A New Argument for the Next Kahler v. Kansas: Due Process Demands More Than Cognitive Capacity

Matthew Hughes

COMMENT

A NEW ARGUMENT FOR THE NEXT *KAHLER V. KANSAS*: DUE PROCESS DEMANDS MORE THAN COGNITIVE CAPACITY

Matthew Hughes[†]

"[A] condition of all others the most afflictive and humiliating—that of HUMAN NATURE IN RUINS."[1]—George Dale Collinson

"[R]eason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety."[2]—Lord Thomas Erskine

I. INTRODUCTION[3]

During the weekend after Thanksgiving in 2009, James Kraig Kahler shot his wife, his two daughters, and his wife's grandmother.[4] Ten years later, the United States Supreme Court agreed to hear his case and resolve, as a matter of constitutional law, a question that gripped the American public forty years ago: Can the government punish a person who is incapable of discerning between good and evil?[5]

[†] Matthew Hughes is a third-year JD candidate at Liberty University School of Law. Special thanks are due to Professors Scott Thompson and Rena Lindevaldsen, who coached me for the moot court tournament in which I originally encountered *Kahler v. Kansas* and its seemingly intractable historico-legal problem. Their probing questions forced me to develop this argument. To my parents—who forced me to learn how to teach myself—I owe the habit developed by my dad's favorite response to my questions: "Look it up." I am also deeply grateful to my late grandfather, Ralph Head Smith, who passed on to me his undying love of the past.

[1] 1 GEORGE DALE COLLINSON, A TREATISE ON THE LAW CONCERNING IDEOTS, LUNATICS, AND PERSONS *NON COMPOTES MENTIS* vii (1812).

[2] Hadfield's Case, 27 How. St. Tr. 1281, 1313 (1800).

[3] On publishing this article, my thoughts—although only relevant if somebody actually reads and uses it—are those of Benjamin Rush in 1812:

> In entering upon the subject of the following Inquiries and Observations, I feel as if I were about to tread upon consecrated ground. I am aware of its difficulty and importance, and I thus humbly implore that BEING, whose government extends to the thoughts of all creatures, so to direct mine, in this arduous undertaking, that nothing hurtful to my fellow citizens may fall from my pen, and that this work may be the means of lessening a portion of some of the greatest evils of human life.

BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS UPON THE DISEASES OF THE MIND 9 (1812).

[4] Kahler v. Kansas, 140 S. Ct. 1021, 1026–27 (2020).

[5] *Id.* at 1024; *see infra* Section II.E.

The Kansas Supreme Court said yes twenty years ago in *State v. Bethel*[6] and reaffirmed its view in early 2018 when it affirmed Kahler's murder convictions.[7] The Supreme Court of the United States granted certiorari in early 2019.[8] Kahler argued that the Due Process Clause required Kansas to allow him to prove his innocence by demonstrating that his mental disturbance deprived him of the ability to realize that his actions were immoral.[9] The Court affirmed Kahler's conviction 6-3, holding that the Due Process Clause does not require the states to acquit defendants whose moral faculties were inhibited by a mental disturbance at the time of the crime.[10]

Mr. Kahler's legal battle is far from over. He almost certainly file a motion in state court for post-conviction relief and might also file a federal habeas corpus petition.[11] This article articulates the argument Kahler should have made at the Supreme Court and raised in his state motion for post-conviction relief,[12] and one with which future mentally disturbed homicide defendants might win where Kahler lost. In light of the *Kahler* decision, I make an argument for the next *Kahler v. Kansas*—whether brought by Mr. Kahler in post-conviction proceedings or by another mentally disturbed homicide defendant. I argue that although the Due Process Clause does not prohibit states from convicting defendants who are unable to distinguish right from

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[6] State v. Bethel, 66 P.3d 840, 851 (Kan. 2003).

[7] State v. Kahler, 410 P.3d 105, 125 (Kan. 2018).

[8] Kahler v. Kansas, 139 S. Ct. 1318, 1318 (2019).

[9] *Kahler*, 140 S. Ct. at 1024–25; Brief for Petitioner at 15–16, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) [hereinafter Brief for Petitioner]; *see* State v. Kahler, 410 P.3d 105, 124–25 (Kan. 2018).

[10] *Kahler*, 140 S. Ct. at 1024–25.

[11] *See generally* Matthew Hughes, Comment, *Evidentiary Issues and Certificates of Appealability in Federal Habeas Corpus Petitions*, 14 LIBERTY U.L. REV. 487, 490–506 (2020); *see also* Andrew P. Lopiano, Comment, *Dumplings Instead of Flowers: The Need for a Case-by-Case Approach to FRCP 60(b)(6) Motions Predicated on a Change in Habeas Corpus Law*, 15 LIBERTY U.L. REV. 111, (2020).

[12] Kahler will undoubtedly raise as many arguments as possible, but his due process argument is doomed in federal court if the state courts reject it in post-conviction proceedings because the federal habeas statute requires federal courts to deny relief unless the state court decision "resulted either in a decision contrary to or involving an unreasonable application of clearly established [f]ederal law, as determined by the Supreme Court of the United States, or in a decision based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." Hughes, *supra* note 11, at 494–95 (alteration in original) (internal quotation marks omitted) (quoting 28 U.S.C. § 2254(d)).

wrong, it prohibits them from restricting the insanity excuse doctrine[13] as narrowly as Kansas has. In words explained and defended below, the Due Process Clause of the United States Constitution—as interpreted by the Supreme Court—requires an insanity excuse that is broader than cognitive incapacity because cognitive capacity is not the only mental prerequisite to criminal responsibility. The American legal system has not recognized a single insanity test as the only right test, nor has it uniformly affirmed the moral incapacity test as an essential component of a correct insanity test, but until recently, it wholly rejected the idea that the cognitive incapacity test was sufficient.

II. BACKGROUND

A. *A Few Caveats*

A few caveats are in order. This article addresses only the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Kahler based his claim on both the Kansas and federal constitutions' due process provisions,[14] but the United States Supreme Court could grant certiorari only on the federal due process claim.[15] The Court also dismissed Kahler's Eighth Amendment claim as waived.[16] Scholars have raised other

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[13] The phrase "insanity excuse doctrine" is my own invention. I devised it to circumvent the confusion that arises from using the phrase "insanity defense" in discussions regarding the appropriate burden of proof and procedural issues. *See infra* Section II.C.

[14] *Kahler*, 140 S. Ct. at 1027; State v. Kahler, 410 P.3d 105, 124 (2018); *see generally*, JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (urging lawyers to raise and judges to address separate and distinct state constitutional claims). The Kansas Constitution does not have a due process clause, but Sections 1 and 2 of its Bill of Rights are equal protection provisions which are "given much the same effect" as the federal Due Process Clause. Manzanares v. Bell, 522 P.2d 1291, 1302–03 (Kan. 1974). But Kansas courts have interpreted Section 1 more broadly than the federal courts have interpreted the federal Due Process Clause. Farley v. Engelken, 740 P.2d 1058 (Kan. 1987). In 2019, the Kansas Supreme Court expressly stated that Section 1 "acknowledges rights that are distinct from and broader than the United States Constitution." Hodes & Nauser v. Schmidt, 440 P.3d 461, 471 (Kan. 2019).

[15] 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."). Addressing the corresponding protections in every state and territory is an arduous task outside the scope of this article, but each state's protection deserves special attention. SUTTON, *supra* note 14, *passim*.

[16] *Kahler*, 140 S. Ct. at 1027 n.4. Others have discussed the Eighth Amendment argument for the insanity excuse. *See*, *e.g.*, Stephen M. LeBlanc, Comment, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U.L. REV. 1281 (2007).

arguments for the insanity defense or a particular version of it,[17] but this article addresses only the federal due process argument.

The practice of criminal law—especially constitutional criminal law—is not about getting the guilty off on technicalities. It is about convicting the guilty and only the guilty. It is about the rule of law. It is about refusing to punish someone if the sentence or conviction, or the process by which they were obtained, violates our common values. It is about giving everyone the same protections we would want if we were accused of a crime. This article addresses the scope of the current protections granted to all American criminal defendants under the Due Process Clause of the Fourteenth Amendment.

Kahler's claim was based on the Court's substantive due process framework. I have grave misgivings about this framework,[18] but the Court has adopted it. This article presents the best argument Kahler could have made in the context of the Court's substantive due process jurisprudence.

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[17] *E.g.* Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Statutes are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477 (2017). The United States signed the Convention on the Rights of Persons with Disabilities, but never ratified it. *CRPD and Optional Protocol Signatures and Ratifications*, UNITED NATIONS (May 2016), https://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg.

[18] The idea that the Due Process Clause of the Fourteenth Amendment contains substantive guarantees has little support in the amendment's legislative history. Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 110–11 (2020). *But see* Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 147–56 (2010). Legislative history is important because our government derives its powers from the consent of the governed as expressed through their elected representatives, and legislative history is one of the best guides to interpreting those representatives' expressions of consent as embodied in written law. *See* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 223 (2020). In practice, the framework also invites each judge to make a legal ruling based on political or moral opinions rather than an objective, reasonably certain standard. *See infra* note 633.

This is a legal argument, not a philosophical or theological argument,[19] not even a moral one.[20] It is certainly not a medical argument.[21] Because the law determines the categories of insanity that are legally relevant, medical expertise helps gather evidence in particular cases and informs policymakers, but it does not dictate legally and morally significant categories of mental diseases and defects. Morality, theology, and philosophy inform legal reform advocates and lawmakers, but they do not have a place in the interpretation of the law outside of ascertaining the intent of the legislators.

This is a nuanced argument that is difficult to articulate but fairly easy to support from the historical record and the Court's precedents. Kahler's lawyers should have realized that their argument had serious inconsistencies that at least five justices would reject.[22] This argument gives the next Kahler a chance to raise the due process argument.

This argument is not so much about what the law is or should be as much as it is about what the law might be. It is an argument that several justices hinted at during the *Kahler* oral argument but was never articulated for the

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[19] The major modern religious traditions harbor debates and discussions about fault and moral responsibility and how a proper view of fault and moral responsibility should inform public policy. In my own tradition, evangelical Protestantism, and in Christendom generally, the doctrines of total depravity and human responsibility complicate the debate. The Mosaic law does not expressly mention any insanity excuse. However, some passages in the Bible tie mental states to moral responsibility and the severity of punishment. *See*, *e.g.*, *Luke* 12:35–48 (ESV) ("And that servant who knew his master's will but did not get ready or act according to his will, will receive a severe beating. But the one who did not know, and did what deserved a beating, will receive a light beating. Everyone to whom much was given, of him much will be required, and from him to whom they entrusted much, they will demand the more.").

[20] Others have raised moral arguments. *E.g.*, Mark Hathway, Comment, *The Moral Significance of the Insanity Defense*, 73 J. CRIM. L. 310 (2009).

[21] Brief for the American Bar Association at 8–9, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) (citing ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 323–24 (1989)) [hereinafter ABA Brief]; Transcript of Oral Argument at 8–9, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) (recording Kahler's attorney conceding that the legal concepts are distinct from any medical diagnosis) [hereinafter Transcript].

[22] Justice Kagan's opinion kindly chalked it up to faulty reasoning, but I find it hard to believe Kahler's lawyers could not see the shortcomings of their position. They ultimately made a foredoomed argument to win the moral incapacity excuse for all time instead of making a much more plausible argument for a less ambitious ruling, which they could have won with the argument this article makes. I believe a less ambitious ruling would have been both more plausible to the justices and laid the groundwork for bigger wins in future cases.

Court or explained as an alternative basis to rule for Kahler.[23] It is also about a vast quantity of historical evidence not included in any of the briefs.

Criminal responsibility is distinct from other reasons for confining the mentally ill.[24] People whose mental disturbances make them dangerous to themselves or others must be restrained.[25] Others may merit confinement by committing a crime for which they can be justly held accountable.[26] It is also separate from the issue of competency to stand trial and the wisdom of "guilty but mentally ill" statutes that provide for punishment and treatment in tandem.[27] The subject addressed here is simply mental prerequisites to criminal responsibility.

This argument is a legal argument based on history. It is a historico-legal argument, if you will. Because history is essential to the argument, I quote freely and sometimes at length from the original sources. Although to some extent the argument depends on my characterization of the materials on which I draw, I have attempted to retain enough of the original writings to allow readers to decide for themselves whether the sources say what I argue they say.[28]

The insanity defense—or, as I refer to it here, the insanity excuse doctrine[29]—is complex and confusing. Interlocking concepts make it difficult to sort out one facet of legal insanity without first clarifying another. That concept, in turn, requires a hard look at yet another facet to fully understand.[30] The remainder of Part II sorts out the most difficult aspects of the insanity excuse.

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[23] Transcript, *supra* note 21, at 57 ("[T]here's just a ton [in the history] that suggests that . . . there was something more than a requirement that the defendant . . . be able to form an intent to kill."); *see infra* notes 140–143, 145 and accompanying text.

[24] Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYR. L. REV. 477, 478 (1982).

[25] *Id.*

[26] *Id.* at 477–78.

[27] *Id.* at 480, 482.

[28] This keeps me honest and enables you, the reader, to make a much more informed conclusion without having to look up the sources for yourself.

[29] *See infra* Section II.C.2.

[30] Confusion is rampant and apt to cause "injustice and inefficiency." Morris, *supra* note 24, at 478. Professor Morris also argued that the fundamentally incompatible language and thinking of the fields of law and psychiatry—not the least of these being the chasm between individuals to be convicted and punished or acquitted and released, and those with mental health issues to be treated—render the insanity excuse's problems acute. *Id.* at 500–01.

B. *Variations on the Insanity Theme*

Every state has some version of the insanity excuse.[31] Despite differences in phraseology, these defenses boil down to one or more of the four basic insanity tests laid out in *Clark v. Arizona*.[32] Three of these defenses correspond to the three major types of mental incapacity. The types of mental incapacity are primarily based on legal, rather than medical, concepts and are focused on the resulting mental deficiency rather than the underlying psychological or physiological causes.[33]

The first type of mental incapacity is cognitive incapacity: the inability to appreciate the nature and quality of one's acts.[34] A person suffering from cognitive incapacity might mistake choking the victim to death for squeezing a lemon. Evidence that a particular defendant's mental disturbance made the defendant think the victim was an alien, for example, would defeat the mens rea required to prove intentional murder.[35]

The second is moral incapacity: the inability to appreciate the wrongfulness of one's conduct.[36] There are two sub-types of moral incapacity. Depending on the jurisdiction, those suffering from moral incapacity are, by reason of a mental defect, either deprived of the moral inhibitions most people experience—best termed pure moral incapacity—or are unable to

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[31] *See* Brief for Petitioner, *supra* note 9, at Addendum.

[32] Clark v. Arizona, 548 U.S. 735, 749–53 (2006).

[33] *See id.* at 752; Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. AM. ACAD. PSYCHIATRY & L. 488, 489 (2013); Arlie Laughnan, *Mental Incapacity Doctrines in Criminal Law*, 15 NEW CRIM. L. REV. 1, 1–2 (2012) ("Although it might be thought to describe a condition or set of conditions, in criminal law, the term 'mental incapacity' refers to the consequences of certain conditions.").

[34] *See Clark*, 548 U.S. at 753. Morris suggests that these tests are hopelessly philosophical:

> Lawyers have been quite content to strap a mattress to the back of any psychiatrist willing to appear in court to answer questions like: At the time of the killing, did the accused "know that nature and quality of the act?"; did he "know that it was wrong?"; did he have "substantial capacity to appreciate the criminality of his conduct?"; [and] did he have "substantial capacity to control his conduct?" Wiser psychiatrists and those not tempted by the bright focus of public interests have avoided these philosophically impossible questions. Nor does it assist materially to direct the psychiatrist to give information to the jury to help it to answer these elusive questions but to avoid offering answers because it is the questions themselves that are philosophically in error, pretending to a precision beyond present knowledge.

Morris, *supra* note 24, at 502–03 (footnote omitted).

[35] *See infra* Section II.C.1.

[36] *Clark*, 548 U.S. at 750; *see* Robert M. Ireland, *Insanity and the Unwritten Law*, 32 AM. J. LEGAL HIST. 157, 165–67 (1988).

understand that society views certain conduct as harmful and has forbidden it by law—which I shall refer to as legal-moral incapacity.[37] Cognitive incapacity always results in moral incapacity, because the inability to distinguish between a lemon and a human neck entails an inability to discern that crushing the neck is wrong.[38] While such a person might know in the abstract that crushing someone's neck is wrong, the person lacks the capacity to discern the moral implications of his conduct because of an inability to accurately understand what he is doing.

The third is volitional incapacity: an inability to control one's acts, or as it is often stated, an inability to conform one's conduct to the requirements of law.[39] The irresistible impulse test is the quintessential version of the volitional incapacity excuse.[40] In early Anglo-American law, cognitive incapacity and moral incapacity were deemed significant because they signified defects of volition that rendered criminal choices neither free nor truly blameworthy.[41]

The fourth insanity test is called the *Durham* test or the product-of-insanity test.[42] Under this insanity defense, a person cannot be held responsible for his criminal conduct if his conduct was the product of mental illness or defect.[43] The *Durham* test inherently allows the jury to consider whether a mental defect or disease so distorted the defendant's cognitive,

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[37] *See*, *e.g.*, State v. Wilson, 700 A.2d 633, 639–41 (Conn. 1997).

[38] *See Clark*, 548 U.S. at 750 nn.11–12.

[39] *Id.* at 750 n.12.

[40] Benjamin B. Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1383 (1986); *see* Parsons v. State, 2 So. 854 (Ala. 1887).

[41] *Id.* at 1373 ("From Bracton in the thirteenth century through Blackstone in the eighteenth century, English commentators adopted Aristotle's identification of the capacities of cognition and volition as the twin bases of justification for excuses in their explanation of the exculpatory character of insanity.").

[42] Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954), *abrogated by* United States v. Brawner, 471 F.2d 969, 981–82 (D.C. Cir. 1972). New Hampshire's insanity test is very similar: "a mental disease or defect *caused* his actions." State v. Fichera, 903 A.2d 1030, 1034 (N.H. 2006) (emphasis added) (citing State v. Abbott, 503 A.2d 791, 794 (N.H. 1985)). New Hampshire's test has been distinguished from the Durham test, most prominently by pointing out that insanity is a question of fact for the jury and there is no specific test as a matter of law. *Id.* at 1035 (citations omitted); *see* John Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 378–79 (1960) (citations omitted); *see also* Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 153 (1994) ("Maybe that is the answer—that we cannot neatly define what mens rea means but rather, the issue must be decided by a fact finder after applying the current understandings of psychiatry and psychology and current social mores to a definition of responsibility.").

[43] *Clark*, 548 U.S. at 749–50; *Fichera*, 903 A.2d at 1034.

moral, or volitional capacity as to render the crime a result of the defect or disease rather than the defendant's mental processes.

The insanity tests of most United States jurisdictions today consist of cognitive incapacity and at least one other form of incapacity.[44] The famous *M'Naghten* test includes two prongs: cognitive incapacity and moral incapacity.[45] The insanity defense of the Model Penal Code, first published in 1962 and currently in force in fourteen states, includes the moral and volitional incapacity defenses.[46] A few states, including Kansas, have adopted the mens rea approach.[47] The mens rea approach does away with the affirmative insanity defense but allows evidence of cognitive incapacity to defeat the mens rea element, or makes evidence of insanity that affects the defendant's ability to form the requisite mens rea element an affirmative defense—in either case, the focus is on the "intent element" of the crime."[48] Other insanity excuse formulations have also been proposed.[49]

C. *Excuse Me*

1. Mens Rea

All crimes have an actus reus element and almost all have a mens rea element. The mens rea element is the mental state, and the actus reus is a voluntary act. Only a willed bodily movement can satisfy the actus reus element.[50] The mens rea element of the crime is whatever mental state the crime requires.[51] For instance, in South Carolina, "[m]urder is the killing of any person with malice aforethought, either express or implied."[52] Malice is

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[44] *Clark*, 548 U.S. at 749–52. Although the *Clark* Court said that 11 states have adopted the moral incapacity defense as their insanity defense, the insanity excuse in those states also includes cognitive incapacity by virtue of the mens rea element of the crime. *See infra* Section II.C.

[45] Finger v. State, 27 P.3d 66, 72 (Nev. 2001).

[46] MODEL PENAL CODE § 4.01 (AM. L. INST. 1962).

[47] State v. Bethel, 66 P.3d 840, 851 (Kan. 2003).

[48] *See id.*

[49] *See* Helen Silving, *The Criminal Law of Mental Incapacity*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 129, 129 (1962) ("No punishment shall be imposed upon a person if at the time of engaging in criminal conduct and for some time prior thereto his ego functioning was so impaired that he had a very considerably greater mental difficulty in complying with social demands and rules than does the majority of the members of the community.").

[50] *E.g.*, People v. Grant, 377 N.E.2d 4, 8-9 (Ill. 1978) (noting that the actus reus element cannot be satisfied by a bodily movement caused by something other than a person's conscious will, including "convulsions, sleep, unconsciousness, hypnosis or seizures.").

[51] *See* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 673–75 (1993).

[52] S.C. CODE ANN. § 16-3-10 (2020) (internal quotation marks omitted).

simply the "wrongful intent" to kill.[53] Malice is express if it is admitted in words and implied when it can be inferred from the circumstances.[54] In a murder case, the prosecution must produce enough evidence—either through the defendant's statements or other circumstances—to persuade the jury beyond a reasonable doubt that the defendant *maliciously* intended to kill the victim. A defendant can challenge the prosecution on the malice element in two ways. First, a defendant can present evidence that contradicts or counteracts the prosecution's evidence and thereby give the jury room to reasonably doubt wrongful intent—the mens rea element. Second, a defendant can raise an affirmative defense of insanity, which typically requires proof to a preponderance of the evidence.[55]

2. The Insanity Excuse Doctrine

Kahler and his amici spoke much of "the insanity defense" and "the affirmative defense of insanity,"[56] but the burden of proof is irrelevant and Kahler should have framed his argument in terms of an insanity excuse doctrine.[57] In *Leland v. Oregon* and *Clark v. Arizona*, the Supreme Court made it abundantly clear that states may set the burden of proof for the insanity "defense" as they see fit.[58] States may also forbid defendants from using expert opinion testimony to support an affirmative insanity defense.[59] The *Clark* Court distinguished proving an affirmative insanity defense from challenging the prosecution's proof of mens rea and from defeating a statutory presumption of sanity.[60] As Justice Kavanaugh clarified at oral

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[53] State v. Oates, 803 S.E.2d 911, 921 (S.C. Ct. App. 2017) (quoting *In re* Tracy B., 704 S.E.2d 71, 80 (S.C. Ct. App. 2010)); *see* State v. Friend, 281 S.E.2d 106, 107 (S.C. 1981).

[54] *Friend*, 281 S.E.2d at 106–07; *Oates*, 803 S.E.2d at 921; *see* State v. Fields, 214 S.E.2d 320, 322 (S.C. 1975).

[55] *E.g.*, State v. Finley, 290 S.E.2d 808, 810 (S.C. 1982) (citing State v. Bolton, 223 S.E.2d 863 (S.C. 1976)).

[56] *E.g.*, Brief for Petitioner, *supra* note 9, at 12, 15, 23, 28, 36; ABA Brief, *supra* note 21, at 6; Brief for the American Civil Liberties Union at 2, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135); Brief for Criminal Law and Mental Health Law Professors at 2, 4, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135); Brief for Legal Historians and Sociologists at 3, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

[57] The argument that abolishing the insanity defense violates due process is equivalent to the argument that the mens rea approach is not broad enough. *See* Morse & Bonnie, *supra* note 33, at 489, 491.

[58] Clark v. Arizona, 548 U.S. 735, 770–73 (2006); Leland v. Oregon, 343 U.S. 790, 798–99 (1952) (upholding an Oregon law that required defendants to prove insanity beyond a reasonable doubt).

[59] *Clark*, 548 U.S. at 757–61, 769–78.

[60] *Id.* at 766–69; *see supra* Section II.C.1; *see also* Hart v. State, 702 P.2d 651, 655–56 (Alaska Ct. App. 1985).

argument in *Kahler*, states that have adopted the mens rea approach "haven't necessarily abolished the insanity defense. . . . They have funneled it into mens rea."[61]

The phrases "insanity defense" and "affirmative insanity defense" breed confusion by failing to acknowledge *Leland*, *Clark*, and several other key cases.[62] In light of those cases, the fundamental question is not what the burden of proof must be,[63] but whether states can wholly dispense with insanity—or a particular insanity test—as a means of negating criminal responsibility. The term "excuse," which has the virtue of not being associated with a particular burden of proof,[64] refers to a defense which, if proved, does not make the act a morally upright act but "negate[s] responsibility."[65] Therefore, I use the term *insanity excuse doctrine* to refer to the notion that insanity, regardless of the test or tests adopted in a given

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[61] Transcript, *supra* note 21, at 21; *see Kahler*, 140 S. Ct. at 1029 ("Kansas, [Kahler] then contends, has altogether 'abolished the insanity defense,' in disregard of hundreds of years of historical practice. . . . [but] [h]is central claim . . . is more confined. It is that Kansas has impermissibly jettisoned the moral-incapacity test for insanity."); *see also* Gardner, *supra* note 51, at 640–41 (distinguishing between a proposed first level of mens rea based upon the definition of the crime and a second level functioning as an excuse).

[62] *See*, *e.g.*, Jean K. Gilles Phillips & Rebecca Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 459–61, 486–88 (2008). A recent law review article stated that Alaska abolished the insanity defense, but Alaska has instead limited the affirmative insanity defense to cognitive incapacity. R. Michael Shoptaw, Comment, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1105 (2015) (citations omitted); *see infra* note 78 and accompanying text. The other key cases regarding mens rea, defenses, and burdens of proof are *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion), and *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion).

[63] Even those who argue against *Clark* for the *M'Naghten* rule as guaranteed by due process admit that states may vary the burden of proof to the defendant's disadvantage. *See* Shoptaw, *supra* note 62, at 1131–32.

[64] *See* Joshua Dressler, Foreword, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1172 (1987).

[65] Brief for Philosophy Professors at 3, Kahler v. Kansas 140 S. Ct. 1021 (2020) (No. 18-6136) (citing J. L. Austin, *A Plea for Excuses: The Presidential Address*, 57 PROCS. ARISTOTELIAN SOC'Y 1, 2 (1956)); *see* Arnold N. Enker, *In support of the Distinction Between Justification and Excuse*, 42 TEX. TECH L. REV. 273, 274 (2009) (quoting Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 675–76 (1988)); Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389–90 (2005); Dressler, *supra* note 64, at 1162–63, 1165–67; *see also* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 258 (1987) ("The other ground for asserting my innocence is excuse. Here, again, I deny my culpability even while admitting the criminal harm, but not, as before [with justification], because I did the right thing after all. Rather, I argue, some disability in my freedom to choose the right makes it inappropriate to punish me."); Francis A. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 496–97 (1962) (citation omitted).

jurisdiction, is sufficient ground for absolving a defendant from criminal responsibility.[66]

D. *Substantive Due Process*

The Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to prohibit the states from defining crimes and establishing criminal procedures in ways that "offend[] principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[67] It also prohibits state action contrary to principles that are "implicit in the concept of ordered liberty,"[68] but the Court's insanity jurisprudence precludes a decision in Kahler's favor based on this test.[69] Fundamental liberty interests, which must be articulated precisely, are founded upon these fundamental or implicit principles and may be interfered with only by government action "narrowly tailored to serve a compelling state interest."[70]

E. *Insanity Excuse Reform*

Popular outrage followed John Hinckley, Jr's trial and acquittal for attempting to assassinate President Ronald Reagan.[71] Unaware of the nuances of the insanity defense and criminal procedure, Americans tended to believe the insanity defense was a golden opportunity to abuse the system.[72] A study of public perception shortly after the Hinckley trial found

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[66] *See* Sendor, *supra* note 40, at 1371; Marina Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U. CHI. L.J. 61, 77 n.61 (1977).

[67] Patterson v. New York, 432 U.S. 197, 201–02 (1977) (citations and quotation marks omitted).

[68] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citing Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

[69] Although the Court's Due Process precedents are unfavorable, there is a compelling argument that the Court's Eighth Amendment juvenile and mental illness cases, combined with a few key substantive due process cases, allow the Court to conclude that the moral incapacity excuse is implicitly in the concept of ordered liberty. *See*, *e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (holding that life without parole for "third strike" probation violation was cruel and unusual); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is cruel and unusual when imposed on juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (holding it cruel and unusual to execute a mentally ill offender).

[70] *Glucksberg*, 521 U.S. at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

[71] State v. Herrera, 895 P.2d 359, 361 (Utah 1995); Valeri P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: the Public's Verdict*, 47 PUB. OP. Q. 202, 202–03 (1983); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 779 (1985); Phillips & Woodman, *supra* note 62, at 485 (citations omitted); Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. B. ASS'N 38, 43 (1997); *John Hinckley Jr.*, BIOGRAPHY (Apr. 16, 2019), https://www.biography.com/crime-figure/john-hinckley-jr.

[72] Hans & Slater, *supra* note 71, at 205–07.

87% percent of Americans believed that "the insanity defense is a loophole that allows too many guilty people to go free."[73]

In response, several states abolished the moral incapacity excuse in favor of the mens rea approach, leaving only the cognitive incapacity excuse. Montana made the change in 1979,[74] before the failed assassination. Utah changed in 1983,[75] Kansas and Nevada in 1995,[76] and Idaho in 1996.[77] In 1982, Alaska abolished the moral incapacity excuse and made cognitive incapacity an affirmative defense.[78] In 1981 and 1982, about twenty states reconsidered their insanity defenses.[79] Congress considered abolishing the moral incapacity excuse in 1984, but ultimately passed a statute defining the federal affirmative insanity defense to include both moral and cognitive incapacity.[80]

F. *State and Federal Insanity Jurisprudence*

Several early state decisions upheld the insanity defense as a right under state or federal constitutional provisions or both.[81] In 1910, the Washington Supreme Court reversed a murder conviction because the defendant had been denied his right to due process and a jury trial under the Washington

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[73] *Id.* at 207. Professor Morris argued that when it comes to mentally disturbed offenders, "[w]e are at the same time more forgiving and more fearful, less punitive and more self-protective." Morris, *supra* note 24, at 480.

[74] State v. Korell, 690 P.2d 992, 996–97 (Mont. 1984).

[75] *Herrera*, 895 P.2d at 361 (citing State v. Young, 853 P.2d 327, 383 (Utah 1993); *Utah Legislative Survey*, 1984 UTAH L. REV. 115, 151 (1984)).

[76] State v. Bethel, 66 P.3d 840, 844 (Kan. 2003) (quoting Kan. Stat. Ann. § 22-3220 (2006), *repealed*, 2011 Kan. Sess. Laws 556–57). The statute took effect on January 1, 1996. *Id.*

[77] 1996 Idaho Sess. Laws 737–38 (codified at Idaho Code § 18-207); Finger v. State, 27 P.3d 66, 70 (Nev. 2001).

[78] ALASKA STAT. § 12.47.010 (2020); State v. Patterson, 740 P.2d 944, 945, 949 (Alaska 1987); Hart v. State, 702 P.2d 651, 657 (Alaska Ct. App. 1985) (citations omitted).

[79] Elkins, *supra* note 42, at 155.

[80] Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 20, 98 Stat. 2057 (codified as amended at 18 U.S.C. § 17). The federal insanity defense now reads as follows:

> (a) Affirmative Defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of Proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 17.

[81] *See supra*, Section II.B.

State Constitution.[82] In 1931, the Mississippi Supreme Court held that the state legislature had violated the Mississippi State Constitution's due process provision by abolishing insanity as a defense to murder.[83] Several of the Mississippi justices also relied on federal due process arguments.[84] The Nevada Supreme Court held that the 1995 Nevada statute violated the Fourteenth and Eighth Amendments,[85] but the high courts of Alaska, Idaho, Kansas, Montana, and Utah sanctioned their respective states' reforms.[86] Federal courts upheld the new federal insanity excuse law against constitutional challenges.[87]

Before and after the Hinckley stir, the Supreme Court issued a series of rulings that all but foreclosed the argument Kahler made in October 2019. In *Leland v. Oregon* in 1952, the Supreme Court considered the case of a mentally disturbed man who brutally murdered a teenage girl.[88] Oregon law required the defendant to prove the affirmative defense of insanity by a preponderance of the evidence.[89] The Supreme Court ruled that since the prosecutor had to prove the defendant's cognitive capacity beyond a reasonable doubt in order to establish the mens rea element, it did not matter that the defendant had the burden of proof on Oregon's affirmative insanity defense.[90] This seminal case stands for the proposition that states have wide latitude in defining claims and defenses, but it did not set out the boundaries of that discretion.

Powell v. Texas involved intoxication and the Eighth Amendment, not insanity and substantive due process.[91] Noting that *Robinson v. California* had struck down a statute "making it a crime to be addicted" to drugs, the *Powell* Court nevertheless held that states have broad discretion in criminalizing conduct despite claims that such conduct results from mental

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[82] State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910) (en banc).

[83] Sinclair v. State, 132 So. 581, 582 (Miss. 1931) (per curiam).

[84] *Id.* (McGowen, J., concurring); *id.* at 582–83, 588 (Ethridge, J., concurring). Justice Ethridge believed the statute also violated other provisions of the Mississippi Constitution.

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

[86] State v. Searcy, 798 P.2d 914, 919 (Idaho 1990); State v. Bethel, 66 P.3d 840, 852 (Kan. 2003); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984); State v. Herrera, 895 P.2d 359 (Utah 1995).

[87] *E.g.* United States v. Amos, 803 F.2d 419 (8th Cir. 1986) (holding that placing the burden of proving insanity by clear and convincing evidence was constitutional).

[88] Leland v. Oregon, 343 U.S. 790, 792 (1952).

[89] *Id.* at 795–96.

[90] *Id.*

[91] Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion).

disturbance or malfunction rather than true choice.[92] The Court repudiated the idea of defining a specific, constitutionally required insanity test,[93] stating:

> 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.[94]

Montana v. Egelhoff involved an intoxicated murderer who sought to prove that he lacked the mens rea required for murder by proving that his blood-alcohol content not long after the murder was an astonishing .36.[95] Montana law forbade defendants from introducing evidence of voluntary intoxication to negate the mens rea element of the crime, and the jury was instructed accordingly.[96] The Montana Supreme Court held that this violated due process because it "relieved [the State] of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged."[97] The United States Supreme Court reversed and held that because the common law had long treated the voluntarily intoxicated as criminally responsible no matter how incapacitated at the time of the crime, the principle espoused by the Montana Supreme Court was not fundamentally rooted in the American tradition and conscience.[98]

In *Clark v. Arizona*, the Supreme Court laid out the three types of mental incapacity and the four major insanity excuses.[99] Arizona had eliminated the cognitive incapacity component of its affirmative insanity defense, leaving only a pure moral incapacity affirmative defense.[100] Cognitive incapacity evidence would therefore only go to mens rea. As to the mens rea element, Arizona barred psychiatric testimony to negate specific intent.[101] Clark argued that the cognitive incapacity affirmative defense was fundamentally rooted in the American tradition and conscience so that he could raise it and

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[92] *Id.* at 532–36.

[93] *Id.* at 536.

[94] *Id.*

[95] Montana v. Egelhoff, 518 U.S. 37, 40–41 (1996) (plurality opinion).

[96] *Id.* at 41.

[97] *Id.* (quoting State v. Egelhoff, 900 P.2d 260, 266 (Mont. 1995)).

[98] *Id.* at 44–51.

[99] Clark v. Arizona, 548 U.S. 735, 748–49 (2006).

[100] *Id.* at 751.

[101] *Id.* at 745 (citing State v. Mott, 931 P.2d 1046 (Ariz. 1997) (en banc)).

present psychiatric evidence to prove it.[102] The Court rejected Clark's argument, both based on the historical evidence and because cognitive incapacity by definition entails moral incapacity.[103]

Based on these decisions, the Supreme Court refused to grant certiorari to review the Idaho insanity excuse statute.[104] But in 2019, it granted certiorari to address James Kraig Kahler's case.[105] The Court hoped to resolve the question first posed in Washington state court in the early twentieth century. However, the Court was not confronted with and did not consider the argument I present below.

III. *KAHLER V. KANSAS*

Two days after Thanksgiving in 2009, Kahler murdered his wife, two daughters, and his wife's grandmother.[106] Charged with murder in state court, he argued that the new statute violated the Due Process Clause.[107] The trial court rejected his arguments, and ultimately the Kansas Supreme Court did the same.[108] The United States Supreme Court granted certiorari[109] and affirmed the Kansas decision, holding that the Due Process Clause does not require states to make insanity an excuse for murder.[110]

A. *A Heinous Quadruple-Murder*

James Kraig Kahler had a perfect marriage—or so he said—until he gave his wife, Karen, permission to engage in a homosexual relationship with a coworker.[111] Kraig soon became angry and believed the relationship was destroying his marriage.[112] After Kraig reversed course on Karen's affair and became violent, Karen filed for divorce.[113] Kraig soon lost his marriage, his

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[102] *Id.* at 748.

[103] *Id.* at 750–54.

[104] Delling v. Idaho, 568 U.S. 1038, 1039 (2012). Justices Breyer, Ginsburg, and Sotomayor dissented from the denial of certiorari. *Id.* (Breyer, J., dissenting).

[105] Kahler v. Kansas, 139 S. Ct. 1318 (2019).

[106] Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020).

[107] *Id.*

[108] *Id.* (citing State v. Kahler, 410 P.3d 105, 124–25).

[109] Kahler v. Kansas, 139 S. Ct. 1318 (2019).

[110] Kahler v. Kansas, 140 S. Ct. 1021, 1025–26 (2020).

[111] Brief for Petitioner, *supra* note 9, at 7–8; Brief for Respondent at 2, 4, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) [hereinafter Brief for Respondent]. To me, it is hard to imagine which is more odd—that he gave permission, or that she requested it.

[112] Brief for Respondent, *supra* note 102, at 3.

[113] *Id.*; Brief for Petitioner, *supra* note 9, at 8.

job, and his relationship with his two daughters.[114] He ended up back on his parents' farm with nothing but daily chores and periodic visitation with his nine-year-old son, Sean.[115] When Karen refused to allow Sean to stay with Kraig past the scheduled Thanksgiving visitation because of her family tradition of visiting her grandmother, Kahler became upset.[116] Several hours later, he drove to Karen's grandmother's house, entered the home with a high-powered rifle, and systematically shot his wife, her grandmother, Dorothy, and his two daughters, Emily and Lauren.[117] When the shooting started, Sean ran out the back door.[118] Kraig fled but was spotted the day after on the side of a road and arrested.[119]

B. *State Court Proceedings*

The case received considerable media coverage.[120] Kansas charged Kahler with multiple murders and sought the death penalty.[121] Kahler raised the defenses of insanity and diminished capacity, but the trial court disallowed both.[122] The jury convicted Kahler, and the judge sentenced him to death.[123]

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[114] Brief for Petitioner, *supra* note 9, at 8–9; Brief for Respondent, *supra* note 102, at 4.

[115] *Kahler*, 140 S. Ct. at 1026; Brief for Petitioner, *supra* note 9, at 9–10; Brief for Respondent, *supra* note 102, at 4–5.

[116] Brief for Petitioner, *supra* note 9, at 9–10; Brief for Respondent, *supra* note 102, at 5.

[117] Brief for Petitioner, *supra* note 9, at 10; Brief for Respondent, *supra* note 102, at 5; Chris Fisher, *Deputy First to Arrive at Gruesome Murder Recounts Dying Teen's Last Words*, 13WIBW (June 4, 2018, 11:06 AM), https://www.wibw.com/content/news/Deputy-first-to-arrive-at-gruesome-murder-recounts-dying-teens-last-words-484479451.html; *see* Juan Ignacio Blanco, *James Kraig Kahler*, MURDERPEDIA, https://murderpedia.org/male.K/k/kahler-james-kraig.htm (last visited June 10, 2020) (compiling basic information, news stories, and photographs).

[118] *Kahler*, 140 S. Ct. at 1027; Brief for Petitioner, *supra* note 9, at 10; Brief for Respondent, *supra* note 102, at 5.

[119] *Kahler*, 140 S. Ct. at 1027; Brief for Petitioner, *supra* note 9, at 10.

[120] *See*, *e.g.*, Steve Fry, *Kansas Jury Recommends Death for Kahler*, COLUMBIA DAILY TRIB. https://www.columbiatribune.com/article/20110829/News/308299700 (Aug. 29, 2011, 1:00 PM).

[121] *Man Charged with Killing Wife, 2 Daughters*, NBC NEWS, http://www.nbcnews.com/id/34210991/ns/us_news-crime_and_courts/t/man-charged-killing-wife-daughters/#.XuEPDucpBhE (Nov. 30, 2009, 5:57 PM).

[122] Brief for Petitioner, *supra* note 9, at 11; Brief for Respondent, *supra* note 101, at 9–10.

[123] State v. Kahler, 410 P.3d 105, 112 (Kan. 2018); *Jury Recommends Death Penalty for Kahler*, OFF. OF THE KAN. ATT'Y GEN. (Aug. 29, 2011), https://ag.ks.gov/media-center/news-releases/2011-news-releases/2011/10/07/jury-recommends-death-penalty-for-kahler; Steve Fry, *Sarcastic Kahler Draws Death Penalty*, TOPEKA CAP. J. (Oct. 11, 2011, 10:05 AM), https://www.cjonline.com/article/20111011/NEWS/310119788; Aliyah Shahid, *James Kraig Kahler, Convicted of Killing Family After Wife's Lesbian Affair, May Face Death Penalty*,

On appeal, the Kansas Supreme Court upheld the trial court's ruling and refused to reconsider its prior holding that the mens rea approach satisfied due process.[124] Kahler petitioned the United States Supreme Court for certiorari, which it granted.[125]

C. *Briefs*

Kahler's brief argued that the moral incapacity excuse was enshrined in the heart of the American legal system until a few agitators pulled the wool over the eyes of an ignorant public and bumbling state lawmakers after Hinckley's failed assassination and subsequent acquittal.[126] The history, they wrote, clearly shows that insanity negates moral culpability and that due process proscribes criminal responsibility absent moral culpability.[127] Hence, moral incapacity negates moral culpability and therefore negates criminal responsibility.

Kansas responded in its brief by disputing the history. "[T]he various insanity tests that have been used over the years demonstrate that the right-and-wrong insanity test is not deeply rooted in our history and tradition."[128] And the ancient texts produced by Kahler were "at best ambiguous and consistent with the mens rea approach."[129] Relying on Supreme Court precedent, Kansas also argued that, "given the complex legal, religious, moral, philosophical, and medical questions involved," the Constitution gives great latitude to states in setting their criminal law.[130] Kansas aptly

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DAILY NEWS (Aug. 26, 2011, 10:15 AM), https://www.nydailynews.com/news/national/james-kraig-kahler-convicted-killing-family-wife-lesbian-affair-face-death-penalty-article-1.951568.

[124] State v. Kahler, 410 P.3d 105, 124–25 (Kan. 2018).

[125] Kahler v. Kansas, 139 S. Ct. 1318 (2019).

[126] Brief for Petitioner, *supra* note 9, at *passim*.

[127] *Id.* at 12–29. Kahler's lawyers were not the first to move from the general proposition that Anglo-American law has always recognized that insanity negates moral culpability to the proposition that moral incapacity negates moral culpability without doing a lot to show exactly how the latter, a rather specific statement, follows from the former, a very general one. *See, e.g.*, Morse & Bonnie, *supra* note 33, at 488–89. I find it hard to explain why very intelligent writers leap the vast chasm between the two statements on the strength of a bland, unjustified, unsupported assertion. Perhaps the history is just too dicey for them to deal with it in detail. *See infra*, Sections III.E, IV.A, and IV.B. Or perhaps they prefer not to spend a month's worth of summer evenings perusing the legal reports of insanity trials in days of yore. If I had not taken a summer internship in an unfamiliar city in the middle of COVID-19, I might not have tackled it myself.

[128] Brief for Respondent, *supra* note 102, at 14–15.

[129] *Id.* at 19.

[130] *Id.* at 15 (citing Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring)).

observed that asserting that "those who are morally blameless should be exempted from criminal liability . . . begs the question of who is morally blameless."[131] And the current statutes of Alaska, Idaho, Montana, and Utah, with several prior attempts at insanity reform, rounded out the argument that the mens rea approach was consistent with American practice.[132]

The briefs of the amici mostly regurgitated the parties' arguments.[133] The Brief for Legal Historians and Sociologists was a rare exception. It contributed significantly to the lively historical debate.[134] Criminal defense lawyers from Idaho, Utah, and Montana wrote a brief that added a focus on the financial cost of the criminal justice system.[135] Various states supporting Kansas emphasized popular sovereignty as a basis for "allow[ing] the People through their legislatures to decide for themselves what is blameworthy."[136]

D. *Oral Argument*

At oral argument, Kahler's attorney repeated the charge that Kansas was doing what no state had ever done before—subjecting the insane to criminal culpability.[137] Justice Kagan broke through the fog about ten minutes into the argument and asked about the historical evidence.[138] She pointed out that the test for whether a principle of law is protected by substantive due process is whether history shows that it is fundamentally rooted in the American tradition and conscience, but that "there are many ways in which understandings of criminal culpability change over the years."[139] After pointing out that not every part of the historical criminal law is protected

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[131] *Id.* at 15. The smoke and mirrors of the Petitioner's argument is evident in discussions that repeat the talismanic phrase "moral blameworthiness" and its equivalents while glossing over the substantive question, which is whether the moral incapacity test is deeply engrained in Anglo-American legal practice. *See*, *e.g.*, Phillips & Woodman, *supra* note 62, at 463–66; Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (noting widespread and longstanding agreement on moral blameworthiness and wrongful intent as a prerequisite to criminal responsibility but "hopeless disagreement" on the precise state of mind required).

[132] Brief for Respondent, *supra* note 101, at 27–31, 34–36.

[133] *E.g.* ABA Brief, *supra* note 21, at *passim*.

[134] *E.g.* Brief for Legal Historians and Sociologists, *supra* note 52, at 9, 13–14.

[135] Brief for the Idaho Association of Criminal Defense Lawyers, the Montana Association of Criminal Defense Lawyers, the Utah Association of Criminal Defense Lawyers, and the Salt Lake Legal Defender Association as Amici Curiae in Support of Petitioner at 4–5, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

[136] Brief of Amici Curiae for Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Texas Supporting Respondent at 6, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

[137] Transcript, *supra* note 21, at 5–6, 22.

[138] *Id.* at 12–13.

[139] *Id.* at 12.

now, she asked, "[W]hat does due process require we hang onto notwithstanding changing times?"[140] She never got a straight answer.

Kansas began with a salvo against Kahler's version of history.[141] After fending off some questions and dodging others, Kansas responded to Justice Kavanaugh's inquiry about the existence of some "baseline that is historically rooted, above which there have been a variety of tests that have been accepted by the states until . . . the end of the 20th century."[142] After some discussion and further questioning, Justice Alito clarified that the effect on the Court's ruling would be the same if, for instance, in 1791 the mens rea for murder always included the ability to understand that the murderous act was wrong.[143] The justices were unable to get a full answer before Kansas's time expired.

The United States as amicus emphasized the wide variety of insanity tests employed by the states over time.[144] Justice Kagan resurrected Justices Kavanaugh and Alito's point by stating that the historical record seems to point to an insanity excuse broader than cognitive incapacity.[145] In response, the United States pointed out that "outlier states aren't necessarily violating substantive due process."[146] The United States also emphasized the reasonableness of many different approaches to insanity, both in terms of distinguishing between types of mental incapacity and in procedurally accounting for those incapacities.[147] The final point, made in response to a question from Justice Sotomayor, was that the question before the Court was not whether justice requires that the insane be acquitted, but whether the American people had so clung to a specific "theory of moral culpability" as to make that theory a baseline of due process.[148]

On rebuttal, Kahler's attorney alleged that distinguishing between the cognitively, morally, and volitionally incapacitated was "completely arbitrary."[149] She also charged Kansas with adopting a position that put no limits on states' ability to define crimes.[150] She finished her remarks by

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[140] *Id.* at 13.

[141] *Id.* at 30–34.

[142] *Id.* at 45.

[143] Transcript, *supra* note 21, at 46–48.

[144] *Id.* at 50–54.

[145] *Id.* at 55–56.

[146] *Id.* at 56.

[147] *Id.* at 59–60.

[148] *Id.* at 60–61.

[149] Transcript, *supra* note 21, at 61.

[150] *Id.* at 62.

returning to the historical argument.[151] At the end, Justice Alito sparked a short exchange in which he questioned her as to how to deal with the fact that, according to Kahler, the moral incapacity excuse was embedded in the mens rea element at common law, which, if correct, suggests that the moral incapacity excuse should be applied to every crime.[152] She answered that it merely showed that moral incapacity has deep historical roots and is therefore fundamentally rooted.[153]

E. *The Decision*

Justice Kagan wrote the opinion for the six justices in the majority, which included Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justices Ginsburg and Sotomayor joined Justice Breyer's dissent. Kahler raised an Eighth Amendment argument, but the Court held that he waived it by not raising it before the Kansas Supreme Court.[154] Both opinions focused heavily on the historical evidence.

1. Majority Opinion

The Court began with a survey of *Clark* and the legislative history of the Kansas statute. *Clark*, Justice Kagan wrote, classified the four major insanity tests described above.[155] After describing the four major tests, the Court explained that Kansas law provided that any defendant could present evidence of mental disturbance to demonstrate a lack of the required mens rea.[156] Although "the Kansas statute [also] provides that '[m]ental disease or defect is not otherwise a defense,'"[157] defendants can raise mental illness as a mitigating factor at sentencing.[158]

After recounting the facts and procedural posture of the case,[159] the Court laid out the relevant portions of its due process insanity excuse jurisprudence. It is difficult to prove that a principle is fundamentally rooted and therefore entitled to substantive due process protection.[160] The inquiry is based on history and evidenced by both Colonial Era and pre-Colonial Anglo-

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[151] *Id.* at 63.

[152] *Id.* at 63–66.

[153] *Id.* at 64–66.

[154] *Kahler*, 140 S. Ct. at 1027 n.4.

[155] *Id.* at 1025 (citing Clark v. Arizona, 548 U.S. 735, 749 (2006)); *see infra* Section II.B.

[156] *Id.* (quoting KAN. STAT. ANN. § 21-5209 (Cum. Supp. 2018)).

[157] *Id.* at 1026 (second alteration in original) (quoting KAN. STAT. ANN. § 21-5209 (Cum. Supp. 2018)).

[158] *Id.* (citing KAN. STAT. ANN. §§ 21-6815(c)(1)(C), 21-6625(a) (2018)).

[159] *Id.* at 1026–27.

[160] *Kahler*, 140 S. Ct. at 1027 (citing Leland v. Oregon, 343 U.S. 790, 798 (1952)).

American common law.[161] "The question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another."[162] *Powell* established the principle that states have the prerogative to define crimes, defenses, and burdens of proof.[163] This principle, the Court said, is especially critical "in addressing the contours of the insanity defense."[164] The moral, philosophical, evidentiary, and medical problems involved—not to mention the "wide disagreement"—are for the states and for legislatures to resolve, not the judiciary.[165] That is why the Court had twice refused to "define a specific insanity test in constitutional terms."[166]

Justice Kagan proceeded to point out the major flaws the majority saw in Kahler's argument. First, Kahler incorrectly argued that Kansas had "altogether abolished the insanity defense."[167] In reality, his "central claim" was "that Kansas has impermissibly jettisoned the moral-incapacity" excuse.[168] Second, the moral incapacity test was not actually "the touchstone of legal insanity" at any time, let alone before the famous *M'Naghten* decision in the mid-nineteenth century.[169] Third, Kahler tried to cover gaps and ambiguities in the historical record and dodged the question regarding the moral incapacity test with the bland statement that insanity has long been a ground for negating criminal responsibility.[170] Fourth, Kahler disregarded the significance of the feature of the Kansas statute that allowed any and all evidence of mental illness to "mitigate culpability and lessen punishment."[171]

Fifth, and at some length, the Court disputed Kahler's version of history. The Court concluded that some early common law writers adopted a moral incapacity test and others a mens rea approach.[172] Many early cases dealt both with cognitive and moral capacity, but their "overall focus was less on

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[161] *Id.* at 1027–28.

[162] *Id.* at 1028.

[163] *Id.* (citing Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion)).

[164] *Id.*

[165] *Id.*

[166] *Kahler*, 140 S. Ct. at 1028 (internal quotation marks omitted) (quoting *Powell*, 392 U.S. at 536). The Court refused to create a specific test in *Leland* and in *Clark*. *Id.* at 1028–29 (citing Clark v. Arizona, 548 U.S. 735, 750–53 (2006); Leland v. Oregon, 343 U.S. 790, 800–01 (1952).

[167] *Kahler*, 140 S. Ct. at 1029 (citing Brief for Petitioner, *supra* note 9, at 39).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1030–31.

[171] *Id.* at 1031.

[172] *Id.* at 1032 (relying on early English legal treatises).

whether a defendant thought his act moral than on whether he had the ability to do much thinking at all."[173] Thus, "moral incapacity was a byproduct of the kind of cognitive breakdown that precluded finding mens rea, rather than a self-sufficient test of insanity."[174] The same was true of the unambiguous cases Kahler cited in support of his position.[175] *M'Naghten*, the Court said, was the first case to "disaggregate[] the concepts of moral and cognitive incapacity" and therefore took Anglo-American courts by storm.[176] The *M'Naghten* test itself was not required by due process, as Kahler conceded, and even if it were, the Court would then have to choose between pure moral incapacity and legal-moral incapacity—a tough decision because the moral incapacity states vehemently disagree on which version is best.[177] Besides, because five states had adopted the mens rea approach and Congress seriously considered it, the moral incapacity test could hardly be said to be fundamental.[178]

2. Dissenting Opinion

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented on the ground that the moral incapacity test was fundamentally rooted.[179] The common law's definition of a madman included those only morally incapacitated, Justice Breyer wrote.[180] Touching on the "wild beast" test of insanity, he noted that animals can knowingly and intentionally kill people, but they are not criminally culpable because they have no power of moral judgment.[181] He also pointed to Bracton's famous treatise and argued that Bracton's definition of "madmen" included those who, like young children, "cannot be held liable in damages unless he is capable of perceiving the wrongful character of his act."[182] He argued the same for the equally famous English jurists Sir Edward Coke, Sir Matthew Hale, and Sir William

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[173] *Kahler*, 140 S. Ct. at 1033. "In such cases, even the language of morality mostly worked in service of the emphasis on cognition and mens rea. The idea was that if a defendant had such a 'total[] want of reason' as to preclude moral thinking, he could not possibly have formed the needed criminal intent." *Id.* at 1034 (quoting Rex v. Lord Ferrers, 19 How. St. Tr. 886, 947 (1760)).

[174] *Kahler*, 140 S. Ct. at 1034.

[175] *Id.*

[176] *Id.* at 1034–35.

[177] *Id.* at 1035–36.

[178] *Id.* at 1036–37. The proposal had bipartisan support. *Id.* at 1037 (citing United States v. Pohlot, 827 F.2d 889, 899 (3d Cir. 1987)).

[179] *Id.* at 1038–39 (Breyer, J., dissenting).

[180] *Kahler*, 140 S. Ct. at 1040 (Breyer, J., dissenting).

[181] *Id.*

[182] *Id.* (citation and internal quotation marks omitted).

Blackstone.[183] He also pointed out that the modern concept of mens rea is "narrower and more technical" than it used to be, and then used early English and American cases to prove that it formerly included moral capacity.[184] Justice Breyer concluded with the post-Colonial history of the insanity excuse, a plea for conforming the insanity excuse to America's views on moral blameworthiness, and a rebuttal of Kansas's arguments.[185]

IV. DUE PROCESS REQUIRES MORE THAN THE COGNITIVE INCAPACITY TEST

Although three justices hinted at it during oral argument, neither opinion mentioned the third option: the Due Process Clause guarantees no specific insanity excuse, but requires one which is broader than mere cognitive incapacity.[186] This rule is consistent with the Supreme Court's precedents and supported by history. It can be articulated with precision and proved to the satisfaction of most of the Justices. And it obviates concerns about an inflexible constitutional insanity test.

A. *Precisely Articulated Principle*

When someone challenges a statute on substantive due process grounds, the challenger must precisely articulate the deeply rooted principle.[187] But the principle may be broad in scope.[188] Hence, the broad principle I advocate

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[183] *Id.* at 1042 (citations omitted).

[184] *Id.* at 1042–45.

[185] *Id.* at 1046–50.

[186] *See supra* notes 142–143, 146 and accompanying text.

[187] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277–78 (1990)); Transcript, *supra* note 21, at 57.

[188] *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (citations omitted). The *Obergefell* Court, which held that the right to marriage guaranteed by substantive due process includes the right to homosexual marriage and did so, in practice if not in theory, by broadening the principles the Court's precedents had previously established. *See id.* (citations omitted). Along the way, the Court explained the precedents as follows:

> *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking

here—that an insanity excuse limited to cognitive incapacity is deficient—is appropriate. Precisely stated, that broad principle is that the cognitive incapacity excuse alone is not broad enough to excuse from criminal liability those not truly responsible for their crimes and therefore not worthy of criminal punishment because cognitive capacity is not the sole mental prerequisite to criminal fault.

B. *Persuading a Majority*

In every important due process insanity case, the challenger was unable to persuade a majority of the justices. The Court was not convinced that the historical evidence or psychiatric advances militated against the moral incapacity test in 1952,[189] nor for it to the exclusion of other tests in 2006.[190] The *Kahler* majority was also unconvinced. But the three minority justices would probably be happy to limit *Kahler*.

Justices Alito, Kagan, and Kavanaugh asked questions which suggest they briefly considered the argument this Article advances, or at least would be open to considering it. Justice Kavanaugh asked the Kansas attorney whether there was some "baseline that is historically rooted, above which there have been a variety of tests that have been accepted by the states until . . . the end of the 20th century?"[191] He then queried, "[S]ince the early 1800s, at least, to the late 20th century in the United States, didn't every state allow some form of a separate insanity defense at the guilty phase?"[192] And he again clarified: "[A]ll the states had something separate from the [mens rea] approach at the guilt phase through the end of the 20th century."[193] Justice Alito joined in by clarifying that Justice Kavanaugh's point would hold true if the early American mens rea element included a moral incapacity test.[194]

During the United States' portion, Justice Kagan resurrected Justices Kavanaugh and Alito's point by asking how she could rule for Kansas, assuming she concluded that the historical evidence showed that the insanity excuse went beyond the modern concept of mens rea.[195] She then said, "[I]t's less helpful to me to go over each case one by one than for you to tell

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> if there was a sufficient justification for excluding the relevant class from the right.

Id. (citations omitted).

189 Leland v. Oregon, 343 U.S. 790, 796–97, 800–01 (1952).

190 Clark v. Arizona, 548 U.S. 735, 752–53 (2006).

191 Transcript, *supra* note 21, at 45.

192 *Id.* at 46.

193 *Id.*

194 *Id.* at 47–48.

195 *Id.* at 55–56.

me [if] . . . what I think is true[, that] . . . there's just a ton that suggests that . . . there was something more than a requirement that the defendant . . . be able to form an intent to kill."[196] To me, her tone seems to indicate she was stating her opinion, not continuing the assumption.[197]

C. *Historical Evidence*

The Due Process Clause prohibits the states from defining crimes and establishing criminal procedures in ways that "offend[] [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[198] The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice."[199] "Our collective conscience does not allow punishment where it cannot impose blame,"[200] but early and modern American views on fault and criminal responsibility are not easily defined in a manner both concise and comprehensive. That is why "the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule."[201] But baked into the American legal tradition and the public conscience is the principle that cognitive capacity is not the only mental prerequisite to fault, and therefore to criminal liability. This idea has been embodied in concrete legal protections for centuries, and the historical case for the insufficiency of the cognitive incapacity excuse is strong. The Court should recognize the fundamental and deeply rooted principle that cognitive capacity is not the sole mental prerequisite to criminal fault.

1. Early English Writers

The early English writers consistently based criminal responsibility on moral and volitional capacity. Early English law distinguished between "ideots" and "lunaticks." Idiots were those insane from birth.[202] A blind deaf-mute was taken to be an idiot because the person's mind lacked the senses necessary to understand the world.[203] Lunatics became insane later in life "by

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[196] *Id.* at 57.

[197] Oral Argument at 52:52–53:14, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135), https://www.oyez.org/cases/2019/18-6135.

[198] Patterson v. New York, 432 U.S. 197, 202 (1977) (citations and quotation marks omitted).

[199] Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (plurality opinion).

[200] Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954) (citing Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945)).

[201] *Kahler*, 140 S. Ct. at 1034.

[202] GEORGE DALE COLLINSON, 1 A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS *NON COMPOTES MENTIS* 2 (1812).

[203] *Id.* at 4 (citation omitted).

the visitation of God."[204] Many lunatics wafted in and out of sanity, sometimes bereft of some or all of their rational powers, at other times fully sane. These periods of sanity were referred to as "lucid intervals."[205]

The insanity excuse was closely tied to the infancy excuse. The *Kahler* majority conceded that under English law, "a madman could no sooner be found criminally liable than a child."[206] The early English legal treatises have much to say on the mental capacity required for a child or adult to be found criminally liable.

a. Henry de Bracton

In the thirteenth century, Henry de Bracton—whose spelling, like that of the other early English writers, I take the liberty of updating where most distracting—summarized and analyzed the English common law. Bracton "wrote that 'it is will and purpose which mark *malificia*' and 'a crime is not committed unless the intention to injure exists.'"[207] He also said that the "insane [were] not far removed from the brutes."[208] Kansas argued that Bracton's "wild beast" test meant that the insanity excuse of Bracton's day included only those "not far removed from the brutes" by reason of "not know[ing] what [they are] doing" and "lacking . . . mind and reason."[209]

Whatever Bracton's precise meaning, "will and purpose" combined with "the intention to injure" probably means something beyond the mere knowledge that one's act will result in the death of a human being rather than a kitten or lemur. Justice Breyer astutely observed that surely a lion cognitively understands killing other creatures, and surely also understands the basic difference between killing an antelope and killing a human being.[210] Hence, even if Bracton's "brute animal" formulation of the insanity excuse is tied directly to his concept of "intent" or "understanding," those concepts were broader in the thirteenth century than the modern cognitive incapacity excuse. In thirteenth-century thought, the way a deer understands the

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[204] *Id.* at 5.

[205] *E.g.* 4 WILLIAM BLACKSTONE, COMMENTARIES *25 ("[I]f a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.).

[206] *Kahler*, 140 S. Ct. at 1030 (internal quotation marks omitted) (citing 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans., 1968)).

[207] Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655 (1993) (quoting BRACTON, *supra* note 206, at 384).

[208] Eugene J. Chesney, *The Concept of Mens Rea in the Criminal Law*, 29 J. OF THE AM. L. INST. OF CRIM. L. & CRIMINOLOGY 627, 640 (1939) (citation omitted).

[209] Brief for Respondent, *supra* note 101, at 21 (quoting Sayre, *supra* note 131, at 1005).

[210] *Kahler*, 140 S. Ct. at 1040 (Breyer, J., dissenting).

difference between wolves and humans is far different from the way that mentally healthy adult human beings understand the difference between wolves and humans.[211] Therefore, Bracton's "wild beast" test must have been broader than the modern version of cognitive incapacity.

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[211] Although the criminal prosecution of animals in medieval times was actually a thing, it seems to have been far more prominent on the Continent than in England. *See* Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L.J. 97 (2003). Much of it, too, seems to have been conducted with great regard to legal formalities and little or no regard to the animals' moral faculties. *Id.* at 102 ("In spite of the skilled arguments attorneys made on behalf of their animal clients, the defendants usually failed to appear in court on their appointed day and therefore typically lost the case by default."). One potential important explanation for the trials is legal sanction for an act of economic destruction, but that explanation only suffices for executions of domesticated animals. And the legal writers of the time period did not account for the criminal prosecution of animals based on any pretense to their having the same kinds of cognitive and moral capacities as humans, but primarily as a way to recognize the significance of the damage the animals had caused. *Id.* at 117 & n. 141.

The early American scholarship on this topic seems to have been dominated by Edward Payson Evans, who combined and expanded two of his prior articles for a book on the subject. EDWARD PAYSON EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (1906). For historiographical reasons, it is difficult to discern the extent to which all of these reported trials actually happened. Eric Grundhauser, *The Truth and Myth Behind Animal Trials in the Middle Ages*, ATLAS OBSCURA (Aug. 10, 2015) ("The sources are 19th century scholars who didn't both to give a whole lot of explicit information on where they found [their information]."). Nevertheless, sufficient historical evidence remains and is discoverable to show that these trials actually occurred. Peter Dinzelbacher, *Animal Trials: A Multidisciplinary Approach*, 32 INTERDISCIPLINARY HISTORY 405, 407 (2002).

In any event, there is adequate evidence that medieval legal thinkers believed that animals, though they might lack an ability to understand the concept of humanity or of "wolfness," they could perceive humans and wolves—yet they had not the faintest idea of the moral and intellectual faculties that distinguished people from animals. ANSELM OELZE, ANIMAL RATIONALITY 27, 34–43 (Investigating Medieval Philosophy No. 12, John Merenbon et al., eds., 2018). Oelze explains the medieval thinking on the distinction between humans and the higher animals:

> In short, the discontinuity between humans and other animals consists in the fact that only the former have *rational* or *intellectual* souls. Consequently, humans are not simply animals but a very peculiar kind of animals, namely, "rational animals" (*animalia rationalia*). They are, so to speak, "animals *plus x*" with "*x*" being the faculties of intellect and reason.

Id. at 36 (footnote omitted). But "what are the specific operations of rational [and intellectual] souls?" *Id.* at 37. Oelze further explains the reason or intellect with which humans are endowed but of which animals were thought to be wholly destitute.

> In most accounts there are three main intellectual operations, namely, (i) universal cognition and concept formation, (ii) judging, and (iii) reasoning.
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> . . . .

Further, Bracton based criminal responsibility on both cognition and volition.[212] That his medieval ideas of evidence and mental disturbance prevented him from forming a legal test as broad as modern Anglo-American tests does not undermine his adherence to the basic premise that criminal responsibility hinges upon a free will, which demands a properly working mind.

b. William Lambard

William Lambard wrote that a person without "knowledge of good [or] evil" was a madman, and therefore not criminally liable.[213] Lambard, like Michael Dalton in the same century and Bracton much earlier, "selected cognition and volition as elements of criminal responsibility, mentioning the cognitive capacities of knowledge and understanding (including knowledge and understanding of good and evil) and the volitional capacity of will."[214]

c. Michael Dalton

Michael Dalton, for his part, highlighted the knowledge of good and evil and the functions of the will as prerequisites for criminal responsibility.[215] A

> The connection between the intellect's *operations* and its *nature* shows that it is not the case that the animal/human boundary can only be described in terms of *capacities*. It can also be described in more general terms as being largely identical with other dividing lines. First, it is identical with the *sensory/intellectual* divide because nonhuman animals have sensory powers while humans have intellectual faculties in addition.
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> . . . .
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> This, of course, has an impact on how different animals perceive or, as one could also say, on how they *mentally represent* the world. To give an example, a sheep only perceives this or that particular wolf. Humans, in contract, also cognize the universal "wolf." In modern terms, we possess the concept of "wolf" by means of which we can refer to all particular wolves. The sheep, however, lacks such a concept.

Id. at 38, 42, 52 (emphasis in original). The significance of these patterns of medieval thought is that a dog could perceive a human being, distinguish the human from a nearby rabbit, and maul the human to death with at least some degree or form of understanding what it did. *See id.* at 52–53. Hence, a person "not far removed from the brutes" could have cognitive capacity, or at least something closely akin to it. If, on the other hand, the criminal prosecution of animals is taken to imply that people in medieval times thought of animals as having considerably more cognitive and moral faculties than most modern humans attribute to them, this also supports the conclusion that a "brute beast" insanity test is broader than mere cognitive incapacity.

[212] Sendor, *supra* note 40, at 1374 (citations omitted).

[213] *Kahler*, 140 S. Ct. at 1032 (quoting WILLIAM LAMBARD, EIRENARCHA 218 (1581)).

[214] Sendor, *supra* note 40, at 1374 (citations omitted).

[215] *Id.* at 1374–75 (citations omitted).

person without "knowledge of good and evill" could not "have a felonius intent, nor a will or minde to doe harm."[216] Almost in the same breath, Dalton tied the mental capacities of adults to those of children: a child could "commit Homicide, and . . . be hanged for it, viz. if it may appeare . . . that he had knowledge of good and evill, and of the perill and danger of that offence."[217]

d. Anthony Fitzherbert

Anthony Fitzherbert founded the criminal responsibility of children and adults alike on their "memory and discretion."[218] The Oxford English Dictionary defines the age of discretion as the "age at which a person is presumed to be capable of exercising sound judgment in speech and action,"[219] a far cry from mere cognitive understanding. Fitzherbert's use of the phrase affirms a broad definition of the word discretion: "an Infant of the age of 14 years has such discretion . . . [that] if he at such age commit [a] felony, he shall be hanged for the same," but if a person under 21 attempted to lease or sell property, the lease or sale "shall not bind him . . . because he hath not perfect discretion or knowledge what he ought to do, or what is to his profit, or disadvantage before such age."[220] Like an infant, Fitzherbert wrote, an insane person without discretion could not be held responsible for his crimes.[221] And an absence of discretion is an absence of the higher rational powers of sound judgment and its attendant mental abilities, not necessarily the absence of all or nearly all cognitive abilities whatsoever.[222]

e. Edward Coke

Sir Edward Coke defined murder as "when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice afore-thought."[223] Because malice was essentially the intent to kill, a person

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[216] 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, 1235 (1966) (quoting MICHAEL DALTON, THE COUNTREY JUSTICE 244 (1530)).

[217] *Id.* (alteration in original) (quoting DALTON, *supra* note 215, at 244).

[218] ANTHONY FITZHERBERT, THE NEW *NATURA BREVIUM* 491 (William Rastall ed. & trans., 1666).

[219] *Discretion*, OXFORD ENGLISH DICTIONARY (3d ed. 2013) (citing examples from 1485, 1542, 1641, 1749, 1863, 1911, and 1978).

[220] FITZHERBERT, *supra* note 216, at 492.

[221] *Id.*

[222] *See id.* at 491–92.

[223] EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 47 (E. & R. Brooke ed., 1797). Every person was considered a "reasonable creature." *See id.* at 50.

could not be held liable for murder without having intended to kill the victim.[224] A person so deeply disturbed as to lose all understanding and imagination could not be prosecuted for treason based on his "compassing," or imagining, the king's death.[225] Beyond that, neither a person *non compos mentis*—the Latin version of "unsound mind"—nor an infant under the age of discretion could commit murder as Coke defined it.[226]

Even if Coke's invocation of the ambiguous phrase *non compos mentis* did not explicitly include either moral or volitional incapacity for adults, Justice Kagan's opinion acknowledged that the insanity and infancy defenses are closely parallel.[227] And, in another place, Coke describes intoxicated criminals as *non compos mentis*.[228] Because intoxication must be very severe to negate the mens rea for murder, it makes more sense to interpret Coke's use of the phrase *non compos mentis* as a fairly broad term for insanity. And no person without discretion, whether because of tender age or a mental defect, was to be criminally punished.

f. John Brydell

John Brydell, in his treatise on the law of insanity, interpreted Coke to mean that a man without memory who commits a murder could not be held responsible because the absence of memory and understanding equals "involuntary ignorance."[229] Madmen and children without discretion, he wrote, were excused from responsibility for any felony.[230] A madman was not responsible for his crimes because a madman lacks his mind and discretion.[231] The law ascribed the crime to the madman's involuntary ignorance, not his free and knowing choice, and therefore excused him.[232] This ties culpability to volitional capacity as Brydell understood it.

Brydell's discussion of suicide, or *felo de se*, mirrors Coke's. Brydell restates the proposition that a *non compos mentis* who kills himself is not guilty of suicide any more than a *non compos mentis* who kills another is guilty of

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[224] *Id.* at 50.

[225] *Id.* at 6.

[226] *Id.* at 4.

[227] *Kahler*, 140 S. Ct. at 1030 (internal quotation marks omitted) (citing BRACTON, *supra* note 206, at 384).

[228] *Beverley's Case*, 76 Eng. Rep. 1118, 1122 (1603).

[229] JOHN BRYDALL, *NON COMPOS MENTIS*, OR, THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATICK PERSONS INQUISITED AND EXPLAINED FOR COMMON BENEFIT 76 (R. & E. Atkins eds., 1700).

[230] *Id.*

[231] *Id.*

[232] *Id.*

murder.[233] So, too, a person did not commit suicide by deliberately injuring himself merely because he "recovered his Memory" before dying.[234] While Coke and Brydell's use of the word "memory" is difficult to define precisely, it is broader than the modern sense of the faculty of remembering. The Oxford English Dictionary provides several different examples of the term's legal usage, including early uses that indicate that being of sound or perfect memory does not merely refer to the ability to perceive and understand the basic realities of one's current surroundings.[235]

g. Matthew Hale

Sir Matthew Hale's famous treatise *The History of the Pleas of the Crown* discussed insanity in some depth, and his work have been said to have been "the best treatment of the subject up to its time."[236] Hale explained that insanity may be total or partial and compared the mental capacities of insane adults to those of children. Some people are lucid on some topics, yet insane with respect to others.[237] Others are lucid to some degree, yet at least partially mentally disturbed.[238] Hale explained the evidentiary problem and compared the mental capacities of insane adults to those of children:

> [F]or doubtless [most who choose to become felons] are under a degree of partial insanity, when they commit these offenses: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes: the best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen

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[233] *Id.* at 78.

[234] *Id.*

[235] *Memory*, OXFORD ENGLISH DICTIONARY (3d ed. 2001) (citing examples from 1402 to 1998).

[236] Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV. 105, 112 (1924).

[237] MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 29 (George Wilson ed. 1800).

[238] *Id.* at 29–30.

> years hath, is such a person as may be guilty of treason or felony.[239]

Kansas admitted in its brief that Hale founded the excuses of insanity and infancy on the same kinds of mental capacities, or lack thereof, but argued that Hale limited both to mens rea and asserted that Hale's chapter on insanity said "nothing about right and wrong or good and evil."[240] Kansas was right that Hale expressly tied infancy and insanity to the same foundational mental requirements.[241] But, contrary to Kansas's argument, Hale expressly stated that an infant—a child under the age of fourteen—was responsible for his crimes only if "it appears to the court and jury that he was *doli capax*, and could discern between good and evil."[242] He wrote again that "if it appear by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him."[243]

As for the insanity excuse for adults, Hale's version is demonstrably broader than the modern cognitive incapacity excuse. Those with a "total alienation of mind" or "totally depriv[ed] of the use of reason" were not responsible for their crimes because they were "in effect in the condition of brutes."[244] Justice Breyer's astute comment on the cognitive ability of predators shows that Hale's conception of human reason, like that of his contemporaries, was so expansive that one could be said to completely lose it and yet retain the basic ability to distinguish between the types of creatures and to understand death and killing. Thus, a person could be said to so completely lose the use of his powers of understanding as to be on the level of a wild animal, and yet not necessarily be able to take advantage of the modern cognitive incapacity excuse.

This interpretation is borne out by the example Hale recounts at the end of his discussion of insanity and murder. Hale tells of a woman who "fell into a temporary frenzy" from lack of sleep and murdered her newborn baby.[245] When others came in, yet before she had "recovered her understanding," she told them she had killed it and showed them the body.[246] The jury acquitted her after being instructed that if "she had the use of reason when she did it,

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[239] *Id.* at 30.

[240] Brief for Respondent, *supra* note 101, at 22 (citing Sayre, *supra* note 131, at 1006)

[241] Sayre, *supra* note 131, at 1006 (citations omitted).

[242] HALE, *supra* note 236, at 25.

[243] *Id.* at 26.

[244] *Id.* at 30–31 (citations omitted).

[245] *Id.* at 36.

[246] *Id.*

they were to find her guilty."[247] She seems to have known she was killing her child when she committed the deed, and she certainly knew it when she told it to others. And she could be said to be "deprived of the use of all reason" even though she retained cognitive capacity.

Hale's example rebuts the force of Justice Kagan's assertion that "the language of morality mostly worked in service of the emphasis on cognition and mens rea" and her argument that someone "destitute of all power of judgment" rendered moral incapacity "a byproduct of the kind of cognitive breakdown that precluded finding mens rea[] rather than a self-sufficient" insanity excuse.[248] Rather than "serv[ing] as a sign . . . that the defendant lacked the needed criminal intent,"[249] Hale's moral incapacity excuse stood despite significant evidence of cognitive capacity. And the early writers' strong language can be partially explained as evidentiary demands based on fears of faking insanity.[250]

h. William Hawkins

William Hawkins' legal treatise, *The Pleas of the Crown*, contains a clear statement of the pure moral incapacity test. Like Hale and Blackstone, he wrote that criminal responsibility depended on volitional capacity and that cognitive and moral incapacity could impair volitional incapacity to the point of vitiating criminal responsibility.[251] He equated the infancy and insanity excuses and tied both to the pure moral incapacity test: "[T]hose who are under a natural Disability of distinguishing between Good and Evil, as Infants under the Age of Discretion, Ideots and Lunaticks, are not punishable by any criminal prosecution whatsoever."[252]

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[247] *Id.*

[248] Kahler v. Kansas, 140 S. Ct. 1021, 1034 (2020) (citation omitted).

[249] *Id.*

[250] Jurists of the time would have been familiar with the Biblical story of David faking insanity in front of Achish, King of Gath. Once David was recognized as the famous Israelite who had killed the giant Goliath, David drooled and bashed his head, fooling the king into thinking David was insane and dismissing David from his presence without the revenge David dreaded. 1 *Samuel* 21:12-15.

[251] Sendor, *supra* note 40, at 1375.

[252] 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 2 (1716); Crotty, *supra* note 235, at 113. Sendor, using the term "cognitive incapacity" to include the both cognitive and moral incapacity, as I use those terms here, explained that Hawkins "identified cognitive capacity as the key factor in the insanity defense." Sendor, *supra* note 39, at 1376. Hawkins further explained the infancy defense:

> And if it appear by the Circumstances, that in Infant under the Age of Discretion could distinguish between Good and Evil, as if one of the Age of nine or ten Years kill another, and hide the Body, or make Excuses, or

h. William Blackstone

Sir William Blackstone united all "pleas and excuses" to "this single consideration: the want or defect of *will*."[253] Thus, for Blackstone and the common law of his day, the insanity excuse was ultimately founded upon the freedom of the will. Although Blackstone and his jurisprudential forefathers were skeptical of modern theories of irresistible impulses and fearful of violators feigning insanity to escape punishment,[254] they recognized that a defect of the will was a—or *the*—proper ground for absolving an insane defense from criminal responsibility:

> An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. . . .
>
> N[ow] there are cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice, to do or to abstain from a particular action: he therefore, that has no understanding, can have no will to guide his conduct. . . . It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.[255]

> hide himself, he may be convicted and condemned, and forfeit, *&c.* as much as if he were of full Age. But in such a Case the Judges will in Prudence respite the Execution in order to get a Pardon: And it is said, That if an Infant apparently wanting Discretion, be indicted and found guilty of Felony, the Justice themselves may dismiss him without a pardon, *&c.*

HAWKINS, *supra* note 251, at 2 (footnote omitted).

[253] BLACKSTONE, *supra* note 205, at *20 (emphasis in original).

[254] *Supra* note 250 and accompanying text.

[255] BLACKSTONE, *supra* note 205, at *20–22.

Blackstone, like Dalton, tied infancy and insanity closely together—both excuses relied upon mental deficiencies, including pure moral incapacity. Children were not subject to criminal prosecution of any sort until they reached the "age of discretion."[256] Children under seven years old could commit no crime whatsoever.[257] Nor, generally speaking, could children above seven but between the ages seven to ten and a half.[258] Children beyond ten and a half received reduced punishment but were held criminally responsible if "capable of mischief" (*doli capaces*).[259]

The age of discretion for capital crimes was generally twelve, but age was not the sole factor in criminal liability for homicidal children: "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[260] Children above fourteen were presumed "capable of mischief," but those under fourteen were presumed not punishable unless the evidence showed that "he was *doli capax*, and could discern between good and evil."[261] Prior cases showed that a girl of thirteen and boys of ten and nine were sentenced to death because they hid the bodies of their victims, "manifest[ing] a consciousness of guilt, and a discretion to discern between good and evil."[262] Boys of eight and ten, respectively, were executed for felonies because they showed "a mischievous discretion" and "malice, revenge, and cunning."[263]

The insanity defense of Blackstone's day also rested upon a volitional defect resulting from deficient understanding. Like infancy, insanity excused criminal liability when it caused a "defective or vitiated understanding.[264]

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[256] *Id.* at 22.

[257] *Id.* at 22–23.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 23.

[261] BLACKSTONE, *supra* note 205, at *23.

[262] *Id.* at 23–24.

[263] *Id.* at 24. The word "discretion" describes the moral faculties more than it does cognitive capacity. *See* WILLIAM OLDNALL RUSSELL, 1 A TREATISE OF CRIMES AND MISDEMEANORS 2 (Daniel Davis ed., 1824) ("[T]hough an infant at the age of eighteen, or even fourteen, by his own acts, may be guilty of a forcible entry, and may be fined for the same; yet he cannot be imprisoned, because his infancy is an excuse by reason of his *indiscretion*.") (emphasis added) (citing Hale's treatise). The original edition's pagination is in brackets on the side, but here I refer only to the pagination of the edition cited.

[264] BLACKSTONE, *supra* note 205, at *25. Sendor, using the term "cognitive incapacity" to include the both cognitive and moral incapacity as I use those terms here, explained that "Hale, Hawkins, and Blackstone represent the third pattern among pre-*M'Naghten* commentators: those who viewed volitional capacity as the basic mental criterion of criminal liability, and who saw cognitive capacity as a secondary criterion, a condition of volitional capacity." Sendor, *supra* note 39, at 1375.

"Total idiocy" and "absolute insanity" excused the mentally disturbed from responsibility for "any criminal action committed under deprivation of the senses."[265] Those with "lucid intervals" were answerable for crimes committed during their periods of clear thinking.[266] Blackstone did not elaborate on these principles, except to state that idiots and lunatics were "not chargeable for their own acts, if committed when under their incapacities."[267] But he says that voluntary intoxication is not a defense, but an aggravation of crime, even if it has the same mental effect as insanity.[268] It is instructive that drunkards who commit crimes frequently retain their cognitive capacity but lack the inhibitions that normally govern their behavior.

j. Summary

From the thirteenth to the eighteenth centuries, the great common law writers consistently treated the insanity and infancy excuses similarly and sometimes equally. Each writer adopted the pure moral incapacity excuse for infants and something similar or the same for the insanity excuse. Even in Coke's brief treatment of insanity, the moral incapacity test lurks behind his words. The other writers, especially Hawkins, more straightforwardly applied the moral incapacity excuse to insane adults. Even if the more ambiguous writers are read to restrict the insanity excuse to those capable of forming "intention" or "understanding" in a form of the wild beast test, such a reading is inconsistent with the modern mens rea approach because the Christianized common law writers understood human reason to be so expansive and powerful that losing it and becoming "like one of the brute animals" was not necessarily to drop so low as to lose all cognitive capacity. Like modern legislators and scholars, early English jurists and writers struggled to frame the best insanity excuse and capture it precisely in words. But the historical record leaves no doubt that none of them believed the modern cognitive incapacity excuse was enough. They left unequivocal evidence that the Anglo-American people's basic views of criminality and responsibility demand a broader insanity excuse.

2. Authoritative English Cases

The reported English cases upon which Kahler and Kansas drew, and upon which early American practice was based, developed and enshrined an insanity excuse based primarily on cognitive and moral incapacity. Despite claims that the moral incapacity excuse essentially dates from the famous

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[265] BLACKSTONE, *supra* note 205, at *25.

[266] *Id.*

[267] *Id.* at 24.

[268] *Id.* at 25–26 (citation omitted).

M'Naghten case in 1843, the authoritative cases that preceded it uniformly employed the moral incapacity test. "[T]he principles, by which the criminal jurisprudence of this country is guided in cases of insanity, are the capability of distinguishing between right and wrong—of knowing that the crime, of which the party may stand accused, is an offence against the laws of God and nature."[269] Like the early English writers, the most widely cited English cases stressed that the insanity excuse is based on volitional defects, some of which result from cognitive and moral incapacity.[270] And "it is . . . established by a multitude of cases in English and Scotch jurisprudence, that as a *general principle*, this test, viz.—the competency to distinguish between right and wrong, has been the main point kept in view when the plea of insanity has been urged as an extenuation of crime."[271] Contrary to Justice Kagan's argument that "the language of morality mostly worked in service of the emphasis on cognition and mens rea,"[272] the moral incapacity test was an independent basis for excusing the insane. The moral incapacity test was almost completely uncriticized and the most important insanity excuse of the eighteenth century.[273]

a. *Rex v. Arnold* (1724)

The insanity test embodied in the jury instructions given in *Rex v. Arnold*[274] went far beyond the cognitive incapacity test. Edward Arnold was prosecuted for the shooting of Lord Onslow.[275] Two witnesses testified that he was a "morose" person but were uncertain as to whether he was a lunatic.[276] The woman who sold him ammunition believed him to be "as sensible as any customer [she] had."[277] A witness who knew him and had talked with him shortly before the shooting said that he was not in his right senses at the time and that all the neighbors knew that he was often out of his senses.[278] A witness who examined Arnold in prison gave ambiguous

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[269] FORBES WINSLOW, THE PLEA OF INSANITY IN CRIMINAL CASES 10–11 (Lawbook Exchange, Lit. ed. 2005).

[270] Sendor, *supra* note 40, at 1376.

[271] WINSLOW, *supra* note 269, at 13.

[272] Kahler v. Kansas, 140 S. Ct. 1021, 1034 (2020) (emphasis in original).

[273] Platt & Diamond, *supra* note 216, at 1236, 1250 (citing RAY, MEDICAL JURISPRUDENCE OF INSANITY 13 (3d ed. 1853)); Sayre, *supra* note 131, at 1006.

[274] Rex v. Arnold (1724), 16 How. St. Tr. 695.

[275] *Id.* at 699. Onslow survived the shooting and requested clemency for Arnold, which was granted. *Id.* at 766.

[276] *Id.* at 707.

[277] *Id.* at 708.

[278] *Id.* at 711. The witness suggested he might have been drunk. *Id.*

statements as to his sanity.[279] One of his brothers affirmed that he was a madman,[280] and another testified that he was "not perfect in his senses" and "did not know what he did at some certain times."[281] Arnold told one of his brothers that Onslow had "bewitched" and "plague[d] . . . [him] day and night."[282]

The state's attorneys summed up Arnold's acts before the murder, all of which showed full cognitive awareness: Arnold bought fresh powder and shot, fired his gun to remove the old powder and ensure the gun was in good working order, and ascertained where Lord Onslow was hunting.[283] After the shooting, Arnold was asked why he did not shoot a different person, and he responded that the other man was innocent, but Lord Onslow a wicked man.[284] Earlier that morning, he purchased ammunition and asked for the biggest size of shot available.[285]

The judge instructed the jury that the prosecution had proved that Arnold had "shot [Onslow], and that wilfully."[286] The only question that remained was the question of malice, which depended on whether Arnold, at the time of the killing, "ha[d] the use of his reason and sense."[287] The judge explained:

> If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked *will and intention* of the man. If a man be deprived of his *reason*, and consequently of his *intention*, he cannot be guilty; and if that be the case, though he had actually killed my lord Onslow, he is exempted from punishment. . . . [I]t is not every frantic and idle humour of a man, that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption; therefore it is not every kind of frantic humour or something

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279 *Id.* at 714–15.

280 Rex v. Arnold (1724), 16 How. St. Tr. 695, 717.

281 *Id.* at 719.

282 *Id.* at 721.

283 *Id.* at 701.

284 *Id.* at 702.

285 *Id.* at 708.

286 Rex v. Arnold (1724), 16 How. St. Tr. 695, 764.

287 *Id.*

> unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be that a man is *totally deprived of his understanding and memory*, and *does not know what he is doing*, no more than an *infant*, than a *brute*, or a *wild beast*, such a one is never the object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, [shows] a man, who *knew what he was doing*, and was able to *distinguish whether he was doing good or evil*, and understood what he did. . . . There you have a great many circumstances about the buying of the powder and shot; his going backward and forward; and if you believe he was sensible, and had the use of his reason, and understood what he did, then he is not within the exemptions of the law, but is as subject to punishment as any other person.[288]

Read in isolation, certain passages could be interpreted as equating the ability to grasp the basic nature of one's acts with the ability to discern between good and evil. But the evidence showed that Arnold had deliberately shot Onslow for the purpose of killing him: Arnold threatened to kill Onslow,[289] carefully prepared his weapon and ammunition shortly before the shooting,[290] and carefully maneuvered around Onslow's companions to shoot Onslow and leave the others unharmed.[291] A wolf might do the same: hunt downwind, stalk its prey stealthily, and go for the throat. A child, too, can carefully execute elaborate plans to get what the child wants and can distinguish between cake and asparagus and between Fido and Mommy. Yet a wolf—a wild beast and a "brute"—and a child lack the reason and understanding of grown men and women and may not really know what they are doing. The jury could have concluded from the evidence that Arnold thought himself ridding the world of a wicked man who was determined to "plague" and "bewitch" him, and in that sense lost "the use of reason" and hence been unable to "distinguish whether he was doing good or evil, [or to] underst[and] what he did."[292]

Justice Kagan emphasized the portion of the instruction stating that if a person was "deprived of his reason," he was "consequently [deprived] of his

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[288] *Id.* at 764–65 (emphasis added).

[289] *Id.* at 765.

[290] *Id.* at 701.

[291] *Id.* at 703–06.

[292] Rex v. Arnold (1724), 16 How. St. Tr. 695, 765.

intention [and] cannot be guilty."[293] First, moral and cognitive incapacity stood as independent insanity excuses. Second, the judge had already instructed the jury that the state had proved both that Arnold shot Onslow and that he did it "wilfully,"[294] which indicates the judge took cognitive capacity as conclusively proved. If, as the judge also said, the question of malice and sanity were yet to be answered, his remaining instructions must have included or perhaps consisted of a moral incapacity test. His language harkened to the early English writers' close connection between the volitional faculties and the cognitive and moral faculties. A person without reason was without intention, not because the person lacked the cognitive capability to decide upon and carry out a course of conduct based on an accurate perception of physical reality, but because a person with only the basic cognitive ability of a wild animal could not have a free will or make truly voluntary choices.[295] The assertion that "a madman" can have "no design"[296] cannot have meant that Arnold did not understand that he was purchasing ammunition, loading his gun, pointing it at a human being, and firing a shot intended to be fatal. It must have meant that the loss of the higher human powers of reason short of cognitive incapacity nevertheless negated criminal responsibility by depriving a person of the moral inhibitions that guide the conduct of mentally healthy adults.

b. *Rex v. Lord Ferrers* (1760)

The Earl of Ferrers murdered John Johnson and was tried by his peers in the House of Lords.[297] Ferrers made an appointment with Johnson at Ferrers' house and arranged to have most of the other occupants away.[298] Ferrers locked the door, he and Johnson argued, a maid heard Ferrers tell Johnson to get on his knee and that it was his time to die, and then Ferrers shot him.[299] Ferrers had Johnson sent upstairs to bed and called for a doctor, but then said he would "shoot [Johnson] through the head."[300] When Johnson's daughter arrived, Ferrers told her he had killed her father "on purpose, and deliberately."[301] He also told the doctor that he had "shot Mr. Johnson, and

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[293] Kahler v. Kansas, 140 S. Ct. 1021, 1033 (2020) (quoting *Arnold*, 16 How. St. Tr. at 764).

[294] *Arnold*, 16 How. St. Tr. at 764.

[295] *Id.*; *supra* notes 212, 214, 216, 229–232, and 251 and accompanying text.

[296] *Arnold*, 16 How. St. Tr. At 764.

[297] Rex v. Lord Ferrers (1960), 19 How. St. Tr. 886, 886.

[298] *Id.* at 896–97, 903–05.

[299] *Id.* at 903, 905.

[300] *Id.* at 897, 907.

[301] *Id.* at 897, 909–10.

that he had done it coolly."[302] He also told the doctor which direction to look for the bullet and demonstrated how he had held the pistol.[303] In frustration, he said that he had shot through a wooden board and wondered why the bullet had not gone through Johnson's body.[304] The doctor recounted that Ferrers had told him all about the shooting, saying he insisted Johnson sign a confession of his various wrongs Ferrers believed he had done, that Johnson refused, and therefore Ferrers shot him and was "quite cool" when he did it.[305] "He said he had long intended to shoot him," and that it was "premeditated."[306]

Justice Kagan's discussion of *Rex v. Ferrers* does not take into account these portions of the report. She focuses on the sections of the Solicitor's arguments addressing cognitive capacity.[307] But the evidence and the closing arguments on both sides include appeals to a moral incapacity excuse independent of the modern version of the cognitive test.[308]

Ferrers submitted his closing arguments in writing and had the clerk read them.[309] His argument depended both upon moral incapacity and volitional incapacity.[310] He opened by stating that "the fact of Homicide is proved against me by witnesses, who, for aught I can say to the contrary, speak truly."[311] "But," he continued, "if I know myself at this time, I can truly affirm,

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[302] *Id.* at 898.

[303] Rex v. Lord Ferrers (1760), 19 How. St. Tr. 886, 913.

[304] *Id.* at 911, 913.

[305] *Id.* at 915.

[306] *Id.* at 914–15.

[307] Kahler v. Kansas, 140 S. Ct. 1021, 1033 (2020) (quoting Rex v. Lord Ferrers, 19 How. St. Tr. 886, 948 (1760)).

[308] Crotty, *supra* note 236, at 115.

> Lord Ferrers was indicted for murder, and set up the defence of partial insanity, and showed by witnesses and medical testimony that he was occasionally insane and at those times incapable of knowing what he did. He appeared to be suffering from several unfounded delusions with respect to the deceased. The murder was carried out with coolness and deliberation. It appeared form the evidence that the prisoner at the time he committed the crime had sufficient capacity to form a design and know its consequences. The prosecution argued that complete possession of reason was unnecessary to warrant judgment of the law, and that it was sufficient if the party had such possession of reason as enable him to comprehend the nature of his action, and discern the difference between good and evil.

Id.

[309] Rex v. Lord Ferrers (1760), 19 How. St. Tr. 886, 944.

[310] Sendor, *supra* note 40, at 1379.

[311] *Ferrers*, 19 How. St. Tr. at 944.

I was ever incapable of it, knowingly: if I have done and said what has been alleged, I must have been deprived of my senses."[312] The remainder of his argument appeals to the moral incapacity defense. He argued that he was sometimes "driven and hurried into [the] unhappy condition" of being "so insane as not to know the difference between a moral and an immoral action."[313] Never hinting that he did not know he was shooting a human being for the purpose of killing him, Ferrers instead urged his "weak or distemptered mind" and claimed that not he, but "passion, rage, [or] madness" was responsible.[314]

The Solicitor General responded with closing arguments for the crown. He first summarized Hale's treatment of insanity, then set out the English insanity excuse as he believed it to be:

> If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner: but if there be only a partial degree of insanity, mixed with a partial degree of reason; not a full and complete use of reason; but (as lord Hale carefully and emphatically expresses himself) a competent use of it, *sufficient to have restrained those passions*, which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions; *to discern the difference between moral good and evil*; then, upon the fact of the offense proved, the judgment of the law must take place.[315]

The Solicitor thus listed four components of mental ability required to be held criminally responsible: sufficient mental power to govern oneself (volitional capacity), sufficient mental ability to plan and purpose, sufficient mental ability to discern what one is doing (cognitive capacity), and sufficient mental capacity to understand the morality of one's acts (pure morality capacity). Because the evidence clearly showed purpose and intent,[316] the Solicitor framed the question before the House of Lords in terms of the moral incapacity test:

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[312] *Id.*

[313] *Id.* at 945. One such instance was when Ferrers came "on horseback with guns and other offenses weapons to take away" a horse. *Id.* at 939–41.

[314] *Id.* at 945.

[315] *Id.* at 947–48 (footnote omitted) (emphasis added).

[316] *Id.* at 949–50.

> My lords, the question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? It is not pretended to be a constant general insanity. Was he under the power of it, at the time of the offence committed? Could he, did he, at that time, distinguish between good and evil?[317]

The evidence clearly showed Lord Ferrers' cognitive capacity, but the Solicitor General also argued that Ferrers had moral capacity. The only evidence of insanity Ferrers could produce, he argued, was based on his "temper and opinion."[318] He reminded the lords that one of Ferrers' own witnesses stated that Ferrers was "jealous and suspicious" but never unable to "distinguish[] between good and evil" or to not know "that murder was a great crime."[319] One of Ferrers' brothers had failed to provide specific instances to prove his assertion that, "at particular times, the noble lord might not be able to distinguish between moral good and evil."[320] And Ferrers' former attorney "thought lord Ferrers capable of distinguishing between moral and immoral actions."[321]

c. *Parr's Case* (1787)

Parr's Case[322] involved an accusation of fraud. Francis Parr was accused of impersonating Isaac Hart in order to receive payments Hart was due.[323] Parr's entire defense was that he had fallen overboard while at sea and had

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[317] Rex v. Lord Ferrers (1760), 19 How. St. Tr. 886, 948; *see* COLLINSON, *supra* note 202, at 476–77 ("The murder, however, was deliberate; and it was urged upon the authorities of Coke and Hale, that complete possession of reason was unnecessary to warrant the judgment of the law, provided the party had sufficient to enable him to comprehend the nature of his actions, and discriminate between moral good and evil.").

[318] *Ferrers*, 19 How. St. Tr. at 952.

[319] *Id.*

[320] *Id.* at 953.

[321] *Id.* at 952.

[322] *Trial of Francis Parr* (Jan. 15, 1787) (Ref. No. t17870115-1) at 212, in *Old Bailey Proceedings Online*, version 8.0, https://www.oldbaileyonline.org/browse.jsp?div=t17870115-1 [hereinafter *Trial of Parr*]. Because the Old Bailey Proceedings Online website is structured and maintained differently from most internet sources, I adopt a middle ground between the site's suggested citation format and traditional Bluebook rules. Although the original publications were printed long ago and have not changed, the site is periodically updated to a new version. The Old Bailey Proceedings Online contains a transcript of the original publications on which their materials are based, along with scanned copies of those originals. The page number given in each citation refers to the page number of the originals on which the cited materials can be found.

[323] *Id.*

consequently suffered fits of insanity during which he did not know what he did and of which he could remember nothing afterward.[324] Because he claimed only cognitive incapacity, the judge's instructions focused on his understanding what he did. Impersonation, the judge told the jury, was a crime that required skill and demonstrated cognitive capacity.[325] It also generally showed a "wicked discretion," but the defendant could be excused if the jury concluded that his acts resulted from "the impulse of the moment arising from a disordered mind, without attending to the consequences [i.e. criminal penalties], and without having knowledge enough at that time to form a criminal intention."[326] But it was "difficult to conceive that he should take the necessary steps, [and] write the name of Isaac Hart, both in the book and the warrant, if he did not know that he was then about to write the name of another person."[327]

However, the first half of his instructions smacked of moral incapacity. The judge instructed the jury that a person "incapable of distinguishing between right and wrong, good and evil, and the necessary tendency of his own actions," must be acquitted.[328] Leaving aside any question of mere cognitive capacity, he told the jury that evidence of insanity must be clear because sometimes those who lead very upright lives commit a crime, and their sensitive consciences—which must operate based on what the criminals know they have done—produce symptoms that could be mistaken for a form of insanity that might lead the jury to conclude that they were not moral agents and were unable to "discern[] between good and evil."[329]

d. *Hadfield's Case* (1800)

The arguments and instructions in *Hadfield's Case*[330] lend even stronger support to the argument of this article than those of *Arnold* and *Ferrers* because Hadfield was acquitted even though he demonstrably knew what he was doing when he committed the murder. Hadfield was charged with treason for attempting to assassinate King George III.[331] He went to the Royal Theatre at Drury Lane, chose a position from which he could see the royal

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[324] *Id.* at 221–22.

[325] *Id.* at 229.

[326] *Id.*

[327] *Id.*

[328] *Trial of Parr*, *supra* note 322, at 228.

[329] *Id.* at 228.

[330] Hadfield's Case, 27 How. St. Tr. 1281, 1281 (1800).

[331] *Id.* at 1283.

box, and, during the performance, stood up and shot at the king.[332] Fortunately, he missed.[333]

Noting that Hadfield had *deliberately* gone to the theater, and implying that the shot was an intentional act,[334] the Attorney General stated the English law of insanity:

> I apprehend, that according to the law of this country, if a man is completely deranged, so that he knows not what he does, if a man is so lost to all sense, in consequence of the infirmity of disease, that he is incapable of distinguishing between good and evil—that he is incapable of *forming a judgment* upon the consequences of the act which he is about to do, that *then* the mercy of our law says, he cannot be guilty of a crime.[335]

He explained that a person unconscious of his acts, whether because of a fever or insanity, could not distinguish right from wrong and therefore was not criminally responsible.[336] Other persons of weak understanding were to be held accountable if they possessed enough mental ability to "discern good from evil,"[337] which was to be measured in the same way that a jury determined whether a child had sufficient capacity to be held accountable:

> [I]t is not the *age* of the child, but the *capacity* of the child, and you judge of it principally from that which he did at the moment of the fact with which he stands charged; for instance, if a child having done a criminal act, shows a consciousness that he has done wrong; if he endeavours to conceal it; if he does that which demonstrates that although he had not a complete view of the subject—he did not understand the enormity of his guilt—he did not see it in all its consequences as a person possessed of a complete mature understanding would do—yet if he possessed that degree of sense which enabled him to judge whether the act which he was committing was right or wrong, that has constantly been held sufficient to induce a jury to find infants of very tender years guilty of offenses. . . . [T]he law of this country states it

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[332] *Id.* at 1284–85.

[333] *Id.* at 1285.

[334] *Id.* at 1285–86.

[335] *Id.* at 1286 (first emphasis added).

[336] *Hadfield's Case*, 27 How. St. Tr. at 1286–87.

[337] *Id.* at 1287.

> to be [the same] in the case of persons labouring under that disorder which is commonly called lunacy.[338]

After two hundred years, the eloquence of Lord Thomas Erskine, Hadfield's defense attorney, still twinkles on the page. Agreeing with the Attorney General that civil and criminal insanity tests were distinct,[339] and almost as though anticipating the kinds of arguments Kansas would make centuries later, Erskine noted that Hale and Coke's statements were extreme and untenable if interpreted strictly.[340] Only on rare occasions is a person almost completely without mental power; in others, "reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety."[341] Erskine proposed that a person was legally insane and not criminally responsible if the criminal act was the result of a delusion that distorted the criminal's view of reality.[342] Such delusional versions of reality could include complete distortions of basic realities, or they could be delusions about the identity of the criminal or his victim,[343] the latter of which would fit squarely within the moral incapacity test.

Erskine distinguished between the modern cognitive and moral incapacity tests. He found fault with the Attorney General's formulation of the moral incapacity test, through which a person was acquitted if he lacked "the knowledge of good and evil."[344] Erskine explained that a person might murder his victim while under the delusion that the victim was a piece of pottery or a wild animal, and yet not fall within the knowledge-of-good-and-evil test because in all other respects he was sane and knew the principles of morality.[345] He thus, while criticizing a formulation of the moral incapacity test, clearly distinguished between the pure moral incapacity test and the cognitive incapacity test, noting while he did so that cognitive incapacity engenders moral incapacity. Erskine did not denounce the moral incapacity excuse, upon which he hung his case, but criticized a particular formulation

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338 *Id.*

339 *Id.* at 1310–12.

340 *Id.* at 1312–13; WINSLOW, *supra* note 269, at 6 (quoting *id.*).

341 *Hadfield's Case*, 27 How. St. Tr. at 1313.

342 *Id.* at 1314.

343 *Id.* at 1315–16.

344 *Id.* at 1317.

345 *Id.* at 1317–18.

of it.[346] Hadfield, though he intended to kill the king, whom he knew to be a human being, was delusional, on that account could not tell right from wrong, and therefore deserved acquittal.[347]

Erskine anticipated presenting witnesses to prove that Hadfield, as a result of wounds incurred during military service,[348] delusionally believed himself to be a savior, and that he must be killed to save the world.[349] Rather than simply dispatch himself, he decided to murder the king, for which he knew he would surely be caught and hanged. After the prosecution put on its case and Erskine had made considerable progress in presenting the defense, the judge interposed. Was Erskine quite finished? No, he had "twenty more witnesses to examine."[350] Because the Attorney General had no witnesses to counter the testimony Erskine produced, the judge more or less told the Attorney General the case was over.[351] Erskine said he agreed with the Attorney General's statement of the law, the Attorney General agreed that Erskine had proved his case, and the judge, Lord Kenyon, put the case to rest.[352] As a matter of form, the jury promptly returned a verdict of not guilty by reason of insanity.[353] Because everyone agreed that Hadfield knew he was attempting to assassinate the king, the only way Hadfield could have been acquitted was if Lord Kenyon, Erskine, and the Attorney General all agreed that the insanity excuse was broader than cognitive incapacity.

e. *Parker's Case* (1812)

Parker's Case was a treason case.[354] Parker, a British marine, was captured by the French and imprisoned on the Isle of France.[355] He deserted to the French to gain his freedom. He told a French sentry that he, Parker, was going

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[346] *See* WINSLOW, *supra* note 269, at 7–8 (quoting *id.*). One history of the Anglo-America insanity excuse inaccurately asserts that "[t]he 'good and evil' test was momentarily abandoned in *Hadfield's Case*." Platt & Diamond, *supra* note 216, at 1236.

[347] *See Hadfield's Case*, 27 How. St. Tr. at 1315, 1318–19. He understood both the nature of his acts and that they were illegal, and that is why he committed them. But he was still acquitted. Crotty, *supra* note 236, at 116–17 (citations omitted).

[348] *Hadfield's Case*, 27 How. St. Tr. at 1319–20 (noting that Hadfield was struck several times by swords, "his head hung down almost dissevered," and even after he recovered, his brain's membrane was visible).

[349] *Id.* at 1321.

[350] *Id.* at 1353.

[351] *Id.* at 1353–54.

[352] *Id.* at 1354–55.

[353] *Id.* at 1356.

[354] COLLINSON, *supra* note 202, at 477.

[355] *Id.* at 477–78.

to join the sentry's side.[356] He joined the French army and tried to get a fellow British soldier to do the same.[357] A witness who had known Parker growing up testified that he was of "very weak intellect[]" and that his friends and neighbors were surprised he was allowed to join the army.[358] In the face of all the evidence showing that Parker understood the nature of his acts (getting out of prison, joining the French military, putting on a French uniform and drawing French pay), Parker's attorney appealed to the jury to acquit Parker based on his poor mental abilities.[359] The Attorney General accepted that, in light of the evidence of Parker's sanity and clear understanding, the jury could acquit Parker if it was "perfectly satisfied, that at the time when the crime was committed, the prisoner did not really know right from wrong."[360] Given the evidence of Parker's cognitive abilities, the Attorney General must have been conceding moral incapacity as an independent insanity excuse.

f. *Bellingham's Case* (1812)

John Bellingham shot and killed the Prime Minister, Spencer Perceval.[361] While in Russia on business, Bellingham was thrown into prison.[362] He believed he was imprisoned unjustly, but the British government refused to help.[363] Back in England, he sought redress in vain.[364] He went so far as to apply for Parliamentary aid, but the law required Prime Minister Perceval's consent first, and Perceval refused to give it.[365] Bellingham shot Perceval as the Prime Minister walked into the House of Commons.[366]

The Attorney General ended his opening statement by arguing that Bellingham was quite sane enough for the jury to convict him. First, he

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356 *Id.* at 478.

357 *Id.*

358 *Id.* at 479.

359 *Id.*

360 COLLINSON, *supra* note 202, at 479–80.

361 *Id.* at 636; *Trial of John Bellingham* (May 13, 1812) (Ref. No. t18120513-5) at 264, in *Old Bailey Proceedings Online*, version 8.0, https://www.oldbaileyonline.org/browse.jsp?div=t18120513-5 [hereinafter *Trial of Bellingham*]. For an explanation of the citation format above, *see supra* note 322. Collinson's treatise and the Old Bailey Proceedings contain reports of the proceedings, but only Collinson contains the Attorney General's opening statements. Therefore, the remainder of the discussion cites Collinson first, and the Old Bailey Proceedings second where they contain the same or other supporting materials.

362 COLLINSON, *supra* note 202, at 649; *Trial of Bellingham*, *supra* note 361, at 268.

363 COLLINSON, *supra* note 202, at 649; *Trial of Bellingham*, *supra* note 361, at 268.

364 COLLINSON, *supra* note 202, at 649–51; *Trial of Bellingham*, *supra* note 361, at 268–69.

365 COLLINSON, *supra* note 202, at 650–51; *Trial of Bellingham*, *supra* note 361, at 269.

366 COLLINSON, *supra* note 202, at 652; *Trial of Bellingham*, *supra* note 361, at 268.

managed his own affairs and none of his friends or family attempted to take out a commission of lunacy against him.[367] Second, others employed him to manage their business affairs.[368] Ignoring Hale's point that insanity may be total or partial and Erskine's discussion of delusions, the Attorney General argued that since Bellingham could have written a valid will the morning of the murder, he must be held accountable for the killing.[369] If any killer could base his insanity defense on the absurdity of his acts or his inability to judge between right and wrong, he said, every murderous act would be its own insanity defense.[370] Then he narrowed the question before the jury: "the only question upon the point of sanity or insanity, that can be presented to your consideration upon the present trial, is this, namely, whether the Prisoner was capable or incapable of distinguishing right from wrong."[371] He noted that civil law required more mental powers than did the criminal law; a man cannot validly transact his own business unless he understands his affairs, but a person could commit murder if his sanity rendered him "incapable of distinguishing right from wrong."[372]

The famous Lord Chief Justice Mansfield gave the jury instructions. It was clear that Bellingham had killed Perceval and had done so on purpose.[373] But a man would be excused if he were "deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction."[374] Justice Mansfield then said that the defendant had the burden of proving "beyond all doubt" that "he did not consider that murder was a crime against the laws of God and nature."[375] A person "[de]void of all power of reasoning from . . . birth" was excused, but a person subject to fits of lunacy could be held responsible if, at the time of the crime, the person could "distinguish good from evil."[376] If the defendant was deluded into thinking he was unjustly wronged and was justified in seeking

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[367] COLLINSON, *supra* note 202, at 653.

[368] *Id.*

[369] *Id.* at 655–56.

[370] *Id.* at 656 ("Every man who committed a crime greater than the ordinary sort of criminality, might set up as a defence, that it was impossible that any person could be guilty of such enormity, possessed of a sane or a proper understanding, or who was capable of judging whether the act was right or wrong.").

[371] *Id.* at 656–57.

[372] *Id.*

[373] COLLINSON, *supra* note 202, at 670; *Trial of Bellingham*, *supra* note 361, at 272–73.

[374] COLLINSON, *supra* note 202, at 671; *Trial of Bellingham*, *supra* note 361, at 273.

[375] COLLINSON, *supra* note 202, at 671.

[376] *Id.* at 672; *Trial of Bellingham*, *supra* note 361, at 273.

revenge, but could otherwise distinguish between right and wrong, the jury could not acquit.[377]

Mansfield's instructions represent a broad form of the moral incapacity excuse and included both forms, the pure moral and legal-moral formulations. A severe cognitive incapacity—one that would defeat the modern mens rea for murder—would lead to moral incapacity and therefore relieve the defendant of criminal responsibility,[378] but Bellingham suffered from no such mental defect. The operational instruction was the final form of insanity Mansfield described. A delusion that prevented the killer from discerning right from wrong with respect to a particular act would not excuse his conduct, but a general inability to understand and apply both the laws of morality and the laws of the government would.[379] Based on that rule and the evidence that Bellingham was sane on every point except his delusional obsession with revenge against Perceval, the jury convicted him, and he was sentenced to death.[380]

Although Mansfield's instructions were inconsistent with the law as stated in *Hadfield's Case* and *Bowler's Case*, they showed a clear commitment to a moral incapacity excuse independent of severe cognitive incapacity. Mansfield may have been influenced by the sensational nature of the case and the public stature of the victim.[381] His statement of the moral incapacity excuse seems calculated to obtain a conviction of the Prime Minister's killer while preserving an independent moral incapacity excuse.

g. *Bowler's Case* (1812)

Less than two months later, on July 1, 1812, Thomas Bowler was tried for the attempted murder of William Burrows.[382] As Burrows was driving to the London Market, Bowler came up to his cart, aimed a blunderbuss at him, said "d[am]n your eyes," and fired.[383] Earlier that morning, Bowler and his grandson brought a fast horse to a blacksmith's shop near the road to London.[384] Bowler said loudly to the blacksmith that he thought his

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[377] COLLINSON, *supra* note 202, at 672; *Trial of Bellingham*, *supra* note 361, at 273.

[378] COLLINSON, *supra* note 202, at 672; *Trial of Bellingham*, *supra* note 361, at 273.

[379] COLLINSON, *supra* note 202, at 672; *Trial of Bellingham*, *supra* note 361, at 273.

[380] COLLINSON, *supra* note 202, at 674; *Trial of Bellingham*, *supra* note 361, at 273.

[381] COLLINSON, *supra* note 202, at 669; *see infra* note 412 and accompanying text.

[382] *Trial of Thomas Bowler* (July 1, 1812) (Ref. No. t18120701-11) at 322, in *Old Bailey Proceedings Online*, version 8.0, https://www.oldbaileyonline.org/browse.jsp?div=t18120701-11 (hereinafter *Trial of Bowler*). For an explanation of the citation format above, *see supra* note 322.

[383] *Id.* at 322–23, 325.

[384] *Id.* at 324–25.

blunderbuss was broken but privately told him he was going to shoot a dog and did not want his grandson to know.[385] Bowler left his grandson near the blacksmith's, positioned himself behind a large tree beside the road, ambushed Burrows, and escaped on the horse with his grandson.[386] About a week later, he was arrested at his home.[387]

The blacksmith testified that Bowler's manner was normal and that he was "very cool and deliberate."[388] A stable-keeper by the name of William Shepherd testified that, a few months before, Bowler swore he would kill Burrows.[389] When Shepherd protested, Bowler cursed and repeated his vow to kill Burrows in June.[390]

Other testimony showed that he suffered from epilepsy and had become greatly disturbed after a fit in mid-1811, which came on while he was in a hay-field with Mr. Burrows.[391] Subsequently, Bowler said that he, Bowler, was a madman and that he suffered from delusions about losing his estate for failure to pay his taxes properly.[392] He lost his ability to count money, too.[393] He fancied he had seen the dead in underground caves, while playing cards did not realize that he was doing so, ate raw meat for breakfast, and sometimes spoke incoherently.[394] He was sufficiently lucid at one point to make a valid will,[395] but the prison doctor testified that Bowler was insane.[396] He also confirmed that Bowler was deluded into thinking Burrows was intent on harming him, but otherwise "kn[ew] the consequences of his actions, and . . . whether his actions were right or wrong."[397] The prosecutor's final question to the prison doctor is quite revealing because it shows he assumed Bowler knew, at the time of the crime, that he was trying to shoot Burrows: "do you know whether he was sensible of his killing and shooting Mr. Barrows [sic] was a wrong thing?" The doctor's reply was equally telling because even though it showed he thought Bowler did not know that he had shot Burrows, it addresses cognitive and moral capacity separately and

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385 *Id.* at 324.

386 *Id.* at 324–25.

387 *Id.* at 327.

388 *Trial of Bowler*, *supra* note 372, at 324–25.

389 *Id.* at 326–27.

390 *Id.* at 327.

391 *Id.*

392 *Id.* at 327–28.

393 *Id.* at 327.

394 *Trial of Bowler*, *supra* note 372, at 328.

395 *Id.* at 330.

396 *Id.* at 339.

397 *Id.*

independently: "I don't think he had any idea he had shot Mr. Burrows, or, that he had been doing a wrong thing."[398]

The judge, Lord Simon Le Blanc, charged the jury with both cognitive and moral incapacity tests. Bowler should be acquitted only if he "was not capable of distinguishing right from wrong" or if he suffered from a delusion that made him "insensible of the nature of the act he was about to commit."[399] But if the defendant was "capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning, that he was doing a wrong act," he was guilty.[400] The jury returned a guilty verdict, most likely because they determined he understood he was shooting at a human and because even if Bowler's delusion regarding Burrows' alleged conspiracy to have him thrown in jail were true, Bowler was able to know that murder was the wrong way to go about frustrating Burrows' plan.

h. *Rex v. Offord* (1831)

Rex v. Offord[401] was like *Bowler's Case* in that Offord, like, Bowler, was deluded into believing that the victim and others were conspiring to "deprive him of his liberty and life."[402] After the murder, various papers were found on his person, including a "List of Hadleigh conspirators against my life" and a summons with the note reading as follows: "This is the beginning of an attempt against my life."[403] Doctors testified that he suffered from monomania and "might not [have been] aware that, in firing the gun, his act involved the crime of murder."[404] The judge, citing *Bellingham's Case*, instructed the jury that even if Offord knew the shot would be fatal, the jury must be convinced that Offord knew "he was committing an offence against the laws of God and nature."[405] Like Lord Mansfield, Lord Lyndhurst adopted a clear moral incapacity excuse not dependent on cognitive incapacity. Although the evidence showed he was deliberately killing a person he delusionally believed was hounding him, the jury acquitted on the ground of insanity[406]—undoubtedly on the ground of moral incapacity.

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398 *Id.*

399 COLLINSON, *supra* note 202, at 674 n.

400 *Id.* at 674.

401 Rex v. Offord (1831), 172 Eng. Rep. 924, 924, 5 Car. & P. 168, 168. Forbes Winslow copied the report almost verbatim in his nineteenth century treatise on criminal insanity. WINSLOW, *supra* note 269, at 8–11.

402 *Offord*, 172 Eng. Rep. at 925, 5 Car. & P. at 168.

403 *Id.*

404 *Id.*

405 *Id.* at 925, 5 Car. & P. 168–69.

406 *Id.* at 925, 5 Car. & P. at 169.

i. *Regina v. Oxford* (1840)

Regina v. Oxford[407] involved a charge of treason for Oxford's attempted assassination of Queen Victoria.[408] The Attorney General opened by recounting the evidence to be produced of the careful steps Oxford took to procure pistols, powder, and bullets, his lying in wait for the queen's carriage, and deliberately taking aim and firing at her twice.[409] When bystanders initially seized someone else, Oxford said, "It was me, I did it, I surrender myself."[410] The Attorney General said that the prisoner would be guilty if the jury concluded that he was "able to distinguish right from wrong, in his own case, and to know that he was doing wrong in the act which he committed."[411] After clarifying Hale's strong language and citing the major cases discussed here, the Attorney General declined to rely on *Bellingham's Case* because of "doubts as to the correctness of the mode in which that case was conducted.[412] He cited *Rex v. Ferrers* for the proposition that the criminal law was satisfied if Oxford "could discriminate between good and evil."[413]

Oxford's defense attorney noted that Oxford delusionally believed himself to be a part of a political society whose existence could not be verified.[414] The prosecution responded first by acknowledging that if the jury found the pistols were loaded with bullets, there could be no dispute that Oxford's object was to kill the queen.[415] He then conceded that the appropriate test was whether the prisoner knew "he was committing an offence against the law of God and nature."[416] He interpreted this test as including cognitive and legal-moral incapacity, saying that the question before the jury was "whether the prisoner, at the time he did the act, was in a situation to know right from wrong—to know that the act was one calculated to inflict death, *and that its performance would subject him to punishment*."[417]

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[407] Regina v. Oxford (1840), 173 Eng. Rep. 941, 9 Car. & P. 525.

[408] *Id.* at 941, 9 Car. & P. at 525–26.

[409] *Id.* at 942, 9 Car. & P. at 527.

[410] *Id.* at 942, 9 Car. & P. at 528.

[411] *Id.* at 944, 9 Car. & P. at 532 (quoting a treatise on Scottish law).

[412] *Id.* at 944–45, 9 Car. & P. at 531–33. The Attorney General was likely referring to Justice Mansfield's inappropriate display of emotion and bestowal of encomiums on the victim just before charging the jury.

[413] Regina v. Oxford (1840), 173 Eng. Rep. 941, 944, 9 Car. & P. 525, 532 (citing Rex v. Lord Ferrers, 19 How. St. Tr. 886 (1760)).

[414] *Id.* at 946, 9 Car. & P. at 538.

[415] *Id.* at 948, 9 Car. & P. at 541–42.

[416] *Id.* at 948, 9 Car. & P. at 542 (citing *Offord*, 172 Eng. Rep. at 925, 5 Car. & P. at 168).

[417] *Id.* at 948–49, 9 Car. & P. at 543 (emphasis added).

The prosecution explained that Oxford's alleged insanity would not excuse him unless it caused the criminal act by destroying either his cognitive or moral capacity relative to the act of shooting at the queen:

> Mark, therefore, the connexion, as Mr. Erskine put it, of the delusion with the act. If the prisoner in this case did the act, knowing it was a guilty act, for the sake of public notoriety, he is responsible, and must be found guilty. It is evident he knew he was breaking the laws of God; let us see whether he knew that he was liable to punishment. His answers before the Privy Council sh[o]w that there was no imbecility. What you will have to say, therefore, will be, whether the prisoner was under any delusion when he committed the act, which delusion alters the character of the act. If he thought he was doing an innocent act, and did not know that he was doing an illegal act which would subject him to criminal punishment, he must be acquitted; but otherwise, not.[418]

The Chief Justice, Lord Denman, instructed the jury on moral incapacity and expressly referred to it as "moral insanity."[419] Addressing evidence of the defendant's grandfather's alleged insanity, he gave a volitional incapacity test founded on the relationship between the will and the rational faculties.[420] Drawing upon cognitive and moral incapacity concepts and the language of the prosecution, he ended by telling the jury that the defendant would be excused if "he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime."[421] Understanding the *nature* of the act depends on cognitive capacity; understanding the character of the act can be reasonably interpreted to depend on both cognitive and pure moral capacity; and understanding the consequences of one's act, which hearkens to the prosecution's legal-moral incapacity language, depends on the ability to understand that society disapproves of an act and will punish it.[422]

The jury returned a verdict of not-guilty grounded jointly on insufficient evidence that the pistols were loaded and sufficient evidence that Oxford was insane.[423] They were told to retire and return a special verdict on each

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[418] *Id.* at 949, 9 Car. & P. at 544–45.

[419] Regina v. Oxford (1840), 173 Eng. Rep. 924, 950, 9 Car. & P. 525, 546–47.

[420] *Id.* at 950, 9 Car. & P. at 547.

[421] *Id.*

[422] *See id.*; *supra* note 418 and accompanying text.

[423] *Regina*, 173 Eng. Rep. at 950–51, 9 Car. & P. at 548.

question.[424] They returned shortly thereafter with a verdict of not guilty by reason of insanity.[425]

j. *M'Naghten's Case* (1843)

Daniel M'Naghten lent his name, though perhaps not its correct spelling,[426] to the most famous of the modern formulations of the insanity excuse. *M'Naghten's Case*[427] served as the occasion for the great English jurists of the day to unambiguously articulate the English insanity excuse. M'Naghten was charged with shooting "a certain pistol of the value of 20" shillings at Edward Drummond, from which Drummond received "one mortal wound," "languished" for several months, and died.[428]

Medical testimony was presented to the effect that an otherwise sane person might be "affected by morbid delusions," and that such a delusion had deprived M'Naghten of his "moral perception of right and wrong" and his self-control in matters relating to the delusion.[429] Lord Chief Justice Tindal instructed the jury on an insanity excuse closely parallel to the instructions discussed above:

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour.[430]

When the jury acquitted him, the House of Lords debated the insanity excuse and requested some of the highest judges of the land to answer several questions regarding existing English insanity law.[431] Justice Tindal answered for fourteen of the fifteen judges, concluding that the insanity excuse would relieve a defendant from responsibility only if,

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[424] *Id.* at 951, 9 Car. & P. at 548.

[425] *Id.* at 952, 9 Car. & P. at 551.

[426] United States v. Freeman, 357 F.2d 606, 608 n.2 (2d Cir. 1966) (citation omitted) (noting that the "inglorious individual" spelled his name "M'Naughten").

[427] Daniel M'Naghten's Case (1843), 8 Eng. Rep. 718, 10 Cl. & Fin. 200.

[428] *Id.* at 719, 10 Cl. & Fin. at 200–01.

[429] *Id.*, 10 Cl. & Fin. at 201.

[430] *Id.* at 719–20, 10 Cl. & Fin. at 202.

[431] *Id.* at 720, 10 Cl. & Fin. at 202.

> 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 [1] not to know the nature and quality of the act he was doing; or, if he did know it, [2] that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong.[432]

This formulation, which reflected the justices' view of existing English law rather than a new insanity excuse, includes separate cognitive and moral incapacity components. Tindal recognized that the phrase "knew the difference between right and wrong" was not merely an extension of the cognitive incapacity test but had been an independent excuse for centuries. The M'Naghten test, with its independent cognitive and moral incapacity prongs, was not a new test, but an articulation of the English insanity excuse as it had existed for generations. Justice Maule, the only justice who disagreed with Justice Tindal's exposition of the law, did so on the ground that jury instructions were a matter of discretion for the trial court.[433] His statement of the insanity excuse, taken in context, was a verbatim repetition of the pure moral incapacity excuse.[434]

k. Summary

This discussion of the early English cases disproves Justice Kagan's assertion that English judges "[threw] everything against the wall . . . without trying to order, prioritize, or even distinguish among them."[435] Contrary to the *Kahler* majority's analysis, the jury instructions and attorneys' arguments in every single case discussed above show that the English legal system had firmly established the moral incapacity excuse as a separate and independent ground for relieving a defendant from criminal liability. There can be no question that the cases adopted insanity tests that went beyond the cognitive incapacity excuse, with some even using volitional incapacity, either as its own test or as a theoretical justification for the cognitive and moral incapacity tests.

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[432] *Id.* at 722, 10 Cl. & Fin. at 210.

[433] *Daniel M'Naghten's Case* (1843), 8 Eng. Rep. 718, at 720–21, 10 Cl. & Fin. 200, at 204–06.

[434] *Id.* at 721, 10 Cl. & Fin. at 205 ("To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong.").

[435] Kahler v. Kansas, 140 S. Ct. 1021, 1034 (2020)

3. Pre-*M'Naghten* British Writers

British writers who wrote after the early English works discussed above but whose works appeared before *M'Naghten's Case* discussed separate cognitive and moral incapacity excuses. Some of these works were legal in nature, while others combined law and medicine. Several examples of these works demonstrate that the moral incapacity excuse was widely recognized before the famous *M'Naghten* test was formulated in 1843. The insane could provide testimony only if they understood the "moral obligation" of an oath,[436] and the same concepts of moral capacity were at play in the substantive criminal law as well.

a. John Shapland Stock

John Shapland Stock's *Practical Treatise on the Law of* Non Compotes Mentis accepted the moral incapacity excuse but argued that pure moral incapacity should be abandoned in favor of legal-moral incapacity.[437] An insane person could either be generally incapable of understanding "the nature of his Acts," or incapable of understanding the nature of specific acts.[438] The jury instructions from several key English cases indicated that a person would be excused from criminal liability if the person had basic cognitive capacity but were "unconscious[] that it [was] a violation of the Laws of God and Nature," or the laws of morality.[439] Stock argued that pure moral incapacity was a flawed test because laws do not always depend on "abstract right and wrong."[440] Instead, society's wellbeing depended on holding everyone accountable who could understand that society disapproved of his conduct and imposed punishment for it.[441] Stock's argument assumed the cognitive incapacity excuse and argued about the separate incapacity excuse, saying the legal-moral incapacity excuse was superior to the pure moral incapacity excuse.

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[436] JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 588 (Thomas Huntington ed., 1832) (noting that any insane person with "a due sense of moral obligation" could be competent to testify). Chitty was an English attorney. The edition cited here was published in New York and Philadelphia.

[437] JOHN SHAPLAND STOCK, A PRACTICAL TREATISE ON THE LAW OF *NON COMPOTES MENTIS* 39–40 (1839). Each page contains an earlier edition's pagination in brackets, but I cite to the pagination of the 1839 edition. Stock was a barrister of the Middle Temple in England.

[438] *Id.* at 38.

[439] *Id.* at 39.

[440] *Id.* at 39.

[441] *Id.*

b. J. M. Pagan

J. M. Pagan published a series of his lectures on forensic medicine in 1840.[442] Although he disclaimed full knowledge of the legal aspects of insanity,[443] he did discuss it. He cited a Scottish treatise for the proposition that a criminal defendant would be excused on the ground of insanity only if the defendant's insanity was "of such a kind as entirely deprived him of the use of reason . . . and the knowledge that he was doing wrong in committing it."[444] He also cited the moral incapacity test from *Bellingham's Case*.[445] He then cited the Scottish treatise again to show that, although imagined hurts and insults would not justify a killing if true, an insane delusion consisting of imagined wrongs that would justify a killing if true could excuse the defendant even if he "was perfectly aware that murder in general was a crime."[446] Pagan criticized the moral incapacity excuse, which he took to be established English law, on medical and evidentiary grounds.[447]

Pagan recounted a Scottish murder and the intellectual capacities of the murderer, a man named Barclay, whom he had examined in his role as a physician. Although the murderer had severe cognitive deficiencies, Pagan's account credits him with understanding human life and killing and the fear of punishment from the authorities, but little or no sense of the moral rightness or wrongness of actions.[448] Pagan explained that "[a]ll the[] circumstances seem clearly to show, that Barclay, imbecile as he was, was capable of forming the design of murder, of executing his purpose secretly, and of endeavouring, by flight and falsehood, to free himself from the consequences of his act."[449] Nevertheless, "he seemed to have no internal impression of the difference between right and wrong."[450] The jury convicted him on the testimony of doctors who believed Barclay was an imbecile but "knew the distinction between right and wrong" and that "murder was a crime."[451] Pagan's account can reasonably be read as implying that where cognitive capacity is not in question, proof of moral capacity defeated the insanity defense.

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442 J.M. PAGAN, THE MEDICAL JURISPRUDENCE OF INSANITY iii (1840).

443 *Id.*

444 *Id.* at 3 (citation omitted).

445 *Id.* at 3–4.

446 *Id.* at 4 (citation omitted).

447 *Id.* at 6, 13–14, 285, 305–06.

448 J.M. PAGAN, THE MEDICAL JURISPRUDENCE OF INSANITY 307–11 (1840).

449 *Id.* at 311.

450 *Id.* at 310.

451 *Id.* at 312.

c. Leonard Shelford

Leonard Shelford wrote his *Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* in 1833. His chapter on crimes by and against lunatics opened with a clear statement of the cognitive and moral incapacity excuses.[452] Citing *Rex v. Ferrers*, he noted that the prosecution's statements contained a dual cognitive and moral incapacity test.[453] After summarizing some of the key English cases discussed above, he recounted the trial of Jonathan Martin for burning a cathedral. Martin believed he had dreams from God telling him to burn the cathedral.[454] Although he knew he was setting fire to the cathedral when he did it, he was found not guilty by reason of insanity.[455] Because the testimony showed he knew he was setting fire to another's property, the jury could have only acquitted him on the ground of moral incapacity brought on by insane delusions.[456]

d. Anthony Highmore

Anthony Highmore published his *Treatise on the Law of Idiocy and Lunacy* on both sides of the Atlantic. The treatise was largely a regurgitation of the early English writers and a few then-contemporary cases, including *Hadfield's Case*.[457] Highmore specifically wrote that the insane should not be prosecuted "because they [lack] knowledge to distinguish between good and evil."[458] He also wrote that a man might be insane, yet commit a criminal act "with premeditation" and "under the dominion of mischief and malice" for which he would be responsible.[459] That description includes both cognitive

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[452] LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 458 (1833) ("T[he] essence of a crime consists in the *animus* or intention of the person who commits it, considered as a free agent, and in a capacity of distinguishing between moral good and evil.").

[453] *Id.* at 458–59.

[454] *Id.* at 465–66,.

[455] *Id.* at 467.

[456] Insanity law and religious liberty meet at the invisible border between psychological problems and religious fanaticism. Lawyers, legislators, and psychiatric experts ought to be wary of attributing religious views with which they disagree to a disordered mind. *See* Stuart Schoffman, *"Insane on the Subject of Judaism": Pursuing the Ghost of Warder Cresson*, 94 JEWISH Q. REV. 318 (2004) (recounting the story of Walter Cresson, whose wife attempted to take his property by taking out a commission of lunacy against him when he converted to Judaism and became an avid Zionist).

[457] *See* ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 138–56 (First American ed., 1822).

[458] *Id.* at 138.

[459] *Id.* at 151.

and moral language. Furthermore, Highmore's account of *Hadfield's Case* included all the facts showing that Hadfield had full possession of his basic cognitive faculties, knowing what it was to kill a human and knowing that he could do it with a pistol and knowing that the king was the head of state.[460] Highmore must have realized that the Chief Justice and the jury could only have concluded Hadfield was not guilty by reason of insanity if the English insanity excuse was broader than cognitive incapacity.

4. Pre-*M'Naghten* American Writers

The American writers, relying on English authorities, set forth in their treatises and articles an insanity excuse that included both cognitive and moral incapacity prongs and were based on the connection between the rational and volitional powers. Some writers discussed only the medical or philosophical aspects of moral incapacity and limited their discussions of the legal aspect to questions of public policy.[461] Others, discussed below,[462] show that the moral incapacity excuse was widely accepted in American legal practice before *M'Naghten*.[463]

a. Matthew Bacon, Henry Gwillim, and Bird Wilson

Matthew Bacon's *New Abridgment of the Law* was added to by Henry Gwillim, and the American judge Bird Wilson added new English and American cases and had it published in Philadelphia in the early nineteenth century. The section on the criminal responsibility of the mentally disturbed is fairly short, but it opened with a statement of the insanity defense that smacks of moral incapacity: "[I]diots and lunaticks being by reason of their natural disability incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever."[464] It closed by distinguishing between civil and criminal liability for "trespass against the person or possession of another"; a person who "wants discretion" was civilly, but not criminally liable.[465] The common law tort of battery required intent to make

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[460] *Id.* at 151–54.

[461] *E.g.* RUSH, *supra* note 3, at 357–67.

[462] The authors discussed below were chosen primarily as representative examples, not because they necessarily were the most widely respected or widely read authorities of their day. But their positions are consistent, not only with the argument this article makes, but with the views of their contemporaries.

[463] Platt & Diamond, *supra* note 216, at 1250. Platt and Diamond point out that few writers, if any, criticized the moral incapacity excuse prior to 1843. *Id.*

[464] MATTHEW BACON, 3 A NEW ABRIDGMENT OF THE LAW 535 (Bird Wilson ed., 1813). The original pagination is indicated in brackets on the side of each page, and that pagination is reflected here.

[465] *Id.* at 536.

contact with another person, which a person with mere cognitive capacity can do, whereas a person needs moral capacity in order to intend that the contact be wrongful.[466] A person with the cognitive capacity to form intent may nevertheless lack "discretion" and be unable to understand the moral or legal implications of his action. Hence, a person with the cognitive capacity to be liable in tort for a battery could, in a criminal case, raise the defense of moral incapacity based on a lack of discretion.

b. Thomas Cooper

Thomas Cooper's *Tracts on Medical Jurisprudence*, published in Philadelphia in 1819, included only three pages of his own writing on the medical aspects of insanity.[467] But Cooper included the English physician Haslam's work on mental disturbances and the law.[468] Haslam's discussion of lawyers' questions about whether particular defendants could discern between right and wrong treats the question as a matter involving both moral and cognitive faculties.[469]

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[466] *E.g.* Wagner v. Utah Dep't of Human Servs., 122 P.3d 599, 603–04 (Utah 2005) (citing RESTATEMENT (SECOND) OF TORTS §§ 8(A) and 13 (AM. LAW INST. 1965)).

[467] THOMAS COOPER, TRACTS ON MEDICAL JURISPRUDENCE 66–68 (1819).

[468] *Id.* at 281.

[469] JOHN HASLAM, MEDICAL JURISPRUDENCE AS IT RELATES TO INSANITY 12–13 (1817). Haslam wrote:

> If violence be inflicted by such a person during a paroxysm of rage, there is no acuteness of metaphysical investigation which can trace the succession of his thoughts, and the impulses by which he is goaded for the accomplishment of his purpose. And it will be [shown] hereafter that in some instances he is not himself conscious of his actions.
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> . . . .
>
> His belief in the GOOD of his principle, his faith in the RIGHT of his actions, are superior to arguments,—his motive cannot be controlled by reason, or baffled by the fear of punishment. Impressed with a *belief* in the truth of his delusion, he hurries forward to its accomplishment: and in the pursuit of the phantom cannot be diverted by the most awful consequences.
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> . . . .
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> A person *in* his sense may entertain and believe a number of unfounded and erroneous opinions, but on the exposure of their falsity he is capable of being convinced, but the madman never is; and this forms the great distinction between them. This incapability of being convinced of the GOOD and EVIL, RIGHT and WRONG, TRUTH and FALSEHOOD of his BELIEF is that, which as an intellectual being, renders him different from other men, and constitutes his distemper.

c. Charles Humphreys

Summarizing the common law of Kentucky in 1822, Charles Humphreys justified the infancy and insanity excuses on the same grounds. He essentially restated Blackstone as the common law of Kentucky.[470] Children under seven were not responsible because they could not "discriminat[e] good from evil."[471] Children between seven and fourteen were responsible if found to be *doli capax* and able to "discern good from evil."[472] He repeated Blackstone's accounts of the execution of several children executed for murder because "[t]heir conduct was considered a manifestation of a sense of guilt."[473] His treatment of idiocy and lunacy likewise mirrored Blackstone's, which, as discussed above, included a moral incapacity component.[474]

d. William Russell

The American edition of William Russell's *Treatise on Crimes and Misdemeanors* was edited by Daniel Davies and published in 1824. Russell, like Blackstone, founded criminal culpability on volitional capacity and linked the cognitive and moral faculties to the volitional faculties.[475] Children of fourteen were held accountable for capital crimes as adults because "the law presumes them at those years to be *doli capaces*, and able to discern between good and evil."[476] On the subject of insanity, Russell gave the traditional distinction between idiots and lunatics, along with some other remarks, and then recounted several of the major English cases on the insanity defense.[477]

He then tackled head-on the "right and wrong" language of those cases and expressly tied them to the defendant's awareness of moral and legal principles. The ability to "distinguish right from wrong," the ability to "discern that he was doing a wrong act," being "totally deprived of his

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Id. at 14, 20–21, 23–24. He also treats those who believe they are ordered by God to murder their friends as unable to discern between right and wrong. *Id.* at 37–38. These cases fall outside the modern mens rea approach but squarely within the moral incapacity excuse. *E.g.* People v. Serravo, 823 P.2d 128, 139 (Colo. 1992) (en banc).

[470] *See* CHARLES HYMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 464–65 (1822) (citing BLACKSTONE, *supra* note 205, at *21, *23–25, *27).

[471] *Id.* at 464.

[472] *Id.*

[473] *Id.* (citations omitted).

[474] *Id.* at 464–65; *supra* notes 256–268 and accompanying text.

[475] RUSSELL, *supra* note 263, at 1–2.

[476] *Id.* at 4.

[477] *Id.* at 8–18 (citations omitted).

understanding and memory," and Hadfield's statements at his interrogation and trial all concern whether the defendant was "aware that he was doing a *wrong act*."[478] Russell concluded that Hadfield knew he was doing wrong, but conceded that "the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected."[479] He believed that the proper insanity test was reflected in the formulation adopted by the prosecution in *Rex v. Ferrers*, that the defendant was responsible only if he possessed "thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil."[480]

e. Peter Oxendine Thacher

Peter Oxendine Thacher, a Massachusetts judge, delivered several charges to grand juries in Suffolk, Massachusetts, and later had them printed. In the written version of his 1835 charge, Thacher declared that those with a defective will were punishable for their crimes.[481] Immaturity of understanding resulting from infancy usually caused such a defect, but a child under fourteen years old was responsible if the child "possessed sufficient discretion to distinguish between moral good and evil."[482] Imbecility, too, provided an excuse if it caused "an incapacity to distinguish between right and wrong."[483] Another part of his charge drew upon volitional and moral incapacity concepts.[484]

Thacher's discussion dwelled mostly on cognitive capacity, but the language quoted above is demonstrably broader than the mens rea approach. Explaining the principles he had expounded, Thacher wrote that one species of insanity that would excuse a defendant in a murder case was different only

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[478] *Id.* at 18.

[479] *Id.*

[480] *Id.* (citation omitted).

[481] PETER OXENDINE THACHER, A CHARGE TO THE GRAND JURY OF THE COUNTY OF SUFFOLK 17 (1835). The grand juries typically requested Thacher to have them printed, perhaps as a delicate way of allowing him to have them printed without seeming self-aggrandizing.

[482] *Id.* at 17–18.

[483] *Id.* at 18.

[484] *Id.* at 25 ("For as it would be a great reflection upon the public justice, that an innocent man should be convicted; it would be equally unjust, and contrary to the principle of public punishment, that one, deprived of his reason by the act of Providence, and without the power of choosing between right and wrong, should, for an act done at such time, and under such circumstances, be punished as a criminal.").

in "duration" from passionate bitterness against another.[485] That is, in one case, the resentment was caused by an insane delusion and the offender was not responsible; in the other, the resentment was caused by voluntary meditation on perceived wrongs, and the offender was responsible. Only an insanity excuse considerably broader than cognitive incapacity could explain that result.

f. Isaac Ray

Isaac Ray's *Treatise on the Medical Jurisprudence of Insanity* was published multiple times on both sides of the Atlantic, before and after *M'Naghten's Case*. In the 1839 edition, Ray found no reason to hold criminally responsible an insane person who murders a person for the same silly reasons he might kill an animal because such a person "is constitutionally unable to appreciate any difference in the *moral character* of the two actions."[486] He lacks this capacity because natural rights and "the sentiment of wrong" are as far from his mind as complex math.[487] He might competently perform various acts but be a "stranger to that high moral power which instinctively teaches the distinctions of right and wrong."[488] As illustrations, he recounted a foreign case and a domestic case in which the defendants had been acquitted on the ground of moral incapacity.[489]

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[485] *Id.* at 23 ("But it must always devolve on a jury to decide, under all the circumstances, whether an unlawful act proceeded from insanity, or from the voluntary indulgence of evil passions. For in some persons, the instinct of resentment, by being habitually cherished and indulged, becomes a passion, which differs from insanity only in its duration.") (citation and internal quotation marks omitted). *But see* STEPHEN W. WILLIAMS, A CATECHISM OF MEDICAL JURISPRUDENCE 180 (1835) ("Can the protection of insanity be allowed to a man who only exhibits violent passions, and malignant resentments, who is impelled by no morbid delusions, but who proceeds upon the ordinary perceptions of the mind? No.").

[486] ISAAC RAY, TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 98 (1838) (emphasis added).

[487] *Id.*

[488] *Id.* at 100.

[489] *Id.* at 101–03, 109–17 (referencing the second defendant's "moral and intellectual powers" after explaining that he chose very poor explanations for the murder and a subsequent confession). In the American case, the defendant deliberately murdered his employer's wife, thinking that he could kill the husband also and would somehow inherit the property. *Id.* at 112–13.

Ray criticized the moral incapacity test and advocated a new insanity excuse based on then-current medical notions of insanity. Platt & Diamond, *supra* note 216, at 1250 (citing ISAAC RAY, TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 13 (3d ed. 1853)). Ray wished to reform insanity law and he proposed a comprehensive insanity statute. Regarding the criminal liability of the insane, the proposed statute provided that "[i]nsane persons shall not be made responsible for criminal acts" unless the prosecution proved that the act was

5. Pre-*M'naghten* American Cases

Anthony Platt and Bernard Diamond documented that the American legal system enshrined the moral incapacity test in infancy and insanity cases in the early nineteenth century.[490] Other early American cases, some before 1843 and some after, which frequently cited the English jurists and cases discussed above, demonstrate that the "good and evil" or "right and wrong" test as a staple of both insanity and infancy before *M'Naghten's Case* popularized its most famous formulation. Because the early English authors discussed above adopted the moral incapacity test more distinctly concerning infancy than they did concerning insanity,[491] this section focuses on the insanity excuse. To the extent that these cases did not hew closely to the moral incapacity test, they adopted volitional tests or founded their tests on the connection between cognition and volition, or they otherwise demonstrated a commitment to a form of the insanity excuse that went beyond the cognitive incapacity test or modern mens rea approach. None even mentioned a purely cognitive approach of the type that would support the modern mens rea approach, which they almost certainly would have done if their purpose was to overturn an old test in favor of a new one. All of this demonstrates that, from the birth of the United States until the late twentieth century, the people and the legal system of this country believed that it took more than cognitive capacity to be a moral agent worthy of society's censure and punishment.

a. New York

Six New York trial court cases from the early nineteenth century demonstrate that New York regularly employed the moral incapacity test in cases to which it was relevant. In 1816, George Frederick Cooke was tried for grand larceny for stealing a portrait.[492] His attorney alleged insanity, the primary proof being the attorney's own "knowledge of physiognomy," along with the prisoner's irrational method of attempting to turn a profit on the portrait and his odd mannerisms on the witness stand.[493] The court's priceless response was to tell the jury that "it is pretended, but not in evidence, that the

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neither directly nor indirectly caused by the defendant's insanity. PROJECT FOR A GENERAL LAW FOR DETERMINING THE LEGAL RELATIONS OF THE INSANE § 12 (ISAAC RAY n.d.). It also prohibited trying insane defendants during their insanity and required juries to specify whether their verdicts were based on insanity. *Id.* at §§ 13 and 15.

[490] Platt & Diamond, *supra* note 216, at 1238–46.

[491] *See supra* Section IV.C.1.

[492] George Frederick Cooke's Case, 1 New York City-Hall Recorder 5, 5 (N.Y. Court of Gen. Sess. 1816).

[493] *Id.* at 6.

prisoner is insane."[494] So instructed, the jury needed no explanation of the insanity test and quickly found Cooke guilty.[495]

Isaac Truax was also tried for grand larceny in 1816, and he, too, raised the insanity defense.[496] He was well-to-do, and a friend's testimony indicated that after a good start in life, he had become an alcoholic.[497] Constant intoxication allegedly "impaired" his "senses" and "totally ruined" his "moral faculties," and he was therefore acquitted.[498]

Richard Clark was tried that same year for petty larceny, and he also raised the insanity defense.[499] Clark was a foreigner, and one of his few American friends believed him insane, but many others who had interacted with him thought he was of sound mind.[500] The court nevertheless instructed the jury on the insanity defense, saying that lunatics were responsible for crimes committed when they were both lucid and could "distinguish[] good from evil."[501] Although evidence of his eccentricities was introduced, none of the testimony indicated that he did not understand the nature of money or the concept of ownership and the court instructed the jury that "[t]he principal subject of inquiry [is] . . . whether the prisoner, at the time he committed this offence, had sufficient capacity to discern good from evil."[502] If the court had adopted the mens rea approach, there would have been no reason to give an insanity instruction, and the court would have essentially instructed the jury to convict as it had done at Cooke's trial.

Diana Sellick was also tried in 1816 but for murder.[503] She tried to poison Hetty Johnson by mixing rat poison with gin and offering it to her.[504] Johnson refused to drink any of the gin, so Sellick drank a small amount and gave some to her own child.[505] Johnson told Sellick not to give Johnson's child any

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494 *Id.*

495 *Id.*

496 Charles Mitchell, Lemuel H. Mitchell, and Isaac Truax's Cases, 1 New York City-Hall Recorder 41, 44–45 (N.Y. Court of Gen. Sess. 1816).

497 *Id.* at 45.

498 *Id.*

499 Richard P. Clark's Case, 1 New York City-Hall Recorder 176, 176 (N.Y. Court of Gen. Sess. 1816).

500 *Id.*

501 *Id.* at 177.

502 *Id.* at 176–77.

503 Diana Sellick's Case, 1 New York City-Hall Recorder 185, 186–87 (N.Y. Court of Gen. Sess. 1816).

504 *Id.*

505 *Id.* at 187.

liquor, but Sellick did so anyway while Johnson was distracted.[506] Both children soon became ill, and Johnson's child died a few days later.[507] Johnson testified that when Sellick found out the children were sick and that others had discovered that she had bought poison earlier, she confessed she intended to poison Johnson, but only because she, Sellick, was "possessed by the devil."[508] Sellick's old employer said she never saw anything to make her believe that Sellick was insane.[509] The judge reminded the jury that Sellick had testified that she was "possessed [by] the devil, and knew not what she did."[510] But he refused to believe the defense had made a case for insanity and essentially skipped the insanity instruction, telling the jury only that to convict, they only need believe that the prisoner "wilfully and wickedly perpetrated" the murder.[511] That language is not conclusive but suggests cognitive, moral, and volitional components. So does the judge's conclusion, after the verdict, that the evidence showed Sellick acted with "cunning artifice."[512]

John Ball was tried in 1817 for setting a home on fire.[513] None of the evidence raised any question of the defendant's inability to understand the nature of fire.[514] Rebutting the argument that the evidence of a morally reprehensible act was inherent evidence of insanity—which only makes sense in the context of a moral incapacity or volitional incapacity excuse—the judge instructed the jury to convict Ball if they were convinced he had set the fire and that, "at the time he committed the offense, he was capable of distinguishing good from evil[.]"[515]

Lawrence Pienovi was tried in 1818 for biting off part of his wife's nose.[516] Mr. Pienovi discovered that the good Mrs. Pienovi had a lover whose last name was not Pienovi, and the indignant Mr. Pienovi committed the

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[506] *Id.*

[507] *Id.*

[508] *Id.*

[509] Diana Sellick's Case, 1 New York City-Hall Recorder 185, 188 (N.Y. Court of General Sessions 1816).

[510] *Id.* at 190.

[511] *Id.* at 190–91.

[512] *Id.* at 191.

[513] John Ball's Case, 2 New York City-Hall Recorder 85, 85 (N.Y. Court of Oyer and Terminer 1817).

[514] *See id.* at 85–86.

[515] *Id.* at 86.

[516] Lawrence Pienovi's Case, 3 New York City-Hall Recorder 123, 123 (N.Y. Ct. of Gen. Sess. 1818).

forementioned act for revenge.[517] Insanity was his only defense.[518] His employer testified that, after Mr. Pienovi discovered his wife's affair, he appeared very angry, "drank [water] to excess," "frequently beat his head against the wall during the night, and exhibited every other symptom of derangement."[519] The next day he went out early and returned in the evening with a "piece of flesh," and "his conduct was so much like that of a madman, that" his employer "took up a stick of wood for defence."[520] Three other witnesses who knew Mr. Pienovi testified that they thought him "in some degree deranged,"[521] and several others confirmed or contradicted this testimony.[522] The prosecution and the court agreed that the relevant insanity test was whether Mr. Pienovi could "distinguish good from evil."[523] The court's explanation resolves all doubt as to whether this language was used, as Justice Kagan argued such language generally was, merely as an evidentiary proxy for determining cognitive capacity: "[W]hen she raised her voice in pain and agony, he went and closed the window shutters that she might not be heard. Did he do this unconscious of guilt, not knowing the difference between good and evil?"[524]

In 1822, Eliza Tripler was tried for the theft of five silver spoons.[525] Although she produced evidence of no specific acts of insanity, she proved that a "fall some years ago" had "affected her head."[526] Platt and Diamond indicate that the court employed an insanity test that required the jury to convict her if she showed the understanding of a fourteen-year-old child.[527] Because the New York infancy excuse included a moral incapacity prong,[528] *Tripler* indirectly supports the proposition that the moral incapacity excuse was firmly established in New York.

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[517] *Id.* at 124.

[518] *Id.*

[519] *Id.* at 124–25.

[520] *Id.* at 125.

[521] *Id.* at 125–26.

[522] Lawrence Pienovi's Case, 3 New York City-Hall Recorder 123, 126 (N.Y. Ct. of Gen. Sess. 1818).

[523] *Id.*

[524] *Id.* at 127.

[525] People v. Tripler (N.Y. Ct. of Gen. Sess. 1822), *in* JACOB D. WHEELER, 1 REPORTS OF CRIMINAL LAW CASES DECIDED AT THE CITY-HALL OF THE CITY OF NEW YORK 48 (1854).

[526] *Id.* at 48–49.

[527] Platt & Diamond, *supra* note 216, at 1260.

[528] George Stage's Case, 5 New York City-Hall Recorder 177, 178 (N.Y. Ct. of Gen. Sess. 1821) (employing the moral incapacity excuse for infancy).

Thus, of seven early New York cases, four specifically and expressly employed moral incapacity tests (*Clark's Case*, *Sellick's Case*, *Ball's Case*, and *Pienovi's Case*). In the fifth, the defendant was acquitted because his "senses" were "impaired" and his "moral faculties" were "totally ruined," which directly implies a moral incapacity excuse.[529] In the sixth, the evidence of insanity was so flimsy that the judge skipped the insanity test and instructed the jury to convict. The seventh expressly tied the infancy and insanity excuses together, indicating that both included moral incapacity prongs. By the early nineteenth century, long before *M'Naghten's Case*, New York courts regularly employed the moral incapacity excuse in insanity cases.

b. Delaware

Delaware adopted an insanity excuse that included cognitive and moral prongs before *M'Naghten's Case*. In *State v. Dillahunt*[530] in 1840, the court dealt with the insanity excuse. The defendant argued that he suffered from *mania a potu*, or insanity as a result of refraining from alcohol after becoming accustomed to constant drinking.[531] Chief Justice Bayard instructed the jury that the defendant would be guilty if he were able to "distinguish the nature of actions" and "discern the difference between moral good and evil," and that the key question was whether the defendant "did . . . or did . . . not know at the time he committed the act, that he was doing an immoral and unlawful act."[532] The word "moral" strongly indicates that Bayard's second prong, like the statements of several of the writers discussed in the previous section, referred to the moral faculty rather than the cognitive faculties. The testimony of the doctors also focused on the ability to distinguish between right and wrong.[533]

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[529] *See supra* note 498 and accompanying text.

[530] State v. Dillahunt, 3 Del. (3 Harr.) 551 (Ct. of Gen. Sess. 1840).

[531] *Id.* at 552.

[532] *Id.* at 553.

[533] *Id.* at 552.

c. New Jersey

New Jersey adopted the moral incapacity excuse for infancy before *M'Naghten*.[534] A lawyer's argument in *Den v. Vancleve*[535] in 1819 suggests the same was true of the insanity defense. *Vancleve* involved a disputed will. One of the lawyers argued that the deceased lacked the capacity to make a valid will if he "could not distinguish between right and wrong or distributed his property discreetly."[536] Jury instructions in a homicide case from 1846 unequivocally embraced the moral incapacity excuse, relying in part on *M'Naghten* and in part on pre-1843 English cases.[537]

d. Pennsylvania

In 1838, William Miller was tried for the murder of a peddler named Solomon Huffman.[538] Miller and Huffman stayed in the same room at a tavern one night.[539] Miller claimed that the tavernkeeper was his creditor and he did not want the tavernkeeper to know he had money, so he offered to purchase goods from Huffman the next morning on the road Huffman was to take out of town.[540] Miller met Huffman on the road the next morning, murdered him, and took what he wanted.[541] Miller was caught and brought to trial, and his attorneys attempted to prove partial insanity by producing the testimony of a phrenologist.[542] The phrenologist testified that Miller's

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[534] State v. Guild, 10 N.J.L. 163, 163 (1828); State v. Aaron, 4 N.J.L. 269, 276–77 (1818). In *Guild*, the judge charged the jury as follows:

> And at the age of this defendant [twelve and a half years old], sufficient capacity is generally possessed in our state of society, by children of ordinary understanding, and having the usual advantages of moral and religious instruction. You will call to mind the evidence on this subject; and if you are satisfied that he was able, in a good degree, to distinguish right and wrong; to know the nature of the crime with which he is charged; and that it was deserving of severe punishment, his infancy will furnish no obstacle, on the score of incapacity, to his conviction.

Guild, 10 N.J.L. at 174.

[535] Den v. Vancleve, 5 N.J.L. 695 (1819).

[536] *Id.* at 791.

[537] State v. Spencer, 21 N.J.L. 196, 201–13 (1846) (citations omitted).

[538] ELLIS LEWIS, AN ABRIDGEMENT OF THE CRIMINAL LAW OF THE UNITED STATES 399 (1848).

[539] *Id.*

[540] *Id.*

[541] *Id.* at 399–400.

[542] *Id.* at 400. Phrenologists, who gauged intelligence and mental characteristics by the topography of the subject's head, would never be allowed to give expert testimony today.

"intellectual [and] moral faculties" were in good working order, but that his "animal passions" were "deranged."[543] The court instructed the jury that if it believed the prosecution's evidence, it could acquit only on the ground of insanity.[544] The jury could acquit by reason of insanity if it "believed that the prisoner was, at the time of committing the act charged, 'incapable of judging between right and wrong, and did not know that he was committing an offence against the laws of God and man.'"[545] The court further stated that, in the case at hand, the only species of insanity supported by the evidence was that of "moral insanity," which was essentially an irresistible impulse excuse.[546] Pennsylvania appears to have adopted the English moral incapacity excuse and added a volitional incapacity excuse based on compelling proof of an irresistible impulse.

In dicta, the Pennsylvania Supreme Court wrote in a civil case in 1846 that an insane delusion must be connected with and result in the offense in order to excuse the defendant from criminal liability.[547] Considered by itself, this formulation is almost as broad as the product-of-insanity test. Without citing *M'Naghten*, the court that same year in a criminal case employed a volitional incapacity test with moral incapacity overtones.[548] By 1875, the Pennsylvania Supreme Court had adopted and persisted in using an insanity excuse with a

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[543] *Id.*

[544] LEWIS, *supra* note 538, at 400.

[545] *Id.* at 401 (quoting the judge's instruction).

[546] *Id.* The court explained as follows:

> But (continued the court) if any insanity exists in this case, it is of that description denominated MORAL INSANITY. This *arises from the existence of some of the natural propensities in such violence, that it is impossible not to yield to them.* It bears a striking resemblance to *vice*, which is said to consist in "an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime." It is therefore to be received with the utmost scrutiny. It is not *generally* admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought *never* to be admitted as a defence until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. *Where its existence is fully established, this species of insanity, like every other, relieves from accountability to human laws.* But this state of mind is not to be presumed without evidence; nor does it usually occur without some premonitory symptoms indicating its approach.

Id.

[547] M'Elroy's Case, 6 Watts & Serg. 451, 456 (Pa. 1843).

[548] Commonwealth v. Mosler, 4 Pa. 264, 267 (1846) ("But there is a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense.").

clear moral incapacity prong and also seemed to adopt a volitional incapacity prong.[549]

e. Virginia

In a Virginia murder trial in the late 1830s, the judge charged the jury on an insanity excuse containing both pure and legal-moral incapacity.[550] The jury could acquit on the basis of insanity only if the evidence showed the defendant was "incapable, in consequence of insanity either partial or general, of judging between right and wrong or good and evil, and that at the time he committed the act he did not consider it a crime, an act evil in itself or forbidden by the laws of the land."[551] If the jury based its conclusion on partial insanity, it must find that the defendant suffered from a delusion that made the prisoner believe "that the act . . . was justifiable."[552]

f. Connecticut

Pre-*M'Naghten* Connecticut decisions followed Blackstone in holding that infants and the insane were not held responsible because "the *will* must concur with the act."[553] A child of fourteen—the same age at which the common law presumed a person responsible as an adult—could be held liable for "malicious words" because, at that time period, "at the age of fourteen the law presumes the human mind has acquired a complete sense of right and wrong."[554] Therefore, it would seem that Connecticut founded its insanity defense, like its infancy defense, in part on the moral incapacity excuse. It was founded, at the very least, on a defect of will resulting from a defect of cognition. Statements like this may show that if it were not for evidentiary concerns and old ideas of volition and sin, American courts would have widely adopted a separate volitional incapacity defense.

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[549] Ortwein v. Commonwealth, 76 Pa. 414, 424–25 (1875) (citing jury instructions from an early case, which in turn cited an abridgment of United States criminal law). General insanity was not an excuse unless it was "so great in its extent or degree as to blind him to the nature and consequences of his moral duty." *Id.* at 424. "[G]eneral insanity" had to "be so great as entirely to destroy his perception of right and wrong." *Id.* "It must amount to delusion or hallucination controlling his will, making the commission of the act, in his apprehension, a duty of overruling necessity." *Id.* at 425. The insanity must have been "so great as to have controlled the will of its subject and to have taken from him the freedom of moral action." *Id.*

[550] Gwatkin v. Commonwealth, 36 Va. (9 Leigh) 678, 678-80 (1839).

[551] *Id.* at 679.

[552] *Id.* at 679–80.

[553] Myers v. State, 1 Conn. 502, 505 (1816) (citing BLACKSTONE, *supra* note 205, at *20, *24).

[554] *See* Sterling v. Adams, 3 Day 411, 426–27 (Conn. 1809) (citing an unknown source).

g. Georgia

In *Roberts v. State* in 1847, the Georgia Supreme Court discussed jury instructions on the insanity defense.[555] The instructions, with which the court did not find fault, embodied a clear moral incapacity test. The judge instructed the jury that the defendant must be convicted if he had enough mental power "to enable him to distinguish between right and wrong in regard to the particular act about to be committed, to know and understand that it would be wrong, and that he would deserve punishment by committing it."[556] The court cited English and American authorities but did not rely on or cite *M'Naghten*.[557] In particular, for its statement of the moral incapacity test, the *Roberts* court cited Joseph Chitty's *Medical Jurisprudence*, Shelford's treatise on lunacy, *Rex v. Ferrers*, *Rex v. Arnold*, *Parker's Case*, *Rex v. Offord*, and *Commonwealth v. Rogers*.[558] It also cited *Hadfield's Case* at length and argued in some detail that the case depended on the volitional incapacity excuse.[559] The justices of the Georgia Supreme Court seemed to believe that the moral incapacity test had been around a long time in Anglo-American law and was the quintessential insanity excuse,[560] but the specific test given to the jury depended upon the specific facts of the case because not all cases called for a full explanation of the insanity excuse.[561]

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[555] Roberts v. State, 3 Ga. 310, 326–27 (1847).

[556] *Id.* at 327.

[557] *Id.* at *passim*.

[558] *Id.* at 330.

[559] *Id.* at 330–32 (citations omitted). The *Roberts* court explained the insanity excuse relied on in *Hadfield's Case* as follows:

> Now, in this case, it was not pretended that Hadsfield [sic] was a raving madman, or an imbecile idiot; nor was it contended that he was incapable of knowing that shooting a pistol at the king, would, or might kill him, or that if he should kill the king, that he would deserve death for the act; (for that really was what he desired,) or that he was incapable of distinguishing between the right and the wrong of the act; but it was contended, that the delusion under which he laboured had so shattered his intellect, as to control his will, and impel him resistlessly to the commission of the act, and *therefore* there was no criminal motive, no wicked or mischievous intent, and if these were wanting, he was irresponsible.

Id. at 331.

[560] *Roberts*, 3 Ga. at 327–33.

[561] *Id.* at 332 (citations omitted).

h. Massachusetts

Homer Crotty asserted that *Commonwealth v. Rogers*[562] in 1844 was the earliest definitive American case on the moral incapacity excuse,[563] but the excuse was in use in Massachusetts long before. The court reporter for an 1810 Massachusetts murder trial reported in the New York City-Hall Recorder stated that the test for insanity, which the defense raised, was the ability to "distinguish[] good from evil."[564] *Rogers*, for its part, employed the moral incapacity excuse—including pure moral and legal-moral components—in reliance on *M'Naghten's Case*, four older English cases, and two legal treatises.[565]

i. Tennessee

Tennessee defined murder with Coke's definition: "murder is where a person of sound mind and discretion, unlawfully killeth any reasonable creature . . . with malice aforethought."[566] *Discretion*, as argued above, signifies far more than mere cognitive capacity.[567] The prior history of an 1806 Tennessee murder case indicated that the accused's ten-year-old brother was disqualified as a witness.[568] He did not have "sufficient discretion to be sworn" because "he had not any sense of the obligation of an oath."[569] "So far from this child having discretion, it is directly the reverse."[570] This is a clear affirmation that early Anglo-American courts understood *discretion* to include moral capacity.

Furthermore, in that same case, a young teenager was acquitted of murder through the infancy excuse even though the evidence showed insanity rather

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[562] Commonwealth v. Rogers, 48 Mass. (7 Met.) 500 (1844).

[563] Crotty, *supra* note 236, at 121 (citation omitted).

[564] Commonwealth v. Meriam, 6 New York City-Hall Recorder 162 (Mass. 1810). The report contained in the Massachusetts reporter is not as detailed as the report contained in Roger's New York City-Hall reporter.

[565] *Rogers*, 48 Mass. (7 Met.) at 501–02, 502 n. (citations omitted).

[566] State v. Seaborne, 8 Rob. 518, 523 (La. 1843) (citing a Tennessee case without indicating the case name or year); *supra* note 223 and accompanying text; *see* Jacob v. State, 22 Tenn. (3 Hum.) 493, 495 (1842) ("Murder at common law, as described by Lord Coke, is where a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the peace of the State, with malice aforethought, either express or implied.").

[567] *Supra* Section IV.C.1.iv (Anthony Fitzherbert).

[568] State v. Doherty, 2 Tenn. (2 Overt.) 79 (1806).

[569] *Id.*

[570] *Id.*

than a lack of mental development due to age.[571] The judge instructed the jury that persons over fourteen years old were "*doli capax*," but between the ages of seven and fourteen were presumed incapable of "disern[ing] between right and wrong."[572] "But this presumption is removed, if from the circumstances it appears that the person discovered a consciousness of wrong."[573] She had apparently feigned insanity so well that none of the judges or members of the jury, or even many spectators who had attended the trial, had questioned that "she had literally lost her understanding, if not her speech. Several hundreds, if not thousands, particularly examined her from time to time, and none discovered the deception."[574] It was essentially an insanity verdict, and the case demonstrates that, as far as the moral incapacity prong goes, the infancy and insanity excuses differed only according to the age of the defendant, the presumption of capacity or incapacity, and the burden of proof.

Twenty years later, Burrell Cornwell was tried and convicted of murder.[575] He attempted to prove that the use of "ardent spirits . . . produced partial insanity."[576] Insanity could only be a ground for his acquittal if it was not the result of the defendant deliberately becoming intoxicated.[577] The court instructed the jury that the defendant was not responsible if he "had not sufficient understanding to distinguish right from wrong, and was in a state of insanity."[578]

j. Ohio

In *Clark v. State*,[579] the defense produced a medical expert who testified that the defendant was insane.[580] On cross-examination, the prosecutor asked the doctor whether he believed the defendant was "incapable of distinguishing right from wrong."[581] This language was not merely a proxy for questioning the doctor about the defendant's cognitive capacity, because

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[571] *Id.* at 80, 88.

[572] *Id.* at 88.

[573] *Id.*

[574] State v. Doherty, 2 Tenn. (2 Overt.) at 89. The deception was not uncovered until after the trial. Immediate after the verdict, she resumed acting normally.

[575] Cornwell v. State, 8 Tenn. (Mart. & Yer.) 147, 147, 149 (1827).

[576] *Id.* at 148.

[577] *Id.* at 148–49.

[578] *Id.*

[579] Clark v. State, 12 Ohio 483 (1843) (en banc), *overruled on other grounds by* Kelch v. State, 45 N.E. 6 (Ohio 1896) (holding a different proof requirement was appropriate in insanity cases).

[580] *Id.* at 484.

[581] *Id.*

the prosecutor then asked whether the doctor believed the defendant "would . . . have known that it was wrong to commit murder," then whether he "would . . . have known that it was wrong to commit arson, rape, or burglary."[582] The defense objected to these questions as irrelevant, but the trial court held they were relevant and admitted them, and the Ohio Supreme Court affirmed.[583] The jury instructions in *Clark* embodied the moral incapacity excuse.[584]

Three Ohio cases from the early 1830s dealt with insanity.[585] *Wallace v. Bevard* was a civil case, and the report shines no light on the substance of the Ohio insanity excuse.[586] *State v. Gardiner* contained a jury instruction on cognitive capacity as part of the definition of premeditated murder, but no definition of the insanity excuse.[587] *State v. Thompson* included a jury charge on moral incapacity.[588]

In *Walton v. State*[589], the Ohio Supreme Court considered the proper interpretation of the Ohio murder and manslaughter statute in relation to the intoxication excuse.[590] At oral argument, the defendant's attorney argued that intoxication severe enough to prevent "deliberation" was a valid excuse to first-degree murder because the statute required deliberation, without any qualification or restriction on the kinds of causes that could prevent the mental state of deliberation.[591] If intoxication caused the defendant to be unable to deliberate on the killing before putting his plan into action, the offense would be reduced to manslaughter.[592] However, the defendant could not even form malice if he was so intoxicated that he was "totally deprive[d] the party of reason, so that he has no faculty to distinguish the nature of actions, to discern the difference between moral good and evil."[593] The

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[582] *Id.* at 485.

[583] *Id.* at 485–86, 494.

[584] *Id.* at 494 n.a ("Was he, at the time the act was committed, capable of judging whether *that* act was right or wrong? [A]nd did he know at the time that it was an offence against the laws of God and man?").

[585] John K. McHenry, *The Judicial Evolution of Ohio's Insanity Defense*, 13 U. DAYTON L. REV. 49, 57 & n.70 (1987) (citing State v. Thompson, 1 Wright 617 (Ohio 1834); State v. Gardiner, 1 Wright 392 (Ohio 1833); Wallace v. Bevard, 1 Wright 114 (Ohio 1832)).

[586] *Wallace*, 1 Wright at 114.

[587] *Gardiner*, 1 Wright at 399–402.

[588] *Thompson*, 1 Wright at 620, 622.

[589] Walton v. State, 10 Ohio Dec. Reprint 256 (1843).

[590] *Id.* at 256–57.

[591] *Id.* at 257–58.

[592] *Id.*

[593] *Id.* at 258.

punctuation renders the statement ambiguous, but it is best read as setting forth two prongs of the intoxication excuse—one cognitive, one moral. That interpretation is consistent with *Clark* and with the nature of reports of oral remarks. It is also consistent with the all-important word "moral" and the logical progression of the sentence.

k. Alabama

Alabama laid out its insanity defense in *State v. Marler*[594] in 1841. The question was the insanity excuse's burden of proof.[595] The *Marler* court approved the strong statements in *Rex v. Arnold*, which adopted the wild beast test, and *Bellingham's Case*, which adopted the moral incapacity excuse and demanded "the most distinct and unquestionable evidence" to prove insanity "beyond all doubt."[596] Both tests, which the court said were "undoubted law,"[597] included the moral incapacity component and were indisputably broader than the modern cognitive incapacity test as embodied in the mens rea approach.[598]

l. Federal Cases

Michael Clarke shot his wife one day when she came back from church.[599] He was tried in 1818, and the Circuit Court for the District of Columbia instructed the jury, based on evidence that his constant recourse to the bottle had "disordered" his "body and mind," that they were to acquit him if they found him, by reason of insanity, "not to have been conscious of the moral turpitude of the act."[600] In *United States v. Cornell*,[601] the defendant raised the insanity excuse on the basis of inadequate education and greater than average "ignoran[ce]" and "stupid[ity]."[602] The defendant's attorney "explicitly abandoned" the insanity excuse because all the evidence showed that "he was *compos mentis*, having intelligence to discern what was right and what was wrong."[603]

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[594] State v. Marler, 2 Ala. 43 (1841).

[595] *Id.* at 47–48. Later decisions called into question *Marler*'s contradictory statements on the burden of proof. *E.g.*, Boswell v. State, 63 Ala. 307, 322–23 (1879).

[596] *Marler*, 2 Ala. at 48 (citations omitted).

[597] *Id.*

[598] *Supra* Sections IV.C.2.i (*Rex v. Arnold*) and IV.C.2.vi (*Bellingham's Case*).

[599] United States v. Clarke, 25 F. Cas. 454, 454 (C.C.D.C. 1818) (No. 14,811).

[600] *Id.*

[601] United States v. Cornell, 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868).

[602] *Id.* at 657.

[603] *Id.*

In an 1820 case, a creditor sued a sheriff for the loss incurred when an indebted person became insane and violated his bond condition of remaining in prison.[604] The sheriff defended by alleging the escapee's insanity as an excuse to a bond violation.[605] The court reasoned that the bond, which required the debtor to "faithfully and absolutely 'remain within the limits of the jail-yard . . . until he be lawfully discharged,'"[606] could "be observed only by a rational being, who can discriminate between fidelity and a violation of duty" and who had "a sense of right and wrong."[607] The obligation of the bond could not "continue after the extinction of the moral sense."[608]

In 1828, Alexander Drew, a ship captain, was tried for the murder of his second mate.[609] Drew, a man of no small accomplishments in the intoxication department, had all the alcohol dropped into the ocean.[610] After five days, he became delusional.[611] He thought his crew would kill him and "complained of persons, who were unseen, talking to him, and urging him to kill Clark."[612] The prosecutor admitted he could not win unless the court held that insanity caused by excessive alcoholism—but not the immediate result of intoxication—was not an excuse.[613] The court held it was a defense, and Drew was acquitted, even though the testimony clearly showed he knew he was killing the second mate.[614]

In early 1835, Richard Lawrence tried to assassinate President Andrew Jackson.[615] "The assault with intent to kill was proved by the clearest possible evidence,"[616] but it was subsequently discovered that Lawrence believed he was the king of England.[617] Believing, further, that America was still part of England, he took it upon himself to kill the President.[618] The prosecutor conceded that *Hadfield's Case* contained the proper insanity test, and within

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[604] Hazard v. Hazard, 11 F. Cas. 925, 925 (C.C.D. Vt. 1820) (No. 6278).

[605] *Id.*

[606] *Id.* (citing the language of the bond).

[607] *Id.* at 926.

[608] *Id.*

[609] United States v. Drew, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828) (No. 14,993).

[610] *Id.*

[611] *Id.*

[612] *Id.*

[613] *Id.*

[614] *Id.* at 913-14.

[615] United States v. Lawrence, 26 F. Cas. 887, 887 (C.C.D.C. 1835) (No. 15,577).

[616] *Id.*

[617] *Id.* at 891.

[618] *Id.*

five minutes the jury acquitted Lawrence on the ground of insanity[619]—a verdict only possible if the insanity excuse included moral incapacity.

m. Summary

New York, Massachusetts, Tennessee, Ohio, and Alabama cases demonstrate that the moral incapacity excuse was established in those states in the early nineteenth century. Federal courts also employed the moral incapacity excuse in the early nineteenth century. Infancy and civil cases before 1843, and criminal cases afterward, showed that the same was true of Delaware, New Jersey, Pennsylvania, Virginia, and Georgia.

6. Post-*M'Naghten* American Practice

American practice after 1843 is documented much more thoroughly elsewhere[620] but deserves a summary here. American authorities and cases demonstrate that the moral incapacity excuse was firmly established in the American legal system well before *M'Naghten's Case* in 1843, and American practice post-*M'Naghten* shows that, although not every state retained the moral incapacity test at all times, the insanity excuse remained broader than cognitive incapacity in every state until the mid-1900s. Early twentieth-century attempts to adopt the mens rea approach were struck down by state courts. Before Idaho, Utah, Nevada, and Kansas adopted mens rea legislation—the very states whose legislation is in question—no state had successfully implemented the mens rea approach.

After *M'Naghten*, the dual cognitive-moral incapacity formulation took American courts by storm.[621] Some states added the volitional incapacity excuse or replaced the moral incapacity excuse altogether.[622] New Hampshire adopted the product-of-insanity test described above.[623] The District of Columbia temporarily adopted the Durham test, which is closely related to the product-of-insanity test.[624] Fourteen states have adopted the Model Penal

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[619] *Id.*

[620] *See e.g.*, McHenry, *supra* note 585, at 65–77; Janet A. Tighe, *Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition*, 27 AM. J. LEGAL HIST. 223 (1983); Doug B. Abrams, Comment, *The Insanity Defense in North Carolina*, 14 WAKE FOREST L. REV. 1157 (1978); Trent Echard, Comment, *Clark v. Arizona: Has the Court Painted Itself into a Corner?*, 1 PHOENIX L. REV. 213, 224–26 (2008).

[621] Platt & Diamond, *supra* note 216, at 1257 (citations omitted).

[622] *Id.*

[623] *Supra* note 42.

[624] *Supra* note 42.

Code's insanity excuse, which includes moral and volitional incapacity prongs.[625]

In the early twentieth century, Washington and Mississippi tried to abolish the insanity defense in favor of the mens rea approach, but the high courts of both states stepped in and struck down the changes.[626] Montana adopted the mens rea approach in 1979, and Utah, Kansas, Nevada, and Idaho did the same over the next two decades.[627] In 1982, Alaska abolished the moral incapacity excuse and made cognitive incapacity an affirmative defense.[628] The Nevada Supreme Court struck down its state's statute,[629] but the other states' laws survived state-court challenges.[630] Based on the United States Supreme Court's substantive due process jurisprudence and the historical evidence presented in this article, the Court has clear historico-legal grounds for striking down these statutes.

D. *Objections*

Having made the historical case, three major objections to this article's argument deserve attention. One is theoretical, and two others, practical. The lack of a uniform insanity excuse, the practical difficulties of applying the broad principle articulated here, and the nature of our form of government might cause some to hesitate before accepting my thesis.

1. Lack of a Uniform Insanity Excuse

First, the historical evidence does not show that a particular insanity excuse—let alone a particular formulation of it—satisfies the rigorous "historically rooted" standard. Although it is true the history shows that no single test or formulation can attain the status of a Due Process right, the history shows a principle fundamentally rooted in the American tradition and conscience: cognitive capacity is not the only mental prerequisite to moral fault and criminal responsibility. That principle, although it does not guarantee the moral incapacity excuse to every defendant, does require more

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[625] Model Penal Code § 4.01 (AM. LAW INST., 1962).

[626] Sinclair v. State, 132 So. 581, 582 (Miss. 1931) (per curiam) (relying in part on federal due process arguments); State v. Strasburg, 110 P. 1020, 1025 (Wash. 1920) (en banc) (relying on state constitutional grounds).

[627] *Supra* notes 74–79 and accompanying text.

[628] ALASKA STAT. § 12.47.010 (2020); State v. Patterson, 740 P.2d 944, 945, 949 (Alaska 1987); Hart v. State, 702 P.2d 651, 657 (Alaska Ct. App. 1985) (citations omitted).

[629] Finger v. State, 27 P.3d 66, 68 (Nev. 2001).

[630] State v. Searcy, 798 P.2d 914, 919 (Idaho 1990); State v. Bethel, 66 P.3d 840, 851–52 (Kan. 2003); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984); State v. Herrera, 895 P.2d 359, 366–67 (Utah 1995).

than the cognitive incapacity excuse and would have been enough for the Court to strike down Kansas's statute.

2. Lack of Specific Guidance

The broad rule articulated in this article provides little guidance to the states. Kansas, Idaho, Utah, Montana, and Alaska would have to revisit their insanity excuses, but how could they be sure that a new, narrowly drawn insanity excuse would meet the Supreme Court's requirements? Attempts to rewrite the statutes as narrowly as possible could lead to new and more nuanced questions based on the voluminous but difficult to interpret historical record. The answer is that any insanity excuse that is broader than the mens rea approach is acceptable. The states must have the cognitive incapacity excuse and a formulation of at least one of the other insanity tests, including the product-of-insanity test, the moral incapacity test, or the volitional incapacity test.

3. Incompatibility with Our Form of Government

Others might be concerned about preserving federalism and curbing judicial activism. Justice Thomas and the Federalist Society are not the only ones who share this concern—the Supreme Court's own Due Process insanity jurisprudence's oft-repeated theme is the right of state legislatures to define crimes and defenses without federal interference.[631] Additionally, the substantive due process doctrine is troubling because it violates the principle of rule by the people through their elected representatives[632] and creates a prime opportunity for judges to be swayed by their historical and moral views.[633] I fully concur with these objections, but they have not led the

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[631] *See*, *e.g.*, Clark v. Arizona, 548 U.S. 735, 752 (2006) ("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 offenses, is substantially open to state choice."); Leland v. Oregon, 343 U.S. 790, 792, 799 (1952). Louis J. Capozzi III raised similar concerns and argued for the benefits of federalism in a recent article on appointed counsel for indigent defendants in misdemeanor cases. Louis J. Capozzi III, *Sixth Amendment Federalism*, 43 HARV. J.L. & PUB. POL'Y 645, 695–96, 713–15, 719 (2020). Judge Jeffrey Sutton's recent book argues at length for the benefits of federalism and shows that the federal government and its highest organs, including the Supreme Court, cannot always be relied upon to protect individual rights and our common values. *See generally* SUTTON, *supra* note 14.

[632] *Supra* note 18.

[633] *See* Christian B. Sundquist, *Genetics, Race and Substantive Due Process*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 341, 389–90 (2014) (citations omitted); Sandefer, *supra* note 18, at 148, 157–59; Charles B. Blackmar, Essay, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U.L.J. 511, 512 (1991) ("I reached my conclusion on the basis that the statute, as applied to this driver, simply did not sound right to me.").

Supreme Court to overturn its substantive Due Process jurisprudence. As a historico-legal argument, this article is only relevant if the Supreme Court continues to make substantive due process decisions.

V. CONCLUSION

Until the late twentieth century, the Anglo-American legal system consistently and without exception demonstrated its commitment to the principle that cognitive capacity, by itself, is not sufficient to make a person criminally responsible. The early English writers embraced the cognitive and moral incapacity tests because they and their fellow English citizens believed that the power to make a meaningful choice depended on the power to understand. The early English cases employed moral incapacity tests—sometimes pure moral incapacity, sometimes moral-legal incapacity, and sometimes both, but always at least one or the other. Later English writers and early American writers took up the task of summarizing and analyzing the law, and they regularly included the moral incapacity excuse in their discussions of the criminal law. Pre-*M'Naghten* American cases demonstrate that the moral incapacity excuse was in use in America long before *M'Naghten's Case* made a single formulation so popular. Subsequent American practice diverged somewhat from the moral incapacity excuse but never shrunk to the cognitive incapacity test alone until the late twentieth century.

The Supreme Court should recognize that if there was ever a principle firmly rooted in the tradition and conscience of the American people, it is the core principle that lurks behind the Anglo-American views on moral fault and criminal responsibility: a person cannot be criminally responsible unless that person's inner being is capable, at a minimum, of something more than merely understanding the nature of the person's acts. Although the "something more" should be left to the people of each state to decide, the core principle is enshrined in the hearts and minds of the people of the whole country and in courtrooms across the nation. It is high time the Supreme Court enshrined it in the jurisprudence of our highest tribunal.