

1-1-2022

Out of Sight and Out of Mind: Criminal Laws Disguised Moral Culpability Requirement

Andrew Ingram
South Texas College of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Andrew Ingram, *Out of Sight and Out of Mind: Criminal Laws Disguised Moral Culpability Requirement*, 56 U. Rich. L. Rev. 491 (2022).

Available at: <https://scholarship.richmond.edu/lawreview/vol56/iss2/5>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

OUT OF SIGHT AND OUT OF MIND: CRIMINAL LAW'S DISGUISED MORAL CULPABILITY REQUIREMENT

Andrew Ingram *

INTRODUCTION

Last spring, the Supreme Court of the United States made a little-remarked constitutional ruling in *Kahler v. Kansas*.¹ Upon casual inspection, *Kahler* looks like a doctrinal dead-end. The petitioner asked the Supreme Court to recognize a due process right for mentally ill defendants to raise the *M'Naghten* right-and-wrong test of insanity, and the Court said, “No.”² The petitioner’s failure notwithstanding, *Kahler* is not a barren vine. On the contrary, it is heavy-laden with new doctrinal insights for criminal law scholars.

The case deserves a thorough look—not for what it can teach us about constitutional contentions that the Court has rendered unviable for the foreseeable future—but for what the creative arguments written by the petitioner’s attorneys can teach us about criminal law. Specifically, the briefing in *Kahler* unmasks a cached moral blameworthiness requirement in criminal law doctrine, on the same plane as the canonical requirements of voluntariness, action, and mens rea, but buried over the last two centuries in the rules governing the insanity defense.

* Scholar in Residence, South Texas College of Law. Ph.D., 2018, The University of Texas at Austin; J.D., 2013, The University of Texas School of Law; A.B., 2009, Brown University. Law Clerk to The Honorable Gregg Costa, United States Court of Appeals for the Fifth Circuit, 2016–2017; Law Clerk to The Honorable Michael Massengale, Texas Court of Appeals for the First District, 2013–2014.

My Articles on criminal law have appeared in *Houston Law Review*, *Ohio State Journal of Criminal Law*, and *Villanova Law Review*. My philosophical Articles have appeared in *Ratio* and *Philosophy*.

This Article was composed while I was Visiting Assistant Professor at Chicago-Kent College of Law. My thanks are due to the students and faculty at Kent who helped me develop the ideas for this Article, including Chris Schmidt, Mark Rosen, Steven Heyman, Kathy Baker, Alex Boni-Saenz, Ed Lee, and Nancy Marder.

1. 589 U.S. ___, 140 S. Ct. 1021 (2020).
2. *Id.* at ___, 140 S. Ct. at 1024–25.

The Supreme Court heard arguments in *Kahler* during last year's October term.³ Summarizing the case for her readers at SCOTUSblog, Amy Howe stated that the Court would "consider whether the Constitution allows a state to abolish the insanity defense."⁴ While this makes a fair opening line for a blog, it fails to capture the crux of the arguments before the Court. Attorneys for the petitioner and Kansas did not wrestle over the insanity defense per se but over whether states are free to abolish the venerable right-and-wrong test of insanity.⁵ Relying on the Fourteenth Amendment's Due Process Clause, the petitioner contended that the Anglo-American legal tradition does not allow those who are incapable of recognizing that their actions are wrong to be convicted and punished.⁶ He made much the same argument about the Eighth Amendment: it is cruel and unusual to punish someone who was not morally blameworthy for his actions because he could not discern the difference between good and evil when he acted.⁷

In either thread of the petitioner's argument, the emphasis is not on the independent significance of a defendant's mental illness at the time of his alleged crime but rather on his ability to plead, argue, and prove that his mental health was so compromised that he lacked the ability to discern good from evil, right from wrong. Ultimately, the petitioner asserted that neither the deeply rooted traditions of Anglo-American life safeguarded by the Due Process Clause nor the Eighth Amendment will permit conviction of a person who is morally blameless. A case that at first glance appears to be about psychiatry in the courtroom is actually a case about

3. Amy Howe, *Argument Analysis: Justices Open New Term with Questions and Concerns About Insanity Defense*, SCOTUSBLOG (Oct. 7, 2019, 3:58 PM), <https://www.scotusblog.com/2019/10/argument-analysis-justices-open-new-term-with-questions-and-concerns-about-insanity-defense/> [<https://perma.cc/N39F-D642>].

4. Amy Howe, *Argument Preview: Justices to Hear Challenge to Lack of Insanity Defense*, SCOTUSBLOG (Sept. 30, 2019, 4:18 PM), <https://www.scotusblog.com/2019/09/argument-preview-justices-to-hear-challenge-to-lack-of-insanity-defense/> [<https://perma.cc/9EWW-NKX9>].

5. See Howe, *supra* note 3 ("Arguing for *Kahler*, attorney Sarah Schrup began by emphasizing that, for centuries, a defendant's culpability hinged on his ability to distinguish between right and wrong. The insane, she stressed, lack that capacity.")

6. See Brief for Petitioner at 11, *Kahler*, 589 U.S. ___, 140 S. Ct. 1021 (No. 18-6135).

7. See *id.* at 31 ("Whether the Court applies the Fourteenth Amendment or the Eighth, and whether it applies a historical analysis or a modern one, the answer is the same: The Constitution requires some mechanism to excuse a defendant who, because of mental disease or defect, is not morally culpable."); see also *id.* at 28–29.

whether states can eliminate the only vehicle for the defendant to argue that he acted voluntarily but without moral culpability.

This past spring, the petitioner learned that the Supreme Court had affirmed the judgment against him. Holding that he had waived his Eighth Amendment argument by not raising it in the Kansas courts below, a six-justice majority captained by Justice Kagan, ruled that the Fourteenth Amendment did not require states to maintain a “moral capacity” test of insanity. In the face of Justice Breyer’s contrary research, the majority said that there was no clear tradition in England or America of sparing criminal law for those who could not discern moral right from moral wrong.

The petitioner’s due process arguments undoubtedly miscarried: when the Supreme Court pulled back the curtain, there was no new rule of *constitutional law* governing the insanity defense. The petitioner’s arguments are nonetheless revelatory of exciting doctrinal truths in *criminal law*. Whether or not the majority correctly decided the constitutional question—and there are good reasons to believe it did not, which I will develop below—every scholar of criminal law should take heed of Kahler’s brief, for it reveals a heretofore disguised moral culpability requirement hiding in criminal law of the federal government and the large majority of states that retain the moral capacity test of insanity.

Philosophers of criminal law have long argued that moral blameworthiness ought to be a *sine qua non* of criminal liability.⁸ For example, philosophers Larry Alexander and Kimberly Kessler Ferzan argued insistently that the morally blameless ought to be spared criminal prosecution in their landmark monograph *Crime and Culpability*.⁹ They accordingly demanded that states dismiss criminal negligence from their criminal codes: for Alexander and Kessler Ferzan, a person who is not reckless but truly negligent—a person who causes harm wholly unaware of the risk of that harm—is not a fit subject for criminal prosecution because he is morally blameless.¹⁰

8. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 415 (1978); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 6 (2009); RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM* 82, 89–90, 92, 100 (2012).

9. See ALEXANDER & KESSLER FERZAN, *supra* note 8, at 6–7.

10. *Id.* at 85.

Although the idea that criminal records and prison cells should be reserved for the morally blameworthy has certainly influenced the shape of statutory criminal law and common law criminal doctrine,¹¹ scholars of those codes and doctrine do not recognize moral blameworthiness as a basic requirement of criminal law. Consult the Model Penal Code, Wayne LaFave's treatise, or Joshua Dressler's hornbook, and you will learn that criminal liability requires a voluntary act that is accompanied by mens rea and proscribed by law ex ante.¹² You will not find the moral blameworthiness constraint that philosophers support¹³ listed among these canonical conditions.

It does not belittle philosophical analysis of criminal law to recognize that treatises, hornbooks, and model codes have a different function. The latter are paradigmatic "secondary authorities" that are trusted by practitioners and judges when deciding what the law is and, on the margins, how it ought to be shaped in novel cases.¹⁴ Just like an attorney who finds a favorable paragraph in Prosser and Keeton can feel her chances of winning her client's negligence case growing as she reads, a lawyer working in the criminal courts should be heartened to see that LaFave or the American Law Institute agrees with her side of the argument; certainly, she should not omit to tell the judge as much in her brief. In contrast, an article in the pages of *Criminal Law and Philosophy* may be an insightful scholarly contribution, but it does not carry the same weight as a citation to LaFave, or even a careful doctrinal analysis by George Dix in the *Journal of Criminal Law*

11. *E.g.*, MODEL PENAL CODE § 1.02(1)(c) (AM. L. INST., Official Draft and Revised Comments 1985) (explaining the drafter's goal "to safeguard conduct that is without fault from condemnation as criminal").

12. *Id.* §§ 1.05, 2.01–2.02; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 5.01[A], 9.02[A], 10.01 (8th ed. 2018) (describing "legality," "voluntary act," and "mens rea" as general "principles" of criminal law); WAYNE R. LAFAVE, CRIMINAL LAW 10–12 (6th ed. 2017) (describing seven basic premises of criminal law: the requirement of an act; the requirement of "some sort of bad state of mind"; concurrence of physical conduct and mental state; harm; causation; punishment defined ex ante; and proscription ex ante). As we will see, the need for "some sort of bad state of mind" cannot be construed as a requirement of moral blameworthiness under modern definitions of mens rea.

13. *See* Douglas Husak, *Mistake of Law and Culpability*, 4 CRIM. L. & PHIL. 135, 135 (2010) ("[M]ost contemporary legal philosophers subscribe to some version of retributivism.").

14. *See, e.g.*, Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 8 (1996) (describing an appellate judge's use of "conventional legal treatises, and other orthodox legal materials" to help decide a case).

and *Criminology*.¹⁵ Whereas I feel confident recommending my students obtain a copy of Dressler's *Understanding Criminal Law* to prepare for their criminal law final, I would not counsel a student to read *Crime and Culpability* in the same context.

Thus, while most philosophers concerned have long argued that criminal law *ought* to have a general moral blameworthiness requirement, scholars writing about criminal law as it *is* have not acknowledged one. The arguments in *Kahler*, however, reveal that criminal law's blameworthiness requirement was hiding away in the provisions on insanity. In short, the law of the forty-five states and the federal government that follow some version of the right-and-wrong test of insanity¹⁶ presumes the defendant was morally culpable unless it is shown that the defendant lacked the ability to distinguish right from wrong and was therefore not morally culpable. Commentators have long recognized that a crime requires a voluntary act, but that voluntariness is normally not an issue in trials absent special circumstances like sleepwalking.¹⁷ In the same way, commentators should acknowledge that a crime requires moral blameworthiness that it is normally presumed, but that it can be rebutted by raising a successful, right-and-wrong insanity defense. Hence, my thesis is that the treatises and the standard lessons we tell our students about criminal law should be updated accordingly.

Kahler is indisputably a case about constitutional law, but it teaches a lesson about criminal law. Despite the outcome in *Kahler*—regardless of the fact that the Supreme Court decided that the right-and-wrong test of insanity is not a constitutional

15. See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1105 (1997) (explaining that “legal information” or “law in its most routine and banal sense” encompasses “cases, statutes, constitutional provisions, law journals (the *Harvard Law Review* and the *Journal of Legal Studies*, but not *Philosophy and Public Affairs* or the *American Economic Review*),” as well as “textbooks and treatises that are plainly about legal doctrine (*Corbin on Contracts*, *Prosser on Torts*, *Wigmore on Evidence*, *Loss on Securities Regulation*, but not more general books about welfare policy, child custody, or foreign trade, even though members of the latter set would typically include discussion of legal matters”).

16. Brief for Petitioner, *supra* note 6, at 29.

17. *E.g.*, MODEL PENAL CODE § 2.01(2) (AM. L. INST. 1985) (implementing the voluntary act requirement by defining reflexes and actions performed while asleep or under hypnosis as involuntary).

minimum¹⁸—the reasoning before the Court reveals that moral culpability is a pedigreed requirement of the common law that now lives on as a rebuttable presumption in every state that follows the right-and-wrong test of insanity.

I. BACKGROUND

A. *Philosophers of Criminal Law on Moral Culpability*

When lawyers and academics hear the words “philosophy of law,” they may think of hoary questions like, “What is law?”; “What is the difference between a rule propounded by Emily Post and a law of Illinois?”; and “Does a law have to be moral to be a law?” All of these questions fall under the heading of “analytic jurisprudence.”¹⁹ A philosopher who studies analytic jurisprudence is interested in understanding the nature of law in much the same way that another philosopher might be interested in understanding the nature of mathematics or the nature of games.²⁰

Not all philosophers who write about the law are writing about analytic jurisprudence. Indeed, most philosophers who write about criminal law are interested in ethical rather than definitional questions.²¹ The philosopher of criminal law is not concerned with unknotting conceptual puzzles about what makes a practice a legal one; rather, she is asking what the ethical limits are on the particularly severe human practices of criminal enforcement and adjudication. She is like the philosopher of mathematics who asks whether it is ethical for mathematicians to publish papers on cryptography that might be helpful to terrorist cells; she resembles the philosopher of games who asks what makes it wrong for a quarterback to throw a Sunday contest.

Law, mathematics, football, and any other social practice can be the subject of moral criticism.²² The actions of those individuals

18. *Kahler*, 589 U.S. __, __, 140 S. Ct. at 1037.

19. SCOTT J. SHAPIRO, LEGALITY 3–4 (2011).

20. *See id.* at 4.

21. *See, e.g.*, THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW (John Deigh & David Dolinko eds., 2011) (including Essays on topics such as “The Limits of the Criminal Law,” “Responsibility,” and “Culpability”).

22. *E.g.*, ROUTLEDGE, THE ETHICS OF SPORTS COACHING (Alun R. Hardman & Carwyn Jones eds., 2011); Paul Ernest, *The Ethics of Mathematics: Is Mathematics Harmful?*, in

who enact that social practice do not lose their moral valence on account of their official or jural character.²³ Addressing constitutional law, a philosopher could criticize a valid constitutional rule that enables warrantless access to citizen's Internet records as nonetheless contrary to a fundamental right of privacy that all governments must respect. Turning to criminal law, a philosopher can ask whether it is right to indict, try, convict, and imprison an elderly person who loses control of his car and kills a mother and child at a crosswalk. In such a case, the philosopher of criminal law could maintain that it is wrong for the prosecutors, police, judges, and guards to stigmatize and punish a person who did cause a tragedy but caused it inadvertently and blamelessly. The philosopher acknowledges that the law permits the prosecution, but on their view, it is simply immoral to label and punish such a person as a criminal.

Among legal philosophers who comment on criminal law, some form of retributivism—the view that criminal punishments should relate to the desert of the defendant—is close to the consensus theory.²⁴ Strict retributivists require that a criminal punishment be imposed if and only if a defendant deserves that degree of punishment.²⁵ Other retributivists do not believe that governments have to sanction each culpable person, but only affirm that the blameworthy defendants should be convicted and punished.²⁶ Ultimately, what all retributivists do agree on is that criminal prosecution ought to be contingent on a culpability “side-constraint” that ensures only the blameworthy are convicted and punished.²⁷

Philosophers like Alexander and Ferzan who believe in the culpability constraint on criminal law avow that they are discussing

THE PHILOSOPHY OF MATHEMATICS EDUCATION TODAY 187 (Paul Ernest ed., 2018).

23. *E.g.*, STEPHEN MICHAEL SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS*, xv (2009) (“This book examines a very basic idea: Officials must be moral, not just legal.”). *But see* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 321–22 (2002) (“Because punishment is part of a system of institutional authority, it is not amenable to a simple moral analysis.”).

24. *See* Richard S. Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT* 83, 84 (Michael Tonry ed., 2004); Russell L. Christopher, *Time and Punishment*, 66 *OHIO ST. L.J.* 269, 305–06 (2005).

25. ALEXANDER & KESSLER FERZAN, *supra* note 8, at 7.

26. *See id.* at 7–8 (describing “weak” and “moderate” forms of retributivism).

27. *See* J. L. Mackie, *Morality and the Retributive Emotions*, 1 *CRIM. JUST. ETHICS* 3, 4 (1982) (discussing the divisions and baseline of agreement within retributivism).

criminal law as it ought to be and not as it is. They write, "What we intend to do in this book is to explore what the doctrines of criminal law would look like if they were structured (primarily) by the concern that criminal defendants receive the punishment they deserve, and particularly that they receive no more punishment than they deserve."²⁸ Accordingly, they admit when the existing law in codes and court decisions deviates from their ideals,²⁹ and certainly do not claim that the culpability constraint is an operative rule of law, like the voluntary act requirement.³⁰ As such, they presumably would not dispute the omission of a moral culpability requirement from the list of first principles of criminal liability that we will shortly see authors like Dressler and LaFave propounding in their descriptive treatises.

B. *The Canonical Premises of Criminal Liability*

LaFave's *Criminal Law* offers an authoritative catalog of the basic premises of American criminal law.³¹ Although criminal law may appear to students to be an eclectic medley of specially defined crimes, there are actually some general principles humming under each melody that delimit criminal liability in all or most cases.³² LaFave enumerates seven such *ostintati* in his book.³³

In order for there to be criminal liability, the conduct in question must have been *publicly forbidden prior* to the action.³⁴ By the same token, *punishment must not exceed that legally authorized* for the crime before it was committed.³⁵ A criminal defendant's actions must be the legal or proximate *cause* of some sort of *harm* to

28. ALEXANDER & KESSLER FERZAN, *supra* note 8, at 6.

29. *E.g., id.* at 196 ("Because the law currently gives independent significance to the role of resulting harm, criminal law doctrine is mired with flaws.")

30. *Cf.* Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84, 84-85 (1990) (assuming that criminal law seeks to accomplish, inter alia, "some blend of retributive response" but affirming that "it is the law in all Anglo-American jurisdictions" that no crime can be committed without a voluntary act).

31. *See generally* LAFAVE, *supra* note 12.

32. *Id.* at § 1.2(b).

33. *Id.*

34. *Id.*

35. *Id.*

himself, to others, or to society.³⁶ Finally, the defendant must have performed a *voluntary act* that coincides with a *criminal mental state* (“mens rea”).³⁷ There is no moral blameworthiness or moral culpability principle listed.³⁸

Each foregoing requirement is a principle internal to criminal law doctrine. Many of them are also the subject of implicit or explicit constitutional guarantees: the Constitution has its ex post facto clauses,³⁹ and the Supreme Court has held that criminal punishment for mere status, like being addicted to narcotics, violates due process.⁴⁰ This does not change the fact, however, that criminal codes, common law doctrine, and authoritative treatises independently establish each of these basic premises of criminal law.⁴¹ My ultimate concern in this article is with the canon of fundamental criminal law doctrines, not their status in constitutional law.

In this section, I will focus on two doctrinal motifs: mens rea and voluntariness. The mens rea inquiry asks what the defendant believed, intended, or knew at the time that he acted. It is shorthand for the mental state element of a crime: “The basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).”⁴² The specific mental state that makes one guilty varies from crime to crime. For example, awareness of risk (“recklessness”) may suffice for manslaughter,⁴³ while knowledge or intent that death would result is needed for murder under some codes,⁴⁴ and intent to steal has to be proven to convict for theft.⁴⁵

36. *Id.*

37. *Id.*

38. *Id.*

39. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

40. *Robinson v. California*, 370 U.S. 660, 667 (1962).

41. See, e.g., Frederick M. Lawrence, *The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risks in Bias Crime Law Enforcement*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES* 209–10 (Richard L. Wiener et al. eds., 2007) (distinguishing matters of constitutional law and criminal law doctrine).

42. LAFAVE, *supra* note 12, § 5.1(a).

43. *E.g.*, TEX. PENAL CODE ANN. § 19.04(a) (West 2021).

44. *E.g.*, *id.* § 19.02(b)(1).

45. *E.g.*, *People v. March*, 886 N.W.2d 396, 401 (Mich. 2016).

The mens rea requirement can be mistaken for a moral culpability requirement. Mens rea is sometimes glossed as the “bad mind” requirement of criminal law.⁴⁶ While it literally means “guilty mind” in Latin,⁴⁷ the translation is now misleading; a better account in English would be “mental thing” or “mental part.”⁴⁸ As H.L.A. Hart explained, “[T]he expression mens rea is unfortunate, though too firmly established to be expelled . . . the true translation of *mens rea* is ‘an intention to do the act which is made penal by statute or by the common law.’”⁴⁹ A more comprehensive definition would include other mental states besides intention, such as knowledge or recklessness.⁵⁰ But whether the modern law speaks of knowledge or intent, it refers to purely psychological states, without moral coloring.

At one time, mens rea was not a misleading Latin phrase but indeed did signify the common law’s insistence that criminals act with a bad or guilty mind.⁵¹ Mens rea was then synonymous with a person’s blameworthiness, “with . . . those conditions that make a person’s violation sufficiently blameworthy to merit the condemnation of criminal conviction.”⁵² The common law judges used a variety of colorful, morally loaded language to express the wicked mental state needed to pull off various crimes. To commit murder or arson, a person had to act “maliciously.”⁵³ To perpetrate forgery, someone needed to act “fraudulently.”⁵⁴ And to enact larceny, a man must have harbored the “intent to steal.”⁵⁵ As one treatise put it, the early mens rea concept “smacked strongly of general moral blameworthiness.”⁵⁶

46. LAFAVE, *supra* note 12, § 5.1.

47. *Mens Rea*, BLACK’S LAW DICTIONARY (11th ed. 2019).

48. See LAFAVE, *supra* note 12, § 5.1 (“This section discusses generally what is required of crimes in the way of the mental part, variously called mens rea (‘guilty mind’) or scienter or criminal intent.”).

49. H.L.A. Hart, *Legal Responsibility and Excuses*, in *Punishment and Responsibility* 28, 36 (1968).

50. See LAFAVE, *supra* note 12, § 5.1(c).

51. Paul H. Robinson, *Mens Rea*, in 1 *ENCYCLOPEDIA OF CRIME & JUSTICE* 995, 995–96 (Joshua Dressler ed., 2d ed. 2002).

52. *Id.* at 995.

53. LAFAVE, *supra* note 12, § 5.1(a).

54. *Id.*

55. *Id.*

56. PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD J. BONNIE, *CRIMINAL LAW*

In the present day, the same minor chords—“maliciously,” “fraudulently,” and the rest—retain only a sinister sound but no moral substance. The language still has moral connotations in lay ears, but judges have long been playing the mens rea motif in a neutral interval.⁵⁷ “When a person is said to act maliciously, it is *commonly meant* both that the person acts intentionally, and that the person wishes to cause harm or suffering for its own sake.”⁵⁸ But, as any first year law student should be quickly informed, these connotations are misleading when the word “malice” appears in modern criminal codes or decisions. As Justice Holmes already knew at the end of the nineteenth century, “[m]alice, in the definition of murder, has not the same meaning as in common speech, and, in view of the considerations just mentioned, it has been thought to mean criminal intention,”⁵⁹ i.e., “foresight that particular results will flow from a particular act, and second, desire that the results foreseen shall occur.”⁶⁰

Further bleaching the mens rea concept, the drafters of the Model Penal Code devised pure, psychological terminology that took the moral *sturm und drang* right out of it. Now dressed in plain clothes, mens rea meant the defendant had acted either purposely, knowingly, recklessly, or negligently.⁶¹ While commentators praised the Model Penal Code’s “streamlined” mens rea concepts, they also recognized that they were not essentially moral.⁶² For example, a person who guiltlessly kills in self-defense does not act maliciously but may cause the death of a human being purposefully.⁶³ As we will see, Kansas is one of the many states that have adopted the Model Penal Code’s mens rea provisions.⁶⁴

This is not to say that the modern concept of mens rea—even the sanitary terminology of the Model Penal Code—has nothing to do

195 (2d ed. 1986).

57. See Note, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123, 1128 (1975).

58. *Id.* (emphasis added).

59. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 50 (Belknap Press 2009) (1881).

60. Note, *supra* note 57, at 1128 (citing HOLMES, *supra* note 59, at 45).

61. MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1985).

62. See John Quigley, *The Need to Abolish Defenses to Crime: A Modest Proposal to Solve the Problem of Burden of Persuasion*, 14 VT. L. REV. 335, 353 (1990).

63. *Id.* (citing MODEL PENAL CODE § 3.04 (AM. L. INST., Proposed Official Draft 1962)).

64. Compare MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1985), with KAN. STAT. ANN. § 21-5202(b) (2020).

with moral culpability.⁶⁵ At this point, we must distinguish between rules of decision (model or actual) and the policy concerns underlying them. Economic efficiency favors expectation damages as the measure of relief in contract law, but contract law has no rule requiring that damages be economically efficient.⁶⁶

In the case of the Model Penal Code, making criminal law track moral culpability was one of the express policy goals of the drafters: they sought to “safeguard conduct that is without fault from condemnation as criminal” and “to differentiate on reasonable grounds between serious and minor offenses.”⁶⁷ One of the ways they did this was through dictating that every crime, save the smallest violations punishable by de minimis penalties, have a mental state in its definition.⁶⁸ This sufficed to remove a great many morally blameless acts from the reach of criminal law, but it was only one doctrinal device used to further the policy goal. For instance, the drafters also used the voluntary act requirement to achieve their policy goals through their text.⁶⁹ Thus, while philosophical concerns about moral culpability were among the drafter’s motives when authoring the mens rea provisions, the drafters did not respond to those motives by writing a moral culpability requirement into the text.⁷⁰ On the contrary, they chose simplified, streamlined mens rea language that left the moral connotations of words like “maliciously” and “corruptly” behind.⁷¹

The requirement of a voluntary act or omission is another basic riff in criminal law.⁷² Cases reflect that mere omissions are subject to criminal liability only when there is a specific legal duty to act.⁷³

65. See Andrew Ingram, *Pinkerton Short-Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 73 (2019) (“The Code is built on certain guiding principles, among them the culpability principle, and its interlocking provisions are so drawn that the principles can be realized in a consistent fashion.”).

66. See generally Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 UNIV. COLO. L. REV. 683 (1986) (explaining the role economic theories play in justifying rules for contract damages).

67. MODEL PENAL CODE § 1.02(1)(c), (e) (AM. L. INST. 1985).

68. *Id.* §§ 2.02(1), 2.05, 2.05 explanatory note.

69. See Ingram, *supra* note 65, at 75 (quoting §§ 2.01(1), 2.02(1)).

70. See § 1.02(1).

71. See *id.*

72. LAFAVE, *supra* note 12, §§ 1.2(b), 6.1.

73. *Id.* § 6.2(a) (“For criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.”).

Constitutional decisions striking down laws that criminalize mere status further illustrate and buttress this principle.⁷⁴

Like a good guitar vamp in a classic rock song, the voluntary act riff is always sustained even when it is not specially mentioned in the statutes. Crimes are not defined with the words “voluntary” or “act,” but starting a housefire while sleepwalking is not arson and letting a stranger die by not leaping in the river to save him is not murder. This is because, in modern codes, the voluntary act requirement is listed as a general requirement in the first chapter or article and made applicable to all the crimes contained within.⁷⁵

The voluntary act requirement usually hums along unnoticed: it need not be particularly proven unless extraordinary facts call it into question.⁷⁶ As the Indiana Supreme Court put it, “In most cases there is no issue of voluntariness, and the State’s burden is carried by proof of commission of the act itself.”⁷⁷ Some courts and commentators have thus denied that voluntariness is actually a requirement of every crime and have preferred to affirm that involuntariness is an affirmative defense.⁷⁸ But the better view appears to be that voluntariness is a “basic requirement of responsibility,” always chargeable to the prosecution’s account, but usually precredited or so cheaply proven in passing that the parties and court need not mention it to the jury.⁷⁹ It is thus unlike the mens rea of a crime: a jury must always be instructed on mens rea, and the prosecutor must always be able to point to record evidence of mens rea to defend the sufficiency of the evidence to support her verdict in an appellate court.⁸⁰

74. *Id.* §§ 1.2(b), 3.3(d), 3.5(g).

75. *See id.* § 6.1(c) n.24.

76. *E.g.*, *State v. Pierson*, 514 A.2d 724, 728 (Conn. 1986) (“There are some basic aspects of criminal liability that may be presumed and thus need not be discussed in a charge to the jury, at least in the absence of a request or some evidence casting doubt upon the presumption.”); *State v. Almaguer*, 303 P.3d 84, 91 (Ariz. Ct. App. 2013) (“An instruction that the state must prove the defendant committed a voluntary act is appropriate only if there is evidence to support a finding of bodily movement performed unconsciously and without effort and determination . . .” (citing *State v. Lara*, 902 P.2d 1337, 1339 (Ariz. 1995))).

77. *Baird v. State*, 604 N.E.2d 1170, 1176 (Ind. 1992).

78. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1559–60 (2013) (collecting authorities).

79. *Id.* at 1600–02.

80. *See id.* at 1602 (“On the other hand, the jury must always be instructed on the proper mens rea element, even if it is not colorably in dispute . . .”).

Voluntariness is a rule of criminal law visible in the breach and invisible in the observance. The reason for this might be traced to the metaphysical mire that must be crossed if a definition is to be given in positive terms. We manage to stay out of this muck for the most part in everyday life—and can do likewise in the courtroom—so long as we do not ask too many questions about the nature of the mind and free will. If we once try to say what we mean by “voluntariness,” we are liable to fall into talking in circles. LaFave reports, “Sometimes a voluntary act is said to be an external manifestation of the will. Or, it may be said to be behavior which would have been otherwise if the individual had willed or chosen it to be otherwise.”⁸¹ Of course, asking what is meant by the words “will” or “chosen” will reveal that the definition has only ephemeral explanatory power.

To avoid these philosophical bogs, some courts, legislators, and commentators have preferred to define what is involuntary rather than venture to say what is voluntary.⁸² The choice to do so mirrors the use we make of the notion of voluntariness in extra-jural life. Usually, we have no problem acting on the assumption that choices in the minds of those we meet stand behind the actions we see their bodies carry out. However, there are some extraordinary circumstances, usually involving a small number of *sui generis* psychological or physical anomalies, in which we discard this assumption. We readily say that a man sleepwalking, for example, does not do what he does voluntarily, and we reply the same for a woman under hypnosis. Accordingly, many criminal codes try to catalog these special psychological or physical conditions. For example, the Model Penal Code “identifies certain movements which are deemed not to be voluntary acts: a reflex or convulsion; those during unconsciousness or sleep; those during hypnosis or resulting from hypnotic suggestion; and others which are not a product of the effort or determination of the actor, either conscious or habitual.”⁸³

That voluntariness need not be proven in every case as *mens rea* must be does not change the fact that it is a basic requirement of

81. LAFAVE, *supra* note 12, § 6.1(c).

82. *See id.* (“There are those who believe that the term is indefinable, and also those who take the view that a voluntary act must be defined in terms of conditions which render an act involuntary.”).

83. *Id.* (citing MODEL PENAL CODE § 2.01(2) (AM. L. INST. 1985)).

criminal liability. Its inverse—involuntariness—lies coiled in the heart of every criminal case—like a worm.⁸⁴ But, it can only unburrow opportunistically, whenever certain openings appear, namely the special physical and psychological phenomena commonly identified with involuntary movement. As we will see, the hidden moral culpability requirement in criminal law exhibits a similar dynamic, albeit in the form of an affirmative defense: it lies latent until special circumstances—mental disease or defect—call it into question and open the door to evidence that a defendant is not morally blameworthy because he cannot distinguish right from wrong.

C. *The Insanity Defense Today*

The modern law of insanity in common law countries crystalized with the 1843 decision in *M'Naghten's Case*.⁸⁵ *M'Naghten* provided a disjunctive test: a person is insane if, by reason of mental illness, he is unable to appreciate the nature and quality of his actions or is unable to tell that what he is doing is wrong.⁸⁶ This remains the majority test in American jurisdictions today.⁸⁷ However, it has been joined or replaced by three other approaches to insanity. The most common of these, the volitional test, asks whether mental illness made the defendant unable to conform his conduct to law.⁸⁸ The product test, found only in New Hampshire, simply asks whether a mental illness was the cause of the defendant's criminal behavior.⁸⁹ Finally, the mens rea approach eliminates insanity as a freestanding affirmative defense but specifies that evidence of mental illness is relevant to proving whether the defendant satisfied the mental element of the crime.⁹⁰

In every code in which insanity remains an independent defense, the defendant has at least the burden of production, oftentimes the

84. Cf. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 21 (Hazel E. Barnes trans., Philosophical Library 1956) (1943) ("Nothingness lies coiled in the heart of being—like a worm.").

85. DRESSLER, *supra* note 12, § 25.04[A]; *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 10 Cl. & F. 200.

86. 8 Eng. Rep. at 719, 10 Cl. & F. at 201; DRESSLER, *supra* note 12, § 25.04[C][1][a].

87. LAFAVE, *supra* note 12, § 7.2.

88. DRESSLER, *supra* note 12, § 25.04[C][2][a].

89. *Id.* § 25.04[C][4][a].

90. *See id.* § 25.06[B].

burden of proof as well.⁹¹ *M'Naghten* specified that a defendant is always presumed to be sane,⁹² and except where the mens rea approach has eliminated a freestanding defense, the defendant carries the initial burden of placing his sanity in question.⁹³ In a majority of states, the defense must plead and prove insanity by a preponderance of the evidence.⁹⁴ A smaller group force the prosecution to negate insanity beyond a reasonable doubt, but only after the defendant has met his burden of production by coming forward with some evidence of insanity.⁹⁵ In the federal system and a small number of states, the defendant has the burden of production and must prove the defense by clear and convincing evidence.⁹⁶ Because it is presumed until the defendant has at least met her burden of production, sanity—or the absence of insanity—is never an element of the crime and so, like voluntariness, never need be demonstrated in the millrun of criminal cases.

1. The *M'Naghten* Test

Daniel M'Naghten intended to kill a man when he shot Edward Drummond, the private secretary of Prime Minister Robert Peel, whom he mistook for Peel himself.⁹⁷ When the justices of the Queen's Bench were asked to explain the law of insanity by the House of Lords in the aftermath of the decision,⁹⁸ they wrote:

[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.⁹⁹

This test itself has two prongs, and both are cognitive, i.e., they ask what the defendant knew or understood at the time he acted. One test asks about the defendant's comprehension of the

91. LAFAVE, *supra* note 12, § 8.3(a).

92. 8 Eng. Rep. at 719, 10 Cl. & F. at 201 (“[E]very man is presumed to be sane . . .”).

93. DRESSLER, *supra* note 12, § 25.02[E].

94. *Id.*

95. *See id.* § 25.02[E].

96. *Id.*

97. LAFAVE, *supra* note 12, § 7.2(a).

98. *Id.* at 495–96.

99. M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722, 10 Cl. & F. 200, 210.

descriptive or physical facts; the other asks after her grasp of the normative ones.

Today, the *M'Naghten* rule is the law in the federal criminal system and the majority of states.¹⁰⁰ LaFave describes it as the rule in the federal system and over thirty states.¹⁰¹ However, even this underestimates the test's enduring popularity because the chief rival to the classic *M'Naghten* language is the Model Penal Code's test. While the Model Penal Code adds a volitional test¹⁰² and substitutes a test of "substantial capacity" for absolute inability to distinguish right from wrong, the core of the *M'Naghten* test remains in the Model Code.¹⁰³ Wrapping in states inspired by the Model Penal Code, forty-five states, the federal criminal law, and the District of Columbia use some version of *M'Naghten's* normative prong, the right-and-wrong test.¹⁰⁴

"[T]he question of whether wrong means legally or morally wrong has not been clearly resolved."¹⁰⁵ In the opinion, the majority in *Kahler* stressed the diversity of interpretations in the states in their opinion.¹⁰⁶ They counted sixteen states adopting a legally wrong interpretation of the right-and-wrong test.¹⁰⁷ Additionally, the Court could have directly cited the Model Penal Code's language (adopted by some of the Court-tallied states, like Vermont)¹⁰⁸: it asks whether the defendant had the "substantial capacity . . . to appreciate the *criminality* . . . of his conduct."¹⁰⁹ Ultimately, the majority reasoned that accepting the petitioner's argument that tradition mandated a moral blameworthiness test of insanity would compel invalidating these states' laws as well,

100. LAFAVE, *supra* note 12, § 7.2(a).

101. *Id.*

102. *See infra* section I.C.2.

103. *See* MODEL PENAL CODE § 4.01 (AM. L. INST. 1985).

104. *Kahler v. Kansas* 589 U.S. __, __, 140 S. Ct. 1021, 1046 (2020) (Breyer, J., dissenting).

105. LAFAVE, *supra* note 12, § 7.2(b)(4).

106. *See Kahler*, 589 U.S. at __, 140 S. Ct. at 1025, 1036 ("Contrary to *Kahler's* (and the dissent's) contention, that difference matters.").

107. *Id.* at __, 140 S. Ct. at 1035.

108. VT. STAT. ANN. tit. 13, § 4801(a)(1) (2021).

109. MODEL PENAL CODE § 4.01(1) (AM. L. INST. 1985) (emphasis added).

rhetorically suggesting that due process compelled no such imperious outcome.¹¹⁰

The Court majority's research notwithstanding, the evidence that some states have adopted a strictly legal permutation of *M'Naghten's* normative prong is equivocal, misleading, or superficial. To begin with, Justice Breyer's dissenting pen rightly challenged the bottom-line significance of states proclaiming that their version of *M'Naghten* asks about law rather than morality.¹¹¹ Quoting cases, he asserted that the distinction often fails to surface in practice.¹¹² For instance, the Washington Supreme Court opined, "[T]he vast majority of cases in which insanity is pleaded as a defense to criminal prosecutions involves acts which are universally regarded as morally wicked as well as illegal, the hair-splitting distinction between legal and moral wrong need not be given much attention."¹¹³ Because of this overlap, trial practice is likely to retain an emphasis on the defendant's ability to morally appreciate the quality of his actions. Not only is it easier for a lay person to comprehend the moral question, but stressing the legal question may muddle the minds of jurors respecting *ignorantia juris non excusat*.¹¹⁴

Furthermore, when the test is framed in terms of "criminality," as it is in Vermont and other states taking their cues from the American Law Institute,¹¹⁵ then it is written with a word that carries moral connotations apart from its narrow legal meaning. The word "criminal" is ambiguous; it carries "implication[s] of both moral *and* legal wrong."¹¹⁶ The ambiguity only grows when we consider that some people assume or argue that legal proscription, especially criminal proscription,¹¹⁷ makes an action immoral: "It

110. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1029, 1036.

111. *Id.* at ___, 140 S. Ct. at 1046 (Breyer, J., dissenting).

112. *Id.*

113. *State v. Crenshaw*, 659 P. 2d 488, 494 (Wash. 1983) (quoting S. SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 184 (Little, Brown, & Co. 1925)).

114. *See id.* at 497 (holding, in a murder case, that no definition of "wrong" should appear in jury instructions in order to forestall "the possibility that the jury would presume that ignorance of the law is a defense in cases wherein it may not be as clear as it was here that the person knew the illegality of his act").

115. VT. STAT. ANN. tit. 13, § 4801 (2021).

116. Herbert Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 255 n.49 (1976).

117. To see the special difference criminalization makes, consider contract law. While

becomes criminal in law as well as in morality [sic]; and since there is at least a prima facie moral duty to abide by law, it becomes in this still further, derivative sense, a moral wrong.”¹¹⁸ Given this fact of language, it is possible that a moral right-and-wrong test is implicit even when the word “criminality” is used in place of the traditional verbiage. Of the sixteen states counted by the majority, six use the criminality language in their codes,¹¹⁹ and one uses it in caselaw.¹²⁰

One of the cases used by the majority, *State v. Worlock*,¹²¹ simply does not stand for the proposition for which it is cited. Rather, the New Jersey Supreme Court affirmed that “[w]rongfulness’ in the insanity defense takes account of both legal and moral wrong.”¹²²

Several of the cases relied upon by the majority to count to sixteen either are from intermediate courts of appeals (three cases)¹²³ or did not squarely present the issue of legal understanding versus moral understanding. *Wallace v. State*,¹²⁴ a Florida Court of Appeals case, suffers on both accounts. The Florida judges first write, “The ‘wrong’ under M’Naghten, however, is measured by societal standards and not any subjective moral standards set forth by the defendant.”¹²⁵ They then pronounce, “Thus, under M’Naghten, if a defendant suffers from some mental infirmity, defect, or disease,

one can say that breaching a contract is unlawful, some legal thinkers have affirmed that the law does not condemn breaching contracts. *E.g.*, Caprice L. Roberts, *Restitutory Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 993 (2009) (“In general, contract law does not morally judge the breaching party.”). Stated flatly, the law is not telling people to keep their contracts or condemning them not doing so; hence, no moral opprobrium attaches to these “violations” of the law. The same could be said of civil fines, where the difference in denominating them civil rather than criminal consists in a lack of social condemnation in the former case. When it takes this tack, the law is offering a fork, “Do this or pay that,” rather than dictating with a baton, “Do this!”

118. Fingarette, *supra* note 116, at 255.

119. ARK. CODE ANN. § 5-2-301(6) (2021); 720 ILL. COMP. STAT. 5/6-2(a) (2021); KY. REV. STAT. ANN. § 504.020(1) (LexisNexis 2021); MD. CODE ANN., CRIM. PROC. § 3-109(a)(1) (LexisNexis 2021); OR. REV. STAT. § 161.295(1) (2019); VT. STAT. ANN. tit. 13, § 4801(a)(1) (2021).

120. *Commonwealth v. Lawson*, 62 N.E.3d 22, 28 (Mass. 2016).

121. 569 A.2d 1314 (N.J. 1990).

122. *Id.* at 1323.

123. *Kahler v. Kansas* 589 U.S. __, __, 140 S. Ct. 1021, 1035 n.10 (2020) (citing one Florida, one Texas, and one Ohio intermediate court case). The Texas case is incorrectly cited as a case of the state’s high court for criminal cases. *See infra* note 139. There are six statutes cited, *see id.* at __, 140 S. Ct. at 1036 n.10, all of which use the Model Penal Code criminality language. *See supra* note 119 and accompanying text.

124. 766 So. 2d 364 (Fla. Dist. Ct. App. 2000).

125. *Id.* at 367.

but nevertheless understands the nature and consequences of his actions and that his actions are against the law, his actions are punishable.”¹²⁶ The contrast the court develops is between “subjective moral standards” and “societal standards.” This case does not rule out either the possibility that societal standards encompass both law and *objective*¹²⁷ morals, or the possibility that the former and latter are fully or partially coextensive. Rather, the opinion is trying to bar the door against claims that a defendant’s idiosyncratic moral views make him eligible for an insanity acquittal.

The same contrast between community standards and personal standards drives the reasoning in an Arizona Supreme Court case invoked by the *Kahler* majority.¹²⁸ In that case, the court begins with an approving reference to one of its prior cases: “[W]e have held that knowledge of wrong in the *M’Naghten* test involves both a legal and moral wrong.”¹²⁹ The court next acknowledges that “it is possible to infer that the defendant believed he was morally justified in shooting Mr. Wright.”¹³⁰ It then proceeds to narrate the evidence that the defendant knew he could be arrested and punished for what he was doing, inferring therefrom that “the defendant knew that his acts were legally wrong and that he should take steps to prevent apprehension.”¹³¹ However, the court does not simply end its reasoning there and reject the defendant’s appeal. Rather, the court concludes its reasoning by responding to defendant’s claim that “wrong” should be defined by defendant’s personal beliefs, replying that it “should be judged by a community standard.”¹³² Deciding whether a “community standard” includes society’s morals or refers only to its laws is left as an exercise for the

126. *Id.* at 368.

127. Objective in the sense that they are recognized by all, or objective in the sense that they are mind independent moral truths. Compare JESSE J. PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS, 164 (2007) (arguing that morality is real but subjective), with David O. Brink, *Moral Realism and the Sceptical Arguments from Disagreement and Queerness*, 62 AUSTRALASIAN J. PHIL. 111, 111 (1984) (explaining the thesis that “there are moral facts” and those facts are “logically independent” of “those beliefs which are our evidence for them”).

128. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1035 n.10 (citing *State v. Skaggs*, 586 P.2d 1279, 1284 (Ariz. 1978)).

129. *Id.* (citing *State v. Malumphy*, 461 P.2d 677, 689 (Ariz. 1969) (McFarland, J., concurring)).

130. *Id.*

131. *Id.*

132. *Id.*

reader. Indeed, when an Arizona intermediate court later betook itself to the opinion for guidance, it cited the case for the proposition that “the insanity defense should be defined by a community standard of morality and not the defendant’s personal beliefs.”¹³³

Three of the majority’s other cases, *People v. Wood*,¹³⁴ *State v. Carreiro*,¹³⁵ and *State v. Crenshaw*¹³⁶ are similarly equivocal and can be read to condemn only an appeal to the defendant’s idiosyncratic opinions about morality.

Some of the *Kahler* majority’s cases do squarely address the issue. In *State v. Hamann*, for example, the Iowa Supreme Court wrote:

Only a part of a society’s moral standards becomes so fixed and agreed upon as to become law. Until a moral standard becomes law it is an unreliable test for sanity. We believe it is far more workable and a more accurate measure of mental health to test a defendant’s ability to understand what society has fixed and established as law.¹³⁷

By the same token, the Tennessee Supreme Court in *McElroy v. State* explained, “In legal contemplation, to obey the law is right, to violate it is wrong, and if he choose the later course, the law implies on his part a criminal intent, and punishment is the result of his violation of its mandate, or its prohibition.”¹³⁸ Not caring to leave exercises for the reader, the Texas Court of Criminal Appeals taught, “Under Texas law, ‘wrong’ in this context means ‘illegal.’”¹³⁹

133. *State v. Tamplin*, 986 P.2d 914, 917 (Ariz. Ct. App. 1999).

134. 187 N.E.2d 116, 121–22 (N.Y. 1962).

135. 988 N.E.2d 21, 27 (Ohio Ct. App. 2013).

136. 659 P.2d 488, 494 (Wash. 1983). *Crenshaw* is a reserved, latitudinarian opinion. The court offers alternative rationales for affirming the conviction before it: jury instructions focusing on the defendant’s knowledge that his actions were illegal were appropriate in the circumstances of the case; the more important distinction is between a defendant’s idiosyncratic moral beliefs and society’s moral beliefs; society’s criminal laws usually mirror its moral judgments, as they did in the murder case before the court; absence of trial evidence to show that the defendant was suffering from mental disease or defect; and harmless error given the overwhelming evidence of sanity. *See id.* at 497.

137. 285 N.W.2d 180, 184 (Iowa 1979).

138. 242 S.W. 883, 885 (Tenn. 1921) (quoting *Watson v. State*, 180 S.W. 168, 171 (Tenn. 1915)).

139. *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008). The *Kahler* majority did not cite *Ruffin* but instead cited *McAfee v. State*, 467 S.W.3d 622 (Tex. App. 2015). *See Kahler v. Kansas*, 589 U.S. ___, ___, 140 S. Ct. 1021, 1035–36 (2020). Regrettably, the Court misidentified *McAfee* as a case of the Court of Criminal Appeals: it is actually a decision of

In the final reckoning, courts and legislatures in only three states have left clear and convincing evidence that their version of the right-and-wrong test of insanity refers only to legal wrong and not moral wrong. While there are twelve other American states in which the cases and codes could be construed to limit the meaning of “wrong” or “criminality” to a distinctly legal definition, the relevant authorities will support a moral interpretation as well. Yet even if the reader is unconvinced by the foregoing arguments, a majority of American jurisdictions undoubtedly give moral content to the right-and-wrong test. As such, the law will still bear out the thesis of this article that a disguised moral culpability requirement is one of the basic principles of American criminal law doctrine.

2. The Volitional Test and the Product Test

The volitional test, commonly known as the irresistible impulse test, focuses on an agent’s will rather than her judgment. Instead of considering what an agent knew or understood, it asks whether a mental disease or defect took from her the power to control her actions. The Model Penal Code, for example, makes a defendant not guilty by reason of insanity if he lacked “substantial capacity . . . to conform his conduct to the requirements of law.”¹⁴⁰ It provides this defense in addition to letting defendants argue that they were unable to appreciate the “criminality” of their conduct.¹⁴¹ Largely owing to the Code’s influence, in all of the seventeen American jurisdictions that have adopted a version of the volitional test, it is an adjunct to some form of the right-and-wrong test.¹⁴²

The appearance of the volitional test as an assistant to *M’Naghten* teaches a lesson about the purpose of the insanity defense in relation to scientific knowledge of mental health. Those who have wished lawyers to be led by doctors on the question of insanity have sometimes argued for the volitional approach as a way of keeping

the Texas Court of Appeals for the First District in Houston, albeit one that relies upon and stands for the same proposition as the Court of Criminal Appeals’ decision in *Ruffin*. *See id.* at ___, 140 S. Ct. at 1036.

140. MODEL PENAL CODE § 4.01(1) (AM. L. INST. 1985).

141. *See id.*

142. *See Kahler*, 589 U.S. at ___, 140 S. Ct. at 1046 (Breyer, J., dissenting) (cataloging states’ approaches and noting a number of states that modeled their provisions on the work of the American Law Institute).

up with *scientific* knowledge of the mind. For example, when Professor Keedy argued for adopting the irresistible impulse test in a 1917 issue of the *Harvard Law Review*, he contended that psychiatry was now sufficiently advanced to differentiate truly irresistible impulses from resistible ones.¹⁴³ Likewise, the Supreme Court in *Leland v. Oregon* acknowledged that evolving scientific knowledge could lead lawmakers to adopt the irresistible impulse standard.¹⁴⁴

The product test, sometimes called the *Durham*¹⁴⁵ test, is the closest thing to a clinical, medicalized approach to insanity.¹⁴⁶ It began in a nineteenth century New Hampshire murder case, *State v. Jones*.¹⁴⁷ The *Jones* court pronounced: “[N]o man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt.”¹⁴⁸ Significantly, the court approved a jury instruction equating insanity with mental illness: “Insanity is mental disease—disease of the mind.”¹⁴⁹ In this instruction, insanity is *defined* as mental illness. Being insane is being mentally ill; insanity/mental illness is a defense when it produces a crime. Accordingly, the court approved this instruction as well: “Insanity is not innocence unless it produced the killing”¹⁵⁰ This is a major departure from the other tests of insanity, according to which insanity is a legal conclusion about a person suffering from mental

143. Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 550–51 (1917).

144. See 343 U.S. 790, 800–01 (1952) (“The science of psychiatry has made tremendous strides since that test was laid down in M’Naghten’s Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law.”).

145. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

146. See Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 225 (1997) (describing *Durham* as attuned to the thinking of psychopathologists).

147. 50 N.H. 369 (1871). New Hampshire retains the product test to this day, the only jurisdiction that now uses it. See LAFAVE, *supra* note 12, § 7.4(a). The product test was briefly the law in the District of Columbia, after the Court of Appeals adopted it in *Durham*. See 214 F.2d at 874–75. The Court abandoned this experiment after eighteen years and switched to the America Law Institute’s test. See *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972).

148. 50 N.H. at 394.

149. *Id.* at 373.

150. *Id.*

illness, not mental illness itself.¹⁵¹ It must be remembered that under the other majority tests, a person may still be guilty even though he is mentally ill and his mental illness produced his crime.

Courts self-consciously adopted the product test in order to make mental illness a defense—at least so long as the disease was the cause of the criminal behavior.¹⁵² In *Durham*, the D.C. Circuit pronounced the right-and-wrong test “inadequate” because “(a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances.”¹⁵³ Supposedly, the test had unduly limited the courts’ access to medical evidence by making one possible symptom of mental illness, the inability to distinguish right from wrong, the ultimate legal criterion.¹⁵⁴

Interestingly, even after the D.C. Circuit had medicalized the *ultimate test* of insanity, it insisted that the *ultimate purpose* of that test remained to separate the mentally ill, morally innocent sheep from the morally guilty goats. Quoting its own recent opinion in *Holloway v. United States*, the D.C. Circuit Court proclaimed juries were still supposed “to apply ‘our inherited ideas of moral responsibility to individuals prosecuted for crime.’”¹⁵⁵ To be sure, the court still insisted that, in making their moral judgments, the jurors “will be guided by wider horizons of knowledge concerning mental life” and “[t]he question will be simply whether the accused acted because of a mental disorder.”¹⁵⁶

3. Taking Stock—The Meaning of the Insanity Defense

It is easy to forget that “insanity” is not a scientific concept but a lawyer’s notion that has seeped out of the courthouse and into

151. See, e.g., *United States v. Reed*, 997 F.2d 332, 334 (7th Cir. 1993) (“Insanity, for our purposes, is a legal term. We do not ask whether Reed is insane by psychiatric or psychological standards.”).

152. This is the story about the product test LaFave tells as well. LAFAVE, *supra* note 12, § 7.4(a). LaFave emphasizes the overt influence of a medical treatise by Dr. Isaac Ray on both the *Durham* and *Jones* opinions. *Id.* (citing ISAAC RAY, TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 39 (5th ed., Little, Brown, and Company 1871)).

153. *Durham*, 214 F.2d at 874.

154. *Id.* at 872.

155. *Id.* at 876 (quoting 148 F.2d 665, 667 (D.C. Cir. 1945)).

156. *Id.*

popular culture. Still, insanity as a legal concept must be distinguished from not only medical concepts of mental illness but folk ideas (sometimes mistaken and bigoted) about “crazy people” and “lunatics.” Certainly, scientific knowledge of the mind ought to be taken into account by courts; certainly, the insanity defense is a vehicle for doing so. Equally certain, however, the insanity defense is doing something else besides conveying medical understanding of mental illness into court.

Apart from giving ear to evolving medical knowledge of mental illness, the insanity defense listens while the prosecution and defense hash out when anomalous behavior reflects a mind so anomalous that the defendant is not to blame for her actions.¹⁵⁷ For better or for worse, arguments and assumptions playing in this forum reflect folk beliefs about “craziness” and “madness” that are influenced by, but that definitely transcend, medical knowledge. While the defendant’s ability to understand the difference between right and wrong only becomes an issue when “mental disease or defect” is supposed to be the reason for its absence, it is a savvy lawyer’s commonplace that the insanity issue is never purely a medical issue.¹⁵⁸

Understanding this cliché rightly is key to understanding the position of the petitioner in *Kahler*: an enduring function of the insanity defense is to sift the morally blameless and the morally blameworthy; medical knowledge may aid in that endeavor and furnish independent bases for foregoing criminal liability; but the insanity defense has never exclusively been a medical test of the defendant’s competency to have committed crime. Despite the experts who crowd the courtroom whenever it is now invoked, insanity is not *the mental illness defense* but a defense available to the allegedly mentally ill.¹⁵⁹ Hence, the petitioner took the position

157. Cf. *Holloway*, 148 F.2d at 667 (“To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.”).

158. E.g., *Graham v. State*, 566 S.W.2d 941, 948 (Tex. Crim. App. 1978) (en banc) (“While the defense is expressed in terms of a ‘mental disease or defect,’ the issue is not strictly a medical one. It is an issue that invokes ethical and legal considerations as well.”).

159. The product test is the exception that proves the rule. Under *Durham*, the insanity defense is simply a test of whether the defendant was mentally ill and whether her crime would have occurred but for her illness. Using this approach, insanity does become a clinical, medical defense. *Durham*, 214 F.2d at 870.

that the right-and-wrong test belongs to a common law tradition older than modern medicine and that it must be retained even if states wish to experiment with other approaches to tapping medical knowledge, be it through the insanity defense or otherwise.¹⁶⁰

D. *The Kansas Approach to Insanity and the Supreme Court*

Kahler was a test case long in coming to the Court. As we will see, the laws in the handful of states that have eliminated insanity as an independent defense have been on the books for decades prior. In this section, I will review the history of Kansas's approach to insanity—called by its friends “the mens rea approach” and its enemies “abolition”—the facts of *Kahler*'s case and its journey to the Supreme Court; the arguments of the petitioner; and the Court's ruling. While my focus will be on the petitioner's research showing that *M'Naghten* crystalized a longstanding tradition of requiring that the criminally convicted be morally culpable, I will also show how the majority opinion misconstrues this history on the way to ruling against the petitioner. Those interested in the rectitude of the Supreme Court's constitutional ruling will find that section of interest.

1. The Mens Rea Approach

At the beginning of the twentieth century, a handful of state legislatures abolished or severely curtailed the insanity defense, but their supreme courts ruled that the changes violated the state or federal constitutions.¹⁶¹ During the 1970s and 1980s, popular fear of malingering and inadvisable acquittals sparked a new movement to restrict the availability of the insanity defense.¹⁶² For

160. Brief for Petitioner, *supra* note 6, at 13.

161. *Sinclair v. State*, 132 So. 581, 582 (Miss. 1931); *State v. Lange*, 123 So. 639, 641–42 (La. 1929); *State v. Strasburg*, 110 P. 1020, 1021, 1025 (Wash. 1910). The Mississippi statute actually only eliminated the insanity defense in murder prosecutions. MISS. CODE ANN. §§ 75-192-1327 to -1328 (1930), *invalidated by Sinclair*, 132 So. at 581–82. The Louisiana statute removed the question of insanity from the courts and made the judgment of a special “lunacy” commission, to be convened when the defense was invoked, determinative of a defendant's insanity claim. LA. CODE CRIM. PROC. ANN. art. 268 (2021), *invalidated by Lange*, 123 So. at 641.

162. See Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1395–97 (1997) (citation omitted).

example, Congress debated possible reform bills during this period before enacting a version of *M'Naghten* into statute law.¹⁶³ One member proposed a bill that would have abolished insanity as an independent defense but expressly provided that a defendant was not guilty if he, by reason of mental disease or defect, “lacked the state of mind required as an element of the offense charged.”¹⁶⁴

Though this bill did not become a law, five states—Kansas, Idaho, Montana, Nevada, and Utah—eventually put like language into their criminal codes.¹⁶⁵ The Kansas statute reads, “It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.”¹⁶⁶ Provincial supreme courts upheld the statutes against constitutional attack in four states,¹⁶⁷ but the Nevada Supreme Court struck down its statute for violating due process.¹⁶⁸

The ability to use evidence of mental illness or mental defect to rebut the prosecution’s case on mens rea is not a sham consideration. While many states—besides recognizing an insanity defense—already permit a defendant to use evidence of his poor mental health to negate mens rea,¹⁶⁹ other states emphatically do not do so.¹⁷⁰ This is true despite the typical background rules making admissible all relevant evidence and helpful expert testimony.¹⁷¹

163. Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 1–3 (1988).

164. Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1520 (2002) (quoting the proposed Criminal Justice Reform Act of 1975, S. 1, 94th Cong. (1975)).

165. MONT. CODE ANN. § 46-14-102 (2021); IDAHO CODE § 18-207 (2021); UTAH CODE ANN. § 76-2-305(1) (LexisNexis 2021); KAN. STAT. ANN. § 21-5209 (2020); NEV. REV. STAT. § 174.035 (2021).

166. KAN. STAT. ANN. § 21-5209 (2020).

167. *State v. Herrera*, 895 P.2d 359, 365–56 (Utah 1995); *State v. Searcy*, 798 P.2d 914, 919 (Idaho 1990); *State v. Korell*, 690 P.2d 992, 999–1000 (Mont. 1984); *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003).

168. *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001).

169. *E.g.*, *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005) (“[R]elevant evidence may be presented which the jury may consider to negate the *mens rea* element [T]his evidence may sometimes include evidence of a defendant’s history of mental illness.”).

170. *E.g.*, *State v. Mott*, 931 P.2d 1046, 1050–51 (Ariz. 1997).

171. *E.g.*, FED. R. EVID. 402, 702.

Most important to the stakes of the bargain, the Supreme Court of the United States has condoned states forcing defendants to limit offers of mental health evidence to the issue of insanity.¹⁷² While proclaiming the general rule of constitutional law that a defendant has a “right to present the defendant’s version of the facts,”¹⁷³ the Supreme Court has not given criminal defendants a license to disregard the rules of evidence.¹⁷⁴ Accordingly, it allows states to “channel” mental health evidence into the insanity rubric if they choose to do so to further the clear and orderly presentation of evidence.¹⁷⁵

2. A Test Case Emerges

James Kahler shot and killed his wife, two daughters, and wife’s grandmother at the latter’s Burlingame, Kansas home.¹⁷⁶ The Supreme Court summarized the facts as follows:

This case arises from a terrible crime. In early 2009, Karen Kahler filed for divorce from James Kahler and moved out of their home with their two teenage daughters and 9-year-old son. Over the following months, James Kahler became more and more distraught. On Thanksgiving weekend, he drove to the home of Karen’s grandmother, where he knew his family was staying. Kahler entered through the back door and saw Karen and his son. He shot Karen twice, while allowing his son to flee the house. He then moved through the residence, shooting Karen’s grandmother and each of his daughters in turn. All four of his victims died. Kahler surrendered to the police the next day and was charged with capital murder.¹⁷⁷

Prior to trial, Kahler filed a motion arguing that the Constitution gave him the right to prove that he was suffering from a mental illness at the time of the killings that made him incapable of appreciating the difference between right and wrong.¹⁷⁸ As the Kansas high court had already found the state’s abandonment of *M’Naghten* constitutional in *State v. Bethel*,¹⁷⁹ the trial court

172. *Clark v. Arizona*, 548 U.S. 735, 770–71 (2006).

173. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

174. *See Clark*, 548 U.S. at 770.

175. *See id.* at 770–71.

176. *State v. Kahler*, 410 P.3d 105, 113–14 (Kan. 2018).

177. *Kansas v. Kahler*, 589 U.S. ___, ___, 140 S. Ct. 1021, 1026–27 (2020).

178. *Id.* at ___, 140 S. Ct. at 1027.

179. 66 P.3d 840, 851 (Kan. 2003).

denied his motion.¹⁸⁰ As such, Kahler was limited to presenting evidence that his alleged illness prevented him from “forming the intent to kill.”¹⁸¹ In his brief to the Supreme Court, his attorneys described his condition as follows:

When Kraig Kahler killed four members of his family, he was experiencing overwhelming obsessive compulsions and extreme emotional disturbance, and may have dissociated from reality. He had long suffered from a mixed obsessive-compulsive, narcissistic, and histrionic personality disorder, and had recently lapsed into a severe depression, causing him to reach the point of decompensation.¹⁸²

This clinical description is substantiated in the brief by an extended history of treatment for mental illness and wrathful, obsessive words and behavior directed towards his wife and daughters:

His behavior became more extreme and unusual. He monitored Karen’s communications with her new partner, even bringing in phone records to show his therapist the frequency of their conversations and texts. At one point he drove 150 miles in an attempt to catch her with her lover. He also hired a private investigator to watch them. By fall 2009, his mental illness had so progressed that he was no longer able to perform his duties, and the City of Columbia fired him. Having lost the paychecks that assured his control over his life and circumstances, he began storing cash “in a very safe place.” Although a therapist warned him that arguing with his wife through his daughters would harm his relationship with them, “he would obsessively try to get information from [them] about [his wife].” He also began objectifying his daughters. Whereas before the strife with Karen, he had effusively praised his daughters, afterwards he harbored only negative thoughts about them. Mr. Kahler’s examining psychiatrist concluded that his “persisting extremely harsh, unforgiving, and condemnatory attitude” towards his daughters was “evidence of severe major depression and obsessive-compulsive/narcissistic personality deterioration.”¹⁸³

At the close of evidence, the court instructed the jury that they should only consider the psychiatric evidence presented to decide whether Kahler harbored intent to take life.¹⁸⁴ The jury convicted Kahler, and the trial proceeded to the penalty phase.¹⁸⁵ At this point, the court allowed him to freely present evidence of his poor

180. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1027.

181. *Id.* at ___, 140 S. Ct. at 1027.

182. Brief for Petitioner, *supra* note 6, at 6 (citations omitted).

183. *Id.* at 8–9 (citations omitted).

184. *Id.* at 11.

185. *Id.*

mental health in mitigation of his offense.¹⁸⁶ His expert, for example, opined that he lost control of his actions during the killings.¹⁸⁷ As the respondent's brief indicates, Kahler's expert notably did not assert that his ability to distinguish right from wrong was impaired;¹⁸⁸ rather, the expert's testimony would have been suited to the volitional test. After hearing this mitigating evidence, the jury nonetheless concluded that Kahler ought to be executed.¹⁸⁹

As the foregoing suggests, the case was a poor vehicle for demanding Kansas reinstate the right-and-wrong test. First, even when the case reached the Supreme Court, Kansas still argued in the alternative that denying Kahler access to the test was harmless error: "There was absolutely no limitation on Kahler's ability to present mitigating evidence, including evidence of insanity, at the penalty phase."¹⁹⁰ And yet, "Dr. Peterson [his expert] *never* testified that Kahler could not appreciate the wrongfulness of his conduct."¹⁹¹ Second, the jury of the penalty phase—the same jury that would have heard Kahler's evidence and arguments on the right-and-wrong test in the first phase—decided that Kahler deserved to die, even though impairment of his ability to appreciate the criminality of his crime was a factor they were expressly instructed to consider.¹⁹² Third, the facts of the case do not strike one as obviously exculpatory. Kahler, for example, deliberately spared the life of his young son while targeting the women of his family.¹⁹³ The biography Kahler's attorneys presented to the Supreme Court shows a man with a long history of treatment for personality disorder; at the same time, when the clinical lens is removed, the viewer sees a prideful, controlling misogynist.¹⁹⁴ Unsurprisingly, when the case later came to the Court, the Justices pressed the petitioner's attorney, Sarah Schrup, about whether Kahler's

186. Brief for the Respondent at 12, *Kahler*, 589 U.S. ___, 140 S. Ct. 1021 (2020) (No. 18-6135).

187. *Id.* at 17.

188. *Id.* at 10.

189. *Id.* at 9.

190. *Id.* at 55–56.

191. *Id.* at 55.

192. *Id.* at 56.

193. See *Kahler v. Kansas*, 589 U.S. ___, ___, 140 S. Ct. 1021, 1027 (2020) ("He shot Karen twice, while allowing his son to flee the house.").

194. Brief for Petitioner, *supra* note 6, at 6–8 ("Mr. Kahler demonstrated 'extreme inflexibility about social mores' and fixated on Karen Kahler's public role as a 'trophy wife.'").

hypothetical right-and-wrong defense would have had any chance of success had he been able to present it.¹⁹⁵

The Kansas Supreme Court had previously upheld the state's approach to insanity against constitutional challenge in *Bethel*.¹⁹⁶ As such, Kahler's appeal on this score fell flat.¹⁹⁷ The court upheld Kahler's conviction, and he successfully petitioned the Supreme Court of the United States for certiorari.¹⁹⁸

3. The Petitioner's Arguments Before the Supreme Court

The petitioner's brief contended that Kansas had to make the right-and-wrong test available to Kahler on pain of violating the Cruel and Unusual Punishments Clause and the Due Process Clause of the Constitution.¹⁹⁹ Because the Court ultimately held that Kahler had failed to preserve the former argument,²⁰⁰ and because Kahler's relevant positions on the history of the common law are confined to the latter argument, my review in this section will not include the Eighth Amendment issue.

According to the petitioner, "moral culpability" is an "essential prerequisite for punishment."²⁰¹ *This is the reason* that someone who "commits a harmful act with no rational appreciation that it is wrong"²⁰² should not be convicted—the latter fact alone is not the ultimate step in the petitioner's argument. Eliminating the right-and-wrong test of insanity, as Kansas did, means "an insane defendant's lack of moral culpability is now irrelevant" because "[a]ll that matters is whether he could form the minimal mental state required to commit the offense."²⁰³

The Fourteenth Amendment demands the states respect this "essential prerequisite for criminal punishment" because respect

195. Transcript of Oral Argument at 15–18, *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1021 (No. 18-6135).

196. 66 P.3d 840, 851 (Kan. 2003).

197. *Kahler v. State*, 410 P.3d 105, 125 (Kan. 2018).

198. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1027.

199. Brief for Petitioner, *supra* note 6, at 13–14.

200. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1027 n.4.

201. Brief for Petitioner, *supra* note 6, at 12.

202. *Id.*

203. *Id.* at 13.

for it is deeply embedded in the nation's history and traditions.²⁰⁴ The petitioner's best historical evidence begins with common law authorities from the seventeenth century. For example, he quotes the English Judge Michael Dalton: "If one that is 'non compos mentis' [mad], or an ideot, kill a man, this is no felony; for they have not knowledge of good and evill, nor can have a felonius intent, nor a will or minde to doe harm."²⁰⁵ The petitioner then plays a trump by quoting Blackstone: "[L]unatics or infants . . . are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong."²⁰⁶ The petitioner also quotes a less famous name, eighteenth century English scholar William Hawkins: "[I]t is to be observed that those who are under a natural disability of distinguishing between good and evil . . . are not punishable by any criminal prosecution whatsoever."²⁰⁷

The petitioner presents a raft of early American cases.²⁰⁸ For instance, he quotes an 1844 Massachusetts case: "A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing"²⁰⁹ In another example, he cites an early Alabama decision that asked whether the defendant "was incapable of judging between right and wrong."²¹⁰ Finally, to underscore the positive reception of the right-and-wrong test in nineteenth-century America, the petitioner quotes the Supreme Court praising the English judges in *M'Naghten* for their "deliberate and careful statement of the doctrine."²¹¹ According to the Court, one accused of crime must have "sufficient mind to comprehend the criminality or the right and wrong of such an act."²¹²

204. *Id.* at 12.

205. *Id.* at 21 (quoting 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 CAL. L. REV. 1227, 1235 (1966)).

206. *Id.* at 22 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *25, *195).

207. *Id.* at 22–23 (quoting Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV. 105, 113 (1924) (quoting WILLIAM HAWKINS, 1 PLEAS OF THE CROWN 1 (1716))).

208. *Id.* at 24–26.

209. *Id.* at 25 (quoting *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501–02 (1844)).

210. *Id.* at 26 (quoting *State v. Marler*, 2 Ala. 43, 48 (1841)).

211. *Id.* (quoting *Davis v. United States*, 160 U.S. 469, 479–80 (1895)).

212. *Id.* (quoting *Davis*, 160 U.S. at 484–85).

Kansas responded to this retrospective by arguing that English authorities were referring only to mens rea and that neither moral culpability nor the ability to distinguish right from wrong were necessary features of English prosecutions in the times before the Founding.²¹³ As Kansas thus urged, it agrees with tradition for the state to force defendants to target their mental health evidence at disproving mens rea.²¹⁴

In his reply brief, the petitioner parried this thrust by explaining that mens rea in the seventeenth century still referred to a defendant's guilty or wicked mind,²¹⁵ and that this encompassed both moral blameworthiness on the one hand and awareness or intent around what a person is doing on the other hand.²¹⁶ The petitioner pointed out that the former has no role in proving the mens rea of a crime in most states today.²¹⁷ Significantly for him, Kansas is thoroughly modern in this respect: it has a mens rea regime modeled on the Model Penal Code replacing morally loaded language like "intent to steal" and "malice" with bare psychological concepts like "knowledge" and "purpose."²¹⁸

While Kansas referenced Henry de Bracton's assertion that "madmen" should not be punished because they did not have "mens rea,"²¹⁹ The petitioner clarified that for Bracton, writing in the thirteenth century, "desire and purpose distinguish evil-doing" and "a crime is not committed unless the intent to injure (*voluntas nocendi*) intervene[s]."²²⁰ Similarly, Kansas underscored that Sir Edward Cook believed that a crime needs "felonious intent and purpose."²²¹ The petitioner admitted that Cook wrote this but added

213. Brief for the Respondent, *supra* note 186, at 19–26.

214. *Id.* at 19.

215. Petitioner's Reply Brief at 2, *Kahler v. Kansas*, 589 U.S. ___, 140 S. Ct. 1021 (2020) (No. 18-6135).

216. *See id.* (explaining that mens rea historically encompassed both the intention to perform a criminal act and evil will).

217. *Id.* at 7–8.

218. *Id.* at 8 (citing KAN. STAT. ANN. § 21-5202(a) (2020)).

219. Brief for the Respondent, *supra* note 186, at 21 (citing NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND, VOLUME ONE: THE HISTORICAL PERSPECTIVE* 27 (1968)).

220. Petitioner's Reply Brief, *supra* note 215, at 2 (quoting Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 985 (1932)).

221. Brief for the Respondent, *supra* note 186, at 21 (quoting *Beverley's Case*, (1603) 76 Eng. Rep. 1118, 1121, 4 Co. Rep. 123b, 124b).

that in the seventeenth century, “felonious” signified “villainy, wickedness, sin, crime” and “ill will, evil intention.”²²²

The petitioner concludes by turning the words of Kansas’s attorneys against them. Kansas urged that the historic notables marshaled by both sides never spoke of a right-and-wrong test.²²³ The petitioner responded that they would have no need for an “independent right-and-wrong test” because moral culpability was part and parcel of “*felonious and criminal* intention.”²²⁴ This last claim goes to the heart of the petitioner’s case to the Supreme Court: the common law’s moral culpability requirement can be tracked back from the present day to *M’Naghten*’s right-and-wrong test and then further back from there to an earlier, morally loaded conception of mens rea.²²⁵

4. The Majority Opinion

Justice Kagan’s majority opinion established that due process does not require states to keep up the right-and-wrong test of insanity.²²⁶ Her opinion takes the petitioner’s historical evidence for a moral culpability requirement charily, refusing to follow him to the conclusion that it is deeply embedded in common law tradition.²²⁷ For present purposes, we must remember that the majority evaluated the history with an aim to clarify constitutional law, not criminal law.²²⁸ Additionally, the Court’s decision did not simply rest on disagreement with the historical conclusions of the petitioner. Rather, the Court also relied (1) on authority holding that substantive criminal law should generally be left to the states,²²⁹ (2) on a history of state experimentation with the insanity rule

222. Petitioner’s Reply Brief, *supra* note 215, at 2 (quoting *Felonie*, MIDDLE ENG. DICTIONARY, https://quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED15545/track?counter=1&search_id=12741802 [<https://perma.cc/9VJB-FBDZ>]).

223. Brief for the Respondent, *supra* note 186, at 26 (quoting WALKER, *supra* note 219, at 64).

224. Petitioner’s Reply Brief, *supra* note 215, at 4 (quoting Brief for the Respondent, *supra* note 186, at 26 (emphasis added) (citation omitted)).

225. *Id.* at 5–6.

226. *Kahler v. Kansas*, 589 U.S. ___, ___, 140 S. Ct. 1021, 1024–25 (2020).

227. *Id.* at ___, 140 S. Ct. at 1027, 1034.

228. *Id.* at ___, 140 S. Ct. at 1024, 1037.

229. *Id.* at ___, 140 S. Ct. at 1027–28.

during the latter twentieth century,²³⁰ and (3) on a policy argument that a defense impacted by evolving philosophical and scientific understanding of the mind and morality should not be frozen in constitutional amber.²³¹

Indeed, the major premise of the Court's opinion appears to be the deference due to states in designing their substantive criminal law. "A challenge like Kahler's must surmount a high bar," the Court writes, "Under well-settled precedent, a state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²³² While the words of worthies ("Blackstone, Cooke, Hale, and the like") and early English and American judicial opinions can show such a tradition, the principle or rule must be "so old and venerable . . . as to prevent a State from ever choosing another."²³³

Relying on *Powell v. Texas*,²³⁴ the Court says such traditions are *rara avis* in criminal law.²³⁵ *Powell* decided whether Texas had to recognize chronic alcoholism as a defense to public drunkenness.²³⁶ The Court highlights language from the 1968 case that spoke to the need for states to adjust criminal law to changing philosophies and shifting policy priorities.²³⁷ Greatly buttressing its ultimate conclusion, the Court quotes the *Powell* plurality's proclamation that "doctrine[s] of criminal responsibility" must needs stay "the province of the States."²³⁸

In the case of the insanity defense, the Court recognized that it had twice before refused to constitutionalize any test of insanity.²³⁹ In *Leland v. Oregon*, the Court rebuffed the contention that due process required states to make the volitional test of insanity

230. *Id.* at __, 140 S. Ct. at 1028–29.

231. *Id.* at __, 140 S. Ct. at 1028.

232. *Id.* at __, 140 S. Ct. at 1027 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (citation omitted)).

233. *Id.* at __, 140 S. Ct. at 1027–28.

234. 392 U.S. 514 (1968).

235. *Kahler*, 589 U.S. at __, 140 S. Ct. at 1027 (citing 392 U.S. at 517, 533, 535–38).

236. 392 U.S. at 517 (plurality opinion).

237. *Kahler*, 589 U.S. at __, 140 S. Ct. at 1027 (citing *Powell*, 392 U.S. at 536).

238. *Id.* at __, 140 S. Ct. at 1027 (quoting *Powell*, 392 U.S. at 534, 536).

239. *Id.* at __, 140 S. Ct. at 1027.

available to defendants,²⁴⁰ and in *Clark v. Arizona* they permitted the Grand Canyon State to bar defendants from arguing that mental illness prevented them from appreciating the nature and quality of their actions.²⁴¹ Language from *Clark*, quoted by the Court, certainly heaped a tall hill for the petitioner to climb: “A State’s ‘insanity rule[] is substantially open to state choice.’”²⁴²

Aside the principle of deference to the states in substantive criminal law, the Court also tenders latter-day experimentation with the insanity defense against the claim that the right-and-wrong test belongs to a deeply embedded American tradition.²⁴³ Apart from the five states that shared Kansas’s mens rea approach, the Court points to states that have adopted the volitional approach in addition to a version of *M’Naghten*.²⁴⁴ Without denying *M’Naghten*’s pedigree, the Court reminds readers that at one time, in the days of *Leland* certainly, law reformers had pressed for courts and legislatures to adopt the volitional test as the state-of-the-art inhumane treatment of the mentally ill defendant.²⁴⁵ In this vein, the Court also makes hay of the diversity in states that understand right-and-wrong legally and those that take it morally.²⁴⁶ As we have seen in our review of the right-and-wrong standard, however, the Court overstates the degree and import of this variation.²⁴⁷

Closely related to its point about contemporary variation in approaches to insanity, the Court makes a policy argument to the effect that insanity law should be left to change in tandem with changes in medical knowledge and popular views of mental illness.²⁴⁸ “Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of criminal law, the ideas of free will and responsibility.”²⁴⁹ Hence, the Court tells us that defining insanity “is a project, if any is, that should be open to revision over time, as

240. 343 U.S. 790, 800–01 (1952).

241. 548 U.S. 735, 742 (2006).

242. *Kahler*, 589 U.S. at __, 140 S. Ct. at 1029 (quoting *Clark*, 548 U.S. at 752).

243. *Id.* at __, 140 S. Ct. at 1027.

244. *Id.* at __, 140 S. Ct. at 1036–37.

245. *Id.* at __, 140 S. Ct. at 1028–29.

246. *Id.* at __, 140 S. Ct. at 1029.

247. *See supra* section C.1.

248. *Kahler*, 589 U.S. at __, 140 S. Ct. at 1028–29.

249. *Id.* at __, 140 S. Ct. at 1037.

new medical knowledge emerges and as legal and moral norms evolve.”²⁵⁰

The foregoing three considerations militated against the Court ruling for the petitioner independently of the historical evidence that he assembled. Nonetheless, the Court did not ignore his evidence and dedicates a chunk of the opinion to explaining it away.²⁵¹ The Court acknowledges that mental illness has, since the Medieval Period, been a bar to criminal conviction;²⁵² however, it frames the issue as whether the right-and-wrong test was uniformly used before the founding.²⁵³ Reading the cases and famous treatises that preceded *M’Naghten*, the Court sees “early versions of not only Kahler’s proposed standard but also Kansas’s alternative.”²⁵⁴

The Court sees an early version of the Kansas approach in the work of Coke—“describ[ing] a legally insane person in 1628 as so utterly ‘without his mind or discretion’ that he could not have the needed *mens rea*.”²⁵⁵ Similarly, the majority claims that Hale “explained that insanity involves a total alienation of the mind or perfect madness,’ such that a defendant could not act ‘*animo felonico*,’ meaning with felonious intent.”²⁵⁶ In the same vein, the Court relies on an eighteenth-century case, *Rex v. Arnold*: “If a man is ‘deprived of his reason, and consequently of his intention, he cannot be guilty.’”²⁵⁷

250. *Id.* This policy argument is half a red herring. As I will discuss at length in my conclusion, it is true that a ruling for *Kahler* would force states to offer *M’Naghten*’s normative prong to mentally ill defendants, but it is not true that states would not be able to provide additional avenues for presenting mental health evidence in court.

251. *Id.* at ___, 140 S. Ct. at 1029–30.

252. *See id.* at ___, 140 S. Ct. at 1030. “So Kahler can prevail here only if he can show (again, contra *Clark*) that due process demands a specific test of legal insanity—namely, whether mental illness prevented a defendant from understanding his act as immoral.” *Id.* at ___, 140 S. Ct. at 1031.

253. *Id.* at ___, 140 S. Ct. at 1032.

254. *Id.*

255. *Id.* (quoting SIR EDWARD COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND § 405, at 247b (1628)).

256. *Id.* (quoting SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN, 30, 37 (Sollom Emlyn ed., 1st ed., the Savoy, London, E. Nutt, R. Nutt & R. Gosling 1736)).

257. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1033 (quoting 16 How. St. Tr. 695, 764 (1724)).

5. A Brief Criticism of the Majority Opinion

The purpose of this article is to draw a lesson about criminal law from the able briefing and research by all involved in the *Kahler* decision. I do not contend that the Supreme Court's constitutional ruling is incorrect. On the contrary, there was ample precedent demanding the federal courts give states freedom to independently define their substantive criminal law and the defense of insanity in particular.²⁵⁸ That said, the Court's treatment of the petitioner's historical evidence suffers from an instructively anachronistic misunderstanding of mens rea that warrants further discussion here.

To begin, the Court frames the historical question in a manner that distorts the root of the petitioner's position. Justice Kagan writes, "He must show that adopting the moral-incapacity version of the insanity rule is not a choice at all—because, again, that version is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²⁵⁹ But the petitioner was not arguing that the "moral-incapacity version of the insanity rule" or any insanity rule for that matter was a distinct part of the law in the seventeenth or eighteenth. These labels were only devised in the nineteenth century, with *M'Naghten* the primary and most influential example of their appearance. The petitioner writes, "These fundamental beliefs about insanity and culpability continued into the Nineteenth Century, though now with additional labels formalizing the affirmative defense that had been percolating in English law for hundreds of years."²⁶⁰

According to the petitioner, before the affirmative defense was formalized, a crime could not be committed when the defendant lacked the ability to appreciate that what he did was wrong.²⁶¹ The common law did not deal with this fact through the device of a defense with its own elements distinct from the crime charged; why

258. See *id.* at ___, 140 S. Ct. at 1028–29 (collecting cases).

259. *Kahler*, 589 U.S. at ___, 140 S. Ct. at 1032 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (citation omitted)).

260. Brief of Petitioner, *supra* note 6, at 23.

261. *Id.* at 18–20 (discussing the moral culpability principle in the context of various civilization and faith traditions).

would it have done so when it was implicit in the concept of mens rea that the defendant acted in a morally blameworthy fashion?²⁶²

The petitioner's key historical claim is that at all relevant times, the common law has hewed to a *moral culpability principle*—not necessarily the right-and-wrong test of insanity, but a principle that will not allow the morally blameless to be convicted.²⁶³ In earlier times, lack of moral culpability negated mens rea. Yet after *M'Naghten*, the principle found a new vehicle in the canonical right-and-wrong test of insanity. It continued to operate under this heading long after it was evicted from its original doctrinal home (cast out when mens rea was psychologized and demoralized during the nineteenth and twentieth centuries).

Because the Court focuses on spotting the canonical right-and-wrong test rather than following the moral culpability principle through the ages as the petitioner would have had it do, it underestimates the force of the petitioner's argument from tradition. Looking to the common law eminences, it finds references to mental illness negating mens rea and satisfies itself that Kansas's "mens rea approach" has a solid match in seventeenth- and eighteenth-century practice.²⁶⁴

In this respect, the majority opinion illustrates the same anachronistic take on mens rea that Kansas's brief exhibits. Professor Michael Corrado pegged this error in the Kansas brief in an article he published last year.²⁶⁵ He sets out the historically mistaken reasoning as follows:

1. It is consistent with the history and tradition behind the insanity defense to suppose that mental illness is relevant to criminal responsibility if, but only if, it is incompatible with *mens rea*.
2. The *mens rea* approach adopted by Kansas permits the fact of mental illness to be admitted to rebut evidence of *mens rea*.
3. Thus Kansas's *mens rea* approach is consistent with the history and tradition behind the insanity defense.²⁶⁶

262. See Petitioner's Reply Brief, *supra* note 215, at 4 ("Yet Hadfield merely articulated what was already implicit (and sometimes explicit) in the common-law concept of mens rea: Mere intention, without moral understanding, was not enough to convict.").

263. See *supra* notes 6–7 and accompanying text.

264. See *supra* notes 51–56 and accompanying text.

265. Michael Louis Corrado, Kahler v. Kansas: *Insanity and the Historical Understanding of Mens Rea*, 32 NAT'L L. SCH. INDIA L. REV. 1, 21–22 (2020).

266. *Id.*

The false *quod erat demonstrandum*, Corrado explains, is “an example of what logicians call the fallacy of equivocation.”²⁶⁷ The phrase “mens rea” means something different in “1” than it does in “2”:

[T]he notion of *mens rea* has changed over the years from the broad idea that a blameworthy state of mind of almost any sort was sufficient for criminal liability to the contemporary more narrow notion of *mens rea* as being whatever state of mind is an element of the definition of the crime.²⁶⁸

To be fair, the majority dedicates its eighth footnote to acknowledging and responding to the criticism that mens rea, at the old common law, implicated moral blameworthiness.²⁶⁹ The footnote claims that the common law treatise writers frequently spoke of mens rea without speaking about morality or culpability; however, it does not provide specific citations.²⁷⁰

A reader of Corrado’s manuscript can see the evidence that the justices are mistaken.²⁷¹ He points out that as late as the 1950s, one could still see the courts putting a moral gloss on a term like “maliciously” in a statute.²⁷² In that decade, an English trial judge told his jury, “‘Malicious’ for this purpose means wicked—something which he has no business to do and perfectly well knows it. ‘Wicked’ is as good a definition as any other which you would get.”²⁷³ No less an authority than Dressler tell us of the older definition of “mens rea,” “defined as ‘a general immorality of motive,’ ‘vicious will,’ or an ‘evil-meaning mind.’”²⁷⁴ As seen in the foregoing discussion of the petitioner’s brief,²⁷⁵ when Latin words like *animo felonico* are translated to modern English, their moral import is unmistakable.

267. *Id.* at 20.

268. *Id.* at 22.

269. *Kahler v. Kansas*, 589 U.S. ___, ___, 140 S. Ct. 1021, 1032 n.8 (2020).

270. *See id.* at ___, 140 S. Ct. at 1032 n.8.

271. Corrado, *supra* note 265, at 22–23.

272. *Id.* (citing *Regina v. Cunningham* [1957] 41 AC 155 (Eng.)).

273. *Cunningham*, 41 AC, at 160.

274. DRESSLER, *supra* note 12, § 10.02[B].

275. *See supra* notes 224–25 and accompanying text.

II. ANALYSIS

My thesis is that moral culpability is a basic premise of criminal liability in common law countries that now lives on in every jurisdiction that retains the right-and-wrong test of insanity. Identifying moral culpability—rather than the ability to distinguish right from wrong—as the basic principle is doctrinally appropriate because it tracks the principle through its historical migration from the mens rea concept to the insanity concept. As such, treatises and hornbooks should recognize it as a fundamental principle in the same company as voluntariness and ex ante criminalization. Like voluntariness, it is normally presumed and can only be rebutted under special circumstances. The moral culpability principle/presumption can be broken down into two further assumptions: criminal law presumes that those who violate criminal law are morally blameworthy because it assumes (1) that defendants are morally responsible agents and (2) that violations of criminal law are immoral. As we will see, a successful right-and-wrong insanity defense rebuts the former assumption; the latter assumption is irrebuttable—a hardwired feature of criminal law’s self-understanding.

A. *Old Wine in New Wine Skins*

The right-and-wrong prong of *M’Naghten* formalized a defense to criminal liability that earlier decisions and commentary had treated as a fact negating mens rea. As its eager reception on both sides of the Atlantic indicates, *M’Naghten*, in the best common law tradition, embodied rules and practices already implicit in prior cases.²⁷⁶ The evidence assembled in Kahler’s Supreme Court briefing, reviewed at length above, is unmistakable: the reason that *M’Naghten*’s right-and-wrong test was a restatement and not a revolution was that mental illness had always operated to negate “knowledge of good and evil,” “felonius intent,” or “the will or minde to doe harm.”²⁷⁷

Seen aright, classical common law mens rea has two components corresponding to *M’Naghten*’s two prongs. This is demonstrated by

276. See *supra* note 85 and accompanying text.

277. See *supra* note 206 and accompanying text.

how the 1931 Mississippi Supreme Court treated mens rea when it had to decide whether Mississippi could prevent a murder defendant from pleading and proving insanity.²⁷⁸ In that day, the Magnolia court was still very much a believer in the wisdom of the common law and the “better” view.²⁷⁹ As oracles of the brooding omnipresence, the justices explained that the reasons for allowing a defense of insanity were “obvious” because mental disease or defect could disprove the mental part of a crime in *two* ways:

One of the essential ingredients of crime is intent. Intent involves an exercise of the reasoning powers in which the result of the criminal act is foreseen and clearly understood. Another essential element of crime is animus. Animus involves an exercise of reasoning powers, in which the result of the criminal act is recognized as being contrary to the rules of law and justice. If a person is mentally unsound, one or both of these elements may be, and usually are, wanting.²⁸⁰

As the Nevada Supreme Court put it, “Historically, the mens rea of most crimes, particularly specific intent crimes, incorporates some element of wrongfulness as that term is used in . . . *M’Naghten*.”²⁸¹ Yet in most states today, especially states influenced by the Model Penal Code, only “intent” remains a part of mens rea.²⁸² At the same time, “animus”—a defendant’s knowledge that what he did was wrong—did not disappear completely. Rather, it is presumed and can only be rebutted by establishing an insanity defense.

Even today, there are a small number of states that have retained enough of the common law of crimes for vestiges of moral blameworthiness or “animus” to remain part of the mens rea element of certain crimes. Michigan, for example, continues to follow the common law definition of larceny as a trespassory taking and carrying away of the chattels of another *with the intent to steal*.²⁸³

One way to understand the journey of the moral blameworthiness requirement from the “animus” in mens rea to the insanity

278. See *Sinclair v. State*, 132 So. 581 (Miss. 1931).

279. For example, it explains that the Due Process Clause binds legislatures not simply because the Supreme Court of the United States held that it does but also because it is “supported by the better reason.” See *id.* at 584.

280. *Id.* (quoting GEORGE A. SMOOT, LAW OF INSANITY 372 (1929)).

281. *Finger v. State*, 27 P.3d 66, 84 (2001).

282. See generally *supra* section I.B.

283. *People v. March*, 886 N.W.2d 396, 404 (Mich. 2016).

defense of today is to consider whether the petitioner could have made the arguments that he did in a world where Kansas had abolished the insanity defense but retained a morally loaded notion of mens rea. For example, had Kansas never adopted a schedule of mens rea concepts from the Model Penal Code and instead kept the common law requirements of “malice aforethought”²⁸⁴ for murder and “intent to steal” for larceny, the state could abolish the free-standing insanity defense without precluding defendants like Kahler from arguing that mental illness stopped them from appreciating the wrongfulness of their actions. Indeed, insofar as Kansas expressly allows defendants to present expert mental health testimony to prove they “lacked the culpable mental state required as an element of the crime charged,”²⁸⁵ the letter of Kansas statute would privilege defendants to argue that a disease restrained them from acting, say, maliciously, because it forestalled them from knowing that their conduct was wrong. In that alternate universe, Kahler’s argument would wither at the root because the moral culpability principle would not be offended by a trial without a standalone insanity defense.

As late as the 1930s, high court judges could still speak of “the essential elements of volition, animus and intent” in crime.²⁸⁶ In describing how the courts should respond to claims of mental illness, *M’Naghten* formalized a defense that corresponded to the latter two elements (the irresistible impulse test could be thought of as formalizing a path to negating “volition”). I cannot stress enough that *M’Naghten*’s formalization was nothing more than a reverse statement of known principles. Whereas the law had been saying for centuries that three times four is twelve, it was now, for the better tuition of its listeners, explaining that twelve divided by four is three.

284. It must be kept in mind that modern courts have reduced the meaning of “malice” so that it is coextensive with the Model Penal Code mental states like “knowledge” and “purpose,” though some states still insist that the word has normative content. Compare *People v. Woods*, 331 N.W.2d 707, 727 (Mich. 1982) (explaining malice aforethought as simply “the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm”), with *Lowery v. State*, 317 So. 2d 360, 361 (Ala. 1975) (approving a jury charge that explained “malice means a *wrongful* act purposefully done” (emphasis added)).

285. KAN. STAT. ANN. § 21-5209 (2020).

286. *Sinclair v. State*, 132 So. 581, 589 (Miss. 1931) (Griffith, J., concurring).

Of course, in the decades that followed *M'Naghten*, the insanity defense persisted while the moral element fell out of the definition of mens rea. Observing the victory of the latter trend, commentators insisted, sagely, that mens rea had nothing to do with moral blameworthiness. Simultaneously, they mistakenly omitted moral culpability from enumerations of criminal law's basic premises, overlooking its survival in the law of insanity. To best capture the past and present of criminal law, everyone writing about criminal law should acknowledge the nomadic durability of the moral culpability principle.

B. *Two Presumptions*

Criminal law assumes that individuals are morally responsible for their voluntary actions; it assumes that they are morally blameworthy when those actions violate criminal law. The courts will entertain challenges to the former premise under the rubric of insanity but will not suffer attacks on the latter.

In everyday life, we take it that mentally well adolescents and adults who do something wrong on purpose are morally blameworthy for what they do. The seventh-grade bully who mocks the chubby eighth grader for his size and gets stuffed in a trash barrel by his tormentee is morally blameworthy and has gotten what he deserved. A grown man who cheats on his wife with his coworker has done something wrong and is denying a plain fact if his psychologist tells him he ought to feel guilty about it. Moral responsibility is the default for every person who seems to possess a basic set of human mental faculties.

We also assume that the actions of others are attributable to their free choices. We take it for granted that it was up to Jane whether she went to Quiznos or Subway, whether she wore a red blouse or a blue one. We only drop this assumption in extraordinary circumstances. If Jane is suffering from a grand mal seizure, if she is sleepwalking, or if she tells us that she is hearing voices from invisible speakers, we relax our commitment to the assumption that Jane does what she does because she chooses to do so. Notably, our everyday assumption that Jane's choices explain her actions is not disturbed by philosophical arguments that Jane actually has no free will in a world governed by the laws of physics

or that she chooses red shirts instead of blue because of facts about her genes and upbringing.

The law also assumes that what criminal defendants have done they did voluntarily. It will not work in court to bring in neurologists to testify to the purely physical causes of your healthy client's behavior or a philosopher to propound that voluntary action is impossible in a deterministic universe. If you want to show that Jane, for example, injured the baby involuntarily, you need to show that she was sleepwalking when she picked him up from his crib or that she fell faint from hypoglycemia while taking him to the high-chair. Similarly, the law assumes that Jane is morally responsible for her actions. It will not do to argue that Jane cannot be held morally responsible for embezzling from the apartment complex she manages because circumstances conspired to bring Becky the shoplifter to her school in the ninth grade to tutor her in theft. The only way that Jane can establish that she was not morally responsible for pocketing the rent checks is to show that mental illness kept her from understanding that what she did was wrong.

To be clear, the law generally will not recognize a hypothetical individual who has no mental illness but still does not know that what he does is wrong.²⁸⁷ While this fact may seem to vitiate the claim that the law recognizes a moral culpability principle, in this respect, the law mirrors common sense which treats every mentally healthy adult as morally responsible for his or her actions.

The law's assumption that criminal defendants are morally responsible for what they do voluntarily and with scienter is rebuttable via *M'Naghten's* normative prong. On the other hand, the law's further assumption that crimes are actually immoral actions is irrebuttable. However indefensible it may seem to hold that every action defined to be criminal in the modern regulatory state is *actually* immoral, the *assumption* that they are so is built into the definition of criminal law as a category distinct from the civil law.²⁸⁸

287. But consider the case of the accused thief who lacked intent to steal because he believed that the property he took was abandoned or belonged to him. See *generally March*, 886 N.W.2d at 404 (explaining common law larceny).

288. See, e.g., Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 487 (2004) (“[C]riminal law categorically prohibits the actor from doing ‘immoral’ things whereas tort law,

When I affirm that criminal law presumes that transgressions are morally blameworthy, I do not mean to deny that some of those transgressions are actually morally blameless. One can defend the view that—in a just, liberal, and democratic society—all actions that society sees fit to label off-limits as criminal are ipso facto immoral,²⁸⁹ but I have no need to defend this strong claim. On the contrary, when I say that criminal law presumes that transgressions are morally blameworthy, I am only describing criminal law's conception of itself.²⁹⁰ The sincere writers of a mirthless sitcom take it that the show is a comedy, not a drama. In the same way, society conceives of crimes as moral transgressions, even when a critical eye can see how risible is the pretense that failure to signal a lane change and growing a lone marijuana plant in a pot are immoral.

Saying that criminal law conceives of itself as applying to moral wrongs is an instance of what Liam Murphy calls an “interpretive legal theory.”²⁹¹ An interpretive legal theory “aims to fit and justify at least the main features of an actual body of legal doctrine.”²⁹² In the case of criminal law, the classic *malum in se* crimes fill that core; this is obvious from considering the focus of hornbooks and casebooks on homicides, assaults, thefts, and arson rather than possession of controlled substances and traffic offenses. As the renowned Jerome Hall characterized the law of crimes, the “*most defensible position . . .* is that the more general doctrines of the criminal law are founded on principles of moral culpability.”²⁹³

In tandem, the law's two assumptions that criminal defendants are morally responsible agents and that the actions labeled crimes

through the general negligence prohibition, requires the actor to engage in analyses of future results of her behavior.”).

289. E.g., Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 MICH. L. REV. 1415, 1426 (1990) (reviewing JOEL FEINBERG, *HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW* (1990)) (sketching a view according to which violating the laws of a fair political system is pro tanto wrong because the violator accumulates advantages that the obedient do not get to enjoy in their more limited sphere of action).

290. See Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 971 (1943) (“But in penal law . . . the immorality of the actor's conduct is essential—whereas pecuniary damage is irrelevant.”).

291. Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 UNIV. TORONTO L.J. 453, 454 (2020).

292. *Id.* at 454.

293. Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 771 (1943) (emphasis added).

are in fact immoral embody the moral culpability principle in today's criminal law. Today, a defendant can negate this principle and avoid liability by showing that she was not a morally responsible agent because a mental disease or defect prevented her from recognizing that her conduct was wrong. In former times, it would have been possible to negate moral culpability by refuting mens rea. For example, the common law used to construe claims of self-defense as negating malice;²⁹⁴ by contrast, an attorney arguing self-defense today does not deny that his client killed with mens rea (that he took life intentionally or knowingly) but aims to prove up the elements of the separately defined affirmative defense. By my thesis, the fact that moral culpability is no longer part of mens rea does not change the fact that it is a basic premise of criminal law that lives on in a presumption rebuttable by meeting *M'Nahgten's* normative prong.

C. Implications for Law Reform

Once we recognize that the right-and-wrong test is the modern vehicle for the hoary moral culpability principle, we can think clearly about the function of the insanity defense and how to accommodate the science of the mind in the court room. Before *Kahler* was decided in March, I had the privilege of watching students at my law school moot the case. Invariably, those representing the petitioner always circled back to a defense of the moral culpability principle; they did not argue from the science of mental illness or otherwise assert that respect for medical knowledge required keeping the right-and-wrong test. To be sure, the students' approach matched that of the petitioner's real attorneys.

We can learn from the strategies of the petitioner's real and imaginary advocates to separate the right-and-wrong test of insanity from what ought to be the law's ongoing efforts to respect the facts uncovered by psychologists, psychiatrists, and neuroscientists. With the law as it stands, can a person be mentally ill, not insane, but innocent? No, in every state, save perhaps New Hampshire with its product test, mental illness per se is not a defense to

294. See Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627, 666 (2009) ("Fourteenth century cases on self-defense in homicide treated it as an excuse negating malice.").

prosecution.²⁹⁵ This need not be the case going forward, but in order to both respect our legal traditions and accommodate scientific advances, it is time to separate the traditional insanity defense from the broader treatment of mental illness.

To begin, judges at criminal trials should receive expert testimony on mental health on the same terms that they entertain other expert witnesses. In principle, the law should not refuse to take account of the same observations and tested theories that businesswomen, scientists, and detectives reason with in other serious areas of life.²⁹⁶ It is true that the law of evidence in common law countries embodies, to say the least, a *stylized* epistemology. Absolute rules forbidding the reception of hearsay and propensity evidence, for example, are epistemologically grotesque.²⁹⁷ At the same time, they can be defended as concessions to the frailty of lay jurors, equity in the adversary system, and the need to confine the factual inquiry at a trial to the four walls of the courthouse and a time frame of (we hope) not more than a few weeks.²⁹⁸ However, the law's refusal to weigh the facts using the pounds and ounces employed in common life, business, and the other professions can only go so far before its claim to deal with the facts and the truth becomes worthy of mockery.

It follows that those states that have categorically refused to let criminal defendants use evidence of mental illness to negate the elements, including the mental elements, of the crime charged are taking the wrong tack. Whether or not a man knew that his actions would result in his companion's death is a *fact*, a psychological fact, but a fact nonetheless. The law cannot afford a wholesale rejection

295. See *supra* notes 87–90 and accompanying text.

296. Cf. Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) (“For the social epistemologist, . . . the law of evidence is not a ‘different sort of thing’ from any other practice that has as one of its elements the production of knowledge.”) (emphasis omitted).

297. See, e.g., Kenneth Culp Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689, 690 (1964) (“The detective, the banker, the physicist, the economist, the physician, and the statistician all would consider it silly to use a hearsay rule. Can you imagine the President or the State Department dealing with some important issue of foreign policy, excluding from consideration reports from around the world on the basis of the hearsay rule?”).

298. See, e.g., Allen & Leiter, *supra* note 296, at 1500 (explaining that “the law of evidence . . . operates within a distinctive social institution (the trial and the adversarial system more generally), rather than within the laboratory or the library”).

of evidence bearing on that fact without alienating itself from the truth. Justified fears that defendants or prosecutors will bamboozle ignorant jurors with credentialed, technical testimony can be allayed by applying the *Daubert*²⁹⁹ factors.

If we can think our way past the idea that mental health evidence must always come in through the insanity defense, we can see that it bears on a voluntariness as well. If every crime requires a voluntary act, expert testimony that we think of as going to the irresistible impulse test ought to be admissible whether or not the jurisdiction has adopted that definition of insanity.

With respect to the moral culpability principle, we should recognize that *M'Naghten* passed the baton from mens rea doctrine to the insanity test. To indicate that the purpose of the right-and-wrong test is to save the morally blameless, it could be defined as a test of "criminal responsibility." Codes could be rewritten to define a criterion of "criminal responsibility" that excludes children of tender years and those who, by reason of mental disease or defect, are unable to substantially appreciate the wrongfulness of their actions. Once the defendant had placed her criminal responsibility at issue by coming forward with some evidence that mental disease or defect kept her from knowing right from wrong, the prosecution would have the burden of proving beyond a reasonable doubt that the defendant met this basic premise of criminal liability.

With these changes in place, a state would be free to experiment with a new doctrinal vehicle for receiving evidence on mental health. This new option could break free from the historical baggage surrounding the insanity test, including inaccurate stereotypes about the appearance of mental illness connoted by the word itself.³⁰⁰ When the Court of Appeals for the District of Columbia issued the *Durham* opinion, the judges reached in this direction.³⁰¹ While the product test, deprecated as unworkably open,³⁰² did not

299. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993).

300. Perlin, *supra* note 162, at 1421–22 ("Insanity defense decisionmaking [sic] is often irrational. It rejects empiricism, science, psychology, and philosophy, and substitutes myth, stereotype, bias, and distortion.")

301. *See supra* note 157 and accompanying text.

302. *E.g.*, *United States v. Freeman*, 357 F.2d 606, 621 (2d Cir. 1966) ("The most significant criticism of *Durham*, however, is that it fails to give the fact-finder any standard by

catch fire, it might be possible for a legislature, by consulting experts and the DSM, to define which mental health disorders should support an acquittal if they caused or substantially influenced the defendant's criminal behavior. To be clear, this would be a new defense—not "insanity" and not the criterion of "criminal responsibility" outlined above. Ultimately, whether such a new affirmative defense should be created and how it should function are questions of policy, science, and justice beyond the scope of this article.

D. *Implications for Philosophical Analysis of Criminal Law*

While moral culpability is a basic premise of criminal liability, it does not follow that every action defined as a crime in the United States or other common law nations is actually morally blameworthy. Those philosophers who believe that it is wrong to punish someone for an action that is not morally blameworthy should not stop pressing for law reform. Unless we accept that violations of the law are morally culpable per se, then there is likely room to decriminalize many morally innocent regulatory, traffic, and controlled substance offenses.

I have argued that criminal law understands its own subject matter as serious, morally relevant wrongs. The extent that doctrine in its details actually manages to make this true is a proper subject of philosophical inquiry. Nothing I have said should foreclose the debate about whether states that allows prosecutions for criminal negligence are punishing the morally blameless; nothing I have said settles the dispute over how to define the law of complicity, or that of attempts, in a way that spares she who is without moral guilt.³⁰³

Doctrine says that duly convicted criminals are morally blameworthy for their actions; if they were not morally responsible agents, they could show as much by raising a successful *M'Naghten* defense. But doctrine is one thing, and the moral facts are another. Consider an analogy from contract law. Setting aside unilateral contracts for a moment, doctrine requires that there be an

which to measure the competency of the accused.”).

303. These debates are familiar to those who follow the literature in this area. *E.g.*, ALEXANDER & KESSLER FERZAN, *supra* note 8, at 70, 198, 223 (examining criminal liability for negligence, attempts, and complicity from a retributivist perspective).

exchange of promises to form a contract.³⁰⁴ Whether the various rules and exceptions of contract law—from the doctrine of consideration on down to the mailbox rule—actually ensures that all contracts embody an exchange of promises is an open question. Put differently, the best interpretive theory of contract recognizes an exchange of promises as a fundamental premise,³⁰⁵ but in reality, the law may enforce many contracts that do not involve an actual exchange of promises.³⁰⁶ A critic of contract law—not wedded to expounding existing doctrine but aiming for an external appraisal—could point out how contract law, in its details, fails to enforce all and only genuine exchanges of promises.³⁰⁷ If my position in this article is correct, retributivist philosophers of criminal law are in the same position—insisting that the law alter to respect a principle that the best interpretive theory already places among its axioms.

CONCLUSION

I owe the insights in this article to the fine historical research of the petitioner's attorneys. Reading their briefs and hearing their arguments channeled through the moot court competitors at Chicago-Kent College of Law, I awakened from my dogmatic slumber. I had hitherto accepted what the savvy philosophers and authoritative treatise writers both agreed upon: perhaps criminal law should apply only to the morally culpable, but contemporary doctrine contains no such requirement. I now know different: moral culpability is a basic premise of criminal prosecutions under the common law; it was formerly part of the concept of *mens rea*; and it is now presumed unless rebutted by showing that mental disease

304. See RESTATEMENT (SECOND) OF CONTS. § 75 cmt. a (AM. L. INST. 1981) (“In modern times the enforcement of bargains is not limited to those partly completed, but is extended to the wholly executory exchange in which promise is exchanged for promise.”).

305. *Id.*

306. For example, under the objective theory of contract, a person need not have actually made a promise if a reasonable person in the shoes of the opposite party would think that a promise had been made to him. See *id.* § 24 (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”).

307. See, e.g., Daniel P. O’Gorman, *Redefining Offer in Contract Law*, 82 MISS. L.J. 1049, 1075–76, 1079–80 (2013) (struggling to make sense of how contract law defines an offer).

or defect kept the defendant from knowing that his or her conduct was wrong.

It follows from this that the treatises should be updated to reflect an additional basic principle of criminal liability. Teaching ought to follow suit, and students ought to be taught that—while the Latin translation of “mens rea” is indeed inaccurate—moral blameworthiness has not vanished from criminal law but lives on in the right-and-wrong test of insanity. The practical payoff of all this will be a right understanding of what the right-and-wrong test is actually doing apart from serving as a vehicle for putting a defendant’s psychiatrist on the stand. We should acknowledge that the moral culpability principle, like the voluntariness principle, holds an independent plot of ground. *M’Naghten*, therefore, should be left in peace to dig its own potato, and any experimentation with the science of mental health in the court room should be carried out in new soil.