

ARE CRIMINALS BAD OR MAD?

PREMEDITATED MURDER, MENTAL ILLNESS, AND *KAHLER V. KANSAS*

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INTRODUCTION

Murder, it is sad to say, is an ancient phenomenon.¹ Each one is a profound assault on its immediate victim, but also has the same far-reaching, rippling effect as a stone thrown into a still body of water. Among other consequences, felt both immediately and over the long term, murder corrodes the perception of communal security that any society needs to remain cohesive.²

In the earliest days of Anglo-American law, society found punishment of murderers necessary to avoid the violent inter-clan retaliation that would otherwise follow and to restore, as far as possible, the peace of the realm.³ The criminal law has always been civilization's principal defense against crime; it protects society against such mayhem, whatever its cause might be. As Professors Joseph Goldstein and Jay Katz put it, the criminal law seeks "to protect the life, liberty, dignity, and property of the community and its members by threatening to deprive those who . . . contemplate [antisocial] conduct and

1. See *Genesis* 4:8 (King James) (the story of Cain murdering Abel); Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 415 (1976) ("Homicide was a daily fact of life in medieval England. Brawling was common; serious physical violence routine.").

2. See, e.g., Matt Ford, *What's Causing Chicago's Homicide Spike?*, ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/01/chicago-homicide-spike-2016/514331/> [https://perma.cc/562Y-FG8S].

3. See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 328 (2016).

by inflicting sanctions upon those who engage in proscribed activity.”⁴ That understanding is why the English common law ultimately came to treat all felonies, particularly murder, not only as a harm done to the victim, but also as an act “*contra coronam et dignitatem regis*” (an act contrary to the peace and dignity of the crown), which the sovereign may punish himself.⁵

Mental illness is almost as old as murder,⁶ and sometimes they occur in tandem.⁷ When a murderer is mentally ill, the problems he generates for society increase in complexity. Deciding precisely what the response should be has been the subject of vigorous debate throughout the legal community, the medical profession, and the legislatures on each side of the Atlantic.⁸ It is,

4. Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 YALE L.J. 853, 853 (1963).

5. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 8–9 (4th ed. 2002); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 5–6 (1985); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1911, at 7–10 (1913); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 15 (James F. Colby ed., 1915); Note, *Legal Effect of a Pardon*, 13 COLUM. L. REV. 418, 418 (1913).

6. See, e.g., 1 Samuel 21:12–15 (King James) (describing how David, pretending to be insane, pounded his head on the city gate and foamed at the mouth); Mark 5:1–20 (King James) (describing Jesus’s interactions with a man described as “possessed with the devil” but whose symptoms closely match those associated with mental illness); ROY PORTER, MADNESS: A BRIEF HISTORY 10 (2002); ANDREW SCULL, MADNESS IN CIVILIZATION: A CULTURAL HISTORY OF INSANITY FROM THE BIBLE TO FREUD, FROM THE MADHOUSE TO MODERN MEDICINE 16–47 (2015).

7. See, e.g., DAVID ABRAHAMSEN, CONFESSIONS OF SON OF SAM (1985); RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. (3d ed. 2008); RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN (1981). See generally CHARLES PATRICK EWING, INSANITY: MURDER, MADNESS, AND THE LAW (2008).

8. See, e.g., Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, §§ 401–406, 98 Stat. 1837, 2057–68 (1984) (codified as amended at 18 U.S.C. §§ 17, 4241–4247 (2012)); ROYAL COMM’N ON CAPITAL PUNISHMENT, 1949–1953 REPORT 128 (1953); MODEL PENAL CODE § 4.01 (AM. LAW INST. 1985); EWING, *supra* note 7; HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE (Greenwood Press 1980) (1967); THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE (1985); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES (Mark D. White ed., 2017); Joseph Goldstein & Jay Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960); Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535 (1917); Edwin R. Keedy et

as Professor Francis Allen once put it, “a task of great difficulty.”⁹ The reason, as Chief Justice Burger explained, is that the issue of whether—and, if so, how—a mentally ill offender should be held responsible for his conduct is “complicated” by the “inter-twining moral, legal, and medical judgments” that a judge or jury must make.¹⁰

Tasked with the responsibility to decide concrete cases, however, the Anglo-American courts have long designed rules defining the consequences of mental illness for the trial, conviction, and punishment of an offender.¹¹ That process has gone forward

al., *Insanity and Criminal Responsibility*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 890 (1912); Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); Vicki L. Plaut, *Punishment versus Treatment of the Guilty but Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428 (1983).

9. Francis A. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 496 (1962).

10. *Burks v. United States*, 437 U.S. 1, 17 n.11 (1978) (quoting *King v. United States*, 372 F.2d 383, 389 (D.C. Cir. 1967)) (internal quotation marks omitted). Numerous other courts have held that the issue of mental illness is fundamentally a moral, not medical, judgment. See, e.g., *United States v. Murdoch*, 98 F.3d 472, 478 (9th Cir. 1996); *United States v. Freeman*, 357 F.2d 606, 619 (2d Cir. 1966); *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), *abrogated by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc); *State v. Chase*, 480 P.2d 62, 69 (Kan. 1971); *People v. Schmidt*, 110 N.E. 945, 948–49 (N.Y. 1915); see also Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987) (discussing how far the law should follow moral considerations in defining conditions that will excuse criminal liability including insanity).

11. See, e.g., *Clark v. Arizona*, 548 U.S. 735, 749–53 (2006); *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952); *Fisher v. United States*, 328 U.S. 463, 472–75 (1946); *Guiteau's Case*, 10 F. 161, 182–86 (D.C. 1882) (prosecution of Charles A. Guiteau for the murder of President James Garfield); *M'Naghten's Case* (1843) 8 Eng. Rep. 718, 722–23; 10 Cl. & Fin. 200, 209–11 (HL); *Arnold's Case* (1724) 16 How. St. Tr. 695, 764. Before Congress created a local court system for the District of Columbia in 1970, the federal government prosecuted common law crimes like murder and robbery in the District's Article III courts. See *Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973). For decades, therefore, the District of Columbia Circuit tinkered with or completely revised the insanity test in that jurisdiction. See, e.g., *Brawner*, 471 F.2d at 973 (adopting the American Law Institute Model Penal Code insanity test); *McDonald v. United States*, 312 F.2d 847, 850–51 (D.C. Cir. 1962) (en banc) (per curiam); *Durham*, 214 F.2d at 874–75 (ruling that a defendant is not criminally responsible if his criminal conduct was “the product of mental disease or mental defect”); *Smith v. United States*, 36 F.2d 548, 549 (D.C. Cir. 1929) (ruling that a mentally ill offender is not criminally liable if his “reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong”). For some state court decisions on the subject of insanity, see *People v. Wells*, 202 P.2d 53 (Cal. 1949); *Commonwealth v. Eddy*, 73 Mass. (7 Gray) 583 (1856); *Schmidt*, 110 N.E. 945.

for centuries in much the same manner that Oliver Wendell Holmes used to describe the evolution of the common law: as a matter governed by experience, rather than logic.¹²

The criminal law has traditionally used a multistage process to adjudicate cases involving a defendant's claim that he is not criminally responsible because of insanity based on a severe mental illness.¹³ The trial in such cases worked as follows: A jury would first decide whether the defendant was guilty of the charged offense.¹⁴ In making that determination, the jury could not consider any evidence that, because of a mental disorder, the defendant could not formulate the scienter or mens rea elements of the charged offense.¹⁵ Under the law or practice in the states,¹⁶ the jury could consider evidence of a defendant's severe mental illness only at a separate, post-guilt stage devoted entirely to the issue of his sanity, known as the insanity stage.¹⁷ At that phase, a defendant could offer evidence that he suffered from a disabling mental disease or defect and should not be

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

13. See GOLDSTEIN, *supra* note 8, at 106–21, 171–90; David W. Louisell & Geoffrey C. Hazard, Jr., *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961) (discussing the process of adjudicating an insanity claim at trial).

14. Louisell & Hazard, *supra* note 13, at 809 n.12.

15. *Id.* at 813–15.

16. Kathryn S. Berthot, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045, 1046 n.5 (1989).

17. *Id.* at 1046 n.5, 1059; Louisell & Hazard, *supra* note 13, at 809 n.12. At one time, some states, California in particular, permitted a defendant to present evidence of mental illness at the guilt stage of a case to raise a reasonable doubt of guilt pursuant to a diminished capacity defense. See, e.g., *People v. Gorshen*, 336 P.2d 492, 498–99 (Cal. 1959); *People v. Wells*, 202 P.2d 53, 64–66 (Cal. 1949); GOLDSTEIN, *supra* note 8, at 199–202. In *Fisher v. United States*, 328 U.S. 463 (1946), a case arising from a homicide in the District of Columbia, the Supreme Court rejected the argument that a defendant should be able to assert a diminished capacity defense in federal court. *Id.* at 473. Influencing the Court in *Fisher* were its precedents stating that the District of Columbia courts should fashion their own common law of crimes. See *id.* at 476 (“Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.”). Most states agreed with that ruling as a matter of their own state laws. See *id.* at 473 n.12 (collecting cases accepting and rejecting a diminished capacity defense). For discussions of the diminished capacity defense, see, e.g., HENRY F. FRADELLA, *FROM INSANITY TO DIMINISHED CAPACITY: MENTAL ILLNESS AND CRIMINAL EXCUSE IN CONTEMPORARY AMERICAN LAW* (2007); Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

held criminally responsible for his conduct.¹⁸ If the jury agreed with the defendant, the jury would return a verdict of “not guilty by reason of insanity,” which ordinarily resulted in his commitment to a mental institution, instead of his imprisonment.¹⁹

Within the last two decades, Kansas decided to try a new approach. The state revamped when and how it allows a jury to consider evidence of a defendant’s mental illness. Historically, Kansas followed the widely used practice of conducting a separate, post-guilt stage to resolve a defendant’s claim that he is not guilty of a crime because of a mental disease or defect. Now, Kansas has switched around its procedure for raising any such defense. A defendant may still argue that the jury should not hold him responsible for a crime because of mental illness. Under the new law, however, he may introduce that evidence only at the guilt stage and then only to raise a reasonable doubt that he possessed a mental state defined by state law as an element of the offense.²⁰

This term, the Supreme Court will decide whether the Constitution restrains a legislature’s decision to decide how mentally ill offenders should be held responsible. Offenders twice argued that the new Kansas procedure is unconstitutional, and the Kansas Supreme Court twice rejected their arguments.²¹ The Court granted review in *Kahler v. Kansas*²² to decide whether the Kansas state legislature acted arbitrarily by

18. See, e.g., *Louisell & Hazard*, *supra* note 13, at 806–13.

19. *Id.*

20. See *infra* Part I.A.

21. *State v. Kahler*, 410 P.3d 105, 124–25 (Kan. 2018); *State v. Bethel*, 66 P.3d 840, 844–52 (Kan. 2003). The state courts disagree whether a legislature may abolish an insanity defense. See Brian E. Elkins, *Idaho’s Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151 (1994); Recent Development, *Due Process—Insanity Defense—Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges—State v. Searcy*, 118 *Idaho* 632, 798 P.2d 914 (1990), 104 HARV. L. REV. 1132 (1991). Compare *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) (ruling that the legislature’s decision to abolish the insanity defense violated the federal and state constitutions), with *State v. Searcy*, 798 P.2d 914, 916–19 (Idaho 1990), *State v. Korell*, 690 P.2d 992, 998–1002 (Mont. 1984) (upholding the abolition of an insanity defense in favor of the diminished capacity or mens rea defense), and *State v. Herrera*, 895 P.2d 359, 364–69 (Utah 1995).

22. 139 S. Ct. 1318 (2019) (order granting certiorari).

choosing to experiment with a new approach for resolving that issue.²³

This Article maintains that Kansas's decision was constitutionally permissible. The Due Process Clause does not require the criminal law to offer an insanity defense. The Eighth Amendment prohibits cruel and unusual punishment, but says nothing about the definition of crimes. Ultimately, the Constitution allows the states to determine the relevance of mental illness to the substantive criminal law and requires only that a state's chosen approach be rational, which Kansas's approach certainly is.

The discussion below proceeds as follows: Part I explains how Kansas law treats mental illness, describes James Kahler's crimes, and summarizes the decision of the Kansas Supreme Court. Part II addresses Kahler's claim that the Kansas procedure violates the Due Process Clause of the Fifth and Fourteenth Amendments. Part III addresses that issue from the perspective of the Eighth Amendment Cruel and Unusual Punishments Clause.

I. *KAHLER V. KANSAS*

A. *The Treatment of Mental Disease under Kansas's Criminal Law*

At least as early as 1884, Kansas adopted the formulation of the insanity defense known as the M'Naghten rule.²⁴ Established by the House of Lords in 1843, the M'Naghten rule required a jury to acquit a criminal defendant if it found that he was "not sensible" at the time he committed the crime because, by reason of a "disease of the mind," he suffered "under such a defect of reason" that he did not know "the nature and quality" of his act or that it was "wrong."²⁵

23. *Id.*; see also Petition for a Writ of Certiorari at i, *Kahler v. Kansas*, No. 18-6135 (U.S. Sept. 28, 2018) (Question Presented: "Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?").

24. See *State v. Nixon*, 4 P. 159, 163-64 (Kan. 1884) (holding that if a defendant lacks sufficient mental capacity to distinguish between right and wrong, then he cannot be held criminally liable).

25. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL) ("[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on

The M’Naghten rule remained undisturbed in Kansas until 1995.²⁶ Following years of growing public concern over the insanity defense after John Hinckley, Jr.’s attempt to assassinate President Ronald Reagan,²⁷ the Kansas legislature revisited the insanity defense and revised state law to refocus it.²⁸ The new law, section 22-3220 of Kansas Statutes Annotated, provided as follows: “It 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.”²⁹ The effect of the revision allows a defendant to use evidence of a mental disease to raise a reasonable doubt that he did or could

the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”).

26. See, e.g., *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991); *State v. Hollis*, 731 P.2d 260, 269 (Kan. 1987); *State v. Pyle*, 532 P.2d 1309, 1322 (Kan. 1975); *State v. Chase*, 480 P.2d 62, 67–68 (Kan. 1971); *State v. Coltharp*, 433 P.2d 418, 424 (Kan. 1967); *State v. Mendzlewski*, 299 P.2d 598, 600 (Kan. 1956); *Nixon*, 4 P. at 163–64.

27. See BONNIE ET AL., *supra* note 7, at 121–26. For a sense of the fever pitch of public backlash against the insanity defense, see *The Insanity Defense: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. (1982). At that hearing, the Judiciary Committee considered eight bills that would have, in one way or another, limited the insanity defense. *Id.* at 485–566. Senator Orrin Hatch proposed adding a new section to Title 18 of the United States Code that would read: “It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.” *Id.* at 507–08 (statement of Sen. Orrin Hatch). Kansas’s law, enacted thirteen years later, closely mirrored Senator Hatch’s proposed language.

28. The Question Presented in *Kahler* asks whether a state may abolish the insanity defense. Petition for a Writ of Certiorari, *supra* note 23, at i. That question does not accurately describe Kansas’s law, which reshaped an insanity defense into a diminished capacity defense. Ultimately, however, *Kahler*’s framing of the issue is far less important than how Kansas permits a defendant to make use of evidence of mental illness at trial. The issue is whether—and, if so, how—a defendant can present evidence of mental illness as a defense. Kansas opted for a diminished capacity defense instead of an insanity defense. As explained below, that choice is a reasonable one.

29. KAN. STAT. ANN. § 22-3220 (2007) (repealed 2011). The legislature slightly revised the wording of the statute in 2011 when it moved the statute from section 22-3220 to section 21-5209. The relevant text remains substantively the same. Compare § 22-3220 with § 21-5209 (Supp. 2018) (“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.”).

have formed the mens rea required for conviction.³⁰ That statute was on the books when Kahler was tried and convicted of capital murder for killing four members of his family.

B. Kahler Shoots Four Members of His Family at Close Range in Different Locations in His Grandmother-in-Law's Home

In the summer of 2008, Kahler's wife, Karen, told him that she wanted to have a sexual relationship with a female colleague of hers.³¹ Kahler consented to the relationship but grew embarrassed by public displays of affection between his wife and her lover, one of which led to a shoving match between the Kahlers.³² The two attempted marriage counseling, but the effort proved unsuccessful.³³ By January 2009, Karen had filed for divorce.³⁴ Kahler maintained that these events threw him into severe depression.³⁵ He was unable to cope with the divorce, and, in March 2009, he was publicly arrested and charged with domestic abuse against Karen.³⁶ Karen then left the family home and took with her their three children, Emily, Lauren, and Sean.³⁷

Kahler's marriage and family relationships disintegrated.³⁸ His colleagues noted that he became increasingly preoccupied by his personal problems and paid less and less attention to his job.³⁹ By August 2009, he was fired.⁴⁰ His parents were concerned about his well-being and moved Kahler into their home.⁴¹

The family had a tradition of spending the weekend after Thanksgiving at the home of Karen's grandmother, Dorothy.⁴² Sean had been staying with Kahler and his parents in the days beforehand, and he asked Karen if he could remain there for

30. See § 21-5209 (formerly § 22-3220).

31. State v. Kahler, 410 P.3d 105, 113 (Kan. 2018).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 114.

36. *Id.* at 113.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

the weekend.⁴³ Karen said that Sean should spend the holiday at her grandmother's house instead.⁴⁴ That evening, Kahler drove to Dorothy's house with a Remington .223 caliber rifle,⁴⁵ carried it with him as he entered through the back door, saw and passed by Sean, and, moving throughout the house, shot and killed Karen, Emily, Lauren, and Dorothy.⁴⁶ He did not harm Sean, who, after seeing his father, fled to a neighbor's house.⁴⁷ When officers arrived, they found Karen in the kitchen, Emily and Dorothy in the living room, and Lauren upstairs.⁴⁸ They were dead or died later.⁴⁹

Kahler eluded law enforcement until the next morning when he was spotted walking down a country road.⁵⁰ When law enforcement later searched his car, they found an empty box for a Remington .223 caliber rifle.⁵¹ Although the gun was never found, the serial number on the box matched the serial number of a rifle registered to Kahler.⁵²

At trial, Kahler did not deny that he shot his family members.⁵³ Instead, he argued that his severe depression prevented him from forming the intent and premeditation necessary for capital murder.⁵⁴ A defense psychiatric expert testified that, at the time Kahler shot his family members, "his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did."⁵⁵ The trial judge instructed the jury that it could consider any evidence that Kahler was mentally ill in deciding whether he premeditated on the intent to kill his victims.⁵⁶ Because Kansas's law prohib-

43. *Id.*

44. *Id.*

45. *See id.* at 119.

46. *Id.* at 113–14.

47. *Id.* at 113.

48. *Id.* at 114.

49. *Id.*

50. *Id.*

51. *Id.* at 119.

52. *Id.*

53. *Id.* at 114.

54. *Id.*

55. *Id.*

56. Joint Appendix at 177, *Kahler v. Kansas*, No. 18-6135 (U.S. May 31, 2019). The jury instructions were as follows:

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be

ited him from using evidence of mental illness for any other purpose, Kahler could not also defend on the ground that he was not guilty by reason of insanity.

The jury convicted Kahler of capital murder and recommended the death sentence, which the trial judge imposed.⁵⁷

C. *The Kansas Supreme Court's Decision*

On appeal to the Kansas Supreme Court, Kahler argued that section 22-3220 of Kansas Statutes Annotated violated the Due Process Clause of the Fourteenth Amendment because it abolished the insanity defense.⁵⁸ Relying on its 2003 decision in *State v. Bethel*,⁵⁹ the Kansas Supreme Court rejected Kahler's claim.⁶⁰ In *Bethel*, the defendant killed his father because, he maintained, God had ordered him to do so.⁶¹ Like Kahler, Bethel had argued that the insanity defense was "a fundamental element of our criminal justice system."⁶² The Kansas Supreme Court disagreed, holding that an insanity defense is a creature of state law, not federal constitutional law.⁶³ It relied on the United States Supreme Court's decisions in *Powell v. Texas*⁶⁴

considered only in determining whether the defendant had the state of mind required to commit the crimes.

When considering capital murder, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the first degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the second degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to kill.

When considering aggravated burglary, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to commit capital murder.

Id.

57. *Kahler*, 410 P.3d at 112.

58. *Id.* at 125.

59. 66 P.3d 840 (Kan. 2003).

60. *Kahler*, 410 P.3d at 124–25 (citing *Bethel*, 66 P.3d at 853).

61. *Bethel*, 66 P.3d at 853.

62. *Id.* at 844.

63. *Id.* at 850–51.

64. 392 U.S. 514 (1968).

and *Leland v. Oregon*.⁶⁵ The Kansas Supreme Court interpreted those cases as holding that the Constitution does not mandate any particular approach to insanity but rather leaves it to the states.⁶⁶ In neither *Bethel* nor *Kahler* did the Kansas Supreme Court expressly consider whether section 22-3220 violates the Eighth Amendment's Cruel and Unusual Punishments Clause.

II. THE DUE PROCESS CLAUSE AND THE INSANITY DEFENSE

A. *The Text of the Due Process Clause*

The Due Process Clause is an odd place to look for a limitation on a state's power to define crimes or defenses to a criminal charge. All that its Delphic text states (in the case of the Fourteenth Amendment) is that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."⁶⁷ Those sixteen words do not refer to, let alone define, any conduct that should be made an offense or provide a defense to one. In fact, they give no indication that they do anything more than refer to substantive criminal law that is defined elsewhere. To treat those bare words as creating an insanity defense without any need for supplemental judicial creativity is like saying that the Sistine Chapel painted itself.

That conclusion becomes even more apparent when one compares the text of the Due Process Clause with several other constitutional provisions that, expressly or impliedly, *do* directly address a legislature's substantive legislative criminal lawmaking authority. Those provisions define the elements of a specific offense, empower Congress to carry out that function, or expressly limit federal or state criminal lawmaking authority. One must look to those provisions, not the Due Process Clause, to discern whether the Constitution abridges elected officials' ability to represent the moral judgments of their communities.

65. 343 U.S. 790 (1952); *Bethel*, 66 P.3d at 847–51 (citing *Leland*, 343 U.S. at 797–99 (ruling that a state can require a defendant to bear the burden of persuasion beyond a reasonable doubt on an insanity defense); *Powell*, 392 U.S. at 535–36 (holding that conviction for public drunkenness where the defendant suffered from a compulsion to drink did not violate the Eighth Amendment)).

66. *Bethel*, 66 P.3d at 847–51.

67. U.S. CONST. amend. XIV, § 1; see also *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

Start with the Article III Treason Clause, the only provision in the Constitution that actually defines a specific crime. The clause defines “Treason against the United States” as “consist[ing] only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”⁶⁸ The Framers went out of their way to define that crime in the Constitution because they did not trust elected officials to protect political dissent.⁶⁹ The Framers remembered the English history of using a charge of treason to prosecute not rebels and revolutionaries for violent insurrection or sedition, but rather the average person for merely uttering “expressions” of dissent or possessing “mere mental attitudes” of disagreement with the governing authorities.⁷⁰ The Framers’ decision to ensure that only conduct specifically defined by the Constitution as treason can serve as the basis for such a charge demonstrates that the Framers left the authority to define *other* crimes and defenses to the normal democratic process. The Treason Clause is the exception to the rule that the Constitution does not define specific crimes. It therefore strongly suggests that the Due Process Clause performs no such function.

Other constitutional provisions expressly authorize Congress to define offenses and affix punishments. The Article I Coinage and Counterfeiting Clauses appear in sequence⁷¹ and clearly address different parts of the same problem. No nation can operate a modern economy without a uniform national currency, and there has been a strong need to protect the integrity of banknotes against counterfeiting for probably as long as there

68. U.S. CONST. art. III, § 3.

69. For the historical background to the Treason Clause, see generally *Cramer v. United States*, 325 U.S. 1, 8–15 (1945); J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945); Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331 (1918); Sanford Jay Rosen, *The Law of Treason*, 51 TEX. L. REV. 817 (1973) (reviewing J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970) and JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971)).

70. *Cramer*, 325 U.S. at 28.

71. U.S. CONST. art. I, § 8, cl. 5–6.

have been coins or paper money.⁷² Thus the Coinage Clause authorizes Congress to establish a national currency and define its value,⁷³ and the Counterfeiting Clause empowers Congress to punish falsification of currency.⁷⁴ For another example, the Define and Punish Clause permits Congress to define the crime of “Piracy” along with “Offences against the Law of Nations.”⁷⁵ Finally, the Military Regulation Clause authorizes Congress to establish a separate criminal justice system, including a distinct military penal code, for the armed forces.⁷⁶ These clauses expressly authorize Congress to define offenses, thereby relying on the political process to establish punishments for crimes other than treason.⁷⁷

72. See CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 52 (2014); MALCOLM GASKILL, CRIME AND MENTALITIES IN EARLY MODERN ENGLAND 125 (2000).

73. U.S. CONST. art. I, § 8, cl. 5 (“[The Congress shall have Power] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .”).

74. U.S. CONST. art. I, § 8, cl. 6 (“[The Congress shall have Power] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .”).

75. U.S. CONST. art. I, § 8, cl. 10 (“[The Congress shall have Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .”). “Piracy” is essentially robbery and murder on the high seas. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157–62 (1820).

76. U.S. CONST. art. I, § 8, cl. 14 (“[The Congress shall have Power] To make Rules for the Government and Regulation of the land and naval Forces . . .”); see also 10 U.S.C. §§ 801–946 (2018).

77. Other clauses implicitly authorize Congress to define crimes. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–15 (Ox Bow Press 1985) (1969) (arguing that Congress has the inherent authority to protect the federal interests embodied in the substantive guarantees of federal law-making power in Article I, Section 8). The Commerce Clause power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” carries with it the power to punish criminally anyone who violates those restrictions. U.S. CONST. art. I, § 8, cl. 3. A classic example is the Sherman Act, which makes illegal conspiracies to fix prices and output in interstate commerce. See 15 U.S.C. § 1 (2012). The Excise Tax Clause enables Congress to raise revenue via “Taxes, Duties, Imposts and Excises,” U.S. CONST. art. I, § 8, cl. 1, and Congress has made smuggling a federal offense, 18 U.S.C. § 545 (2012). Finally, the Seat of Government Clause permits the federal government to use land ceded by Virginia and Maryland as the nation’s capital. U.S. CONST. art. I, § 8, cl. 17. Implicitly, then, Congress is authorized to define common law crimes and otherwise use criminal law to exercise police powers over the federal district. See, e.g., 18 U.S.C. § 7(3) (2012); D.C. CODE §§ 22-101 to -5215 (2013 & Supp. 2019). Even if the powers enumerated in the clauses of Article I, Section 8, did not, on their own, implicitly leave it to Congress to decide whether and how to use the criminal law as an en-

The constitutional text also creates certain express defenses to crimes. Consider the Bill of Attainder and Ex Post Facto Clause.⁷⁸ The first half bars a legislature from enacting a law that names and convicts someone of a crime without a trial.⁷⁹ The second half forbids a legislature from retroactively applying a statute defining a new crime or enhancing the penalty for an old one.⁸⁰ The First Amendment also takes away from Congress the authority to “make . . . [any] law” trespassing on certain civil liberties, which naturally includes any law making it a crime to engage in the conduct that the provision safeguards.⁸¹ Defendants in both federal and state criminal cases may defend against a charged federal offense on the ground that the statute violates the First Amendment.⁸²

The clauses discussed above have this in common: they all address aspects of substantive criminal law. One defines a crime in the text of the Constitution. Some describe the type of conduct that the government should outlaw. Others place certain primary conduct entirely out of bounds. The Due Process Clause does none of those things. Instead, as we will explain in the next Section, it ensures that no one can be criminally punished unless he has committed a criminal offense defined by a different positive law and then only in compliance with whatever procedural restraints the law elsewhere requires.

forcement tool, the Article I Necessary and Proper Clause would serve that function. *See* U.S. CONST. art. I, § 8, cl. 18.

78. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . . [or] ex post facto Law . . .”).

79. *See, e.g.*, *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 468–84 (1977); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323–25 (1866); 2 WILLIAM BLACKSTONE, COMMENTARIES *388. Common law bills of attainder ordinarily imposed the death penalty. *See Nixon*, 433 U.S. at 473–74. When such laws fixed lesser punishments, they were known as bills of pains and penalties. *Id.* The Bill of Attainder prohibition forbids laws that impose those sanctions too. *See id.*; *United States v. Brown*, 381 U.S. 437, 441–77 (1965); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

80. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 41–44 (1990); *Weaver v. Graham*, 450 U.S. 24, 28–31 (1981).

81. U.S. CONST. amend. I.

82. *See, e.g.*, *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989). A defendant can also argue that the statute underlying the charge exceeds Congress’s powers under the Constitution, *see, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995), or violates principles of federalism, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 225–26 (2011).

B. *The History of the Due Process Clause*

Justice Holmes once remarked that “a page of history is worth a volume of logic.”⁸³ His aphorism is particularly germane when the subject has deep roots in Anglo-American legal history, like the Due Process Clause.

The phrase “due process of law” comes from a fourteenth century act of Parliament, stating that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”⁸⁴ That provision, in turn, traces its lineage to Chapter 39 of Magna Carta of 1215, a document that rivals our own Constitution in the protections it affords against arbitrary government conduct.⁸⁵

Magna Carta was born as a peace treaty during a time of great political tumult. Angry because of King John’s military failures in expensive overseas wars, never-ending political intrigue, arbitrary exercise of royal power, and repeated personal cruelties, the English barons renounced their feudal obligations

83. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

84. Liberty of Subject Act 1354, 28 Edw. 3 ch. 3; see also A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (rev. ed. 1998) (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911). The English Petition of Right of 1628 reaffirmed the 1354 act and again used the term “due process of law,” instead of “the law of the land.” LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 4 (1999).

85. For a concise discussion of the provenance, meaning, and effect of Magna Carta, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–25 (Liberty Fund 2012) (5th ed. 1956). For in-depth discussions, see DAVID CARPENTER, *MAGNA CARTA* (2015); DANNY DANZIGER & JOHN GILLINGHAM, *1215: THE YEAR OF MAGNA CARTA* (2003); J.C. HOLT, *MAGNA CARTA* (George Garnett & John Hudson eds., 3d ed. 2015); HOWARD, *supra* note 84; A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914); JAMES K. WHEATON, *THE HISTORY OF THE MAGNA CARTA: A BRIEF HISTORY WITH THE ORIGINAL MAGNA CARTA* (2011); R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999); Larkin, *supra* note 3, at 333–39; C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914); Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365 (1891).

to the crown and gathered their forces in rebellion.⁸⁶ King John acceded to the barons' demands in 1215 "in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign."⁸⁷

The most relevant provision in Magna Carta is Chapter 39.⁸⁸ Chapter 39 is perhaps the closest an English law has ever come to being tantamount to a written constitution.⁸⁹ Chapter 39 provided that "[n]o free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land."⁹⁰ Coke construed "the law of the land" to refer to "the Common Law, Statute Law, or Custome of England."⁹¹ Over time, the phrase "law of the land" became "due process of law," but that revision "did not alter its meaning, effect, or significance."⁹² As Professors Nathan Chapman and Michael McConnell have written, "Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of

86. See CARPENTER, *supra* note 85, at 70 ("The financial burdens placed on England to defend and recover the continental empire were the single most important cause of Magna Carta. Had John been content with ruling England and dominating Britain and Ireland, there would have been no Charter."); PLUCKNETT, *supra* note 85, at 22–25; THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY: FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 82 (Philip A. Ashworth ed., 7th ed. 1911) ("In disposition and character John was an oriental despot, a tyrant of the worst sort. . . . [He] was guilty of acts of cruelty rivaling those of Nero.").

87. CARPENTER, *supra* note 85, at 69 (quoting signature section of Magna Carta) (internal quotation marks omitted); see *id.* at 117–18, 315–23; Larkin, *supra* note 3, at 333–34.

88. See HOWARD, *supra* note 84, at 14.

89. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 173 (2d ed. reprinted 1911).

90. HOLT, *supra* note 85, at 389 (quoting MAGNA CARTA ch. 39 (1215)) (internal quotation marks omitted).

91. Ellis Sandoz, *Introduction* to THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 25 (Ellis Sandoz ed., 1993). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. See 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, E. & R. Brooke 1797) (1642).

92. Larkin, *supra* note 3, at 338.

Parliament.”⁹³ The first Congress proposed adding the Fifth Amendment Due Process Clause to the Constitution, and the state ratifying conventions agreed.⁹⁴

The provenance of the Due Process Clause reveals a concern with preventing the arbitrary deprivation of someone’s life, liberty, or property by a government official acting in a wanton, lawless fashion.⁹⁵ The thrust of that history is that the purpose of the Due Process Clause is to limit the government’s ability to act oppressively by forcing it to prove whatever elements the substantive rules of criminal liability demand. It does not also suggest that courts may add to the government’s burden by adopting additional elements in derogation of whatever law Parliament, Congress, or a state legislature deems sufficient.

To be sure, English and American courts have created, shaped, and reshaped defenses to crimes as part of their perceived judicial authority to carry forward the common law and to fashion that law as reason dictates.⁹⁶ There is, however, substantial reason to doubt that federal courts may use the Due Process Clause to accomplish that result. The history of the clause offers no warrant for doing so, and, as explained in the

93. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

94. James Madison was principally responsible for the wording of the Fifth Amendment. Why he chose the phrase “due process of law,” not “the law of the land,” no one precisely knows. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 445–46 (2010). Some scholars have speculated that he used the former to avoid implying that, given the text of the Article VI Supremacy Clause, the term “the law of the land” could permit Congress to escape being subject to the clause because federal legislation would be deemed “the supreme Law of the Land.” See Chapman & McConnell, *supra* note 93, at 1723–24. That explanation is a sensible one, but whatever its persuasiveness might be, it does not matter. The Supreme Court has consistently interpreted “due process of law” to mean the same as “law of the land.” See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Hovey v. Elliott*, 167 U.S. 409, 415–17 (1897); *Hurtado v. California*, 110 U.S. 516, 543 (1884) (Harlan, J., dissenting); *Davidson v. New Orleans*, 96 U.S. 97, 101 (1878); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

95. See *Daniels*, 474 U.S. at 331 (noting that the Framers adopted the Due Process Clause to “secure the individual from the arbitrary exercise of the powers of government” (quoting *Hurtado*, 110 U.S. at 527) (internal quotation marks omitted)); see also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889))).

96. See, e.g., *United States v. Bailey*, 444 U.S. 394, 409–11 (1980) (construing the duress defense).

next Section, the Supreme Court to date has repeatedly refused to use that clause as a basis for creating a constitutionally based doctrine defining criminal responsibility.

C. *The Supreme Court's Interpretation
of the Due Process Clause*

This Section addresses the Supreme Court's interpretation of the Due Process Clause. The first Subsection focuses on the Court's treatment of the use of scienter or mens rea elements to avoid the conviction of morally blameless parties. As explained below, the Court has been willing to read federal statutes to require proof of intentional wrongdoing when the text of a federal offense allows that interpretation. At the same time, the Court has refused to construe the Due Process Clause to demand that legislatures always incorporate some mens rea element into every criminal law. Rather than "constitutionalize" a law of moral responsibility, the Court has gone out of its way to make it clear that legislatures bear the burden of making that judgment.

The second Subsection explains that Kahler's claim rests on substantive due process principles. Kahler does not cite the principal Supreme Court decisions in that area of the law, but his argument challenges the substantive definition of criminal responsibility in Kansas's law, not the adequacy or fairness of the trial procedures that Kansas has adopted to adjudicate that issue. He therefore cannot avoid relying on substantive due process case law as the basis on which his claim must rest.

1. *The Supreme Court and Mens Rea*

In his appeal, Kahler argues that an insanity defense is critical to any fundamentally fair definition of criminal liability.⁹⁷ To prove that point, he scours the common law and collects numerous statements by luminaries such as William Blackstone, Supreme Court Justices Story and Robert Jackson, Professor Francis Bowes Sayre, and others from which he maintains that the ability to know what the law prohibits and to distinguish "good" from "evil" or "right" from "wrong" is essential to the moral legitimacy of the criminal law.⁹⁸ As shown by that evi-

97. Brief for Petitioner at 16–17, *Kahler v. Kansas*, No. 18–6135 (U.S. May 31, 2019).

98. *Id.* at 16–29.

dence, he argues that Anglo-American legal history demands “some mechanism to excuse a defendant who, because of mental disease or defect, is not morally culpable.”⁹⁹ The insanity defense, he submits, is the only historically proven guarantee for that task.¹⁰⁰ By adopting section 22-3220, Kansas has eliminated that protection, rendering the judgment entered against him unconstitutional.¹⁰¹

Kahler is correct, in part. Tort law often uses liability without fault as a means of guaranteeing compensation to injured parties and forcing employers (and others) to maximize their safety efforts.¹⁰² The criminal law, on the other hand has traditionally limited criminal responsibility to people who are morally blameworthy, acquitting the blameless even when they cause harm. Oliver Wendell Holmes’s aphorism that “even a dog distinguishes between being stumbled over and being kicked” makes the point in a homely manner.¹⁰³ The law achieves that result by requiring that the prosecution establish that a person committed a forbidden act with a “guilty mind” or an “evil intent.” “*Actus non facit reum nisi mens sit rea*”¹⁰⁴—or, said differently, a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will.”¹⁰⁵ By defining crimes to require the prosecution to prove that a party had a mental state indicative of blameworthiness, contemporary criminal law car-

99. *Id.* at 16.

100. *Id.* at 16–29.

101. *Id.* at 28–29.

102. See, e.g., *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 196, 208 (1917) (upholding a no-fault state workers’ compensation law); *Second Emp’rs’ Liab. Cases*, 223 U.S. 1, 49–51 (1912) (upholding congressional repeal of the fellow-servant rule); *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 294–96 (1908) (upholding a railroad safety requirement).

103. HOLMES, *supra* note 12, at 7.

104. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). In English, the maxim means that an act does not make one guilty unless the mind is guilty.

105. 4 WILLIAM BLACKSTONE, COMMENTARIES *21; see also, e.g., *Dixon v. United States*, 548 U.S. 1, 6–7 (2006); *United States v. Bailey*, 444 U.S. 394, 402 (1980); Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW*, at xxxvi–xxxvii (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

ries forward the principle that there is a difference between being ignorant, careless, or clumsy and being evil.¹⁰⁶

But the Due Process Clause does not *require* this result. For more than a century, the Supreme Court has consistently held that Congress and state legislatures may, if they so choose, dispense with proof of any mens rea element by adopting so-called “strict liability” or “public welfare” offenses.¹⁰⁷ In a series

106. The common law courts were able to ensure that some form of evil intent was an element of every crime because they had the authority to create offenses and define their elements. Today, there are no federal common law offenses; every one is a creature of statute. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33–34 (1812); see also, e.g., *Dixon*, 548 U.S. at 7 (“[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)) (internal quotation marks omitted)). Nonetheless, because careless drafting can give rise to uncertainty whether and how a statute requires proof of scienter, the Supreme Court uses a presumption that “Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); see also, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (construing an identity theft statute to require proof that the defendant knew that the identifying information belonged to another person); *X-Citement Video*, 513 U.S. at 78 (construing a federal child pornography statute to require proof that the defendant knew that the actor was a minor); *Staples v. United States*, 511 U.S. 600, 603–04, 619 (1994) (construing a federal law regulating firearms to require proof that the defendant knew that the weapon was capable of automatic fire); *Liparota*, 471 U.S. at 433 (construing the federal food stamp laws to require proof that the defendant knew that his possession was not authorized by law); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435–36 (1978) (construing section 1 of the Sherman Act as requiring proof of knowledge); *Morissette v. United States*, 342 U.S. 246, 265–73 (1952) (construing theft statute to require proof that the defendant knew the property belonged to the federal government). The presumption helps ensure that only morally blameworthy parties are subject to conviction. The optimal way to satisfy that requirement, of course, is to force the prosecution to prove that a defendant knew he committed a crime—that is, to prove that he acted “willfully” by voluntarily and intentionally violating a known legal duty. The Supreme Court has consistently read the term “willful” in that manner. See, e.g., *Bryan v. United States*, 524 U.S. 184, 192 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). As a general matter, however, statutes requiring proof of willfulness are a rarity in federal and state penal codes. Ordinarily, the prosecution need prove only that a defendant acted “knowingly” or “intentionally.” For most crimes, proof of either element is sufficient to avoid convicting a morally blameless party.

107. See, e.g., Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595–96 (1958); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 63–67 (1933).

of cases decided between 1910 and 1975—*Shevlin-Carpenter Co. v. Minnesota*,¹⁰⁸ *United States v. Balint*,¹⁰⁹ *United States v. Dotterweich*,¹¹⁰ *United States v. Freed*,¹¹¹ *United States v. International Minerals & Chemical Corp.*,¹¹² and *United States v. Park*¹¹³—the Court rejected due process challenges to the constitutionality of various federal and state laws creating strict liability crimes.¹¹⁴ In each case, the relevant statute made it a crime to commit the actus reus elements of an offense without regard for the defendant's state of mind. In each case, the defendant argued that the statute violated the Due Process Clause because it did not require the government to prove that the defendant acted with a "guilty mind," however defined. And in each case, the Supreme Court rejected that argument and declined to impose a mens rea requirement on the criminal law under the federal constitution.¹¹⁵ In fact, despite the impressive pedigree that the mens rea doctrine had at common law and in the Supreme Court's twentieth century case law,¹¹⁶ the Court's opinions in its strict

108. 218 U.S. 57, 68–70 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent).

109. 258 U.S. 250, 254 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp even absent proof that he knew that the substance was a narcotic); *see also* *United States v. Behrman*, 258 U.S. 280, 288 (1922) (companion case to *Balint*, holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" even without proof that he knew that his actions exceeded that limit).

110. 320 U.S. 277, 278, 284–85 (1943) (holding that a company president can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction).

111. 401 U.S. 601, 609 (1971) (holding that a defendant can be convicted of the unlicensed possession of hand grenades).

112. 402 U.S. 558, 563–65 (1971) (holding that a defendant can be convicted of the unlicensed interstate transportation of sulfuric acid).

113. 421 U.S. 658, 660, 672–73 (1975) (holding that a company president can be convicted of violating the Federal Food, Drug, and Cosmetic Act without proof that he was aware of unsanitary conditions in a food warehouse).

114. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 429–36, 431–35 nn.70–79 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 111–19.

115. As explained below, the Supreme Court has also refused to use the Eighth Amendment Cruel and Unusual Punishments Clause to create a constitutional mens rea defense. *See* *Powell v. Texas*, 392 U.S. 514, 535–37 (1968); *infra* Part III.C.2.

116. *See, e.g.,* *Morrisette v. United States*, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some

liability decisions from *Shevlin-Carpenter Co.* to *Park* gave surprisingly short shrift to the defendants' due process claims.¹¹⁷

The strict liability doctrine certainly is, and has always been, a controversial one. Scholars who could fill out a Criminal Law Hall of Fame lineup—such as Professors Lon Fuller, H.L.A. Hart, Sanford Kadish, Herbert Packer, and Herbert Wechsler—have consistently denounced strict criminal liability on a variety of grounds.¹¹⁸ The common denominator to their criticisms is that strict liability offenses turn morally blameless parties into

mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized." (footnotes omitted).

117. See, e.g., *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 66 (1910).

118. See, e.g., MODEL PENAL CODE § 2.05 cmt. 1 (AM. LAW INST., Tentative Draft No. 4, 1955); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 71 (2009) ("We are not morally culpable for taking risks of which we are unaware."); ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 178–84 (2009); LON L. FULLER, THE MORALITY OF LAW 77 (1964) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. HART, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (2d ed. 2008) ("[S]trict liability is odious . . ."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 130–31 (1968); Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 742–48 (1981); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Joel Feinberg, *The Expressive Function of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 25 (Gertrude Ezorsky ed., 1977); Hart, *supra* note 114, at 422–25; Hughes, *supra* note 107, at 602–03; Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267–68 (1987); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, in APPRAISING STRICT LIABILITY 180, 182, 191 (A.P. Simester ed., 2005); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Sayre, *supra* note 107, at 56; A.P. Simester, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY, *supra* at 21, 21 (noting broad consensus that strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent"); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952).

criminals.¹¹⁹ In so doing, strict liability flips on its head the criminal law tenet that “it is better that ten guilty persons escape than that one innocent suffer”¹²⁰ because it sacrifices a morally blameless party for the sake of others. Nonetheless, the Supreme Court has showed no sign of abandoning those precedents.¹²¹ Strict criminal liability is likely to be with us for quite some time.¹²²

Indeed, it has not gone unnoticed that the criticisms advanced by those scholars of strict liability offenses bear a strong similarity to the same type of criticisms that Kahler (and others) have leveled against criminal prosecution of the mentally ill. As Professor Kent Greenawalt put it, one challenge to holding the mentally ill responsible for a crime is that “it is objectionable to punish someone for an antisocial act performed by him but over which he has no real control.”¹²³ Yet, if that is true, he noted, “it is also objectionable to punish someone who supposes, after exercising all possible care, that the act he performs is socially beneficial and permitted by law, even though he turns out to be mis-

119. See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1079–80 (2014).

120. *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 BLACKSTONE, *supra* note 79, at *358) (internal quotation marks omitted); see also, e.g., Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

121. Despite substantial support for substantive federal criminal law reform, see John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 254–57 (2016), Congress has also given no indication that it will repeal, or even modify, those laws for fear (to some) that doing so would jeopardize “progressive” reforms. Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017) (noting opposition to reform of the federal criminal laws to eliminate strict liability on the ground that any mens rea reform “could undermine public safety and harm progressive goals”).

122. See Larkin, *supra* note 119, at 1078–79 (“The result is this: Regulatory criminal laws have become a settled feature of modern-day statutory codes, and they often impose criminal liability for a host of actions that historically would have been considered only civil infractions. Rather than use the administrative state to sanction regulatory violations only through penalties such as fines, debarment, or license revocation, legislatures have conscripted the criminal justice system—police officers, prosecutors, judges, and jailers—to regulate business by punishing as crimes a broad range of conduct not considered inherently evil, dangerous, or blameworthy. Strict liability, although a relatively recent addition, is no longer a complete oddity in the criminal law. It is just another tool in the toolkit. The result is that we have reached the point where it can be difficult to distinguish the substantive criminal law from tort law save for one distinguishing feature of the former: Only the criminal law is used to incarcerate offenders.”).

123. Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 963 (1969).

taken."¹²⁴ Perhaps, that should be the law, as he and others have argued,¹²⁵ but, as he and others have recognized, it is not. The Supreme Court has reiterated for more than a century that a mistake of law is no defense to a federal crime.¹²⁶ Given the pedigree and number of Supreme Court decisions rejecting a mistake of law defense as a basis for exculpating someone for a nonviolent regulatory crime, it is not likely that the Supreme Court will overrule that line of authority any time soon. And if that is true, it is difficult to see why the Due Process Clause would be thought to contain a mens rea element that would exculpate someone, such as Kahler, on the ground that he did not know that murder is wrongful.¹²⁷

124. *Id.*

125. Federal criminal law conclusively presumes that everyone knows the law. That ancient rule made sense at common law, when there were few felonies and they mirrored the crimes listed in the Decalogue. Today, there are thousands of federal statutes creating criminal offenses and hundreds of thousands of pertinent federal regulations. Under those circumstances, to refuse to reexamine the common law rule that everyone knows the criminal law is a crime all by itself. *See, e.g.,* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335 (2018); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 777–81 (2013); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).

126. *See, e.g.,* Rehaif v. United States, 139 S. Ct. 2191, 2198 (2019); Shaw v. United States, 137 S. Ct. 462, 467–68 (2016); McFadden v. United States, 135 S. Ct. 2298, 2304 (2015) (“ignorance of the law is typically no defense to criminal prosecution”); Heien v. North Carolina, 574 U.S. 54, 67 (2014); Bryan v. United States, 524 U.S. 184, 193 (1998); Ratzlaf v. United States, 510 U.S. 135, 137 (1994); Cheek v. United States, 498 U.S. 192, 199 (1991); Hamling v. United States, 418 U.S. 87, 119–24 (1974); United States v. Int’l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); Lambert v. California, 355 U.S. 225, 228 (1957); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Armour Packing Co. v. United States, 209 U.S. 56, 85 (1908); Reynolds v. United States, 98 U.S. 145, 167 (1878) (“Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.”); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) (“It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”); The Joseph, 12 U.S. (8 Cranch) 451 (1814); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939). The only exception is where a federal statute requires that a crime be committed “willfully.” *See, e.g.,* Ratzlaf, 510 U.S. at 137; Cheek, 498 U.S. at 200.

127. Professor Greenawalt’s argument undermines Kahler’s submission in another way. In the professor’s opinion, “[c]ertain forms of strict liability can be defended as consistent with the principle that an actor should be punished only if morally blameworthy.” Greenawalt, *supra* note 123, at 964–65. As an example, he offers the following hypothetical: someone convicted of murder “because death,

2. Procedural Versus Substantive Due Process

Only a modern day Rip Van Winkle would be unaware of the ongoing debate whether the Due Process Clause merely imposes procedural restraints on executive and judicial action or also limits a legislature's substantive lawmaking power.¹²⁸ The contemporary dispute began no later than the Supreme Court's 1965 decision in *Griswold v. Connecticut*,¹²⁹ which held unconstitutional a state law ban on the use of contraceptive drugs or devices by married couples.¹³⁰ The debate has continued apace to the present. Ordinarily, the debate focuses on the legitimacy of the Supreme Court's later decisions in *Roe v. Wade*¹³¹ and *Obergefell v. Hodges*,¹³² cases in which the Court held that the clause imposes a substantive limitation on legislation affecting the areas of "marriage, family, procreation, and the right to bodily integrity."¹³³ Kahler does not expressly ask the Court to rule in his favor on substantive due process grounds, and he does not cite the *Roe* or *Obergefell* decisions as authority to limit Kansas's criminal lawmaking power.¹³⁴ Nevertheless, because of the nature of Kahler's claim as a challenge to the substantive content of Kansas criminal law, there is no

despite his precautions, occurs as a consequence of his felony." That person, he writes, "has committed an illegal and blameworthy act," so "[h]is only real complaint is that his penalty is disproportionate to his blameworthiness." *Id.* at 965. Kahler cannot make that argument because he hardly took "precautions" to prevent his four victims from dying. On the contrary, he intentionally killed each one.

128. See, e.g., Chapman & McConnell, *supra* note 93, at 1676 nn.5–6 (collecting authorities); Larkin, *supra* note 3, at 298–300 (same). For a description of this "Tastes Great!—Less Filling!" contest between the two theories, see Larkin, *supra* note 3, at 297–99.

129. 381 U.S. 479 (1965).

130. *Id.* at 485.

131. 410 U.S. 113 (1973).

132. 135 S. Ct. 2584 (2015).

133. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992)).

134. Kahler does, however, cite the Supreme Court's plurality opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1972), see Brief for Petitioner, *supra* note 97, at 16, which is also a substantive due process decision, see *Moore*, 431 U.S. at 502–03. Perhaps he did not see the irony between the ruling in *Moore* that the government cannot forbid a grandmother from living with her children and grandchildren, *id.* at 506, and the use he tried to make of it as support for the argument that someone who murdered a grandmother, her daughter, and two of her grandchildren should be able to escape criminal responsibility.

realistic way that he and the Justices can avoid considering the Court's substantive due process case law.

Kahler does not argue that Kansas law made it unduly difficult for him to prove that he did not know the difference between right and wrong. Nor does he contend that the Kansas legislature has biased the trial process against someone like him who seeks to assert that claim. Either of those contentions would sound in procedural due process because their rationale would be that the state has unfairly engineered the conviction of an innocent person. That, however, is not the gravamen of Kahler's argument. Instead, he argues that Kansas's substantive criminal law does not allow him to show that he is morally blameless *at all* because it redefined moral responsibility to focus exclusively on the issue whether he premeditated on the intent to kill his victims.¹³⁵ In so doing, he says, Kansas denied him *any* opportunity to prove that he is morally blameless for murder by virtue of a mental illness that kept him from knowing that murder is *wrongful*.¹³⁶ *This*, he submits, Kansas cannot do—and that is an argument sounding in substantive due process.

Like any argument that rests so heavily on history, Kahler's submission presents a host of familiar interpretive problems that have no obvious nonarbitrary solutions.¹³⁷ How many jurisdictions with a particular practice make a consensus, how long a consensus must stand to become a well-settled tradition, and at what point a tradition is so entrenched that different approaches no longer pass muster, to list a few examples, are questions that defy easy answers. Should other states find the new Kansas approach preferable to their own, there would also be no easy answer for deciding how many states, in what period of time, would be enough to turn the Jayhawk State from an outlier to a trendsetter. Finally, as Professor John Hart Ely has noted, there is more than one past example of community conduct that we now would find unacceptable, even toward its

135. See Brief for Petitioner, *supra* note 97, at 12–13.

136. See *id.*

137. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 60–63 (1980) (explaining why tradition-based solutions do not supply a decisionmaker with an objective means of limiting the reach of substantive due process).

most disfavored members.¹³⁸ Clearly enough, expanse over time and space cannot make a practice into a hallowed constitutional rule, but the distinction between “good” traditions to be constitutionalized and “bad” ones to be abandoned can be elusive. Without answers to these questions, however, we cannot be certain we know what we need to know to create a constitutional right based on history and tradition.

The Supreme Court’s decisions in *Roe* and *Obergefell* involved issues regarding “marriage, family, procreation, and the right to bodily integrity.”¹³⁹ *Kahler v. Kansas* involves murder. Extending the substantive due process doctrine to embrace cases like *Kahler v. Kansas* would be transformative. As explained above (and below), the Supreme Court has refused to use either the Due Process or Cruel and Unusual Punishments Clause as a vehicle for constitutionalizing the criminal law. In fact, less than two decades ago the Court relied on the diverse approaches that Anglo-American law has adopted to the problem of defining criminal responsibility in refusing to specify a particular type of insanity test.¹⁴⁰

The Supreme Court’s 1991 decision in *Chapman v. United States*¹⁴¹ is instructive in this regard. Three defendants were convicted of selling ten sheets (containing 1,000 doses) of blotter paper containing lysergic acid diethylamide, a controlled substance colloquially known as LSD, in violation of the federal controlled substances laws.¹⁴² Under those laws, the length of a defendant’s sentence rests on the weight of the “mixture or substance” containing a detectable amount of a controlled substance.¹⁴³ The defendants argued that, because the weight of the LSD was miniscule compared to the weight of the LSD-laced blotter paper (50 milligrams versus 5.7 grams), the relevant statute should not be read to require counting the weight of the blotter paper or any other transport medium (such as orange

138. *Id.* at 60 (“Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights.” (quoting GARRY WILLIS, *INVENTING AMERICA*, at xiii (1978) (internal quotation marks omitted))).

139. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992)).

140. *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (quoted *infra* at text accompanying note 182).

141. 500 U.S. 453 (1991).

142. *Id.* at 455.

143. *See* 21 U.S.C. § 841(b)(1)(B)(v) (2012).

juice) when calculating their sentences.¹⁴⁴ Counting the weight of an inactive substance, they also argued, was so arbitrary as to violate the Due Process Clause.¹⁴⁵

The Supreme Court rejected those arguments. LSD-infused blotter paper, the Court concluded, was a “mixture” under the controlled substances laws because the LSD and paper were “commingled” or “blended together.”¹⁴⁶ That reading of federal law, the Court also ruled, did not render the controlled substances laws unconstitutionally arbitrary.¹⁴⁷ The defendants had asserted that, because “the right to be free from deprivations of liberty as a result of arbitrary sentences is fundamental,” the federal controlled substances laws could be upheld as applied to LSD “only if the Government has a compelling interest in the classification in question.”¹⁴⁸ The Court quite emphatically rejected both the premise and conclusion of that argument: “we have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now.”¹⁴⁹ The Due Process Clause, the Court explained, regulates *how* the prosecution must prove the essential predicates for punishment, not *what* elements Congress must legislate to define a crime.¹⁵⁰ “Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”¹⁵¹ Once the prosecution satisfies that burden, the Court concluded, the government may impose whatever penalty is authorized by law so long as it does not violate either the Eighth Amendment Cruel and Unusual Punishments Clause or the equal protection principles implicit in the Fifth Amendment Due Process Clause.¹⁵²

144. *Chapman*, 500 U.S. at 456.

145. *Id.* at 464–65.

146. *Id.* at 461–62.

147. *Id.* at 464–65.

148. *Id.*

149. *Id.* at 465.

150. *See id.*

151. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16, 536 (1979)).

152. *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 92 n.8 (1986); *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983); *Meachum v. Fano*, 427 U.S. 215, 224 (1976)); *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Kahler's argument boils down to the proposition that this case is like *Obergefell*. The two cases, however, are materially different. There is no remote similarity between the conduct involved in *Obergefell* (same-sex marriage) and in *Kahler* (murder), so the Court's analysis in *Chapman* should apply here as well. In *Chapman*, the Court was unwilling to import into criminal law the same type of "fundamental right" and interest balancing that it has used in cases like *Obergefell*. Instead, the Court concluded that the Due Process Clause simply seeks to ensure that a defendant receives whatever other procedural guarantees the Constitution elsewhere requires at his trial. The *Chapman* case teaches that substantive due process is inapposite when the underlying conduct does not independently qualify for constitutional protection. *Chapman*, accordingly, is fatal to Kahler's claim.

D. *The Rationality of Kansas's Approach
to Criminal Responsibility*

Kahler argues that the Kansas statute is unconstitutional because it irrationally dispenses with an insanity defense, thereby preventing him from showing he did not know that murder was wrongful.¹⁵³ Kansas has a legitimate interest in defining criminal responsibility and in shaping an insanity defense so that only offenders so disturbed that they cannot distinguish right from wrong can invoke it. Kahler argues, however, that, by eliminating the insanity defense altogether, Kansas has gone too far. Kahler relies on the admittedly longstanding Anglo-American law practice of fashioning the metes and bounds of an insanity defense to allow a defendant to assert that, because of a severe mental illness, he did not know that his conduct was wrongful.¹⁵⁴ No jurisdiction has ever done what Kansas

153. See Brief for Petitioner, *supra* note 97, at 32–36.

154. A state can rationally limit a defense to individuals who suffer from a profound mental disease or defect, for several reasons, one being the interest in deterring fraudulent or false claims. For all their differences, various tests for insanity share one common feature: they aim to encompass only severe mental illnesses—for good reason. If any form of mental illness could prove exculpatory, an enormous number of defendants might be acquitted. Consider the test of *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954), which exculpated a defendant because his unlawful act was the "product" of a mental disease or defect. *Durham* set off a firestorm of debate on that ground. See Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J.

did with section 22-3220, he maintains, and, largely for that reason, Kansas cannot do so now.

Section 22-3220 does *not* eliminate all consideration of a defendant's mental illness, though. Rather, the law channels a jury's consideration of mental illness into the guilt stage, where the jury must decide whether it raises a reasonable doubt that the accused could have formed the intent defined by a crime.¹⁵⁵ In effect, Kansas's law has substituted a diminished capacity defense for an insanity defense. The Constitution does not require the States to recognize either defense. In fact, the Supreme Court twice expressly refused to create a diminished capacity defense. In *Fisher v. United States*,¹⁵⁶ the Court declined the invitation to create such a defense for use in criminal prosecution in the District of Columbia courts.¹⁵⁷ More recently, the Court again rejected a plea to create a diminished capacity defense, this time in *Clark v. Arizona*.¹⁵⁸ Kansas's choice is essentially the mirror image of the one that Arizona made, and that the Supreme Court upheld, in *Clark*—with one important difference. A state can require the defendant to bear the burden of proof on an

905, 905 n.3 (1961) (collecting the “formidable” literature that had developed in the seven years since *Durham*). The National Institute of Mental Health (NIMH) estimates that “[n]early one in five U.S. adults live with a mental illness.” *Mental Health Information, Statistics, Mental Illness*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [https://perma.cc/LT9R-BRVP] (last visited Oct. 19, 2019). Part of the reason is that the mental health profession has defined a “mental illness” to mean virtually everything from an eating disorder to a violent psychosis, in part to allow federal social welfare programs to fund their treatment. “Anxiety disorders” are the most commonly diagnosed mental illnesses, and NIMH estimates that almost a third of U.S. adults have one sometime in their lives. *Mental Health Information, Statistics, Any Anxiety Disorder*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder.shtml> [https://perma.cc/DDD8-L57D] (last visited Oct. 19, 2019).

155. KAN. STAT. ANN. § 22-3220 (2007) (repealed 2011).

156. 328 U.S. 463 (1946).

157. *Id.* at 470, 476–77. “Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.” *Id.* at 475. Noting that Congress had already divided the offense of murder into separate degrees, the Court said that the matter was one for Congress to resolve. *Id.* at 475–76. “It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends.” *Id.* at 476. That type of “radical departure from common law concepts is more properly a subject for” Congress or the District of Columbia courts. *Id.*

158. 548 U.S. 735, 756–79 (2006).

insanity defense.¹⁵⁹ Kansas, however, has decided to bear the burden of proof on the issue of criminal responsibility by allowing a defendant to use proof of a mental disease to raise a reasonable doubt of his premeditation on an intent to kill. Kansas has therefore done more than just substitute one type of mental illness-based defense for another. The state has assumed the risk of nonpersuasion.

It turns out that Anglo-American legal history is rich with that type of experimentation. During the early years of the common law, the number of crimes was small, and the nature of the criminal law was rudimentary.¹⁶⁰ For instance, the law did not distinguish between murder in the first and second degree or between murder and manslaughter, differences that the criminal law developed over time.¹⁶¹ Nor did the early common law recognize justifications and excuses as defenses to crime.¹⁶² Because all murders were capital crimes,¹⁶³ the royal prerogative of mercy was the only means of "flexibility."¹⁶⁴ People who killed in cold blood ordinarily went to the gallows,¹⁶⁵ but not everyone responsible for homicide was executed. To spare

159. *Id.* at 769 ("[A] jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree." (citing ARIZ. REV. STAT. ANN. § 13-502(C) (2001); *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (ruling that a state can require a defendant to prove insanity beyond a reasonable doubt))).

160. See CHRISTOPHER BROOKE, FROM ALFRED TO HENRY III: 871-1272, at 45 (3d ed. 1969) ("The written laws of Anglo-Saxon kings were not comprehensive codes. The main body of the law was customary and unwritten."); Larkin, *supra* note 3, at 327 ("Early English 'law' reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both 'rough and crude.'" (quoting FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 139-40 (1904))). In the thirteenth century, for instance, there were only a handful of felonies and misdemeanors. See PLUCKNETT, *supra* note 85, at 442-62.

161. See Green, *supra* note 1, at 473-87.

162. See, e.g., GASKILL, *supra* note 72, at 206 ("Although homicide had been punishable at common law since the Norman Conquest, observing different degrees of the offense was a comparatively late development."); *id.* at 206-07; Green, *supra* note 1, at 426-56.

163. *Tison v. Arizona*, 481 U.S. 137, 159 n.2 (1987) (quoting MODEL PENAL CODE § 210.2 cmt. n.74, at 31 (AM. LAW INST. 1980)). By 1800, the number of capital offenses exceeded 200. DAVID BENTLEY, ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY 2, 11 (1998).

164. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 479 (1977).

165. See, e.g., J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 433-34 (1986).

morally blameless parties from execution, kings granted pardons to people who committed accidental, excusable, and justifiable homicides, particularly if they were children.¹⁶⁶ Among the offenders traditionally pardoned were the insane, on the ground that they could not make their peace with God before meeting Him.¹⁶⁷ Over time, the common law courts began to address issues of “madness” in the criminal law themselves. By the late eighteenth century, insanity became a defense for excusing a mentally ill defendant from responsibility.¹⁶⁸

Since then, the issue of how the criminal law should treat a mentally ill defendant has arisen in two very different contexts: mental illness at the time of trial and at the time of the offense. The first context raises the question of whether the accused’s mental illness is sufficiently severe that the government can bring him to trial for a crime, regardless of his mental responsibility at the time of the alleged offense.¹⁶⁹ The Supreme Court

166. See NAOMI D. HURNARD, *THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307*, at vii–viii, 152–53 (1969); Duker, *supra* note 164, at 479 (describing the need to pardon a four-year-old child who “accidentally pushed a younger child into a vessel of hot water” simply by opening a door).

167. See, e.g., Ford v. Wainwright, 477 U.S. 399, 406–08 (1986); Solesbee v. Balkcom, 339 U.S. 9, 17–20 (1950) (Frankfurter, J., dissenting); Bateman’s Case (1685) 11 How. St. Tr. 474, 475 (“[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed”); 4 BLACKSTONE, *supra* note 105, at **24–25; 2 HENRY DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1235); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* *619–20 (Philadelphia, Isaac Riley 1819); COKE, *supra* note 91, at 4, 6; 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 2 (Thomas Leach ed., London, Thomas Whieldon 6th ed. 1787); HURNARD, *supra* note 166, at vii–xiv, 68–170; 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND* 194–218 (1968); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 463–70 (1954); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 382–89 (1962). See generally Paul J. Larkin, Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980) (discussing the issue of whether a mentally ill, condemned prisoner could be executed).

168. See BONNIE ET AL., *supra* note 7, at 8; MORRIS, *supra* note 8, at 54–55; Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105, 110–15 (1924).

169. In a different context, the Court has ruled that the Eighth Amendment Cruel and Unusual Punishment Clause prohibits the execution, but not the imprisonment, of a condemned prisoner, who, because of a mental disease or defect, cannot understand that he will be executed and why. See, e.g., Madison v. Alabama, 139 S. Ct. 718, 720 (2019) (ruling that an offender’s inability to remember the events underlying his crime do not justify forestalling his execution, but his dementia might); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (ruling that a

has concluded that the Due Process Clause prohibits a mentally ill offender from standing trial or pleading guilty unless he has “a rational as well as factual understanding of the proceedings against him” and “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”¹⁷⁰

By contrast, when the issue is the responsibility of a mentally ill offender for a crime, there has been anything but uniformity. English and American courts have created an assortment of different tests to distinguish a “bad” from a “mad” offender.¹⁷¹ Among them were the “total defect of understanding” test,¹⁷² the “wild beast” test,¹⁷³ the “right and wrong” test,¹⁷⁴ the M’Naghten test,¹⁷⁵ the “irresistible impulse” test,¹⁷⁶ the “product of mental illness” test,¹⁷⁷ and the American Law Institute test.¹⁷⁸ Some states¹⁷⁹ have chosen a different approach by au-

mentally ill and condemned prisoner cannot be executed if he is incapable of understanding that he will be executed).

170. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotation marks omitted); *see also Godinez v. Moran*, 509 U.S. 389, 391 (1993) (ruling that the standard of competency to plead guilty or waive representation by counsel is the same as the standard for competency to stand trial); *cf. Indiana v. Edwards*, 554 U.S. 164, 167 (2008) (ruling that a state may deny a mentally ill defendant the right to represent himself at trial if the defendant is not competent to defend himself, even if he is sufficiently competent to be tried).

171. *See Clark v. Arizona*, 548 U.S. 735, 749–52 (2006); *BONNIE ET AL.*, *supra* note 7, at 8–21 (describing the various insanity tests).

172. *See* 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 14–15 (George Wilson & Thomas Dogherty eds., London, E. Rider new ed. 1800) (1736).

173. *See Arnold’s Case* (1724) 16 How. St. Tr. 695, 764–65.

174. *See* Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966).

175. *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL) (ruling that a defendant pleading insanity must prove that, at the time of the act, he suffered from a mental disease or defect of reason so as not to know the nature of the act or, if he did know it, that it was wrong).

176. *See, e.g., Parsons v. State*, 2 So. 854, 863 (Ala. 1887); *State v. Thompson*, Wright 617, 622 (Ohio 1834); *Regina v. Burton* (1863) 176 Eng. Rep. 354, 357; 3 F. & F. 772, 780; *Regina v. Oxford* (1840) 173 Eng. Rep. 941, 950; 9 Car. & P. 525, 546 (“If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible.”); *Hadfield’s Case* (1800) 27 How. St. Tr. 1281 (KB) 1314–15, 1354–55.

177. *See, e.g., Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954); *State v. Jones*, 50 N.H. 369, 369–70 (1871); *State v. Pike*, 49 N.H. 399, 402 (1870); John Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 369–70 (1960).

178. *See* MODEL PENAL CODE § 4.01 (AM. LAW INST. 1962) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental

thorizing a jury to return a verdict of “guilty but mentally ill.”¹⁸⁰ Other states have abandoned the insanity defense but, like Kansas, allow evidence of a mental illness to defeat a mens rea element of a crime.¹⁸¹ As the Supreme Court summarized in *Clark v. Arizona*:

With this varied background, 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

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 law.”).

179. Most of the Supreme Court’s decisions involving the insanity defense arose from federal criminal prosecutions. *See, e.g., Jones v. United States*, 463 U.S. 354, 370 (1983) (ruling that the government may confine a defendant who proves that he was insane until the defendant proves that he is no longer mentally ill or a danger to himself or others, even if that period lasts longer than the confinement authorized for conviction of the offense); *Lynch v. Overholser*, 369 U.S. 705, 719 (1962) (ruling that a mentally competent defendant can refuse to interpose an insanity defense); *Fisher v. United States*, 328 U.S. 463, 464–77 (1946) (rejecting the argument that a defendant should be free to use evidence of mental disease short of insanity to disprove the elements of premeditation and deliberation necessary to establish murder); *Davis v. United States*, 160 U.S. 469, 484–93 (1895) (discussing the common law rule that a defendant must be acquitted if there is a reasonable doubt of his sanity). A few, however, involved federal constitutional challenges to the substance of, or procedure for invoking, state-law insanity defenses. *See, e.g., Clark v. Arizona*, 548 U.S. 735, 747–49 (2006) (rejecting arguments that a state must include an inability to comply with the law in an insanity defense and that the state must allow a defendant to use evidence of insanity to disprove an element of the offense); *Rivera v. Delaware*, 429 U.S. 877, 877 (1976) (ruling that the state may place the burden of proof of a preponderance of the evidence on the defendant as to a claim of insanity); *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952) (same, beyond a reasonable doubt; also rejecting the argument that the Due Process Clause requires some form of the “irresistible impulse” test).

180. *See, e.g., Clark*, 548 U.S. at 756–79; *cf. Fisher*, 328 U.S. at 466–67 (refusing to adopt a diminished capacity defendant as a matter of federal common law).

181. *See, e.g., IDAHO CODE* § 18-207 (2016); *KAN. STAT. ANN.* § 21-5209 (Supp. 2018); *MONT. CODE ANN.* §§ 46-14-102, 46-14-311 (2017); *UTAH CODE ANN.* § 76-2-305 (LexisNexis 2017); *Clark*, 548 U.S. at 752 & n.20 (collecting state statutes). In 1964, then-Judge Burger suggested the same approach. *See Warren E. Burger, Psychiatrists, Lawyers, and the Courts*, *FED. PROB.*, June 1964, at 3, 9. Then-Judge Burger argued that “perhaps we should consider abolishing what is called the ‘insanity defense’; the jury would decide within the traditional framework of drawing inferences as to intent from the accused’s conduct only whether he committed the overt acts charged.” *Id.* Under then-Judge Burger’s proposal, “if some mental disorder or illness appears to have precluded the accused from forming a criminal intent, the court alone would deal with that question after a special jury verdict on whether the accused committed the act charged.” *Id.* Thereafter, the judge would then decide the best course balancing protection for society, and protection and rehabilitation for the defendant. *Id.*

offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement.¹⁸²

Foreign nations, including countries such as Canada and Australia that share English legal heritage with the United States, also use different approaches. Canada, for instance, replaced the “not guilty by reason of insanity” verdict with the verdict “not criminally responsible on account of mental disorder.”¹⁸³ And Australia’s nonbinding Model Criminal Code recommends for Australia’s states a test following *M’Naghten*, but also requires that the defendant prove that he was unable to control his behavior.¹⁸⁴ Some Australian states, meanwhile have created a secondary defense applicable only in murder cases called the “diminished responsibility defense.”¹⁸⁵ Among the other former British colonies, too, there is little uniformity.¹⁸⁶ And among nations that do not share a common British legal heritage, the approaches differ even more dramatically.¹⁸⁷ In

182. *Clark*, 548 U.S. at 752.

183. Canada Criminal Code, R.S.C. 1985, c C-46 § 16; RITA J. SIMON & HEATHER AHN-REDDING, *THE INSANITY DEFENSE, THE WORLD OVER* 15–16 (2006). Under that approach, a judge has significant discretion to determine whether a defendant’s mental illness prevented him from appreciating the nature of his act or knowing that it was wrong.

184. SIMON & AHN-REDDING, *supra* note 183, at 221.

185. *Id.* at 221–23. If a defendant convicted of murder successfully proves this defense (by satisfying a relaxed insanity standard), his conviction will be deemed one for manslaughter instead.

186. *See id.* at 233–34.

187. French courts will acquit a defendant whose mental illness “destroyed his discernment or his ability to control his actions,” but will still criminally punish those with diminished discernment or control. *Id.* at 65 (quoting CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-3) (internal quotation marks omitted). The Netherlands uses a guilty but mentally ill verdict that considers the defendant’s degree of culpability when determining an appropriate punishment. *Id.* at 100–02. Some Brazilian states use a verdict similar to “guilty but mentally ill” whereby a mentally ill defendant is convicted but treated. *Id.* at 57–58. Poland considers mental illness when determining a defendant’s culpability, which, in turn, determines the proper punishment. *Id.* at 131. Japan has no specialized law governing mentally ill crimi-

short, when it comes to determining how the criminal law should account for insanity, diversity reigns. Accordingly, even if a longstanding, uniform consensus could establish a due process-based definition of criminal responsibility, there is no such basis here.

That conclusion, however, poses a question: Why do we see uniformity in the case of a standard for determining whether a defendant is competent to stand trial, but variety in the case of the insanity defense? Why has the Supreme Court invoked the Constitution to define the effect of mental illness in the one case but not the other? The reason is twofold. Although medical knowledge is relevant to each problem, the legal response to each problem is fundamentally different from the other. First, the text of the Constitution bears on the issue of competency, but not criminal responsibility. Second, moral (and not only medical) considerations play an important role in deciding criminal responsibility, but not competency.

The Sixth Amendment expressly guarantees every federal defendant a “speedy and public trial,”¹⁸⁸ and the Fourteenth Amendment provides every state defendant with the same right.¹⁸⁹ By the time that the Sixth Amendment had become law, the concept of a “trial” had acquired a meaning that excluded certain practices, including ones previously used to decide guilt or innocence.¹⁹⁰ One forbidden practice was a trial in

nal defendants. *Id.* at 191–92. Nevertheless, it forbids punishment for the “incompetent,” but permits mitigated punishment for those with “diminished competence.” *Id.* at 191. Lastly, Sweden abolished the insanity defense in 1965 and (as of 2006) has never replaced it. *Id.* at 109–10. There, a convicted mentally ill defendant is sentenced to psychiatric incarceration based on the severity of his crime, his age, and his mental state. *Id.* The alternatives summarized here are not exhaustive, but just a few of the many used by different nations. Many countries recognize that the criminal law should treat mentally ill offenders differently, but their approaches differ substantially. They show that the insanity defense as articulated by many United States jurisdictions is but one of many reasonable ways to approach the relationship between mental illness and the criminal law.

188. U.S. CONST. amend. VI.

189. *See* *Klopfer v. North Carolina*, 386 U.S. 213, 223–26 (1967) (ruling that the Fourteenth Amendment Due Process Clause incorporates the Sixth Amendment Speedy Trial Clause).

190. *See, e.g.*, JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 63–66 (2003); PLUCKNETT, *supra* note 85, at 424–41; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123–26 (1983); John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 274–77 (1978). For example, at one time the common law resolved

absentia.¹⁹¹ That principle is relevant here. Trying a defendant who, because of mental illness, does not know what is happening is tantamount to trying him when he is physically absent from the courtroom.¹⁹² Because the courts are responsible for defining the type of “trial” guaranteed by the Constitution, it makes sense to have a uniform rule to determine a defendant’s competency.

The problem of defining the criminal responsibility of the mentally ill raises different considerations. As explained above, there is no term comparable to a “trial” that the Constitution uses to define criminal responsibility.¹⁹³ The only crimes and defenses defined by the Constitution—for example, “Treason” and “Bills of Attainder”—have a meaning that does not demand any consideration of mental illness. Moreover, although moral considerations are inapposite to the issue whether a defendant can understand that he is on trial and what that entails, moral considerations are critical to the definition of crimes and defenses.¹⁹⁴ Understanding that one is on trial is largely a medi-

criminal charges through ordeal, trial by combat, or *peine forte et dure*, a form of torture in which heavier and heavier stones were placed on a defendant until he confessed or died. See, e.g., JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 3 (paperback ed. 2006); MAITLAND & MONTAGUE, *supra* note 5, at 49–50; Andrea McKenzie, “*This Death Some Strong and Stout Hearted Man Doth Choose*”: *The Practice of Peine Forte et Dure in Seventeenth- and Eighteenth-Century England*, 23 L. & HIST. REV. 279, 281–82 (2005). None of those options would have been acceptable in the colonies or new nation.

191. See *Diaz v. United States*, 223 U.S. 442, 445 (1912); *Hopt v. Utah*, 110 U.S. 574, 577–79 (1884).

192. See *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963); Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (“The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”); see also *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975) (“[T]he prohibition [of trials *in absentia*] is fundamental to an adversary system of justice.”).

193. See *supra* Part II.A.

194. See *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion) (“The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.” (quoting *Powell v. Texas*, 392 U.S. 514, 535–36 (1968) (plurality opinion)) (internal quotation marks omitted)); *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (recognizing “the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to

cal (in particular, psychiatric or psychological) matter. Knowing whether killing is wrongful is predominantly a moral issue, and moral issues inevitably arise when the government seeks to hold someone criminally responsible for his past conduct. To be sure, medical and psychiatric learning is clearly relevant to criminal responsibility, but they are “intertwined” with moral and legal judgments, as Chief Justice Burger once noted.¹⁹⁵ The criminal law has not turned over to psychiatrists the moral judgments that are the jury’s prerogative.

The result is this: the most that due process can demand is that the state’s judgment regarding criminal responsibility not be irrational. There are numerous available options for treating the effect of mental illness on criminal responsibility, and there is no one optimal penal code that every state must use. The Supreme Court has all but admitted as much. In *Clark v. Arizona*, the Supreme Court, after canvassing the history summarized above, concluded that history has not witnessed the universal adoption of any “particular formulation” of mental responsibility that could arguably create “a baseline for due process.”¹⁹⁶ The result is to leave the matter “substantially open

disturb a State’s decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion” (citing *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)); *Patterson*, 432 U.S. at 201 (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government” (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion))); see also HOLMES, *supra* note 12, at 36 (“The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”).

195. See *supra* text accompanying note 10; see also GOLDSTEIN, *supra* note 8, at 91 (“So long as we do not know what really ‘causes’ crime, the insanity defense will have to be framed in a way which permits juries to express the feelings of the community on the subject of responsibility. . . . [L]egislatures and courts have fixed the insanity standard in ways which enable jurors to make moral judgments about blame, but informed as much as possible by relevant fact and medical opinion. And because moral judgments are involved about matters calling for widespread acceptance by the public, it is entirely fitting that they be made by a jury. Thus viewed, the insanity test is merely the organizing principle of a process of decision which uses a ‘political’ solution to advance subtle social objectives. It is a normative standard applied to conflicting clusters of fact and opinion by a jury, an institution which is the traditional embodiment of community morality and, therefore, well suited to determining whether a particular defendant, and his act, warrant condemnation rather than compassion.”).

196. 548 U.S. 735, 752 (2006).

to state choice.”¹⁹⁷ To the extent that the Due Process Clause plays any limiting role regarding the choices that a legislature may make in this regard, that role is the limited one of making sure that states do not act arbitrarily. Why? Because that was the rationale for the adoption of Magna Carta and its lineal descendant, the Due Process Clause.¹⁹⁸

Has Kansas acted arbitrarily? To answer that question, one must start by asking what Kansas has done.

Kansas has done what every jurisdiction has always done: use its penal code to prevent *bellum omnium contra omnes*—“war of everyone against everyone.”¹⁹⁹ Along with the responsibility of defining rules and punishments comes the task of identifying who should be exempt from those proscriptions or punishments and why. Kansas has exempted from criminal responsibility people whose mental illness keeps them from forming the premeditation and intent to kill that are elements of the Kansas law of murder. In Kahler’s case, Kansas law, as well as the instructions that his jury received, permitted him to adduce whatever evidence he could muster of mental illness to escape any liability for murder by raising a reasonable doubt about his ability to act intentionally and with premeditation.²⁰⁰ Kahler’s mental illness-based defense to murder failed not because the state arbitrarily chose to define that crime in a manner that entraps morally blameless parties, but because he failed to satisfy the fair and reasonable terms of the defense available to him under Kansas law. To understand why that is so, consider how Kansas’s law applied to Kahler’s claim of mental illness. Three features of this case stand out as being particularly important in that regard.

First, Kahler was convicted of capital murder for shooting and killing his wife, from whom, because of her infidelity, he had been estranged.²⁰¹ Kahler also killed his two daughters,

197. *Id.*

198. See *supra* Part II.B.

199. THOMAS HOBBES, *LEVIATHAN* 80 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651).

200. KAN. STAT. ANN. § 21-5209 (Supp. 2018) (“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.”); see also Joint Appendix, *supra* note 56, at 163–79.

201. *State v. Kahler*, 410 P.3d 105, 112–14 (Kan. 2018).

whom he believed had taken his wife Karen's side in the divorce proceedings, and finally Karen's grandmother Dorothy, the woman who gave refuge to his other three victims.²⁰² These facts helped to establish a powerful *motive* for killing them: retribution. Although proof of motive is not an element of murder at common law or in Kansas, establishing a defendant's motive nonetheless can be "crucial in determining whether or not the defendant has committed a given crime," particularly one involving proof of intent, like murder.²⁰³

Second, in accordance with Kansas's law and the guilt stage jury instructions given at Kahler's trial, the prosecution had to prove that he *intentionally* killed his four victims.²⁰⁴ The evidence establishing that element was conclusive. An "intentional" murder is a homicide that is "purposeful and willful," rather than "accidental."²⁰⁵ To shoot his family members, Kahler used a civilian version of the rifle used by the United States military for the last 50 years.²⁰⁶ His use of that weapon alone proves that Kahler intended to kill his victims.

Third, Kansas law and the jury instructions in this case also required the state to establish that Kahler acted with *premeditation*,²⁰⁷ which means that Kahler "thought the matter over beforehand" and "formed the design or intent to kill before" shooting his victims.²⁰⁸ Although there is no fixed period required for someone to premeditate, premeditation "requires more than the instantaneous, intentional act of taking another's life."²⁰⁹ Some reflection is necessary. Here, there was plenty. The police found an empty rifle box in Kahler's car and discovered the victims lying in three separate parts of the home; Karen was lying in the kitchen, Emily and Dorothy were in the living

202. *Id.*

203. WAYNE R. LAFAVE, CRIMINAL LAW § 5.3(a), at 273 (5th ed. 2010).

204. Joint Appendix, *supra* note 56, at 164–73.

205. *Id.* at 175.

206. Kahler, 410 P.3d at 119; see Todd South, *More than a rifle: How a new 6.8mm round, advanced optics will make soldiers, Marines a lot deadlier*, MILITARY TIMES (Dec. 10, 2018), <https://www.militarytimes.com/news/your-army/2018/12/10/more-than-a-rifle-how-a-new-68mm-round-advanced-optics-will-make-soldiers-marines-a-lot-deadlier/> [https://perma.cc/WAY8-VF4D].

207. Joint Appendix, *supra* note 56, at 163.

208. *Id.* at 176.

209. *Id.*

room, and Lauren was upstairs.²¹⁰ Together, that evidence showed that Kahler took his rifle from his car into Dorothy's home and moved throughout the house to shoot his four victims—virtually a textbook case of premeditation.

To succeed with his due process challenge, a defendant like Kahler would have to show that the law permitted the state to convict him arbitrarily, that is, without the necessary finding of blameworthiness.²¹¹ But the record in this case is clear that, even without a formal insanity defense, the jury had ample opportunity to weigh all the appropriate evidence and assess Kahler's responsibility before handing down its verdict. People who premeditate on an intent to kill are not morally blameless by any stretch of the imagination. The jury convicted Kahler because the state's proof established beyond peradventure that Kahler chose to take four lives with no remote justification or excuse. That conduct has been immoral since Cain killed Abel²¹² and has been a crime since Moses came down from Mount Sinai with the Ten Commandments,²¹³ conduct that traditionally has been, and is in Kansas today, punishable by the death penalty.²¹⁴

A state does not act irrationally by relying on long-standing, widely accepted principles defining conduct like Kahler's as immoral. As historians have noted, "the early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"²¹⁵ Those mores and customs represented a local consensus that certain conduct should be prohibited and certain offenders treated as outlaws.²¹⁶ Mem-

210. *Kahler*, 410 P.3d at 114.

211. *See supra* Part II.C.2.

212. *Supra* note 1.

213. *See, e.g.*, *Exodus* 20:13 (King James) ("Thou shalt not kill.").

214. *See, e.g.*, KAN. STAT. ANN. § 21-6617 (Supp. 2018); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment. In fact, death was 'the standard penalty for all serious crimes' at the time of the founding." (citations omitted)).

215. Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1941); *see also* ROBERT KELHAM, *THE LAWS OF WILLIAM THE CONQUEROR*, at v-xii (London, Edward Brooke 1779) (William the Conqueror maintained pre-Norman English customs); LAFAVE, *supra* note 203, at 78-80.

216. *See, e.g.*, BAKER, *supra* note 5, at 8-9; JENKS, *supra* note 5, at 3 ("The so-called Anglo-Saxon Laws date from a well-recognized stage in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom."); F.W. MAITLAND, *THE CONSTITUTIONAL*

bers of the community had knowledge of what the law prohibited. For one thing, as Holmes noted, “crimes are also generally sins,” so if you knew the Decalogue, you knew the penal code.²¹⁷ Moreover, “The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”²¹⁸ For that reason, “If not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts.”²¹⁹ In fact, there has long been a consensus that the crimes defined at common law reflect harmful and wrongful conduct.²²⁰ That consensus was not a transient phenomenon; it remains strong today.²²¹

HISTORY OF ENGLAND 1–4 (reprt. 1913); FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 139–40 (1904); Larkin, *supra* note 3, at 327 (“Early English ‘law’ reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both ‘rough and crude.’ The laws of the folk, the ‘folk-right,’ could vary among ancestors and from community to community.” (footnote omitted)); *id.* at 328–29; *supra* text accompanying notes 4–5.

217. HOLMES, *supra* note 12, at 100.

218. JOHN W. SALMOND, JURISPRUDENCE 374–75 (2d ed. 1907).

219. *Id.* at 375.

220. As Professor Lawrence Friedman has written about property crimes:

Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights. . . . The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point. Probably all human communities punish theft in one way or another; it is hard to imagine a society that does *not* have a concept of thievery, and some way to punish people who help themselves to things that “belong” to somebody else.

LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 108–09 (1993).

221. Professor Wesley Skogan explained that agreement as follows:

In the case of common crime, a large body of research indicates that there *is* in fact a value consensus. People of all races and classes agree we should shun theft, violence, sexual assault, and aggression against children. They give very similar ratings to the seriousness of various kinds of offenses, and they agree to a surprising extent on how stiff the punishments ought to be for violations of the law. The issue of what is criminal has been settled politically in debate over the criminal code, and within law-abiding society there is broad consensus on such matters.

These middle-class values are just about everyone’s values.

WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 5 (1990).

Not surprisingly, murder has always been at the top of that list. Every colony and every state has treated murder as a heinous offense. In the words of Professor Mark Yochum, "evil is fundamentally known. . . . Ignorance that murder is a crime is no excuse for the crime of murder."²²² What Kansas has done, at bottom, is make the decision that anyone who premeditates on an intent to kill should be held morally responsible for that crime, regardless of whether he knew that murder is wrongful.²²³

Finally, it would be a mistake to assume that every aspect of section 22-3220 works solely to a defendant's disadvantage. Traditionally, the insanity defense "has not threatened" a state's interest in public safety because it rested "upon the concept of mental disease," and that concept has long been regarded as a restrictive one, "extending only to those who had obviously lost touch with reality."²²⁴ The Kansas statute, however, does not require that a defendant be so severely disturbed before he can offer evidence of a mental illness to defeat the state's proof of intent and premeditation. The statute, section 22-3220 of Kansas Statutes Annotated, uses the term "mental disease or defect," but it does not define that term to include only the type of severe mental disorders that rob someone of knowing who he is, what he is doing, and whether (and, if so how) his actions have consequences. Nor did the jury instructions in Kahler's own case limit the jury's consideration of the type of proof that Kahler offered to such severe diseases.²²⁵ Those instructions

222. Mark D. Yochum, *The Death of a Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN'S J. LEGAL COMMENT. 635, 636 (1999).

223. Consider that point from another perspective. In *United States v. Freed*, 401 U.S. 601 (1971), the Supreme Court held that Congress could prohibit the possession or receipt of unregistered hand grenades without including a mens rea element. *Id.* at 609. The likelihood of convicting a morally blameless person, the Court noted, was small because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*; see also *id.* at 616 (Brennan, J., concurring in the judgment) ("Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it."). The same is true of intentional, premeditated murder.

224. GOLDSTEIN, *supra* note 8, at 19.

225. The trial judge instructed the jury in *Kahler* as follows:

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be considered only in determining whether the defendant had the state of mind required to commit the crimes.

actually were a benefit for Kahler because he does not maintain that he suffered from the type of mental disease that leads someone to lose touch with the world.²²⁶

The result is that section 22-3220 has a benefit for a mentally ill defendant that a traditional insanity defense would not: it allows him to use evidence of mental illness to disprove the necessary mens rea for murder in circumstances where he could not hope to prevail if he could use that evidence only to support an insanity defense. That would be particularly true if, as the Supreme Court has held, a state can require a defendant to prove his insanity beyond a reasonable doubt.²²⁷ It should be far easier for a defendant to use evidence of mental illness to disprove an element of the offense that the state must prove beyond a reasonable doubt than it would be to prove his insanity under that standard. At the very least, it was certainly rational for the Kansas state legislature to conclude that the balance struck by section 22-3220 is a reasonable one.²²⁸

When considering capital murder, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the first degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the second degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to kill.

When considering aggravated burglary, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to commit capital murder.

Joint Appendix, *supra* note 56, at 177.

226. See Brief for Petitioner, *supra* note 97, at 6–9.

227. See *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952).

228. One class of defendants adversely affected by the change of law are those represented by the defendant in *Bethel*: killers who believe they are acting on a divine command. Defendants like those suffer from a form of mental illness that does not cast doubt on premeditation, but has historically found some recognition in the law. See *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915). The issue has arisen in other cases too. See, e.g., *Lundgren v. Mitchell*, 440 F.3d 754, 784 (6th Cir. 2006) (Merritt, J., dissenting) (collecting cases where a deific decree claim served as the basis for an insanity defense); *Guiteau's Case*, 10 F. 161, 182 (D.C. 1882) (dictum stating hypothetical in jury instructions); *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 503 (1844) (same); *Moett v. New York*, 85 N.Y. (40 Sickels) 373, 380 (1881) (same). This issue is academically interesting but vanishingly rare in the real world. According to some amici supporting *Kahler*, the insanity defense itself

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Where does that leave us? With this: The Due Process Clause neither defines a crime nor creates a defense to one. In fact, it does not speak to the substantive criminal law at all. That does not mean the clause is unimportant; it is, because it prevents the government from punishing someone outside the bounds of the law. Summary execution, imprisonment, or fines are forbidden. But the clause leaves to the political process—federal and state legislators, and the electorate of each—the responsibility to define the substantive criminal code, both in terms of its offenses and defenses. The Constitution created only one exception to that rule: treason. The Framers defined that crime in the Constitution because they feared that even the new American Congress could be susceptible to the same impulse for self-preservation that drove the English Crown and Parliament

is rarely an issue in criminal cases and is raised in less than one percent of federal and state trials. See Brief of *Amicus Curiae* 290 Criminal Law and Mental Health Law Professors in Support of Petitioner's Request for Reversal and Remand at 19, 21, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019) (less than one percent of criminal cases); Brief of *Amici Curiae* the American Civil Liberties Union and the ACLU Foundation of Kansas in Support of Petitioner at 19, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019) [hereinafter Brief of ACLU] (collecting citations that defendants rarely claim insanity); Brief of American Psychiatric Ass'n et al. as *Amici Curiae* in Support of Petitioner at 10, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019). Although the precise number of instances of these cases is unknown, the majority in *Lundgren* was satisfied that it was so small that defense counsel's failure to raise a deific decree insanity defense did not establish ineffective assistance of counsel. *Lundgren*, 440 F.3d at 773 n.6. Even in the famous case of *People v. Schmidt*, Schmidt's claim was of dubious validity; he later admitted that his asserted delusion was a lie. *Schmidt*, 110 N.E. at 945–46. One possible resolution is that the people of a state like Kansas, through their lawmakers, have simply decided, quite reasonably, not to extend the same protection for such conduct as they do to other forms of homicide under the influence of mental disturbance. If so, that is well within the state legislature's historically broad discretion on the issue. In *Powell v. Texas*, the Supreme Court blanched at the prospect of allowing a mentally ill defendant to go free for murder when his illness compelled him to commit that crime. 392 U.S. 514, 534–35 (1968) (plurality opinion); see *id.* at 548–54 (White, J., concurring in the result); *infra* text accompanying notes 316–318. *Powell* suggests that the Court would not be receptive to such a claim. But whatever the outcome might be for such a defendant's claim, *Kahler v. Kansas* does not give the Supreme Court an opportunity to resolve it. *Kahler* does not contend that God commanded him to slaughter his family. Nowhere in his own description of how his mental illness affected his actions does *Kahler* even hint that God gave him any such order. See Brief for Petitioner, *supra* note 97, at 6–9. Nor does *Kahler* suggest that, because God told him that his family members were, for example, in league with Satan, he inferred that God wanted them dead. Whatever the outcome might be were a different defendant to raise such a claim, *Kahler v. Kansas* does not give the Supreme Court an opportunity to resolve it.

to treat political dissenters as tantamount to armed insurrectionists. Otherwise, the Founders trusted the elected members of Congress and state assemblies with the responsibility of defining the penal code. Neither the text, the history, the judicial interpretation, nor the purpose of the Due Process Clause justifies casting aside the Framers' trust in the democratic process.

III. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE INSANITY DEFENSE

Kahler argues that, however the Supreme Court resolves his due process claim, the Cruel and Unusual Punishments Clause also prohibits Kansas from defining murder and insanity as section 22-3220 provides.²²⁹ In his view, any punishment that an offender receives by virtue of the application of that statute is both "cruel" and "unusual."²³⁰ It would be "cruel," he contends, to punish someone who was "wholly unable to comprehend the nature and quality" of an act when he committed it.²³¹ Doing so serves no legitimate justification for punishment, he contends, and partakes of being "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; [and] unrelenting."²³² It would also be "unusual" to punish such an individual, Kahler maintains, because "both England and the Colonies universally recognized" that someone incapable of distinguishing right from wrong should not be criminally punished.²³³ The appropriate response, Kahler concludes, is to use a verdict of not guilty by reason of insanity to civilly commit an offender until he "has regained his sanity or is no longer a danger to himself or society."²³⁴

Kahler's argument rests on a faulty premise, confusing guilt and punishment issues that are properly treated separately. Kahler starts with the rule that the state cannot try or execute a

229. Brief for Petitioner, *supra* note 97, at 29–36.

230. *Id.* at 30–31.

231. *Id.* at 30 (quoting *Sinclair v. State*, 132 So. 581, 583 (Miss. 1931) (per curiam)) (internal quotation marks omitted).

232. *Id.* at 31 (first alteration in original) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773))).

233. *Id.* at 30.

234. *Id.* at 36 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)) (internal quotation marks omitted).

mentally incompetent offender.²³⁵ To that rule, he adds the conclusion that Kansas's law has eliminated the issue of whether an offender can distinguish right from wrong at the time of the offense, an issue that might be the only one that can save an offender from the gallows.²³⁶ Together, the two halves of that argument, Kahler submits, not only make section 22-3220 an outlier in Anglo-American law, but also render unconstitutional any punishment imposed on a defendant unaware that his conduct was unlawful.²³⁷ As explained in this Part, however, materially different constitutional terms apply to the guilt and sentencing stages, foreclosing any elision of the two.

A. *The Text of the Cruel and Unusual Punishments Clause*

If the Due Process Clause is an odd place to look for a limitation on a state's power to define crimes, the Cruel and Unusual Punishments Clause is a positively bizarre choice. Its text focuses expressly and exclusively on "punishment,"²³⁸ and, as explained above, the Constitution prohibits the state from imposing *any* punishment on someone until after he has pleaded or been found guilty.²³⁹ The Supreme Court's 1991 decision in *Chapman v. United States* made that point well.²⁴⁰ Accordingly, the text of the Cruel and Unusual Punishments Clause alone proves that it has no bearing on the antecedent issue of a defendant's guilt or innocence. The definition of criminal responsibility is a matter for the substantive criminal law, and perhaps the Fifth and Sixth Amendments, but certainly not the Eighth. By the time that the Cruel and Unusual Punishments Clause comes into play, a party is no longer "accused" of a crime, as the Sixth Amendment would treat him;²⁴¹ he has been "convicted" of committing it. His status has changed; he now may be penalized however the law provides, so long as that punishment is not cruel and unusual. Put differently, by the time of sentencing, the government's power to define crimes

235. *Id.* at 12–14.

236. *Id.* at 14–15.

237. *Id.* at 29–36, 39–43.

238. U.S. CONST. amend. VIII.

239. See *supra* text accompanying notes 148–152.

240. 500 U.S. 453, 465 (1991).

241. U.S. CONST. amend. VI.

has dropped out of the picture; what matters is its power to punish.

The scenario in *Kahler* is analogous to the one in *United States v. Marion*.²⁴² There, the defendants argued that the federal government violated their Sixth Amendment Speedy Trial Clause right to a prompt trial²⁴³ by waiting three years after the occurrence of the alleged fraud before obtaining an indictment charging them with a crime.²⁴⁴ The Supreme Court made short work of that argument. In an opinion by Justice Byron White, the Court explained that the Speedy Trial Clause “has no application” until an offender “in some way becomes an ‘accused,’” which did not happen in *Marion* until the grand jury returned its indictment.²⁴⁵ “On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution,” Justice White explained.²⁴⁶ “These provisions would seem to afford no protection to those not yet accused” he added, “nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.”²⁴⁷

Marion recognized that constitutional terms—like “accused”—matter because they define and limit the reach of the law. For that reason, the Court held that the Speedy Trial Clause does not apply to someone not yet charged with a crime because, until a person has been charged, he has been “accused” of nothing.²⁴⁸ The methodology and logic of *Marion* apply directly to *Kahler*. The term “punishments” matters for purposes of the Cruel and Unusual Punishments Clause because it limits the reach of that clause. To adopt a phrase from *Marion*, a clause devoted to regulating the legality of a punish-

242. 404 U.S. 307 (1971).

243. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

244. *Marion*, 404 U.S. at 308–09.

245. *Id.* at 313.

246. *Id.*

247. *Id.*; cf. *Parke v. Raley*, 506 U.S. 20, 27 (1992) (“We have said before that a charge under a recidivism statute does not state a separate offense, but goes to punishment only.” (citing *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Graham v. West Virginia*, 224 U.S. 616, 623–24 (1912); *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901))).

248. *Marion*, 404 U.S. at 313–14.

ment “has no application”²⁴⁹ to the logically and legally antecedent issue of how a crime can be defined.

In sum, just as Marion could not force the Speedy Trial Clause to play a role at a preindictment stage because its text did not permit that reading, Kahler should not be able to force the Cruel and Unusual Punishments Clause to play a role at the preconviction stage. In each case, the text does not allow for that reading. That conclusion should end any discussion of the use of the latter clause to define an offense.

B. *The History of the Cruel and Unusual Punishments Clause*

The history of the Cruel and Unusual Punishments Clause confirms the evident meaning of its text.²⁵⁰ The clause is the direct offspring of the English Bill of Rights of 1689²⁵¹ and section 9 of the 1776 Virginia Declaration of Rights²⁵²—both of which (except for unimportant spelling differences) prohibited “cruel and unusual punishments.”²⁵³ Historians generally agree that what prompted Parliament to adopt the English Bill of Rights were the sentences imposed by the infamous King’s Bench Lord Chief Justice Jeffreys during the Stuart reign of King James II.²⁵⁴ Historians differ only over what precise atrocities Lord Chief Justice Jeffreys committed that outraged Parliament.²⁵⁵ One

249. *Id.* at 313.

250. *Cf. id.* at 313–14 (noting that “nothing in the circumstances surrounding the adoption of the Amendment indicat[es] that it does not mean what it appears to say”). For discussions of the history of the Cruel and Unusual Punishments Clause, see *Harmelin v. Michigan*, 501 U.S. 957, 966–75 (1991) (opinion of Scalia, J.); 4 BLACKSTONE, *supra* note 105, at *369–72; 1 CHITTY, *supra* note 167, at *712; LOIS G. SCHWOERER, DECLARATION OF RIGHTS, 1689, at 279, 295–98 (1981); SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 236–38 (Richard L. Perry & John C. Cooper eds., rev. ed. 1978); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 490 (1883); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750–51 (Boston, Hilliard, Gray & Co. 1833); Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910). For an example of cases interpreting that clause or state counterparts, see *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct. 1823), *aff’d*, 3 Cow. 686 (N.Y. 1824).

251. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. c. 2, § 10 (Eng.).

252. VA. CONST. of 1776 (Bill of Rights), § 9.

253. See *Harmelin*, 501 U.S. at 966–74 (opinion of Scalia, J.).

254. *Id.* at 967.

255. See *id.* at 967–74 (summarizing the different theories).

theory focuses on the vicious sentences that Lord Chief Justice Jeffreys handed down during the “Bloody Assizes” following the Duke of Monmouth’s unsuccessful 1685 rebellion.²⁵⁶ Lord Chief Justice Jeffreys sentenced hundreds of insurgents to death via disemboweling, beheading, and drawing and quartering.²⁵⁷ The other theory is that Lord Chief Justice Jeffreys imposed punishments unauthorized by statute and unknown to the common law.²⁵⁸ In 1685, Titus Oates, a Protestant cleric, was convicted of committing perjury for making false accusations against fifteen Catholics who were executed for organizing the 1679 “Popish Plot” to overthrow King Charles II.²⁵⁹ Capital punishment was no longer an authorized penalty for that crime, but Lord Chief Justice Jeffreys decided to take the law into his own hands.²⁶⁰ He orchestrated a novel sentence for Oates of two floggings and life imprisonment accompanied by five exposures on pillory a year, perhaps believing (perhaps hoping) that Oates would “be scourged to death.”²⁶¹ Though Oates was not a sympathetic character, there was considerable contemporary agreement that, however much he may have deserved the punishment he received, the law did not authorize his sentence, so Lord Chief Justice Jeffreys’s judgment was illegal.²⁶²

Either way, the history offers no support for Kahler’s argument. The Framers understood that the Cruel and Unusual Punishments Clause would prohibit hideously painful or unauthorized sentences. There is nothing to suggest that it would also serve as a restraint on Congress’s ability to define crimes, to say nothing of Congress’s power to decide what defenses to recognize and how they should be adjudicated. Indeed, concern that the *courts*, not Congress, might exceed their authority by going on a frolic and detour to take “special care” of an of-

256. *Id.* at 968.

257. *Id.* Picture the “Freedom!” scene in BRAVEHEART (Paramount Pictures 1995).

258. See *Harmelin*, 501 U.S. at 968 (opinion of Scalia, J.).

259. *Id.* at 969.

260. *Id.* at 970.

261. 1 LORD MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 478, 482 (Charles Harding Firth ed., Macmillan & Co. 1913) (1849); see also Second Trial of Titus Oates (1685) 10 How. St. Tr. 1227 (KB) 1314–17; *Harmelin*, 501 U.S. at 967–71 (opinion of Scalia, J.).

262. See *Harmelin*, 501 U.S. at 973–74 (opinion of Scalia, J.).

fender was a prominent feature of at least one of the explanations why that clause became law.²⁶³

C. *Judicial Interpretations
of the Cruel and Unusual Punishments Clause*

1. *The Cruel and Unusual Punishments Clause and Sentencing*

The Supreme Court's precedents confirm the teaching of the text and history of the Cruel and Unusual Punishments Clause.²⁶⁴ Nearly all of the Court's decisions focus on one aspect or another of the punishment of convicted offenders. Those decisions address one or more of the following types of questions: Are some punishments impermissible regardless of the facts and circumstances of the crime and offender?²⁶⁵ Are some penalties impermissible only for certain crimes²⁶⁶ or offenders?²⁶⁷ Can recidivists be more severely punished than first time

263. *Second Trial of Titus Oates*, 10 How. St. Tr. at 1316.

264. Nineteenth century lower court decisions are to the same effect. They read state counterparts to the Cruel and Unusual Punishments Clause as forbidding only certain punishments. *See, e.g.*, *Jackson v. United States*, 102 F. 473, 487–90 (9th Cir. 1900); *Whitten v. State*, 47 Ga. 297, 301–02 (1872); *Hobbs v. State*, 32 N.E. 1019, 1020–21 (Ind. 1893); *State v. White*, 25 P. 33, 33–35 (Kan. 1890); *Garvey v. Whitaker*, 19 S. 457, 458–59 (La. 1896); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855); *Cummins v. People*, 3 N.W. 305, 305 (Mich. 1879); *State v. Williams*, 77 Mo. 310, 312–13 (1883); *State v. Driver*, 78 N.C. 423, 426–28 (1878); *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449–50 (1824).

265. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (prohibiting prison officials from exhibiting “deliberate indifference” to a prisoner’s serious medical needs); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding use of capital punishment as a penalty for murder); *Trop v. Dulles*, 356 U.S. 86, 91 (1958) (prohibiting the federal government from denaturalizing and expatriating a citizen as the punishment for a crime); *Weems v. United States*, 217 U.S. 349, 382 (1910) (prohibiting Philippine punishment of “*cadena temporal*”).

266. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419–47 (2008) (prohibiting execution of an offender for the offense of raping a minor); *Harmelin*, 501 U.S. at 957 (upholding mandatory imposition of a sentence of life imprisonment without possibility of parole for crime of possessing more than 650 grams of cocaine); *Coker v. Georgia*, 433 U.S. 584, 591–600 (1977) (prohibiting execution of an offender for the offense of raping an adult).

267. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 709 (2014) (prohibiting execution of a condemned prisoner suffering from intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 560–79 (2005) (prohibiting execution of an offender who was younger than eighteen at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002) (same, a mentally disabled offender); *Tison v. Arizona*, 481 U.S. 137, 146–58 (1987) (ruling that parties who planned a violent prison escape were aware that life could be taken and are therefore eligible for the death penalty); *Ford v.*

offenders?²⁶⁸ Do juvenile offenders merit special treatment?²⁶⁹ Is it permissible to carry out a particular punishment in some ways, but not others?²⁷⁰ Are there special procedures that a trial²⁷¹ or

Wainwright, 477 U.S. 399, 405–10 (1986) (prohibiting the execution of a condemned prisoner incapable of understanding that he will be executed); *Enmund v. Florida*, 458 U.S. 782, 788–801 (1982) (prohibiting mandatory imposition of death penalty on an offender who did not intend to kill and did not contemplate that lethal force would be used in commission of the crime).

268. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding two consecutive terms of twenty-five-years-to-life imprisonment for a repeat offender under a state's "three strikes" law); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding a sentence of twenty-five-years-to-life imprisonment under a state's "three strikes" law); *Solem v. Helm*, 463 U.S. 277, 279, 303 (1983) (prohibiting a sentence of life imprisonment without possibility of parole for a repeat but nonviolent offender); *Rummel v. Estelle*, 445 U.S. 263, 264–65 (1980) (upholding a sentence of life imprisonment on a recidivist); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times. . . . Such laws currently are in effect in all 50 States and several have been enacted by the Federal Government, as well." (citations omitted)); *Spencer v. Texas*, 385 U.S. 554, 559–60 (1967) (citations omitted). It is difficult to reconcile *Solem* and *Rummel* in anything approaching an honest, intelligent fashion. Given the Court's later decisions in *Andrade* and *Ewing*, however, there is no reason to try.

269. *See, e.g., Graham v. Florida*, 560 U.S. 48, 82 (2010) (prohibiting a sentence of life imprisonment without possibility of parole on a juvenile offender for a non-homicide crime).

270. *See, e.g., Bucklew v. Precythe*, 139 S. Ct. 1112, 1118–19 (2019) (rejecting challenge to use of injected chemicals to execute a condemned prisoner); *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (same); *Baze v. Rees*, 553 U.S. 35, 41 (2008) (same); *Francis v. Resweber*, 329 U.S. 459, 465–66 (1947) (upholding second attempt at execution after first attempt failed); *In re Kemmler*, 136 U.S. 436, 437, 447 (1890) (upholding execution by electric chair); *Wilkerson v. Utah*, 99 U.S. 130, 131, 137 (1879) (same, firing squad).

271. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 465 (2012) (prohibiting mandatory sentence of life imprisonment without possibility of parole on an offender who was younger than eighteen at the time of the crime); *Kansas v. Marsh*, 548 U.S. 163, 165–66 (2006) (upholding state law directing jury to impose a capital sentence if aggravating and mitigating factors are in equipoise); *Shafer v. South Carolina*, 532 U.S. 36, 39–40 (2001) (ruling that a defendant must be able to inform jury that he will be ineligible for parole if the state makes "future dangerousness" a relevant capital sentencing factor); *Jones v. United States*, 527 U.S. 373, 375–76 (1999) (ruling that jury need not be informed about consequences of its inability to reach a capital sentencing decision); *Loving v. United States*, 517 U.S. 748, 773–74 (1996) (ruling that the President can specify aggravating factors for a military court-martial panel to consider in a capital case); *Payne v. Tennessee*, 501 U.S. 808, 817–30 (1991) (upholding use of "victim impact" evidence at sentencing stage of a capital case); *McCleskey v. Kemp*, 481 U.S. 279, 282–83, 291 (1987) (rejecting the argument that state had improperly discriminated on the basis of the race of defendants or victims); *Gardner v. Florida*, 430 U.S. 349, 355–62 (1977) (ruling that state must disclose to a defendant before sentencing any evidence on which the sentencer might rely to impose the death penalty).

appellate²⁷² court must follow before imposing or upholding a particular type of punishment? Must a state grant a trial judge or jury discretion to consider the aggravating and mitigating factors in a particular case, or can a state impose the identical sentence on everyone convicted of the same crime?²⁷³ Are there limitations on the type of factors that a state can say aggravate or mitigate the nature of an offense?²⁷⁴ Finally, how much punishment is too much?²⁷⁵ All of those inquiries address different aspects of the “punishment” that the Cruel and Unusual Punishments Clause was designed to regulate. They do not tell a state how to draft its criminal code.

272. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 149 (1990) (ruling that state is not required independently to review legality of a capital sentence that defendant decided not to challenge); *Pulley v. Harris*, 465 U.S. 37, 44–54 (1984) (ruling that state supreme court need not conduct a state-wide review of proportionality of capital sentences); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (ruling that condemned prisoner may waive any and all federal constitutional challenges to his sentence).

273. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 285–305 (1976) (prohibiting mandatory imposition of death penalty for murder); *Jurek v. Texas*, 428 U.S. 262, 268–79 (1976) (upholding state capital sentencing scheme that directed jury to answer two or three questions when deciding whether to impose the death penalty); see also *Sumner v. Shuman*, 483 U.S. 66, 77–85 (1987) (prohibiting mandatory imposition of death penalty for murder committed while serving a sentence of life imprisonment without possibility of parole); *Roberts v. Louisiana*, 431 U.S. 633, 633–34, 637 (1977) (per curiam) (same, for the murder of a police officer).

274. See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 971–80 (1994) (upholding state capital sentencing aggravating factor over argument that it is unconstitutionally vague); *Johnson v. Texas*, 509 U.S. 350, 352–53 (1993) (upholding state sentencing scheme over the challenge that it did not allow adequate consideration of the mitigating effect of the offender’s youth); *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980) (plurality opinion) (holding unconstitutional the overbroad interpretation of an aggravating factor permitting the death penalty to be imposed for an “outrageously or wantonly vile, horrible or inhuman” murder); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (footnote omitted)).

275. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 371–72, 375 (1982) (per curiam) (upholding sentence of forty years’ imprisonment for the possession of marijuana with the intent to distribute it); *supra* note 268 (collecting cases rejecting the argument that life-without-parole sentences imposed on recidivists were disproportionate).

2. *The Cruel and Unusual Punishments Clause and Criminal Responsibility*

In truth, only two Supreme Court decisions are relevant to Kahler's claim. The first one is *Robinson v. California*.²⁷⁶ It suggested that the Eighth Amendment might prohibit a state from punishing someone who could not control his conduct.²⁷⁷ The second decision, *Powell v. Texas*, quite explicitly refused to construe (or extend) *Robinson* to create an involuntariness defense.²⁷⁸ *Powell* eliminates any basis for asserting that the Cruel and Unusual Punishments Clause regulates how the state can define the criminal responsibility of the mentally ill.

Robinson held unconstitutional a California law making it a crime to be a narcotics addict and imposing a punishment of no less than 90 days' incarceration for conviction of that offense.²⁷⁹ The statute did not criminalize the purchase, possession, or use of narcotics.²⁸⁰ In fact, the California law did not punish *any* conduct *at all*; the only offense was the *status* of being addicted to narcotics.²⁸¹ In theory, the statute would have allowed the state to arrest and convict anyone who admitted to being an addict at a Narcotics Anonymous meeting. Because the law imposed a criminal punishment for addiction, rather than authorizing involuntary commitment of addicts, it is likely that the rationale for the statute was to simplify narcotics prosecutions.²⁸² Nonetheless, the result was that, under California law,

276. 370 U.S. 660 (1962).

277. *See id.* at 666–67.

278. *Powell v. Texas*, 392 U.S. 514, 548–54 (1968).

279. *Robinson*, 370 U.S. at 660 n.1, 667.

280. *Id.* at 666.

281. *Id.*

282. *See* Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 70 (1968) (“California, surely, sought to punish ‘being an addict’ not from any abhorrence for the status but because addicts *act*, that is, they use drugs, and some are tempted to commit crimes to obtain money to buy drugs.”); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600–03 (1981); Note, *Public Intoxication Convictions and the Chronic Alcoholic*, 82 HARV. L. REV. 103, 107 n.19 (1968) (“A state may well have valid reasons for punishing the status of being an addict, since it simplifies the problem of enforcement by making proof of actual use of drugs unnecessary and at the same time anticipates future antisocial acts almost certain to occur.”).

if you were addicted to narcotics, you were guilty. It was unnecessary for the prosecution to prove anything else.²⁸³

The Court acknowledged that a state could regulate and punish narcotics trafficking.²⁸⁴ The Court also noted that, as a general matter, a state could involuntarily confine a narcotics addict for treatment.²⁸⁵ California, however, had chosen neither option in Robinson's case. Instead, California had chosen to make the mere *status* of being a drug addict into a crime.²⁸⁶ That clearly troubled the Court because it was tantamount to making it a crime to suffer from a disease that "may be contracted innocently or involuntarily."²⁸⁷ That was a bridge too far. A state could no more make it a crime to become involuntarily addicted to narcotics, the Court reasoned, than it could outlaw becoming involuntarily afflicted with a physical or mental illness.²⁸⁸ That the punishment for being a narcotics addict was only 90 days' confinement did not save the California law from invalidity. As Justice Stewart put it, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."²⁸⁹ "But the question cannot be considered in the abstract," he cautioned.²⁹⁰ He then penned the famous line: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."²⁹¹ Because the California law made it a crime to become ill without requiring any voluntary action on someone's part, the Court held the California statute unconstitutional.²⁹²

283. The jury instructions in Robinson's case made that point quite clear. See *Robinson*, 370 U.S. at 662–63; *id.* at 665 ("Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's 'status' or 'chronic condition' was that of being 'addicted to the use of narcotics.' And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.").

284. *Id.* at 664.

285. *Id.* at 664–65.

286. *Id.* at 666.

287. *Id.* at 667. The state conceded that narcotics addiction was an "illness." *Id.*

288. *Id.* at 666.

289. *Id.* at 667.

290. *Id.*

291. *Id.*

292. See *id.*

The *Robinson* decision created quite a stir in the legal and medical communities because it suggested that the Cruel and Unusual Punishments Clause effectively barred criminal liability for involuntary conduct. In the years immediately following that decision, the courts²⁹³ and academic community²⁹⁴ debated that issue in the contexts of alcohol and drug use. Two federal courts of appeals went so far as to rule that the government could not punish an alcoholic for the crime of *public* intoxication because alcoholism is a disease beyond an alcoholic's voluntary control.²⁹⁵ To resolve that confusion, the Supreme Court granted review in the other Eighth Amendment case relevant here, *Powell v. Texas*.²⁹⁶ *Powell* took back any suggestion that *Robinson* constitutionalizes an involuntariness defense or creates a mental illness-based defense in one form or another.

Powell was convicted in a Texas state court of being intoxicated in public, in violation of state law.²⁹⁷ Citing *Robinson*, *Powell* argued that he could not be held criminally responsible for the offense of public intoxication because he was an alco-

293. See, e.g., *Sweeney v. United States*, 353 F.2d 10, 11 & n.2 (7th Cir. 1965) (questioning whether, in light of *Robinson*, it is permissible to revoke an alcoholic's probation for violating a condition of his probation that he refrain from alcohol use); *United States ex rel. Swanson v. Reincke*, 344 F.2d 260, 260-63 (2d Cir. 1965) (concluding that *Robinson* did not immunize an alleged narcotics addict from the crime of unlawfully possessing narcotics); *State ex rel. Blouin v. Walker*, 154 So. 2d 368, 371-72 (La. 1963) (same, for the crime of habitually using narcotics); *People v. Hoy*, 143 N.W.2d 577, 578 (Mich. 1966) (concluding that it is not a cruel and unusual punishment to imprison an alcoholic for the crime of being drunk and disorderly); *City of Seattle v. Hill*, 435 P.2d 692, 698-99 (Wash. 1967) (concluding that *Robinson* did not immunize an alcoholic from the crime of public intoxication); *Browne v. State*, 129 N.W.2d 175, 179 (Wis. 1964) (concluding that *Robinson* did not immunize an alleged narcotics addict from the crime of using narcotics).

294. See, e.g., Peter Barton Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343 (1967); Fred L. Lieb, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 227 (1968); John M. Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1 (1966); John B. Neibel, *Implications of Robinson v. California*, 1 HOUS. L. REV. 1 (1963); John A. Lowe, Note, *The Criminal Responsibility of Chronic Alcoholics*, 52 CORNELL L. REV. 470 (1967); James P. Manak, Recent Decision, *The Narcotics Problem: Outlook For Reform*, 12 BUFF. L. REV. 605 (1963); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

295. See, e.g., *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966) (en banc) (ruling that Cruel and Unusual Punishments Clause forbids punishing an alcoholic for the crime of public drunkenness); *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966) (same).

296. 392 U.S. 514 (1968).

297. *Id.* at 517 (plurality opinion).

holic and could not prevent himself from drinking.²⁹⁸ To prove his case, Powell testified at trial and detailed his inability to overcome his drinking problem.²⁹⁹ Powell also offered the testimony of a psychiatrist that “a ‘chronic alcoholic’ is an ‘involuntary drinker,’ who is ‘powerless not to drink,’ and who ‘loses his self-control over his drinking.’”³⁰⁰ Based on that proof and relying on *Robinson*, Powell argued that he could not be held criminally liable for public intoxication because, as an alcoholic, he could not refrain from drinking to intoxication and appearing in public in that state.³⁰¹

The Supreme Court rejected Powell’s argument.³⁰² After discussing shortcomings regarding the then-current legal and medical knowledge about alcoholism,³⁰³ the plurality opinion by Justice Marshall turned to the issue of whether *Robinson* prohibited the state from punishing alcoholics for any conduct that was the involuntary product of their disease.³⁰⁴ The *Powell* plurality concluded that *Robinson* did not so hold and declined to extend *Robinson* to reach cases like Powell’s.³⁰⁵

Justice Marshall distinguished *Robinson* on the ground that Texas law punished Powell, not for the status of being an alcoholic, but for his conduct of being publicly intoxicated.³⁰⁶ The holding in *Robinson*, the plurality explained, “brings this Court but a very small way into the substantive criminal law” because it disallowed a state only from making the status of ad-

298. *Id.* at 532.

299. *Id.* at 519–20.

300. *Id.* at 518 (quoting the psychiatrist’s trial testimony). The defense psychiatrist added that, when intoxicated, Powell “is not able to control his behavior . . . because he has an uncontrollable compulsion to drink” and lacks “the willpower to resist the constant excessive consumption of alcohol.” *Id.* (same) (internal quotation marks omitted). The psychiatrist conceded that Powell knew the difference between right and wrong when he was sober, but concluded that Powell’s knowledge during sobriety was beside the point because Powell could not keep himself from becoming drunk. *See id.* (same).

301. *See id.* at 521, 532.

302. *See id.* at 531–37; *see also id.* at 548–54 (White, J., concurring in the result).

303. The plurality found that the trial and public records failed to resolve a host of relevant issues, such as whether Powell could refrain from taking his *first* drink, even if he could not stop drinking afterwards; whether the medical profession believed that alcoholism was a “disease”; and whether there were differences among the types of alcoholics. *Id.* at 521–26 (plurality opinion).

304. *Id.* at 532.

305. *Id.* at 532–37.

306. *Id.* at 532.

diction into a crime.³⁰⁷ Reading the holding in *Robinson* any more broadly, the plurality acknowledged, would make the Court, “under the aegis of the Cruel and Unusual Punishment Clause,” into “the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”³⁰⁸ Justice Marshall explained that *Robinson* does not stand for the proposition that the state cannot outlaw conduct that a defendant cannot stop himself from committing.³⁰⁹ “The entire thrust of *Robinson*’s interpretation of the Cruel and Unusual Punishment Clause” is that the state may criminally punish someone only if he “has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.”³¹⁰ *Robinson*, Justice Marshall reasoned, did not address “the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’ or ‘occasioned by a compulsion.’”³¹¹

The plurality also declined the invitation, offered by Justice Fortas in dissent,³¹² to extend the holding in *Robinson* to include cases in which a defendant has involuntarily acquired a “status” or “condition” that forced him to commit the conduct that lead to his prosecution.³¹³ Extending *Robinson* that far would require the Court to create and define “the scope and content of what could only be a constitutional doctrine of criminal responsibility.”³¹⁴ Only by “fiat” could a court limit any such defense to conduct that is both “a characteristic and involuntary” part of conduct caused by a mental illness.³¹⁵

Atop that, “If Leroy Powell cannot be convicted of public intoxication” the plurality reasoned, “it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill, which is an ‘exceedingly strong in-

307. *Id.* at 532–33.

308. *Id.* at 533.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 567 (Fortas, J., dissenting).

313. *Id.* at 533–34 (plurality opinion).

314. *Id.* at 534.

315. *Id.* (quoting *id.* at 559 n.2 (Fortas, J., dissenting)).

fluence,' but 'not completely overpowering.'"³¹⁶ Given the "centuries-long evolution" of the various "interlocking and overlapping" aspects of the concept of criminal responsibility, there was no good reason to conclude that the Due Process Clause forced the states to adopt any one particular answer to that issue.³¹⁷ "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case."³¹⁸

In an opinion concurring in the judgment, Justice White agreed with the plurality that the statute in *Powell* was materially different from the one in *Robinson* because Texas law did not make it a crime simply to be an alcoholic.³¹⁹ His opinion, together with the Marshall plurality opinion, eliminates any basis for asserting that the clause creates a constitutional rule for the law of criminal responsibility.

The Supreme Court's decision in *Powell* dooms Kahler's Eighth Amendment claim. The Court refused to use the Constitution as a mechanism for displacing legislative judgments regarding criminal responsibility, concluding that the legislatures were the better forum to resolve the relationship between a mental disease and criminal responsibility. The Court declined the invitation, implied by Justice Fortas in dissent, to become "the ultimate arbiter of the standards of criminal responsibility, in

316. *Id.*

317. As the plurality put it:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. at 535–36 (footnote omitted).

318. *Id.* at 536.

319. *Id.* at 550 (White, J., concurring in the result) ("I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.").

diverse areas of the criminal law, throughout the country.”³²⁰ All that the Eighth Amendment requires—the “thrust” of its decision in *Robinson*—is that a defendant “has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.”³²¹ Murder certainly qualifies. Indeed, the Court went out of its way to emphasize that a consequence of treating Powell like Robinson would be to make difficult the conviction for murder of someone whose mental disease *compelled* him to kill—a claim that even Kahler does not advance.³²²

The only ground left for making that claim would be that the purpose of the clause—preventing the gratuitous infliction of pain—justifies reading the clause to regulate a state’s definition of criminal responsibility. As explained below, however, that argument is also unpersuasive.

D. The Purpose of the Cruel and Unusual Punishments Clause

Kahler’s last argument is that criminally punishing an insane offender serves no legitimate purpose and therefore amounts to the type of gratuitous infliction of pain that the Cruel and Unusual Punishments Clause bans.³²³ As he sees it, punishing someone who could not and did not know right from wrong serves “none of the four accepted penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, or rehabilitation.”³²⁴ Punishing an offender who cannot understand that his conduct was wrongful is like punishing a tree for falling on someone. Neither one comprehends why he or it was punished. The prospect of criminal punishment also cannot deter a deranged individual from committing a crime any more than the availability of a fire extinguisher can deter a blaze from consuming a home. Punishment “is a poor tool for incapacitating the insane” because an offender’s term of im-

320. *Id.* at 533 (plurality opinion).

321. *Id.*

322. *Id.* at 534.

323. Brief for Petitioner, *supra* note 97, at 31. Kahler also argues that punishing an insane offender is “grossly disproportionate,” but that argument is a make-weight. He committed not one but four murders, so the death penalty is not remotely disproportionate for his crimes.

324. *Id.* at 32 (citing *Graham v. Florida*, 560 U.S. 48, 71 (2010)).

prisonment is ordinarily too short or too long relative to his crime.³²⁵ Finally, punishment is unlikely to rehabilitate the insane because prisons are not mental institutions.³²⁶ Under those circumstances, he concludes, punishing an offender who could not and did not know right from wrong is simply wanton cruelty.

Precedent does not support the result Kahler seeks. Kahler cites Justice Kennedy's opinion in *Graham v. Florida*³²⁷ for the proposition that the four penological goals he discusses are exclusive.³²⁸ *Graham*, however, held no such thing. *Graham* concluded only that there was no penological justification for sentencing juveniles to life imprisonment without parole for nonhomicide offenses.³²⁹ In so ruling, *Graham* did not purport to define an exclusive set of justifications for punishment. *Graham* also did not walk back the Court's recognition only seven years beforehand that "the Constitution 'does not mandate adoption of any one penological theory.'"³³⁰ After all, as Justice Kennedy explained in his separate opinion in *Harmelin v. Michigan*,³³¹ "[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . [D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes."³³² In fact, *Graham* noted that "Criminal punishment can have different goals, and choosing among them is within a legislature's discretion."³³³

325. *Id.* at 34.

326. *Id.* at 34–35.

327. 560 U.S. 48 (2010).

328. Brief for Petitioner, *supra* note 97, at 32–33 (citing *Graham*, 560 U.S. at 71); see also Brief of ACLU, *supra* note 228, at 10–14; Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioner at 4–6, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019).

329. *Graham*, 560 U.S. at 73–74.

330. *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

331. 501 U.S. 957 (1991).

332. *Id.* at 999–1000 (Kennedy, J., concurring in part and concurring in the judgment).

333. 560 U.S. at 71. *Graham* also did not reject what Justice Stewart wrote in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), that repressing vigilantism and expressing society's moral indignation are legitimate justifications for punishment. See *infra* text accompanying notes 339–341.

Reason also does not support Kahler's claim. His argument rests on several curious assumptions that he makes no effort to justify. The first one is that the purposes of the Cruel and Unusual Punishments Clause matter more than its text. The history discussed above reveals that the Framers sought to prohibit use of hideously painful punishments, such as boiling someone in oil, as the penalty for crime.³³⁴ The Framers' use of the term "cruel," read against the English and American background to the clause, proves as much. But the clause ties its concern with cruelty to the punishments that the government may impose, not to the government's definition of the offenses that could lead to those punishments. The clause prohibits the imposition of "cruel and unusual *punishments*," not the definition of "cruel and unusual *crimes*."

The second mistaken assumption is that the government must *justify* its punishment decisions. The Cruel and Unusual Punishments Clause does not require justifications for punishment; it only bans punishments that are "cruel and unusual" regardless of their rationale. Boiling child rapists in oil might well effectively deter that crime, and many people might conclude that a child rapist deserves to suffer in that manner. The clause forbids that punishment, however, even if its use would eradicate that offense. The same point can be made in the other direction. Perhaps the reason why prisoners wear orange jumpsuits (or the old-fashioned, black-and-white, vertically striped jacket and pants) rather than blue jeans is that wardens believe orange jumpsuits are humiliating. That rationale might be childish, but that does not mean the practice is forbidden or that wardens must justify their decisions about prisoners' wardrobes. Even making the heroic assumption that forcing a prisoner to wear an orange jumpsuit to satisfy a warden's ego is a "punishment," it is hardly a "cruel and unusual" one, whatever the underlying rationale might be. Requiring the government to justify a punishment by proving that it promotes one or more judge-created penological rationales gets the Cruel and Unusual Punishments Clause backwards. A punishment that is neither cruel nor unusual is permissible even if there is no rational explanation why a legislature authorized it or a judge imposed it.

334. See, e.g., *Harmelin*, 501 U.S. at 966–75 (opinion of Scalia, J.).

The third assumption is that there are only *four* legitimate rationales for punishment—retribution, deterrence, incapacitation, and rehabilitation (and punishing Kahler, quite conveniently, advances none of them). This assumption ignores what history teaches, how government works, what punishments accomplish, and what courts may do.

At early common law, local English clans sanctioned offenders to prevent the violent retaliation that would follow if murders, assaults, and thefts were left unpunished and uncompensated.³³⁵ That rationale has little in common with the ones that Kahler contends are exclusive. However “unappealing” to some it might appear today to maintain that forestalling private vigilantism is a legitimate justification for punishment, that is the ground on which modern Anglo-American criminal law rested.³³⁶ If you think that America has outgrown any need to use punishment to prevent vigilantism, think again.³³⁷ People have changed since King Ethelbert drafted the first criminal code in (about) 600 A.D.,³³⁸ but their nature has not. “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”³³⁹ Having the government take up that function, the Supreme Court noted in *Gregg v. Georgia*,³⁴⁰ “is essential in

335. See, e.g., BAKER, *supra* note 5, at 2–3; JENKS, *supra* note 5, at 3 (“The so-called Anglo-Saxon Laws date from a well-recognized stage in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom.”); Larkin, *supra* note 3, at 329 (“English King Ethelbert drafted the first written code in approximately 600 A.D. . . . The hoped-for goal was to forestall violent retaliation and intertribal warfare.” (footnote omitted)); Frederick Pollock, *The King’s Peace in the Middle Ages*, 13 HARV. L. REV. 177, 177 (1899) (“All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished.”).

336. *Gregg*, 428 U.S. at 183 (Stewart, J., lead opinion) (citing *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

337. See PAUL H. ROBINSON & SARAH M. ROBINSON, *SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS* (2018).

338. See BAKER, *supra* note 5, at 2–3; MAITLAND, *supra* note 216, at 1.

339. *Gregg*, 428 U.S. at 183 (Stewart, J., lead opinion) (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (internal quotation marks omitted)).

340. 428 U.S. 153.

an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”³⁴¹

How about three other justifications: educating the public about the importance of obeying the law, recognizing the importance of crime’s victims, and expressing moral outrage at particular crimes and criminals? The government must have punishments available to advertise the importance of compliance, and the government must inflict those punishments on offenders to display its enforcement resolve and thereby educate the public that it means what it says.³⁴² Punishing offenders is also critical to demonstrate societal concern for the damage that offenders inflict on their victims. The legislative budgetary process demonstrates that people are important by funding their interests; the criminal justice system demonstrates that people are important by punishing their victimizers. As for expressing moral outrage: *Gregg* noted that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”³⁴³ In some cases—say, mass or torture murders—only the death penalty may adequately express the community’s belief regarding the heinousness of the offense.³⁴⁴

There might be other justifications as well. Our point is not that our list *is* exclusive but that Kahler’s list is *not* and that, even if it were, it is beside the point. There might be scores of

341. *Id.* at 183 (Stewart, J., lead opinion); *see also id.* at 226 (White, J., concurring in the judgment) (referring to his opinion in *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J., dissenting) (“It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere.”)).

342. To the inevitable responses that allowing education to serve as a rationale for punishment enables the government both to avoid defending the rationality of its punishment decisions and to use whatever punishments it finds necessary, we plead “Guilty” and “Not guilty.” Yes, an education rationale enables the government to avoid proving that a punishment advances retribution, deterrence, incapacitation, and rehabilitation. But the relevant question—is that punishment cruel and unusual?—remains unchanged. Whether that punishment “works,” as explained below, is beside the point. Whether or not the government finds a punishment necessary to advance those ends is also beside the point. The government might believe that amputating a pickpocket’s hands is the only way to prevent him from recidivating. The Eighth Amendment nonetheless prohibits that penalty.

343. 428 U.S. at 183 (Stewart, J., lead opinion).

344. *See id.* at 184 & n.30.

reasons why a particular sanction could be a legitimate punishment. Investigating their rationality would be a reasonable inquiry for a penologist or a philosopher. The only relevant inquiry for a court, however, is whether a punishment is “cruel and unusual.” Spending time inquiring *why* society punishes offenders—an undertaking neither expressly nor impliedly required by anything in the text or history of the Cruel and Unusual Punishments Clause—serves no legitimate purpose.

Kahler’s last curious assumption, perhaps the least justifiable of the three, is that a punishment must be *effective* to avoid being gratuitous.³⁴⁵ The Constitution grants the federal government specific powers in the hope that elected officials will use them wisely, maybe even effectively. Congress has the power to borrow money, to regulate interstate commerce, and to declare war.³⁴⁶ Congress acts improvidently, but not unconstitutionally, if it runs up a backbreaking debt, if the economy goes into the tank, and if the nation loses a military conflict. If that happens, the public has the chance to replace its elected officials every two, four, and six years.

Punishment decisions are no different. There too, the remedy for failure is political, not legal. No other approach would be workable. Think of the questions that must be answered to do that job properly.³⁴⁷ Are all justifications of equal importance or do some—say, deterrence—carry more weight than others—say, retribution? How do you measure a punishment’s effectiveness? How effective must a punishment be? How do you trade off short-term versus long-term effectiveness? Are some successes—such as uncovering espionage plots or intercepting terrorist attacks—worth more than others are—such as apprehending mass murderers (or serial killers) or convicting senior members of an organized crime family? There are no easy answers to those questions, let alone objective ones. To evaluate the effectiveness of the decisions that legislators and executive officials make, we use the ballot box, not a courtroom.

Unless the Cruel and Unusual Punishments Clause requires an elitist perspective for resolving those questions, how the *public* would answer them is critical. Courts are better

345. See Brief for Petitioner, *supra* note 97, at 31–36.

346. U.S. CONST. art. I, § 8, cls. 2, 3, 11.

347. See Paul J. Larkin, Jr., *Essay: A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL’Y 231, 242–45 (2019).

equipped than the public to resolve the legal issues involved in any interpretation of the terms of the Cruel and Unusual Punishments Clause. Law schools train embryonic lawyers, and law school graduates obtain experience in construing legal documents, like constitutions. For that reason, lawyers are better equipped than the public to answer a question involving the meaning of ancient legal texts. But a law degree does not make an attorney into a more qualified decisionmaker for every issue that could arise in a criminal case, even one involving an issue of mental illness. For example, a psychiatrist is more qualified than a lawyer or judge to decide whether a prisoner is mentally ill and would benefit from medication.³⁴⁸ Whether a punishment advances society's interests in retribution, deterrence, incapacitation, and rehabilitation is a question involving moral and political considerations, not an issue of law.³⁴⁹ Judges are no better equipped to evaluate the effectiveness of government than are the people chosen to sit on a jury at trial.³⁵⁰ Kahler, in effect, asks the Supreme Court Justices to serve as amateur criminologists and undertake the "tantalizing aspect" of their profession by deciding the effectiveness of punishment.³⁵¹

The public would likely say that executing Kahler would readily promote the public interest in each of the first three ra-

348. See *Washington v. Harper*, 494 U.S. 210, 228–31 (1990) (concluding that "an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge").

349. *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or futility, these are peculiarly questions of legislative policy." (citation omitted)); see also *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) ("I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority."); *supra* note 10.

350. As Justice Frankfurter once put it:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of the judgment).

351. *Gore*, 357 U.S. at 393.

tionales that Kahler identifies. Retribution “build[s] on the widely held feeling that the criminal owes the community a measure of suffering comparable to that which he has inflicted.”³⁵² Kansas can legitimately believe that capital punishment has a deterrent effect, and the state does not need to prove that point with respect to each individual capital defendant. As for incapacitation: capital punishment ensures that result. Finally, given the nature of his crimes, the public would likely be willing to trade any interest it might have in rehabilitating him for the hope of securing greater protection for potential victims. The state legislature made that judgment, and it is in a better position to represent what Kansans think than any federal court.

One could label punishing Kahler and others like him in different ways: as giving Kahler and any future multiple murderers their just deserts, as deterring other people who have also hit rock bottom from committing murder, as avoiding the suffering of future victims, or just as increasing respect for the law. However you describe it, punishing murderers is a legitimate use of governmental power.

* * * * *

We find ourselves in the same position now that we did at the end of our analysis of the Due Process Clause. The Cruel and Unusual Punishments Clause serves an eminently valuable role, but that role comes into play only after a legislature has defined an offense and a jury has convicted a defendant of committing it. The text, the history, and the judicial interpretations of the clause limit its relevance to the punishment that a state has authorized for a crime.

CONCLUSION

Neither the Due Process Clause nor the Cruel and Unusual Punishments Clause contains a directive ordering the federal or state governments to define the substantive criminal law in any particular fashion. The Due Process Clause prohibits the government from punishing someone until he has been convicted of a crime under the governing jurisdiction’s laws, but it does not instruct legislatures how to define those crimes and whether

352. GOLDSTEIN, *supra* note 8, at 11–12.

or how to recognize defenses to them. The Cruel and Unusual Punishments Clause has even less relevance to the content of the substantive criminal law. It only comes into play after an offender has been convicted of a crime and focuses entirely on the punishments that he can receive. The criminal law recognizes various defenses—self-defense, defense of others, duress, necessity, consent, and so forth—but the Framers did not incorporate any of them into the text of the Constitution. Indeed, with the exception of the Treason Clause, the Constitution leaves entirely to the political process the definition of the penal code because the judgments involved in drafting it involve precisely the type of moral decisions that the public and its elected representatives are fully competent to make. The most that could be required of the federal or state governments is to make a nonarbitrary choice. The judgment that Kansas made easily passes that test.