fundamentality of an affirmative insanity defense is the question of whether states are required to employ some specific definition of legal insanity as a backdrop to all criminal proceedings. The answer to this question is clearly yes because operating under a system that fails to define legal insanity categorially excludes fair and equal protection for individuals with mental illness. Rather than abolish the insanity defense, states seeking to refocus insanity protections should redefine their standards for legal insanity to clarify what sorts of mental illnesses rise to the level of insanity warranting legal protection.

C. *Evidence of Insanity*

As Chief Justice Roberts highlighted in the *Kahler* arguments, another issue underlying the debate surrounding insanity defenses is the expansive notion of what counts as evidence of mental illness.[117] In *Clark*

113. Rene J. LeBlanc-Allman, *Guilty but Mentally Ill: A Poor Prognosis*, 49 S.C. L. REV. 1095, 1108 (1998).

114. Transcript of Oral Argument at 7, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

115. Wales, *supra* note 43, at 691.

116. *Id.*

117. Transcript of Oral Argument, *supra* note 114, at 9–10.

v. Arizona, the Supreme Court implicitly suggested there are three categories of evidence that may bear on mens rea: observation evidence, mental-disease evidence, and capacity evidence.[118] While mens rea has little import where an affirmative insanity defense is available, these three categories seem equally applicable to prove mental illness. First, observation evidence includes testimony from persons who observed or heard a defendant when that defendant committed an offense.[119] As the Court stated in *Clark*, observation evidence can support a professional diagnosis of mental illness and can be used to show what in fact was on a defendant's mind when the defendant committed an illegal act.[120] Second, mental-disease evidence includes opinion testimony, typically from professional psychologists or psychiatrics, that a defendant suffered from a mental illness; opinion testimony would also explain the effects a specific mental illness typically imposes.[121] Finally, capacity evidence is generally offered by an expert to advise on the defendant's capacity for cognition, moral judgment, and ultimately, mens rea.[122]

If the Court were to formally adopt a set of standards by which states may receive evidence of mental disease or defect, it should look to the *Clark* definitions for guidance. A comprehensive view of mental illness in the context of criminal proceedings should consider a defendant's mental condition in the context of the defendant's everyday life, experiences at the time the defendant committed the act, and experiences and lucidity after committing the act.

Reasonable minds and licensed mental health professionals could differ on precisely what evidence is necessary to prove a defendant lacked the capacity for culpability. However, as the depth of scientific research into mental illness and mental health continually expands, the issue of what evidence and characteristics are useful for proving mental insanity is ripe for determination. It would be objectively unreasonable for a legislature to determine that no evidence of mental disease or defect is admissible to prove insanity. Yet, this is the result that each of the four states employing a mens rea approach to insanity have achieved. In mens rea insanity jurisdictions, evidence of mental illness is only admissible if it tends to disprove the mens rea element of an offense.[123] This is not met by the vast majority of mental illnesses, so the mens rea approach functionally eliminates the availability of insanity defense protection for vulnerable populations in the states employing that approach.

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118. Clark v. Arizona, 548 U.S. 735, 756–59 (2006).
119. *Id.* at 757.
120. *Id.*
121. *Id.* at 758.
122. *Id.*
123. *Id.* at 738.

While the criminal justice system allows defendants to introduce evidence of mental disease to determine a defendant's fitness to stand trial, this evidence is limited to the defendant's current mental state.[124] Perhaps an alternative to declaring a fundamental right to an affirmative insanity defense is to require that evidence of mental condition be admissible pre-trial for any defendant. However, this method would only be effective if it allowed the three types of evidence mentioned above, without exclusivity, because the defendant's mental state on the date of the crime may have no relation to the defendant's mental state on the date of trial.

To fairly account for the effects of mental illness on criminal defendants, a thorough consideration of all evidence related to the defendant's typical, specific, and current mental states should be permitted for judicial consideration. At this stage, the judge might consider any proffered examiners' reports, expert testimony, medical records, or testimony from the defendant. If the judge determines that the defendant's mental state was sufficiently impaired at the time of the offense or is so impaired that the defendant currently lacks a rational appreciation of his or her actions, the judge may decide to either dismiss the case or order civil commitment for the defendant.[125]

D. *Guilt Phase Contamination*

There are practical implications of treating insanity evidence separate and apart from an affirmative defense. Proponents of the mens rea approach argue that limiting evidence of mental disease to the sentencing phase of a trial is an adequate substitute to providing an affirmative insanity defense.[126] However, evidence at sentencing is not an adequate substitute because jurors make up their minds at the guilt phase of trial, and the result at the guilt phase should not influence the result at the sentencing phase.[127] This concept of guilt phase contamination refers to the idea that, when the same jurors who deliberated and convicted on the facts presented during the guilt phase become contaminated by those negative facts, they are thereafter unable or unwilling to consider mitigation evidence during the sentencing phase.[128] While jurors who refuse to consider mitigation evidence should be dismissed with cause,

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124. Rita D. Buitendorp, Note, *A Statutory Lesson From "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U.L. REV. 965, 992 (1996).

125. HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 125, 134 (1993).

126. *See* Transcript of Oral Argument, *supra* note 114, at 11–12.

127. *Id.* at 12.

128. H. Mitchell Caldwell & Thomas W. Brewer, *Death Without Due Consideration?: Overcoming Barriers to Mitigation Evidence by "Warming" Capital Jurors to the Accused*, 51 HOW. L.J. 193, 212–15 (2008).

the reality is that jurors who have empathized with the victim or developed a prejudice against the defendant are likely to "evaluate the defendant less positively," are "likely to reject mitigation evidence," and are unlikely to be dismissed for cause.[129]

The Supreme Court addressed the issue of guilt phase contamination in capital punishment cases by stressing the importance of a separate proceeding focused solely on the matter of the appropriate sentence.[130] In those cases, the capital sentencer should consider, as mitigating circumstances, any factor relating to the defendant's background, character, or the circumstances of the offense that might call for a lesser penalty.[131] "This bifurcated procedure assumes that jurors can and do make independent decisions[.]"[132] However, juror interviews have shown that "for many jurors, the decision about guilt [is] so overwhelming that it prevents truly separate decision-making about punishment."[133] Further, a significant number of capital jurors do not wait for the sentencing phase to consider the appropriateness of the death penalty, and they report thinking about what the sentence should be during deliberations on guilt.[134]

Some legal scholars believe a determination of "guilty but mentally ill" is the most effective method at preventing guilt phase contamination.[135] "[U]nder a verdict finding a defendant guilty but mentally ill, the defendant is criminally responsible for the acts in question, but [may be] accorded the right to treatment for their mental illness."[136] Proponents of guilty but mentally ill legislation hope to reduce insanity acquittals and provide greater public protection by offering a compromise that ensures both prolonged incarceration and treatment for mentally ill offenders.[137] Nonetheless, "the American Bar Association's Criminal Justice Mental Health Standards, the American Psychiatric Association Statement on the Insanity Defense, and the National Mental

129. *Id.* at 205.

130. Gregg v. Georgia, 428 U.S. 153, 190–92 (1976).

131. *See* Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982).

132. Ursula Bentele & Williams J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOKLYN L. REV. 1011, 1014 (2001).

133. *Id.* at 1019.

134. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1486–89 (1998).

135. *See* Note, *The Guilty but Mentally Ill Alternative*, 8 WM. MITCHELL L. REV. 223, 242 (1982).

136. Debra T. Landis, *"Guilty but Mentally Ill" Statutes: Validity and Construction*, 71 A.L.R. 4th 702 § 1(a) (1989).

137. Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 496 (1985).

Health Association's Commission on the Insanity Defense have all recommended against its adoption."[138]

The incidents which triggered support for the guilty but mentally ill verdict appear to be premised on a fundamental misunderstanding of how the traditional affirmative insanity defense has been used throughout history. Even in states which maintain an affirmative insanity defense, the defense is used in only roughly one percent of all felony cases and is successful less than one-quarter of the time.[139] Thus, the policy benefits of enacting a guilty but mentally ill scheme to reduce insanity acquittals are illusive. The only tangible result of the guilty but mentally ill verdict is the removal of opportunity for a defendant to be relieved of criminal liability based on legal insanity.

E. *Culpability Standard*

Ultimately, both the mens rea approach and the guilty but mentally ill verdict undermine the mechanism of showing that individuals lack culpability for their actions. Thus, another relevant question concerns the type of culpability relevant to this analysis. Some legal scholars believe the right-and-wrong principle embodied by the term "culpability" includes both knowledge of legal wrong and knowledge of moral wrong.[140] In terms of moral culpability, moral theorists have identified four principal conditions which, when satisfied, show that a person deserves moral blame for his or her conduct: "a (1) moral agent must be implicated in (2) the breach of a moral norm that (3) fairly obligates the agent's compliance under circumstances where that (4) breach can be fairly attributed to the agent's conduct."[141] More simply, to qualify as morally blameworthy, an "individual must have the capacity to make moral judgments about what to do and possess the ability to act in accordance with such judgments."[142] This definition of moral blameworthiness ties well into the idea that the definition of legal insanity should focus on a defendant's ability to distinguish fantasy from reality. As legal scholars have noted, "[n]ot everything that is morally culpable is legally culpable, and there may well be instances of legal culpability attaching to a person who is free of moral culpability with respect to the conduct in question."[143]

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138. *Id.*

139. Nusbaum, *supra* note 13, at 1562.

140. *See* Transcript of Oral Argument, *supra* note 114, at 4.

141. Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1518 (1992).

142. *Id.*

143. John Robinson, *Crime, Culpability and Excuses*, 10 NOTRE DAME J.L. ETHICS & PUB POL'Y 1, 2 (1996).

Conversely, legal culpability generally requires that a person acted purposely, knowingly, recklessly, or negligently to be considered guilty of an offense.[144] Mental illness is much less appropriate for consideration in the context of legal culpability than in the context of moral culpability. As previously discussed, it is entirely plausible that an individual with mental illness could commit an act as serious as murder, knowing full well that he or she was doing so, but believing he or she was morally justified in such action. Under the legal culpability framework, so long as the prosecution's case-in-chief meets the requisite level of culpability, the defendant would be guilty as charged. Returning to the mens rea approach, the result is identical. The mens rea approach only allows admission of mental disease evidence which manages to rebut the element of legal culpability required for the offense. Thus, fundamental to the argument that the mens rea approach is an inadequate protection for offenders with mental illness is the premise that moral culpability, and not legal culpability, is what juries should consider in the context of legal insanity.

By satisfying *legal* culpability (mens rea), a rebuttable presumption is created that the defendant was *morally* culpable for the crime.[145] "But, the defendant can defeat this presumption of moral fault by denying that he was morally responsible for engaging in the culpable conduct."[146] To negate the presumption of moral culpability, the defendant could show that "the circumstances preceding the crime deprived him of a *fair opportunity* to make a rational choice to comply with the law's commands."[147] Thus, an individual who committed a murder because, while undergoing the throes of schizophrenic delusions, that individual believed such action would save all the children in America, could show a lack of moral culpability. Where an individual is deemed to lack moral culpability, criminal punishment is not appropriate because it would serve no accepted penological goal.

In *Graham v. Florida*, the Supreme Court declared that where criminal punishment does not serve a legitimate penological goal, such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment.[148] These justifications include retribution, deterrence, incapacitation, and rehabilitation.[149] Retribution is not a legitimate reason to punish a person who lacks moral culpability because the "heart of the retribution rationale is that a criminal sentence must be

144. MODEL PENAL CODE § 2.02 (AM. L. INST. 1962).
145. Arenella, *supra* note 141, at 1523.
146. *Id.*
147. *Id.*
148. Graham v. Florida, 560 U.S. 48, 71 (2010).
149. *Id.*

directly related to the personal culpability of the criminal offender."[150] Similarly, deterrence does not justify such a sentence where an individual did not make a rational choice in committing a crime because rational consideration is essential for deterrence to have any effect.[151] While incapacitation through incarceration of a dangerous person could potentially protect society at large, this purpose is better served by civil commitment in the context of offenders with mental illnesses. Finally, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society."[152] This judgment is not appropriate where an offender lacks moral culpability for the offender's actions.

CONCLUSION

The Supreme Court should formally declare the affirmative insanity defense, or some version of insanity protection which turns on a moral culpability standard, to be a fundamental right. The affirmative defense is the only formulation of insanity protection which truly accounts for moral culpability and completely exculpates criminal defendants who commit crimes while suffering from defects of mind, regardless of their level of legal culpability. For centuries, the insanity defense has protected vulnerable populations who lack the ability to choose between right and wrong behaviors. This standard is rooted in American legal tradition and should be ranked as fundamental. Any insanity defense that, like the mens rea approach, fails to account for a defendant's subjective mental experience is in violation of this constitutional baseline. This Note offers alternative approaches to treatment of legal insanity that balance policy concerns with the legal reality that those suffering from mental illness are not properly the subject of the American penal system.

150. *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).
151. *Id.* at 72.
152. *Id.* at 74.