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Kahler v. Kansas: How The Current Insanity Defense Regime Underserves Postpartum Psychosis Defendants, How the Supreme Court Failed To Act, And How Now is the Perfect Time to Implement a Gender-Specific Postpartum Defense

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COMMENT

KAHLER V. KANSAS: HOW THE CURRENT INSANITY DEFENSE REGIME UNDERSERVES POSTPARTUM PSYCHOSIS DEFENDANTS, HOW THE SUPREME COURT FAILED TO ACT, AND HOW NOW IS THE PERFECT TIME TO IMPLEMENT A GENDER-SPECIFIC POSTPARTUM DEFENSE

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I. INTRODUCTION

"Mental health needs a great deal of attention. It's the final taboo and needs to be faced and dealt with."
– Adam Ant

This simple and powerful statement undoubtedly reflects what is now the chaos-ridden insanity jurisprudence in this country.[1] There is little agreement among the individual states about how or even whether to implement a uniform insanity defense regime,[2] and the remarkable unpredictability of insanity verdicts hints that there is a deficiency in the system as it currently exists.[3] Today, the majority of American jurisdictions implement the *M'Naghten* standard of insanity, or some modified version of this classic formula,[4] to determine whether a criminal defendant may assert an insanity defense and may subsequently be absolved of guilt because of his or her mental disturbance.[5] The test examines whether the defendant possessed the cognitive capacity to fully understand the essence of the criminal act being performed *or* whether they could understand that their

1. *See, e.g.*, Michael L. Perlin, "*She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense"*, 10 WM. & MARY J. WOMEN & L. 1, 5 (2003) ("We may take it as a given that our insanity defense jurisprudence is incoherent.").

2. *See, e.g.*, Beatrice R. Maidman, Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1840 (2016) (listing the varieties of standards implemented by the states).

3. *See id.* at 1833 (explaining the unpredictability of legal insanity cases leading to inconsistent application of defenses, indicating a problematic criminal justice system); *see also* Louis Kachulis, Note, *Insane in the* Mens Rea*: Why Insanity Defense Reform Is Long Overdue*, 26 S. CAL. REV. L. & SOC. JUST. 245, 271 (2017) ("In its current state, the insanity defense is incredibly problematic. In addition to not adequately satisfying its primary rationale—to provide reprieve from liability for those who cannot be held blameworthy for their actions—it is impractical and outdated. The mentally ill are not served by the insanity defense, and the public is left confused and unclear about the defense and how it operates.").

4. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1046 (2020) (Breyer, J., dissenting) ("Seventeen States and the Federal Government use variants of the *M'Naghten* test, with its alternative cognitive and moral incapacity prongs. Three States have adopted *M'Naghten* plus the volitional test. Ten States recognize a defense based on moral incapacity alone.").

5. *See* Kachulis, *supra* note 3, at 247 ("The underlying rationale in the insanity doctrine is that those who are mentally ill and cannot fully comprehend their actions should not, in justice, be held responsible for those actions."); Maidman, *supra* note 2 at 1833 ("The legal insanity defense is generally based on the theory that those who suffer from particular mental diseases or defects cannot be held accountable for their actions.").

behavior was immoral based on some well-accepted societal standard.[6] A minority of states implement the American Law Institute's less rigid Model Penal Code assessment of insanity,[7] while others instead callously prevent defendants from asserting an affirmative insanity defense altogether.[8] In 2020, the Supreme Court held that Kansas and other states that share similar ideologies are not required by the United States Constitution to include the moral capacity prong of this longstanding *M'Naghten* insanity defense formula.[9] They may instead establish distinct parameters for the defense, including specifically eliminating the affirmative component of said defense, without offending the constitutional protections afforded by the Due Process Clause of the Fourteenth Amendment.[10] This country typically has an enduring tradition of reserving punishment only for those who act with moral blameworthiness.[11] Kansas's circumvention of the existing moral capacity standard by only employing the *mens rea* element of the *M'Naghten* formula "violates the deeply rooted principle that criminal liability cannot be assigned to a defendant who, as a result of mental illness, lacks the capacity to understand that his actions were wrong."[12] The Supreme Court's failure to set a constitutional standard that mandates the availability of an affirmative insanity defense and, at the very least, considers moral cognizance in a sanity determination ultimately abolishes the right of

6. *E.g.*, Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 CASE W. RSRV. L. REV.19, 34–35 (2007) (explaining the two ways a defendant suffering from mental illness could be found insane under the *M'Naghten* test).

7. *E.g.*, Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 WM. & MARY L. REV. 699, 725 (2008) (describing how the MPC standard is less stringent than the *M'Naghten* test).

8. IDAHO CODE ANN. § 18-207 (West 1996); KAN. STAT. ANN. §§ 22-3219 (West 1995), 21-5209 (West 2011); MONT. CODE ANN. § 46-14-102 (West 2015); UTAH CODE ANN. § 76-2-305 (West 2016); ALASKA STAT. §§ 12.47.010, 12.47.020 (West 1982).

9. *Kahler*, 140 S. Ct. at 1037 ("We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong.").

10. *Id.* (holding the Due Process Clause does not require Kansas to acquit a criminal defendant because mental illness interfered with their ability to differentiate between right and wrong and, instead, Kansas may decide how to regulate their insanity defense).

11. *See, e.g.*, Eric Roytman, Kahler v. Kansas*: The End of the Insanity Defense?*, 15 DUKE J CONST. L. & PUB. POL'Y SIDEBAR 43, 43 (2020) (explaining how English and American courts have historically refused to assign criminal culpability to those whose mental illness prevents them from telling the difference between right and wrong).

12. *Id.* at 54; *see also* Alisha Marie S. Nair, *Can the Criminally Insane Commit a Crime? The Supreme Court and* Kahler v. Kansas, 35 CRIM. JUST. 15, 16 (2020) ("Since pre-formation of the United States of America, it has remained a constant theme that mentally insane persons are not to be punished to the same degree as those individuals able to distinguish right from wrong during the commission of their offenses.").

acquittal classically available for defendants who meet the well-established requirements of criminal insanity.[13]

This vulnerable population includes women whose criminal behavior manifests in response to postpartum psychosis. The temporary condition presents itself after the birth of a child and causes some women to experience emotional instability, disorientation, delusions, and hallucinations.[14] The condition may become so severe and the psychosis so perverse as to compel the mother to attempt or even commit infanticide.[15] Nevertheless, the severely disturbed mental state of the mother will almost never provide for acquittal in states that have abolished the affirmative insanity defense because evidence of her mental illness is not permitted unless it specifically negates the *mens rea* required for the crime.[16] Mental illness, and especially postpartum psychosis, rarely impedes a defendant's ability to cultivate the necessary *mens rea*, making her fate assuredly grim in these jurisdictions.[17]

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13. *See Kahler*, 140 S. Ct. at 1048 (Breyer, J., dissenting) ("Kansas' abolition of the second part of the *M'Naghten* test requires conviction of a broad swath of defendants who are obviously insane and would be adjudged not guilty under any traditional form of the defense."). *But see id.* at 1031 (stating because Kansas recognizes the cognitive capacity prong of the *M'Naghten* formula and because the scheme allows for the introduction of evidence relevant to any other consequence of mental health, Kansas does not entirely abolish the insanity defense); Joshua Dressler, Kahler v. Kansas*: Ask the Wrong Question, You Get the Wrong Answer*, 18 OHIO ST. J. CRIM. L. 409, 410 (2020) ("[The Court] does not say that abolition of the insanity defense is constitutional, but rather that, because Kansas permits a defendant to introduce mental illness evidence to negate the *mens rea* element of an offense and at sentencing to mitigate punishment, 'Kansas' scheme does not abolish the insanity defense.'" (quoting *Kahler*, 140 S. Ct. at 1031 n.6)).

14. Christina Perez-Tineo, *Criminal Prosecution and the Postpartum Period: A Call for More Effective Application of the Insanity Defense*, 28 ANN. HEALTH L. ADVANCE DIRECTIVE 203, 207 (2019).

15. Amy L. Nelson, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625, 627 (1991) ("A small percentage of women suffering postpartum psychosis will act on their impulses and will hurt or kill their babies or themselves.").

16. Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 985 (1996) ("Under the *mens rea* approach, courts may only acquit defendants if the defendants can raise a reasonable doubt that they did not have the requisite *mens rea* while committing a crime. Consequently, defendants may only bring in psychiatric witnesses or evidence to litigate the intent elements of a crime but not to litigate their mental conditions in general."); Rachel L. Carmickle, *Postpartum Illness and Sentencing: Why the Insanity Defense is Not Enough for Mothers with Postpartum Depression, Anxiety, and Psychosis*, 37 J. LEGAL MED. 579, 589 (2018) ("In those jurisdictions, the inability to assert the insanity defense as a complete defense deprives a woman with postpartum mental illness the ability to assert that her mental illness influenced her behavior or was even the cause of it.").

17. *See, e.g.*, Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 AM. ACAD. PSYCHIATRY L. 488, 491 (2013) ("In virtually all cases, mental disorder, even

Postpartum psychosis jurisprudence is already riddled with inconsistencies in jurisdictions that employ less restrictive and more traditional insanity formulations,[18] and reform is clearly overdue.[19] Undoubtedly, enforcing the *M'Naghten* moral capacity standard would not have ultimately solved the issue of an insanity defense regime that underserves defendants who kill under the duress of postpartum psychosis.[20] A constitutional baseline could have offered a line of hope, however tenuous, to women who suffer from postpartum psychosis in states that have abolished the traditional form of the insanity defense and created a protective layer around what little uniformity does exist.[21] *Kahler v. Kansas*[22] instead gave more freedom to the states to select the insanity formula of their choice and also gave states the opportunity to completely eliminate the affirmative component of the defense if they so choose.[23] However justified, this has devastating consequences on women who commit mental illness-induced crimes in states that implement the *mens*

severe disorders marked by psychotic symptoms such as delusions and hallucinations, does not negate the required *mens rea* . . . .").

18. *See* Perlin, *supra* note 1, at 5 ("The incoherence of our insanity defense jurisprudence is especially troubling in cases involving women who kill their small children."); Emily F. Wood et al., *Individual Differences Relate to Support for Insanity and Postpartum Depression Legal Defenses: The Mediating Role of Moral Disengagement*, 25 PSYCHIATRY PSYCH. & L. 219, 220 (2018) ("Women who have used postpartum depression as a basis for the insanity defense have received outcomes ranging from acquittal to the death penalty . . . .").

19. *See* Carmickle, *supra* note 16, at 592 (stressing the need for sentencing reform and increased information regarding the illness).

20. *See* Abigail Wong, *Filicide and Mothers Who Suffer from Postpartum Mental Disorders*,10 MICH. ST. U. J. MED. & L. 571, 583 (2006) (claiming the *M'Naghten* standard applied in most jurisdictions is not an appropriate test of insanity as applied to women who suffer from postpartum mental disturbance); Michele Connell, Note, *The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women?*, 53 CASE W. RSRV. L. REV. 143, 147 (2002) (emphasizing postpartum psychosis manifests itself in a variety of severities throughout its duration making the complete incapacitation standard required by the *M'Naghten* test difficult to satisfy).

21. *See* Nair, *supra* note 12, at 20 ("If the Kansas state's exclusion of the insanity defense [was] unconstitutional, then it [was] unconstitutional for all states; and all states must then provide for an insanity defense."); Dressler, *supra* note 13, at 425 (exploring how it is unknown whether states in the future that continue to implement a traditional insanity defense will continue to do so after *Kahler v. Kansas*); *see also* Lael K Weis, *Melbourne Legal Studies Research Paper Series No. 874: Legislative Constitutional Baselines*, 41 SYDNEY L. REV. 481, 481 (2019) ("In the context of moral reasoning and analysis, baselines establish a frame of reference for what might otherwise be an unstructured, all-things-considered evaluation of possible ends or states of affairs.").

22. Kahler v. Kansas, 140 S. Ct. 1021 (2020).

23. *See* Elissa Crowder, *Avoiding the Question: The Court's Decision to Leave the Insanity Defense in State Hands in* Kahler v. Kansas, 2020 PEPP. L. REV. 93, 105 (2020) (explaining how *Kahler* gave states freedom to create tests of insanity).

rea approach now and for those who live in states that may transition to this, or an equally damaging regime, in the future.[24]

Despite this potentially devastating outcome, the conversation about how to properly reform current postpartum psychosis jurisprudence should not end here. *Kahler* does not necessarily suggest that these defendants are always ill-fated and undeserving of legal justice; it simply means that the traditional insanity defense may no longer be a viable vehicle for change. This Comment proposes that in the wake of *Kahler* and the Supreme Court's refusal to set a constitutional mandate for the insanity defense and preserve its traditional formulation in American jurisprudence,[25] we should implement a complete female-specific postpartum psychosis defense and disengage from the chaos that is the post-*Kahler* insanity defense.[26] Some have proposed such legislation in the past,[27] and although gender-specific regulations create some controversy, especially concerning feminist viewpoints,[28] this type of solution would create a more uniform and fair standard for defendants, especially as *Kahler* has essentially limited the availability of the already meager defense.[29]

Part II of this Comment describes the general history of the insanity defense and explores the policy and ethical reasons for both the retention and the abolishment of the defense. It then investigates the current available standards and offers some evaluations and criticisms for each. Part III examines Supreme Court jurisprudence prior to *Kahler v. Kansas* and then dissects the significant elements of both the majority and the dissent. It concludes by arguing that *Kahler* has crucial consequences for the insanity defense in America. Part IV introduces some of the history and

24. *See id.* (stating the sentencing provisions in Kansas do not help the effects of a criminal conviction).

25. *See* Elizabeth Poché, Comment, Kahler v. Kansas*: A Defense Denied*, 98 DENV. L. REV. 867, 899 (2021) (describing the decision in *Kahler* as the Court refusing to create a position for the insanity defense).

26. *See* Connell, *supra* note 20, at 145 (advocating for such legislation despite the controversy associated with gender-specific laws).

27. *Id.*

28. Cristie L. March, *The Conflicted Treatment of Postpartum Psychosis Under Criminal Law*, 32 WM. MITCHELL L. REV. 243, 251–52 (2005) ("Some commentators have argued that accommodating postpartum psychosis as a legitimate defense that should merit 'special treatment' recognizes the difference between men and women in far-reaching and detrimental ways.").

29. *See* Brenda Barton, Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 617 (1998) ("[A] separate postpartum psychosis defense would promote uniformity in decisions and sentencing for mothers suffering from the affliction.").

epidemiology of postpartum psychosis; describes how infanticide is treated in this nation and in other nations; and addresses how postpartum defendants who have committed crimes fare in American jurisdictions based on which formulation of the insanity defense the state implements. Finally, Part V explains that the Supreme Court should embrace a female-specific defense for crimes committed while suffering from the devastating impact of postpartum psychosis because these options all provide potential injustices for these women; because this specific mental disturbance is so unique; and because even the most accommodating formulation cannot be invoked in the future with any certainty after *Kahler v. Kansas*. Part V also discusses the controversy related to implementing such legislation and ultimately defends this alternative as the most rational and fair approach. If these clearly mentally ill women cannot be protected under the traditional insanity test, perhaps it is time for legislatures to carve out another way.[30]

II. OVERVIEW AND HISTORY OF THE INSANITY DEFENSE

A. *The Controversy Generally*

"The insanity defense goes to the very root of our criminal justice system,"[31] but despite its continuing presence in American jurisprudence, the defense itself and its varying application across the individual states remain steeped in controversy.[32] This intrinsic conflict is fueled by: competing political ideologies regarding the necessity and severity of punishment required to serve the retributive and punitive goals of the criminal justice system;[33] how little is known about the complexities of mental illness;[34] a lack of consensus between the legal and medical

30. *See* Connell, *supra* note 20, at 145 ("This legislative solution would recognize the indisputable differences between men and women and allow for a legal standard designed specifically to recognize the unique character and nature of this disease.").

31. State v. Curry, 543 N.E.2d 1228, 1230 (Ohio 1989) (citing Kuhn v. Zabotsky, 224 N.E.2d 137, 141 (Ohio 1967)); *see also* R. Michael Shoptaw, Comment, M'Naghten *Is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1106 (2015) ("The insanity defense has long been a fixture of law.").

32. *E.g.*, 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, 1511 (2002) ("To say that the insanity defense is merely controversial would be a vast understatement.").

33. *See, e.g.*, *id.* at 1571 ("The issue of insanity defense reform is, no doubt, a political hotbed.").

34. *E.g.,* Michelle DiSilvestro, Comment, Kahler v. Kansas*: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits*, 53 UIC J. MARSHALL L. REV. 633, 639 (2021).

communities regarding a consistent standard for judging persons with mental disturbances;[35] and by the presence of falsehoods surrounding the defense.[36] Proponents of abolition often claim the insanity defense is routinely overused by "feigning defendants" attempting to avoid being put to death after committing heinous and violent crimes; that those acquitted by reason of insanity statistically spend less time in custody receiving treatment than if they had been traditionally convicted; and myriad other empirically refuted ideas.[37] In truth, an insanity defense is raised in less than 1% of all criminal cases nationwide,[38] and defendants who are acquitted and remanded to a state-run mental facility often stay a comparable or even an extended amount of time in custody.[39] Furthermore, clinicians can differentiate between the feigning defendant and one who actually suffers from a mental disturbance with over 90% accuracy.[40]

35. *Id.* at 639–40; *see* Maidman, *supra* note 2, at 1834 ("[T]he defense is only loosely based on mental illness, yet the science surrounding mental illness itself does not study legal questions.").

36. Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 492 (2017) ("[T]he insanity defense is attacked on the basis of a series of myths that have been firmly and conclusively disproved by all the valid and reliable statistical and empirical evidence.").

37. *Id.* at 497 ("[T]he abolition movement has been fueled by the 'common wisdom' that the insanity defense is an abused, over-pleaded, and over-accepted loophole used as a last gasp plea solely in grisly murder cases to thwart the death penalty; that most successful pleaders are not truly mentally ill; that most acquittals follow sharply contested 'battles of the experts'; and that most successful pleaders are sent for short stays to civil hospitals." (footnote omitted)); *see also* Morse & Bonnie, *supra* note 17, at 493 (asserting abolitionists also argue that "administering the defense requires an assessment of the defendant's past mental state using controversial psychiatric and psychological evidence, a task that is too difficult").

38. Kenneth B. Chiacchia, *Insanity Defense: Insanity Defense Statistics, Problems with NGRI, Guilty but Mentally Ill*, PSYCH. ENCYC., https://psychology.jrank.org/pages/336/Insanity-Defense.html [https://perma.cc/88UH-7PF6].

39. Scott O. Lilienfeld & Hal Arkowitz, *The Insanity Verdict on Trial: The Insanity Defense, Rarely Used, Is Widely Misunderstood*, SCI. AM. (Jan. 1, 2011), https://www.scientificamerican.com/article/the-insanity-verdict-on-trial/ [https://perma.cc/ZGA8-3LXR] ("[D]ata . . . suggest[s] that those deemed not guilty by reason of insanity often remain in institutions just as long as people convicted of comparable crimes do; in some states, such as New York and California, they stay longer."); Maidman, *supra* note 2, at 1846 ("In general, the public believes that those acquitted by reason of insanity will serve little time in confinement, but, in reality, most of the defendants acquitted spend more time hospitalized than they would have spent in prison if convicted.").

40. Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post*-Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 13 (2007).

Despite these lifeless arguments for the abolition of the insanity defense, not all contentions by opponents of the defense can be dispelled easily.[41] First, eliminating the insanity defense and incarcerating those guilty of criminal acts, regardless of whether they are cognitively or morally capable of understanding their actions, ensures that the general population is protected from subsequent—and possibly violent—criminal activity.[42] Another potent argument is that the insanity defense is superfluous because the prosecution must prove specific intent, meaning a mentally ill defendant would not need to invoke it to be adjudged not guilty.[43] Furthermore, abolition of the defense might promote a more evenhanded application of the law itself.[44] An insanity defense is more readily conceivable for moderate-income and wealthy individuals as their access to higher education may make them more skillful at convincing psychiatrists and other testifying experts of their mental illness or defect and may render this testimony more fiscally obtainable.[45] Thus, abolishing the defense would even the playing field for those who cannot afford the luxury of expert testimony.[46] Finally, abolitionists assert that if mental illness deprives an individual of free will, and if this deficiency results in diminished criminal culpability, then other circumstances or mental states like intoxication, starvation, and foolishness would deserve recognition in determining criminal liability as well,[47]ultimately annihilating notions of personal responsibility and debasing the criminal justice system generally.

In contrast, preserving and maintaining the insanity defense theoretically allows for the temporary removal, treatment, and reintegration of those who may pose a danger to society because of some mental defect or disturbance and also protects them from an often dangerous and anti-therapeutic prison structure.[48] Furthermore, punishing those who do not understand the

41. *See* Stephen C. Rathke, *Abolition of the Mental Illness Defense*, 8 WM. MITCHELL L. REV. 143, 162–72 (1982) (discussing the advantages of no longer recognizing the insanity defense).

42. *See id.* at 163 ("People should be secure from those who would do them harm regardless of the wrongdoer's knowledge of good and evil.").

43. *See id.* at 167–68 ("If he lacked that ability, then the verdict should be not guilty. The defendant is entitled to and should be granted the complete exoneration concomitant with that verdict.").

44. *See id.* at 168 (discussing the discrepancies in application of the material illness defense between different socio-economic classes).

45. *Id.*

46. *Id.*

47. *See id.* at 169 ("Drunkenness, stupidity, hunger[,] and physical handicaps should all be relevant for the limited purpose of educating the factfinder about the existence of criminal intent.").

48. Kachulis, *supra* note 3, at 247–48.

nature of their criminal acts, nor that their actions are immoral, does not serve the deterrence goals of an effective criminal justice system.[49] Aside from these rehabilitative and policy purposes, proponents of maintaining the current insanity defense also argue that providing the criminally insane with an excuse from legal culpability reinforces "the moral integrity of the criminal law,"[50] as allowing some individuals to avoid punishment because of inescapable mental illness "is essential to a mature and coherent [legal] system."[51] Professor Michael L. Perlin asserts the following:

> [The insanity defense] has always served as a litmus test for how we feel about a host of social, political, cultural[,] and behavioral issues that far transcend the narrow questions of whether a specific defendant should be held responsible for what—on its surface—is a criminal act, or how responsibility should be legally calibrated, or of the sort of institution in which a successful insanity acquittee should be housed.[52]

Stated differently, how we treat the criminally insane defendant communicates our civic and societal values—or lack thereof—to the rest of the world.[53] Despite this continuing controversy regarding how or if the insanity defense should remain viable, the traditional form of the insanity defense remains intact in the majority of jurisdictions, thus allowing criminal defendants, because of a mental illness or defect, to be completely absolved of criminal culpability.[54]

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49. *See* Buitendorp, *supra* note 16, at 975 (contending proponents of the insanity defense believe it does not serve deterrence because people suffering from mental illness "do not know what they are doing and cannot control their actions").

50. LAWRIE REZNEK, EVIL OR ILL?: JUSTIFYING THE INSANITY DEFENSE 301 (1997).

51. Perlin, *supra* note 36, at 504.

52. *Id.* at 494 (quoting 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. 1377, 1377–78 (1997)).

53. *Id.*; *see* Rozelle, *supra* note 6, at 23 ("Because society is measured by its treatment of the most vulnerable, compassion dictates we do likewise." (footnote omitted)).

54. *E.g.*, Nusbaum, *supra* note 32, at 1538 ("[W]hile the insanity defense has not been uniform in its formulation over the years (in that different jurisdictions have applied different tests, such as the *M'Naghten*, American Law Institute (ALI), and *Durham* tests), every jurisdiction throughout the common law and in the history of this country (with the recent exceptions) has recognized insanity as an *extrinsic* defense and has used some form of an insanity test or standard that recognizes it as such." (footnotes omitted)).

B. *History of the Insanity Defense*

Controversy aside, the concept and application of an insanity defense for persons suffering from mental illness have existed for thousands of years.[55] The defense is actually traced back to Hebrew, Hellenic, and Roman doctrines,[56] which recognized the necessity for some defendants, especially the very young and the insane, to escape criminal prosecution as they did not, and could not, harbor the necessary intent to be rendered blameworthy for their criminal acts.[57] This principle of diminished criminal responsibility in circumstances of mental illness migrated from these ancient cultures into 13th century English courtrooms first as a mitigating factor to criminal liability and then as a complete affirmative defense in the next century.[58] During this time, young children and the mentally insane continued to be coupled in English common law,[59] and as the ability to distinguish right from wrong became a pillar in an infancy defense, English courts in the 16th century began testing whether those asserting an insanity defense understood this fundamental difference as well.[60] Famous jurists, including Coke and Hale in the 17th century, and Blackstone in the 18th century, all commented on the profound similarities between the mentally insane and young children, and readily acknowledged that both groups qualified for a diminished criminal culpability because of their inability to distinguish right from wrong.[61]

C. *The* M'Naghten *Standard*

As mentioned above, the 16th century denotes when English courts began considering the ability of the mentally insane defendant to recognize

55. *E.g.*, Perlin, *supra* note 36, at 492 ("Rooted in Talmudic, Greek, and Roman history, [the defense's] forerunners can actually be traced back over 3000 years.").

56. Shoptaw, *supra* note 31, at 1106.

57. *See* Poché, *supra* note 25, at 885 ("[B]ecause of this incapability of intention, Hebrew law did not require children and individuals with mental illness to compensate individuals that they harm."); *see also* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 764 (2004) (discussing how Roman society often treated the deficient person much like an unwitting animal and might instead hold their guardian responsible for the individual's criminal or tortious actions).

58. *E.g.*, Shoptaw, *supra* note 31, at 1106 (describing the history of the defense); DiSilvestro, *supra* note 34, at 637 (summarizing the development of the defense); Morse & Bonnie, *supra* note 17, at 489 ("[T]he insanity defense has been a feature of ancient law and of English law since the 14th century.").

59. Poché, *supra* note 25, at 886–87.

60. *Id.* at 887.

61. *Id.* at 871–72.

the moral nature of their actions in order to affirm or negate criminal culpability.[62] However, this moral responsibility approach to the insanity defense was not officially solidified in English common law until the 1843 trial of Daniel M'Naghten.[63] M'Naghten was charged with fatally wounding the Prime Minister's secretary and his counsel sought to establish a defense based on M'Naghten's claimed mental disease.[64] After the testimony of physicians confirming the mental defect of the defendant and an absence of any contradicting medical evidence from the opposing counsel, the jury returned a not guilty verdict by reason of insanity.[65] He was subsequently remitted to a mental health asylum and remained there until his death.[66] Despite his permanent institutionalization, the general public and the Queen herself disapproved of the verdict.[67] The House of Lords, convinced the circumstances demanded the creation of a formal assessment for criminal insanity, consequently established the following test to determine criminal liability when one invokes an insanity defense:

> [T]he defense must clearly prove that, at the time the defendant committed the act, he or she was laboring under such a defect of reason, from a 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 what he was doing was wrong.[68]

This standard has been used in Great Britain ever since[69] and a formalized version of the defense continues in most American jurisdictions today.[70]

The *M'Naghten* standard proposes that the defendant may invoke an insanity defense if a mental defect existed at the time the criminal act was committed, and that this defect prevented the defendant from

62. Shoptaw, *supra* note 31, at 1107.

63. *See, e.g.*, Michael Corrado, *The Case for a Purely Volitional Insanity Defense*, 42 TEX. TECH L. REV. 481, 490 (2009) (naming *M'Naghten* as the start of the modern history of the defense).

64. DANIEL N. ROBINSON, WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO PRESENT 169 (1996); *see also* Fradella, *supra* note 40, at 15 (asserting M'Naghten's defense counsel claimed that he was experiencing paranoid persecutory delusions when he mistakenly wounded the Prime Minister's secretary instead of the Prime Minister himself).

65. ROBINSON, *supra* note 64, at 170–71.

66. Fradella, *supra* note 40, at 16.

67. *Id.*

68. *Id.*

69. *See* Dressler, *supra* note 13, at 413 (describing "*M'Naghten* [as] the dominant common law test" at the time of the *Kahler* opinion).

70. Lindsey C. Perry, *A Mystery of Motherhood: The Legal Consequences of Insufficient Research on Postpartum Illness*, 42 GA. L. REV. 193, 202 (2007).

understanding the act being performed *or* from understanding that the act was morally unacceptable.[71] These prongs are identified as a defendant's cognitive and moral capacity respectively, and the defendant can, in most jurisdictions, assert an insanity defense and offer evidence of such if either is impaired by their mental defect or disturbance.[72] Although the *M'Naghten* standard centers on a cognitive component as the defendant must *know* the nature of the act, mental illness rarely manifests itself in such a way as to sufficiently impair or disrupt this type of cognitive capacity.[73] Consequently, defendants intending to put forth an insanity defense must heavily depend on satisfying the moral capacity prong of the test.[74] In fact, critics of the *M'Naghten* standard argue the test relies too heavily on the cognitive prong and tends to ignore how mental illness affects defendants' emotional response or decision-making faculties.[75] These affective or volitional irregularities may inhibit the defendant's ability to make rational decisions even though they know that their actions are ultimately wrong.[76] Furthermore, the explicit language of the test requires complete incapacitation[77] when, in reality, mental illness may manifest in a multitude of ways and severities.

Since the *M'Naghten* standard was formalized in 1843, the United States' modern theoretical framework of the insanity defense and its application has continued to evolve through judicial and legislative intervention,[78] and individual states have chosen to apply a variety of other, often related,

71. Fradella, *supra* note 40, at 18.

72. *Id.*

73. *See* Poché, *supra* note 25, at 894 ("[M]ental illness rarely renders defendants so out of touch with reality as to not understand the nature of their acts."); Fradella, *supra* note 40, at 18 ("Finding cognitive incapacity is rare because it requires that a person suffer from a psychotic disorder of such severity so as to be removed from reality and not know what he or she is doing.").

74. Fradella, *supra* note 40, at 18.

75. *Id.* at 19 (describing how the *M'Naghten* approach "failed to consider 'that mentally ill offenders might be aware that their behavior is wrong, yet nonetheless be emotionally unable to restrain themselves or control their conduct'" (quoting ROBINSON, *supra* note 64, at 227)).

76. *Id.*

77. *See id.* ("[The test] would excuse only those totally deteriorated, drooling[,] hopeless psychotics . . . ." (quoting GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATION AND THE COURTS 116 (1987))).

78. *See* Eugene M. Fahey et al., *"The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense*, 68 BUFF. L. REV. 805, 812 (2020) (explaining the origins and evolution of the insanity defense).

approaches.[79] As of 2015, the federal courts and seventeen individual states use both the cognitive and morality principles set out in the *M'Naghten* test.[80] Ten states rely only on the morality prong of the defense, and three have added a more expansive volitional capacity test, as described below.[81]

D. *Other Modern Regimes*

1. The Inability-to-Control or Irresistible Impulse Test

In 1887, responding to the perceived impracticability and rigidity of the *M'Naghten* standard, the Supreme Court of Alabama added a new volitional component to the insanity defense.[82] This new component served to absolve the mentally disturbed defendant if they could not satisfy the requirements of the *M'Naghten* test:

> If, by reason of duress of such mental disease, he had so far lost the *power* to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; [] and if at the same time the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.[83]

This irresistible impulse test serves to exculpate the defendant that cannot, because of mental illness, tailor their emotional or physical responses in a way that meets traditional legal standards.[84] Although the broad nature of this test allows for more mentally ill defendants to succeed in asserting an insanity defense,[85] the test is often criticized because although

79. Shoptaw, *supra* note 31, at 1107 ("There have been many formulations of the insanity defense since *M'Naghten*, and three tests for legal insanity are currently in existence in the United States legal system.").

80. *Id.* at 1109.

81. *Id.*

82. *See* Parsons v. State, 81 Ala. 577, 594 (1887) (refusing to "deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason or the power of volition").

83. Eric Collins, Note, *Insane: James Holmes,* Clark v. Arizona*, and America's Insanity Defense*, 31 J.L. & HEALTH 33, 37 (2018).

84. *See* Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523, 524 (2009).

85. Maidman, *supra* note 2, at 1836 (explaining how the irresistible impulse test broadens the *M'Naghten* rule).

the defendant contends that he *could not* resist the impulse, perhaps he just *did not* resist it.[86]

2. The *Durham* Product Test

As psychological research began to demystify, at least to some extent, the complexities of the human mind, courts began rejecting the restrictive parameters of the *M'Naghten* and irresistible impulse tests.[87] In 1954, a defendant's burglary conviction was appealed to the D.C. Circuit Court of Appeals.[88] His counsel could not conclusively establish that mental illness had sufficiently inhibited his moral capacity.[89] Psychiatrists readily agreed that the defendant suffered from delusions and hallucinations, however under the *M'Naghten* standard, they could not offer evidence of present mental defects unless these defects fruitfully affected his ability to differentiate between right and wrong.[90] In response to this inability to provide a full summary of the defendant's relevant mental health, the presiding judge proclaimed that, "[a]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect."[91] This lenient new regime raised skepticisms as it allowed clinicians to reveal evidence of all mental defects if they were possibly and even tenuously connected to the criminal behavior.[92] It also provided tremendous power to psychiatric testimony,[93] which critics believed severely diminished the pertinent role of the jury as the ultimate factfinder.[94] Furthermore, the test created a rise in acquittals, thus making the insanity defense perhaps overly

86. *See* Fradella, *supra* note 40, at 23 ("[C]ritics argued that an irresistible impulse was really just an impulse that was not, in fact, resisted."). *But see* Corrado, *supra* note 63, at 499 (explaining that acting intentionally does not necessarily mean the actor was in control of said actions).

87. Maidman, *supra* note 2, at 1837.

88. Durham v. United States, 214 F.2d 862, 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. Ct. of App. 1972).

89. Collins, *supra* note 83, at 38.

90. *Id.*

91. *Id.*

92. *See* Fradella, *supra* note 40, at 20 ("*Durham* appears to have judicially legislated a rule that excused all mentally ill persons from criminal responsibility, regardless of either the type or degree of impairment.").

93. *See* Maidman, *supra* note 2, at 1837 ("[C]ourts reasoned that the rule gave psychiatrists too much power in determining criminal responsibility, which led to general confusion and a plethora of appeals."); Collins, *supra* note 83, at 39 ("The *Durham* Product test tended to result in the expert witness assuming the jury function.").

94. Fradella, *supra* note 40, at 20.

accessible.[95] As a result of these criticisms, just one state, New Hampshire, still employs the *Durham* product test[96] even though the D.C. Circuit Court of Appeals overruled *Durham v. United States*[97] in 1972.[98]

3. The Model Penal Code

As the *M'Naghten* test proved too unyielding and the *Durham* test too pliable, in 1962, the American Law Institute (ALI) created another modified version of the insanity defense in the Model Penal Code (MPC).[99] Its test declared that a criminal defendant lacked culpability if they did not possess a "substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of law."[100] The test provided more inclusive language, as it required only "substantial [impairment] rather than complete impairment," as demanded by the traditional *M'Naghten* test.[101] Moreover, the ALI included a volitional component to avoid concentrating solely on a defendant's cognitive capacity, thus expanding the defense's reach to defendants who are unable to control their pervasive compulsions without regard to their ability to understand that their actions were wrong.[102] Despite continuing criticisms of the built-in volitional element,[103] the ALI's 1962 Model Penal Code insanity formulation was adopted in the majority of both state and federal courts.[104]

Despite its initial acceptance, American society and the courts alike quickly retreated from the ALI approach after John Hinkley Jr. was acquitted by reason of insanity for his attempted assassination of then-President Ronald Reagan.[105] The federal court that was responsible for the

95. *Id.*

96. John Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 367 (1960).

97. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. Ct. of App. 1972).

98. Brawner, 471 F.2d at 981.

99. Maidman, *supra* note 2, at 1837.

100. Shoptaw, *supra* note 31, at 1110 (quoting MODEL PENAL CODE § 4.01 (AM. L. INST. 1962)).

101. *Id.*; DiSilvestro, *supra* note 34, at 639; Fradella, *supra* note 40, at 22.

102. Fradella, *supra* note 40, at 18; Perry, *supra* note 70, at 202.

103. Corrado, *supra* note 63, at 491; s*ee* Fradella, *supra* note 40, at 23 ("[C]ritics argued that an irresistible impulse was really just an impulse that was not, in fact, resisted.").

104. Fradella, *supra* note 40, at 23–24; Perry, *supra* note 70, at 202; Corrado, *supra* note 63, at 491.

105. Wong, *supra* note 20, at 584; Perry, *supra* note 70, at 202–03; Corrado, *supra* note 63, at 491.

trial employed the ALI insanity formulation, which demanded the government to prove beyond a reasonable doubt that John Hinkley Jr. was not insane when he attempted to assassinate Reagan.[106] It could not.[107] Subsequently, most states and all federal jurisdictions[108] transitioned back to the two-pronged *M'Naghten* standard, thus significantly diminishing any application of a volitional insanity element.[109] The federal government formalized this transition in the Insanity Reform Act of 1984, which drastically narrowed the insanity defense, placed the burden to establish insanity on the defendant,[110] and prohibited an expert witness from testifying to the mental state or condition of the defendant if such information is an element of the crime.[111] Despite this retreat by most states, as of 2020, the District of Columbia and nineteen individual states continue to employ some version of the ALI/MPC formulation for insanity.[112]

4. Alternatives to an Insanity Plea

a. Guilty But Mentally Ill

Beginning with Michigan in 1975, some states began implementing a guilty but mentally ill (GBMI) verdict if the defendant could not meet the stringent parameters of the available insanity defense.[113] This verdict allows the defendant to be adjudged as guilty while still considering his mental illness at sentencing.[114] Critics of the verdict argue that those who receive a

106. Corrado, *supra* note 63, at 491.

107. *E.g.*, *id.* (describing how the state was unable to convict Hinkley).

108. *See* 18 U.S.C.S. § 17 ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.").

109. Corrado, *supra* note 63, at 491; Perry, *supra* note 70, at 203.

110. 18 U.S.C. § 17; *see* Fradella, *supra* note 40, at 28 (explaining how shifting the burden of proof converts the insanity defense into an affirmative defense).

111. Christine Ann Gardner, Note, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?*, 24 NEW ENG. L. REV. 953, 978–79 (1990).

112. *See* USLEGAL, https://criminallaw.uslegal.com/defense-of-insanity/the-insanity-defense-among-the-states/ [https://perma.cc/75C9-YVCE] (listing each state's respective insanity defense regime).

113. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 375, 382 (1999).

114. *See id.* at 383 (stating a GBMI verdict still carries the same degree of criminal culpability and the possibility of the same sentence, including the death penalty. However, because the defendant was under the confines of mental illness when the crime was committed, the judge may be more

GBMI verdict are not any more likely to receive treatment for their mental illness than others convicted without the special judgement.[115] Furthermore, because it is often difficult for jury members to differentiate between a not guilty by reason of insanity verdict and guilty but mentally ill verdict, some defendants who readily meet the requirements of an insanity regime may be denied the affirmative defense.[116]

b. Diminished Capacity

In a similar vein, some jurisdictions allow criminal defendants to assert a diminished capacity defense that allows a defendant facing a murder charge to offer evidence related to mental illness if the state does not permit an affirmative insanity defense[117] or if the defendant is unable to meet the full requirements of insanity.[118] If effective, the court will determine that the defendant did not and could not meet the specific intent requirements of the crime charged and reduce the murder charge to one of manslaughter.[119] Critics argue that the diminished capacity defense is a misnomer.[120] Similar to the restrictions on evidence in states that have abolished the affirmative insanity defense, defendants are only permitted to introduce evidence relating to forming the requisite intent for murder.[121] They are unable to establish a diminished capacity if their mental illness effectively hindered their understanding of right and wrong.[122]

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persuaded to assign the defendant to a mental institution instead of a traditional prison setting); Kachulis, *supra* note 3, at 250 ("Typically, verdicts like these show symbols and signals of mitigating factors, and judges will usually issue a lesser sentence when a defendant receives these verdicts. On the other hand, some jurisdictions have specifically stated that verdicts like GBMI do not entitle a defendant to a different sentence.").

115. Borum & Fulero, *supra* note 113, at 384; *see also* Maidman, *supra* note 2, at 1856 (explaining how mentally ill convicts are typically returned to a prison setting, following treatment, to complete their pending sentence).

116. Borum & Fulero, *supra* note 113, at 385; *see also* Maidman, *supra* note 2, at 1856 (acknowledging jurors often mistakenly believe this type of verdict to be a compromise).

117. Shoptaw, *supra* note 31, at 1111.

118. *E.g.*, Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. CRIM. L. & CRIMINOLOGY 713, 737–38 (2003) (discussing the diminished capacity defense).

119. *Id.* at 738.

120. *See* Shoptaw, *supra* note 31, at 1128 ("Rather than be labeled as a defense, diminished capacity should be called what it truly is: 'merely a rule of evidence.' The diminished capacity rule of evidence fails to provide an avenue for acquittal that isn't housed in the definition of the charged crime.").

121. *Id.*

122. *Id.* at 1128–29.

5. Abolition of the Insanity Defense

Instead of a modest transition back to the *M'Naghten* standard of insanity after the Hinkley debacle, some states including Montana, Utah, Kansas, Idaho, and Alaska have eliminated or substantially diminished any existing remnants of the traditional insanity defense.[123] The first four on this list have instead implemented a diminished capacity defense, as described above, which may allow the defendant to offer evidence of mental health and diminished cognitive capacity only to establish that they did not have the necessary criminal intent when they performed the criminal act.[124] Alaska has chosen to ignore any possibility of an available diminished capacity defense and only permits the criminal defendant to challenge the cognitive prong of the *M'Naghten* test.[125] These states prevent a criminal defendant from presenting evidence related to how their mental illness inhibited or eradicated their ability to know right from wrong.

6. Affirmative Insanity Defense v. *Mens Rea* Approach

The insanity defense is typically a viable excuse for criminal behavior, otherwise known as an affirmative defense, which indicates that although a defendant did, in fact, break the law with the requisite state of mind, there is some reason that this defendant should not be held responsible for the harm caused.[126] A defendant hoping to fulfil the demands of an insanity defense typically may provide evidence of mental illness, either to create an affirmative insanity defense after the prosecution has successfully established all necessary elements of the crime *or* to rebut that they possessed the requisite *mens rea* to meet the essential elements.[127] Either satisfying the requirements of the extrinsic defense or negating *mens rea* would ultimately serve to exculpate the defendant.[128] However, the aforementioned states that have abolished the former no longer allow evidence to support the defendant's lack of responsibility due to mental illness, unless the illness prevented them from possessing the intent required

123. *Id.* at 1111–112.

124. *Id.* at 1105, 1112.

125. *Id.* at 1112.

126. Milhizer, *supra* note 57, at 726; *see* Nusbaum, *supra* note 32, at 1517 ("[T]he insanity defense serves to exculpate the defendant even when the state has proved beyond a reasonable doubt all elements of the offense charged, including the requisite *mens rea*.").

127. Nusbaum, *supra* note 32, at 1519.

128. *Id.* at 1521.

as a statutory element of the crime.[129] Arguably, allowing the latter evidence is an inadequate substitute for the insanity defense because the prosecution most often has the burden of establishing the defendant's *mens rea*.[130] If the prosecution cannot satisfy this burden, due to mental illness or some other relevant circumstance, the defendant cannot be found guilty.[131] Alas, someone who suffers from mental illness is often quite capable of cultivating the necessary intent to commit crime,[132] although their reason for engaging in illegal conduct often originates from their mental defect. The states that no longer allow for an affirmative insanity defense effectively deny those who suffer from mental illness the ability to be excused from criminal behavior.[133]

Despite this seemingly obvious injustice, several states fervently attempted to abolish the insanity defense.[134] These state legislatures maintain notions that abolition would prevent abuse of the defense; hold offenders accountable for their behavior while still providing necessary treatment; and do away with existing confusion and inconsistency when judges and juries were called to determine the guilt of individuals with

129. *See* Taryn Jacobsen, *A New Textualism Perspective: Does Abolishing Insanity as an Affirmative Defense Violate the Fourteenth and Eighth Amendments?*, 30 R. L. & SOC. JUST. 335, 343–44 (2021) ("Essentially, the defense can present evidence of mental illness to rebut prosecutorial evidence that the defendant had the requisite *mens rea* at the time of the crime, but the defense cannot present such evidence as an independent defense for purposes of exoneration.").

130. *See* Morse & Bonnie, *supra* note 17, at 491 ("The negation of *mens rea* and the affirmative defense of legal insanity are different claims that avoid liability by different means and trigger different outcomes. The former denies the prima facie case of the crime charged; the latter is an affirmative defense that avoids liability in those cases in which the prima facie case is established. The post-verdict consequences are also different. The former leads to outright acquittal; the latter results in some form of involuntary civil commitment. The two different claims are not substitutes for one another."); *see also U.S. Supreme Court Sides with Kansas Over Insanity Defense*, ABA (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/us-supreme-court-sides-with-kansas/ [https://perma.cc/7W62-GZK5] ("Critics of the decision argue that the Kansas law does not actually provide defendants with a cognizable defense. Rather, the Kansas law restates the burden that prosecutors have always had: to prove that the defendant acted with requisite intent.").

131. ABA, *supra* note 130.

132. Nusbaum, *supra* note 32, at 1520 (quoting Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 254–55 (1999)).

133. *See id.* at 1524 ("[T]he switch to the *mens rea* approach is hardly a matter of semantics—it effectively precludes almost all insane defendants from exculpation on the basis of mental abnormality." (italics added)).

134. *See id.* at 1519–20 (exploring how Louisiana, Mississippi, and Washington attempted to deny defendants an extrinsic insanity defense in the early part of the 1900s, however these attempts were struck down as unconstitutional by their respective state supreme courts).

mental illness.[135] In 1979, Montana was the first state to successfully eliminate this extrinsic defense, and Idaho, Utah, Kansas, and Alaska have since implemented similar legislation.[136]

II. *KAHLER V. KANSAS*: THE END OF THE MORAL CAPACITY PRONG OF THE *M'NAGHTEN* FORMULA

A. *Setting the Stage for the Opinion*

As described above, there is a lack of agreement among states as to what, if any, version of the insanity defense should be applied in American jurisprudence.[137] However, once states began formally adopting the overly constrained *mens rea* approach, choosing one insanity standard over another, and eradicating other similar provisions from already existing standards, defendants began challenging the constitutionality of such legislation.[138] In response to some of these claims, select state supreme courts upheld the decisions of state legislatures to implement the *mens rea*-only approach to insanity cases.[139] However, as of 2019, this nation's highest court had not

135. *Id.* at 1561. *But see* Chiacchia, *supra* note 38 (stating an insanity defense is only offered in less than one percent of felony cased); Maidman, *supra* note 2, at 1846 ("In general, the public believes that those acquitted by reason of insanity will serve little time in confinement, but, in reality, most of the defendants acquitted spend more time hospitalized than they would have spent in prison if convicted."); Nusbaum, *supra* note 32, at 1565 ("[A]doption of the *mens rea* approach would only be rationally related to treatment of the insane if defendants who are sent to prison would be more likely to receive treatment than defendants who would otherwise be sent to a mental health institution. This proposition is simply absurd.").

136. Nusbaum, *supra* note 32, at 1521.

137. *See* Crowder, *supra* note 23, at 95 ("The states have taken widely different approaches to it, with some questioning whether it is even constitutionally required at all."); Shoptaw, *supra* note 31, at 1107 ("There have been many formulations of the insanity defense since *M'Naghten*, and three tests for legal insanity are currently in existence in the United States legal system.").

138. Nusbaum, *supra* note 32, at 1525.

139. *See* State v. Searcy, 798 P.2d 914, 919 (Idaho 1990) ("Accordingly, we conclude, based upon the foregoing authorities, that due process as expressed in the Constitutions of the United States and of Idaho does not constitutionally mandate an insanity defense . . . ."); State v. Cowan, 861 P.2d 884, 889 (Mont. 1993), *cert. denied*, 511 U.S. 1105 (1994) (holding because the United States Supreme Court had not imposed a specific test to determine sanity, Montana's allowance of evidence of mental illness to rebut state of mind only does not violate the Fourteenth Amendment); State v. Herrera, 895 P.2d 359, 367 (Utah 1995) ("The Utah legislature has made a policy decision to limit the traditional insanity defense. We hold that this policy decision, though limiting for defendants, does not violate their state due process rights."). *But see* People v. Skinner, 704 P.2d 752, 757 (Cal. 1985) ("Because *mens rea* or wrongful intent is a fundamental aspect of criminal law, the suggestion that a defendant whose mental illness results in inability to appreciate that his act is wrongful could be punished by death or imprisonment raises serious questions of constitutional dimension under both the due process

commented on whether states must implement a certain standard to determine criminal insanity or whether they were free to create their own limitations to the defense. The Court chose to remain mostly silent on the matter, except for passively expressing support for states' rights to set parameters on their respective insanity defenses.[140]

In *Leland v. Oregon*,[141] the Court held that Oregon was not required to implement an irresistible impulse test and *may* instead gauge criminal culpability under the traditional moral capacity standard.[142] More than a decade later, in *Powell v. Texas*,[143] when tasked with determining whether an alcoholic defendant should be absolved from criminal prosecution because an uncontrollable compulsion to drink might assuage the insanity requirements in one state but not another, the Court announced:

But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.[144]

Finally, in *Clark v. Arizona*,[145] the Court held that Arizona was not required to allow the defendant to introduce evidence of mental illness to rebut that he possessed the specific intent for the crime charged.[146]

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and cruel and unusual punishment provisions of the Constitution." (italics added)); Finger v. State, 27 P.3d 66, 80 (Nev. 2001) ("Recognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another. Historically, the defense has been formulated differently, but given the extent of knowledge concerning principles of human nature at any given point in time, the essence of the defense, however formulated, has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong.").

140. *See* Clark v. Arizona, 548 U.S. 735, 752 (2006) ("[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."); *see also* Leland v. Oregon, 343 U.S. 790, 800–01 (1952) (holding Oregon may implement the moral capacity prong of the *M'Naghten* test instead of a version of the irresistible impulse test as recognized in other states); Powell v. Texas, 392 U.S. 514, 536–37 (1968) (holding a constitutionally mandated rule for insanity would stifle the legal system).

141. Leland v. Oregon, 343 U.S. 790 (1952).

142. *Id.* at 800–01.

143. Powell v. Texas, 392 U.S. 514 (1968).

144. *Id.* at 536–37.

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

146. *Id.* at 756.

In 2020, the Court finally decided to scrutinize the moral capacity tenets of an individual state's circumscribed insanity defense in *Kahler v. Kansas*.[147] As noted above, Kansas employs a *mens rea* approach to the insanity defense, which allows a defendant to present evidence of mental illness only if, at the time the act was performed, the illness negated an individual's ability to have the state of mind required for the act to be considered criminal.[148] Any other consequence of mental disturbance that may have contributed to the criminal act but failed to interfere with the defendant's culpable state of mind, such as diminished moral awareness or inexorable compulsion, is admissible after an affirmative conviction and serves only to influence sentence mitigation or mental health intervention.[149] The Kansas courts will not offer these defendants an acquittal based on a mental illness-induced moral deficiency because the state apparently does not believe the inability to distinguish right from wrong completely eliminates criminal culpability.[150] The central issue before the Court is whether the Due Process Clause of the Fourteenth Amendment requires Kansas to recognize the compromising effects mental illness has on both the cognitive and moral capacity of a criminal defendant during the culpability phase of the trial.[151] If the Constitution requires this recognition, then Kansas and other states that have abolished the moral capacity element from their insanity defense regime must allow defendants to bring more than an isolated *mens rea* challenge and to offer evidence that their mental illness impacted their ability to differentiate between right and wrong.[152] Furthermore, if the jury believes that this mental illness did sufficiently hinder such understanding, then that defendant may be relieved from criminal culpability.[153]

The constitutional implications of Kansas's criminal insanity regime were presented to the Supreme Court by defendant James Kahler.[154] Kahler was

147. *See Kahler*, 140 S. Ct. at 1024–25 ("The issue here is whether the Constitution's Due Process Clause . . . compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime.").

148. *Id.* at 1030.

149. *Id.* at 1024.

150. *Cf.* Brief for Respondent at 40, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) ("Kansas has reasonably determined that individuals who voluntarily and intentionally kill another human being are culpable, even if they do not recognize their actions are wrong.").

151. *Kahler*, 140 S. Ct. at 1024–25.

152. *See id.* at 1036 ("So constitutionalizing the moral-incapacity standard, as Kahler requests, would require striking down not only the five state laws like Kansas's . . . .").

153. *See* Michael Mullan, *Sentencing Alternative to an Insanity Defense*, 19 SEATTLE J. SOC. JUST. 441, 443 (2021) (explaining the parameters of a traditional affirmative insanity defense).

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

sentenced to death for killing his wife, his two daughters, and their grandmother while in the throes of severe depression.[155] Kahler claimed that Kansas's refusal to recognize the moral capacity prong of the insanity defense contravened the Due Process Clause of the Fourteenth Amendment.[156] Kahler contended that by failing to recognize this vital element, Kansas has ultimately abolished the longstanding insanity defense and denied what should be constitutionally mandated reprieve for mentally ill defendants that cannot distinguish between what is morally right and wrong.[157] The Kansas Supreme Court denied Kahler's contention concluding that neither the *M'Naghten* standard of an insanity defense, nor any other standard adopted by other jurisdictions, is so fundamentally engrained in American jurisprudence as to eliminate the opportunity of individual states to implement their own standard.[158] The Supreme Court granted certiorari to determine whether Kansas must, in accord with due process, accept the morality component of the illustrious *M'Naghten* test and potentially acquit the morally incognizant defendant, or whether they and other states are free to impose a distinct state-specific standard.[159] The following introduces the most significant portions of the opinion and analyzes what implications the majority's opinion has on future mentally ill criminal defendants.

B. *The Opinion*

The majority began its due process analysis by emphasizing the paralyzing complexity of the insanity regime in the United States.[160] Justice Kagan observed the multitude of tests employed, as catalogued in *Clark v. Arizona* and identified in Part II, that state courts typically utilize when criminal culpability is challenged by the existence of mental illness.[161] The Court described both the cognitive and moral capacity prongs of the *M'Naghten*

155. *Id.* at 1026–27.

156. *Id.* at 1027.

157. *Id.*

158. *Id.* (citing State v. Kahler, 410 P.3d 105, 124–25 (Kan. 2018)).

159. *Id.*; *see also* Fradella, *supra* note 40, at 18 (stating because mental illness rarely manifests itself as detaching one from the reality of the situation, defendants intending to put forth an insanity defense must heavily rely on the moral capacity prong of the test).

160. *Kahler*, 140 S. Ct. at 1025 (citing Clark v. Arizona, 548 U.S. 735, 750 (2006)). *But see* Emily R. Brandt, *Am I Going Insane or Did Kansas Abolish the Insanity Defense? [*Kahler v. Kansas*, 140 S. Ct. 1021 (2020).]*, 60 WASHBURN L.J. 45, 56 (2021) ("Deciding if a right is fundamental should not turn on whether the right is tied to a complex and evolving issue.").

161. *Kahler*, 140 S. Ct. at 1025 (citing *Clark*, 548 U. S. at 749).

test, the volitional incapacity standard and the "product-of-mental-illness test" defined in *Durham v United States*.[162] To further mystify the already elusive defense, the majority referenced a version of the *M'Naghten* standard not previously discussed, which asks not whether the defendant knew his act was morally wrong but whether he knew the act was unlawful.[163]

The *Kahler* Court then described the availability of an insanity defense in Kansas, the centerpiece being that, unlike in a majority of jurisdictions, the inability to recognize the moral ramifications of one's criminal actions alone does not render exoneration a viable outcome.[164] Thus, the moral capacity prong of the *M'Naghten* test plays no dispositive role in criminal culpability.[165] Instead, Kansas allows defendants to provide evidence of moral or volitional incapacity only when they enter the sentencing phase of the criminal procedure.[166] This information might influence judges to reform the applicable sentencing guidelines or to assign defendants to mental health facilities as opposed to prison, but defendants are still held very much culpable for the criminal behavior.[167]

The Court declared that Kansas's insanity regime 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."[168] Stated differently, a state may not implement a distinctive standard of insanity if another recognized standard "is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another."[169] The Court, citing its opinion in *Powell v. Texas*, concluded that the policy behind criminal responsibility, and consequently an insanity defense doctrine, must not be limited by strict constitutional directives.[170] The policies must instead be allowed to shift with evolving social mores, religious attitudes, and scientific advancement.[171] The majority concluded that given the continuous progression of information concerning mental health and mental illness, a constitutional mandate for the insanity defense would effectively yoke the legal system to certain principles that may

162. *Id.* (citing *Clark*, 548 U. S. at 747, 749–50).
163. *Id.*
164. *Id.* at 1025–26 (citing KAN. STAT. ANN. § 21-5209 (2018 CUM. SUPP.)).
165. *Id.* at 1026 (citing § 21-5209).
166. *Id.* (citing §§ 21-6815, 21-6625).
167. *Id.* (citing § 22-3430).
168. *Id.* at 1027 (citing Leland v. Oregon, 343 U. S. 790, 798 (1952)).
169. *Id.* at 1028 (citing Clark v. Arizona, 548 U.S. 735, 752 (2006)).
170. *Id.* (citing Powell v. Texas, 392 U.S. 514, 536–37 (1968)).
171. *Id.* (citing *Powell*, 392 U.S. at 536).

eventually prove ineffective or overly restrictive when a state's continual experimentation with those appropriate standards might better serve justice.[172]

The Court stated that "due process imposes no single canonical formulation of legal insanity."[173] As the ultimate custodian of shifting social policy and medical advancement in matters related to the mental illness of its citizens, the Court opined that the state of Kansas should alone remain the guardian of the "relationship between criminal culpability and mental illness."[174] Kansas is not bound by any restrictive constitutional parameters and is free to implement whichever variation of the insanity defense it sees fit.[175] Any needed alterations are for Kansas, and Kansas alone, to make.[176]

Putting to rest the argument concerning a state's right to create its own framework for the insanity defense, the majority shifted its focus to impugning the historical prominence of both the moral and cognitive capacity prongs of the *M'Naghten* test.[177] Petitioner claimed that because the cooperation of both prongs of the test were inherited and transposed to American jurisprudence from English common-law[178] and then assiduously implemented by the majority of jurisdictions,[179] the "moral-incapacity standard is a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" and essential to satisfying the demands of due process.[180] The Court was untroubled by Kahler's argument and concluded that the history of the insanity defense suggested the majority of cases focused on the defendant's cognitive failings rather than moral incapacity.[181] Although absence of moral awareness is often present in common-law insanity defense cases, it serves more as "a byproduct of the kind of cognitive breakdown that precluded finding *mens rea*, rather than a self-sufficient test of insanity."[182] Stated differently, a

172. *Id.* (""[N]othing could be less fruitful' than to define a specific 'insanity test in constitutional terms.'" (quoting *Powell*, 392 U.S. at 536)).

173. *Id.* at 1029.

174. *Id.* at 1037.

175. *Id.*

176. *Id.*

177. *Id.* at 1029–30.

178. Brief for Petitioner at 21, 42, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135).

179. *Id.* at 20–23.

180. *Kahler*, 140 S. Ct. at 1030 (quoting Leland v. Oregon, 343 U. S. 790, 798 (1952)).

181. *Id.* at 1033 ("But the decisions' overall focus was less on whether a defendant thought his act moral than on whether he had the ability to do much thinking at all.").

182. *Id.* at 1034.

person will be unable to tell the difference between morally right and morally wrong *because* of their overarching cognitive disturbance.[183] The Court further holds that because Kansas continues to allow a criminal defendant to invoke the insanity defense if they can demonstrate that their diminished cognitive capacity frustrated the ability to form criminally culpable intent and because Kansas later allows for the introduction of any other significant mental health issues that may have contributed to their criminal behavior as mitigating factors during sentencing, Kansas's insanity defense regime does not altogether abolish the traditional insanity defense.[184]

C. *The Dissent*

Justice Breyer theorized that both failure to use this judicial opportunity to set a constitutional minimum for the insanity defense and allowing Kansas to implement its own standard will have devastating consequences on the fundamental rights of defendants who had been able to invoke the defense for over 700 years.[185] In his historic dissent,[186] Justice Breyer concludes that both the moral and cognitive capacity portions of an insanity defense are "fundamental principles of criminal responsibility" embedded in the tradition of both English common-law and American jurisprudence.[187] He emphasized this point by referencing many respected jurists that would tend to agree that there is a significant relationship between criminal culpability and moral perception that is clearly distinct from a defendant's cognitive understanding of the act being performed.[188] The cognitive and the moral capacity components of the insanity defense are, and have historically always been, two distinct and separate mechanisms, and, subsequently, the latter does not exist as merely a contingency to the cognitive component.[189] Justice Breyer asserts that a defendant's cognitive capacity in a common-law insanity defense reflected a greater encompassing standard, which interwove both cognitive and moral components, but the

183. *Id.*

184. *Id.* at 1030–32.

185. *Id.* at 1038 (Breyer, J., dissenting).

186. *Id.* at 1044–46.

187. *Id.* at 1044.

188. *Id.* at 1038 (exploring how Bracton, Coke, Hale, Blackstone, and unnamed others have historically linked a defendant's guilt with their ability to recognize the differences between right and wrong).

189. *Id.* at 1043 ("In none of the common-law cases was the judge's reference to the defendant's capacity for moral agency simply a proxy for the narrow modern notion of *mens rea*.").

modern definition of *mens rea* is nuanced in such a way that morality no longer plays a dipositive role in its meaning.[190] Under this reasoning, the modern concept of the insanity defense *needs* both a cognitive and moral capacity prong to produce the same protective shield intended by the common law.[191]

The dissent further believes that Kansas's elimination of the moral component suppresses the availability of the defense[192] and casually justifies its departure from tradition by allowing the defendant the opportunity to evidence their mental illness post-conviction.[193] But this gesture is misleading as a criminal defendant inflicted by mental illness most often can still readily form intent.[194] Instead, the mental defect "affects their motivations for forming such intent."[195] Justice Breyer provided this example to conceptualize his argument:

> In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecution Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Under Kansas' rule, it can convict the second but not the first.[196]

As this example illustrated, Justice Breyer theorized that many clearly insane defendants will be convicted of criminal transgressions under Kansas's regime when this nation has historically abstained from fully

190. *See id.* at 1042 ("At common law the term *mens rea* ordinarily incorporated the notion of 'general moral blameworthiness' required for criminal punishment. The modern meaning of *mens rea* is narrower and more technical.").

191. *See id.* ("But it fails to explain why, if *mens rea* in the modern sense were sufficient, these common-law writers discuss the role of moral agency at all, much less why such language appears in virtually every treatise and virtually every case. In the Court's view, all that is just spilled ink.").

192. *Id.* at 1049 ("But our tradition demands that an insane defendant should not be found guilty in the first place. Moreover, the relief that Kansas offers, in the form of sentencing discretion and the possibility of commitment in lieu of incarceration, is a matter of judicial discretion, not of right.").

193. *Id.* (citing Brief for Respondent at 8, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135)).

194. *Id.* at 1048.

195. *Id.*

196. *Id.* at 1038.

prosecuting this vulnerable population.[197] Ultimately, the dissent declared that Kansas's refusal to consider the mentally disturbed defendant's understanding of the moral nature of his acts spells the end of the traditional tenets of the defense and "runs contrary to a legal tradition that embodies a fundamental precept of our criminal law."[198]

D. *After Kahler*

The Due Process Clause of the Fourteenth Amendment clearly demands the availability of an affirmative insanity defense as those whose mental illness overpowers their ability to exhibit moral judgment should not be subject to punishment.[199] The states that do not allow the defendant to offer evidence based on mental illness that might excuse them from criminal culpability deny these individuals a complete defense and offend the basic principles of the Constitution.[200] The test for whether a statute contravenes an essential liberty, as *Kahler v. Kansas* emphasized, is how the right itself has been evidenced throughout history.[201] Given the ubiquitous belief that the morally blameless should not be punished for their crimes, and given the availability of an affirmative insanity defense from ancient cultures to our own, the defense clearly satisfies this historical dictate.[202] However,

197. *Id.* at 1048–49; *see* Maidman, *supra* note 2, at 1858 ("Abolishing the insanity defense and using the *mens rea* approach would fail to acquit such actors who committed crimes out of severe mental illnesses.").

198. *Kahler*, 140 S. Ct. at 1050; *see also* Morse & Bonnie, *supra* note 17, at 489 ("Failing to provide an insanity defense confounds the meaning of what it is to be responsible for one's actions. It cheapens the idea of being a responsible person by classifying and holding responsible persons intuitively regarded as fundamentally non[-]responsible.").

199. *See* Nusbaum, *supra* note 32, at 1541 ("In sum, regardless of which method of constitutional interpretation one utilizes, considering both past tradition and the current state of the law, one can arrive only at the conclusion that due process prohibits the elimination of the extrinsic insanity defense."); Rozelle, *supra* note 6, at 24 ("As the United States Congress noted in 1983 (parochially, given the insanity defense's ancient roots), to abolish the defense 'would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment.'" (quoting H.R. REP. NO. 98-577, at 7–8 (1983))); Delling v. Idaho, 133 S. Ct. 504, 504 (2012) (Breyer, J., dissenting) ("The law has long since recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong.").

200. *See* Poché, *supra* note 25, at 899 ("The *mens rea* approach, through introduction of cognitive incapacity evidence, simply does not pass constitutional muster because it prohibits critical evidence of moral innocence.").

201. *Kahler*, 140 S. Ct. at 1027 (quoting Montana v. Egelhoff, 518 U. S. 37, 43 (1996) (plurality opinion)).

202. Morse & Bonnie, *supra* note 17, at 489; Shoptaw, *supra* note 31, at 1119–20 (explaining the affirmative and complete insanity defense has been implemented in this country for more than 170 years).

M'Naghten need not dictate, and states should be permitted and even encouraged to experiment with different elements until they find the insanity regime that best serves their community.[203] The opportunity to invoke an affirmative defense however, must remain intact as there are some individuals whose mental illness absolutely renders them undeserving of criminal sanction regardless of their ability to understand the act itself.[204] This Comment does not speculate who exactly those people are and how exactly their illness expresses itself but only serves to recognize that they do exist and that they are worthy of amnesty. Kansas's law and the parallel laws of other states that implement the *mens rea* approach deny mentally ill defendants an opportunity to offer evidence in support of this crucial affirmative defense, and this practice directly contravenes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and has done so with the Supreme Court's benediction.[205]

The verdict in *Kahler* was not necessarily surprising, as the Court has traditionally refrained from intervening with state legislation regarding similarly situated matters. However, advocates of a more inclusive overall standard for the insanity defense, including this author, hoped to be surprised.[206] Afterall, the insanity jurisprudence in this nation is due for

203. *Kahler*, 140 S. Ct. at 1039.

204. *See id.* at 1048 ("Kansas'[s] abolition of the second part of the *M'Naghten* test requires conviction of a broad swath of defendants who are obviously insane and would be adjudged not guilty under any traditional form of the defense. This result offends deeply entrenched and widely recognized moral principles underpinning our criminal laws.").

205. Leland v. Oregon, 72 S. Ct. 1002, 1007 (1952) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see* Shoptaw, *supra* note 31, at 1105–06 ("[T]he state must be able to demonstrate a compelling state interest for its eliminating the traditional insanity defense and establish that this elimination is necessary to achieve the proffered interest. The actions of Alaska, Idaho, Utah, Montana, and Kansas fail to meet these strict scrutiny requirements."); Roytman, *supra* note 11, at 54 ("Kansas's scheme violates the deeply rooted principle that criminal liability cannot be assigned to a defendant who, as a result of mental illness, lacks the capacity to understand that his actions were wrong."); Tyler Ellis, Comment, *Mental Illness, Legal Culpability, & Due Process: Why The Fourteenth Amendment Allows States to Choose A* Mens Rea *Insanity Defense Over a* M'Naghten *Approach*, 84 MISS. L.J. 215, 250 (2014) ("[T]he *Mens Rea* Model satisfies the standard of fundamental fairness. Not only does it provide defendants with a complete defense by negating the mental state, but also more importantly[,] it is more favorable for many defendants.").

206. *See* Dressler, *supra* note 13, at 412 (explaining that the Court's tendency to abstain from interrupting a state's legislative decisions regarding criminal law made the holding in *Kahler* "virtually preordained"); Nair, *supra* note 12, at 20 (speculating before the verdict that "[g]iven the current conservative nature of the Court, it is unlikely that Kansas's exclusion of the insanity defense will be disturbed, even as they may disapprove").

reform as it is rarely implemented by those with actual mental illness and hardly successful because of its damaged reputation as a deceptive and unsavory defense.[207] Instead of being an underused and often misunderstood almost legal fiction, the defense *should* be seen by the mentally ill as a vehicle, first of amnesty and then of support.[208] Instead of fostering what could have been meaningful reform, the Supreme Court essentially sentenced more mentally ill persons charged in these abolition-wielding states, and any subsequent copycat states,[209] to prison.[210] Prison, although obviously terrible for every inmate, can be exceptionally grim for the mentally ill.[211] Compared to their mentally sound counterparts, these individuals more often find themselves the victims of physical or sexual abuse, are more often penalized with solitary confinement, frequently serve longer sentences, and sadly "[h]alf of all prison suicides are committed by persons with serious mental illness."[212] Arguably, Kansas, the *mens rea* states, and now the Supreme Court have subjected these mentally ill defendants to harsher sentences than their mentally healthy criminal counterparts, thus punishing them for their disability.[213]

The punishment and imprisonment of the mentally ill, although already indefensible because of its cruel nature, also serves no overarching communal purpose.[214] Punishment is traditionally justified if it serves a

207. *See* Kachulis, *supra* note 3, at 263 (exploring why the defense is largely ineffective); Maidman, *supra* note 2, at 1845–46 ("The public tends to believe both that the defense is successfully raised without merit and that dangerous individuals are then released back into public once acquitted.").

208. *See* Collins, *supra* note 83, at 53 ("A mental health patient suffering from the effects of schizophrenia who commits a crime, should be able to trust the reasoned American criminal justice system for reprieve.").

209. *See* DiSilvestro, *supra* note 34, at 665 (recognizing other states' ability to implement the *mens rea* approach if desired). *But see* Paul S. Appelbaum, *Kahler v. Kansas: The Constitutionality of Abolishing the Insanity Defense,* 72 PSYCHIATRIC SERV. 104, 106 (2021) (contending that most states will not change their current insanity regime despite the holding in *Kahler*).

210. *See* DiSilvestro, *supra* note 34, at 634 ("The *mens rea* approach will likely lead to more mentally ill[] criminal defendants being incarcerated rather than receiving the treatment they need.") (italics added); *see also* Perlin, *supra* note 36, at 509 ("The abolition of the insanity defense and the incompetency status—leading directly to more persons with serious mental illnesses being imprisoned—will inevitably increase these abysmal rates.").

211. *See* Perlin, *supra* note 36, at 506–10 (describing the abhorrent conditions people with mental illness can suffer in prison).

212. *Id.* at 509.

213. *See id.* at 507 (explaining the often harsher punitive measures utilized by prison officials on the mentally ill compared to the traditional inmate).

214. Maidman, *supra* note 2, at 1844.

rehabilitative, deterrent, or retributive function.[215] If treatment and reintegration are the objectives, there is an obvious increased likelihood of successful rehabilitation if mentally ill defendants are referred to a mental health facility, as these institutions are designed to respond to the therapeutic demands of each individual.[216] States that implement the *mens rea* approach stipulate that the mentally ill defendant *may* be sentenced to such a facility.[217] However, the availability of any therapeutic opportunity is dependent on the knowledge of judges or jurors who are unlikely to have specialized training in treatment options that would best serve each particular defendant.[218] Regarding deterrence, neither the mentally ill nor the general public are discouraged by the punishment, because the former may have little understanding of why they are being punished and thus cannot tailor future behavior accordingly.[219] The latter does not learn from the punishment as they believe that they are too fundamentally different from the individual who suffers mental illness.[220] And finally, a prison sentence does not serve a retributive theory if the person suffering from mental illness did not consciously choose to act in the same way as someone who maintains mental stability; thus, punishment inspires no personal and moral reflection for the former.[221] Because of the potential increase of these injustices and because of the need for an insanity defense reform, the Court in *Kahler v. Kansas* should have stipulated that the *mens rea* approach is not enough, and that elimination of an affirmative insanity defense offends due process.[222] The future is uncertain, but this failure appears to have punitive consequences on the entire mentally ill population.[223] This Comment will now specifically focus on defendants who employ an insanity claim based on the manifestation of postpartum psychosis.

215. *Id.* at 1841–43; Rozelle, *supra* note 6, at 24.

216. Maidman, *supra* note 2, at 1841; Rozelle, *supra* note 6, at 25.

217. DiSilvestro, *supra* note 34, at 669.

218. *Id.*

219. Maidman, *supra* note 2, at 1842.

220. Rozelle, *supra* note 6, at 26; Maidman, *supra* note 2, at 1842.

221. Maidman, *supra* note 2, at 1844.

222. DiSilvestro, *supra* note 34, at 665; *see* Nusbaum, *supra* note 32, at 1524 ("[T]he concept of insanity is broader than the concept of *mens rea*.").

223. DiSilvestro, *supra* note 34, at 634; Perlin, *supra* note 36, at 509; Morse & Bonnie, *supra* note 17, at 493.

III. POSTPARTUM PSYCHOSIS AND THE LEGAL SYSTEM

"The most difficult part of birth is the first year afterwards. It is the year of travail—when the soul of a woman must birth the mother inside her. The emotional labor pains of becoming a mother are far greater than the physical pangs of birth; these are the growing surges of your heart as it pushes out selfishness and fear, and makes room for sacrifice and love. It is a private and silent birth of the soul, but is no less holy than the event of childbirth, perhaps it is even more sacred."
– Joy Kusek[224]

The potential ramifications of *Kahler v. Kansas* aside, understanding the basis for postpartum psychosis-induced criminal behavior, most commonly infanticide, and the configuration of a uniform and effective means of adjudicating these women remains a problem in American jurisprudence.[225] One significant obstacle of successful reform is that the architects of the existing legal framework often rely on inaccurate or outdated principles related to mental illness.[226] The following introduces some basic epidemiological factors of postpartum illness and deflates some common misunderstandings surrounding the disturbance.

A. *A General Overview of Postpartum Illness*

Postpartum illness is not new; physicians from many countries have spent centuries documenting mental conditions temporally arising in women after childbirth.[227] While a finite explanation regarding the causes of postpartum illness has yet to be conducted,[228] research has typically indicated that the dramatic influx and reduction of birth-related hormones accompanied by a predisposition to mood-related mental health issues can cause the onset of the disorder.[229] The severity of a woman's individual response to these

224. Joy Kusek, *Making Room for Love*, THE JOY OF THIS (July 29, 2010), https://thejoyofthis.com/2010/07/29/making-room-for-love/ [https://perma.cc/6TAG-3KPF].

225. Stacey A. Tovino, *Scientific Understandings of Postpartum Illness: Improving Health Law and Policy?*, 33 HARV. J.L. & GENDER 99, 122–23 (2010) (describing the legal shortcomings in postpartum adjudication).

226. *Id.* at 123 (explaining that these inconsistencies stem from the lack of scientific expertise of law makers; their reliance on legal schemas based on outdated research; inability to expend the necessary resources on creating new laws; and myriad other factors).

227. *See, e.g.*, *id.* at 103 (describing "[o]ne of the earliest recorded medical observations of postpartum illness" noted by the Greek physician Hippocrates).

228. March, *supra* note 28, at 249.

229. Perez-Tineo, *supra* note 14, at 207–08; *see also* Vue Yang, *Postpartum Depression and the Insanity Defense: A Poor Mother's Two Worst Nightmares*, 24 WIS. J.L. GENDER & SOC'Y 229, 232 (2009) ("Theories

known contributory factors is infinitely varied, but clinicians have managed to categorize these responses into three forms of postpartum illness: (1) maternity blues, (2) postpartum depression, and (3) postpartum psychosis, which is the most severe form of emotional dysfunction following childbirth.[230] Symptoms of postpartum psychosis typically imitate those manifested in other related emotional disorders, but this specific category of post-birth mental illness presents distinctive but inexplicably rapidly changing affective responses.[231]

The mildest forms of the illness, maternity or postpartum blues, induce feelings of depression, exhaustion, and may make the affected woman feel as though she is unable to think clearly and rationally.[232] Treatment usually involves close monitoring by a physician to ensure that symptoms do not escalate to a more distressing form of the disorder.[233] Postpartum depression has similar symptoms but affects the individual with increased severity.[234] Mothers with postpartum depression often experience bouts of severe depression and panic coupled with feelings of indifference to the child, inadequacy as a mother, and some pervasive thoughts of inflicting harm on the child.[235] Treatment may require medication designed to treat depression and the intervention of traditional psychotherapy.[236] At the farthest end of the spectrum lies postpartum psychosis, which causes dramatically skewed emotional responses that are often triggered by a misunderstanding of reality.[237] This heightened sensitivity and confusion is then compounded by obsessive thoughts about harming the woman's child

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[also] support the conclusions that biologic, psychosocial, and situational life-stress are the causes of postpartum depression.").

230. Anne D. Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1141–44 (1990).

231. *Id.* at 1140; *see also* Susan Hatters Friedman & Renée Sorrentino, *Postpartum Psychosis, Infanticide, and Insanity—Implications for Forensic Psychiatry*, 40 J. AM. ACAD. PSYCHIATRY L. 326, 326 (2012) (describing postpartum psychosis as "related to bipolar disorder").

232. Brusca, *supra* note 230, at 1142; *see also* Paige Ferise, *Minding Baby: The Link Between Maternal Depression and Infant Health and Development*, 18 IND. HEALTH L. REV. 371, 374 (2021) ("Symptoms can include weepiness, anxiety, irritability, mood swings, insomnia, and an exaggerated sense of empathy.").

233. Brusca, *supra* note 230, at 1142.

234. Connell, *supra* note 20, at 145.

235. *See* Ferise, *supra* note 232, at 374 ("Symptoms of postpartum depression include many of the symptoms of baby blues but also can include more severe symptoms such as difficulty bonding with baby, recurrent thoughts of self-harm or harming the baby, panic attacks, feelings of worthlessness or hopelessness, and fear of being a bad mother.").

236. *Id.*

237. Connell, *supra* note 20, at 146.

or children.[238] Within the first few days of delivery, and sometimes upward of the next couple weeks, the new mother may begin feeling "extreme emotional lability, mania, disorganization, and/or the experience of hallucinations and delusions."[239] Women experiencing postpartum psychosis may shockingly transfer between lucid and delusional thought processes throughout their postpartum period[240] and might be unable to effectively care for their child and even deny giving birth at all.[241] The most concerning symptoms are, of course, shedding these bouts of uninterest in the child, and experiencing intrusive and obsessive thoughts about causing harm to the defenseless infant.[242] At this level of severity, formal treatment can be aggressive and might include a combination of hormone therapy, antidepressants, tranquilizers, and extended hospitalization paired with behavioral and cognitive psychotherapy.[243]

The overall effects of postpartum illness are quite significant as anywhere from fifty to eighty percent of all biological mothers experience some fluctuating symptoms of emotional dysfunction following childbirth.[244] As many as one in nine women may experience heightened symptoms denoting the full onset of postpartum depression, and for every 1,000 women who give birth, two will experience the often-devastating effects of postpartum psychosis.[245] Regrettably, approximately four percent of women in this latter category will either commit harm or attempt to commit harm against her child or children.[246]

B. *How Infanticide is Measured in Differing Jurisdictions*

The women who have committed incomprehensible and violent acts due to severe mental illness must now face a legal system that is undecided on

238. *Id.*

239. Perez-Tineo, *supra* note 14, at 207 (addressing the prevalence and postpartum psychosis and the necessity for expert testimony).

240. Connell, *supra* note 20, at 148.

241. Brusca, *supra* note 230, at 1144.

242. *Id.*

243. *Id.* at 1145; Connell, *supra* note 20, at 146.

244. *See, e.g.*, Brusca, *supra* note 230, at 1133 ("Recent studies indicate that between fifty to eighty percent of new mothers experience some type of emotional stress or dysfunction following childbirth.").

245. Perez-Tineo, *supra* note 14, at 205 ("Up to one in nine women experience postpartum depression and one to two in 1000 women experience postpartum psychosis.").

246. *Id.* at 205–06.

how to punish them.[247] Typically a woman will invoke an insanity defense based on her postpartum psychosis.[248] However, given the variety of tests employed for legal insanity, the defense is limited to certain jurisdictions.[249]

1. Postpartum Psychosis and Abolition of an Insanity Defense

States that have abolished an affirmative insanity defense and only allow a defendant to offer evidence of mental illness to challenge the necessary intent required of the crime charged have almost completely eliminated the opportunity for a defendant's exoneration from crimes committed in response to postpartum psychosis.[250] These mothers most likely intended to cause their children harm,[251] but their disease invaded and disoriented their motivations for doing so.[252] Any relevant evidence of mental illness would not be permitted in the guilt phase of the trial, meaning their postpartum psychosis is inconsequential to the final disposition.[253] These mothers may be able to offer this evidence during the sentencing phase,[254] but as they have already been adjudged guilty, this is obviously far too late.[255] Montana, Utah, Kansas, Idaho, and Alaska have all reformed their existing insanity defense to reflect such changes,[256] and *Kahler v. Kansas* held that this change passed constitutional muster.[257]

247. Connell, *supra* note 20, at 144 ("The wide range of verdicts in similar cases indicates society's and the legal system's ambivalence about postpartum psychosis as a criminal defense.").

248. Colleen Kelly, *The Legacy of Too Little, Too Late: The Inconsistent Treatment of Postpartum Psychosis as a Defense to Infanticide*, 19 J. CONTEMP. HEALTH L. & POL'Y 247, 259 (2003).

249. Yang, *supra* note 229, at 229; *see also* Barton, *supra* note 29, at 618 ("The problem is that when different jurisdictions use different tests, different results occur.").

250. Carmickle, *supra* note 16, at 592 ("In those jurisdictions, the inability to assert the insanity defense as a complete defense deprives a woman with postpartum mental illness the ability to assert that her mental illness influenced her behavior or was even the cause of it.").

251. *See* Morse & Bonnie, *supra* note 17, at 491 ("In virtually all cases, mental disorder, even severe disorders marked by psychotic symptoms such as delusions and hallucinations, does not negate the required *mens rea* for the crime charged.").

252. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1048 (2020) (Breyer, J., dissenting) (asserting mental illness does not interfere with intent but instead interferes with one's "*motivations* for forming such intent").

253. Corrado, *supra* note 63, at 493.

254. Mullan, *supra* note 153, at 444.

255. *Id.* at 453; *see also* Dressler, *supra* note 13, at 418 ("Indeed, allowing a defendant to introduce mental illness evidence at the sentencing phase—after the guilty verdict—is too late.").

256. IDAHO CODE ANN. § 18-207; KAN. STAT. ANN. §§ 22-3219, 21-5209; MONT. CODE ANN. § 46-14-102; UTAH CODE ANN. § 76-2-305, ALASKA STAT. §§ 12.47.010, 12.47.020.

257. Crowder, *supra* note 23, at 95.

2. Postpartum Psychosis and the *M'Naghten* Standard

In a *M'Naghten* jurisdiction, a woman who commits a crime while suffering from the effects of postpartum psychosis may be found legally insane and acquitted for her actions if she can prove that mental defect prevented her from understanding either the true nature of her actions *or* that her actions were wrong.[258] Traditionally, this standard is criticized for requiring complete incapacity by ignoring the fact that mental illness varies in severity, and for requiring the factfinder to rely too heavily on dueling expert opinions.[259] These shortcomings can be detrimental to the defendant asserting a postpartum psychosis based insanity defense in a jurisdiction that embraces the *M'Naghten* standard.[260] Given the ability of some defendants to fabricate elaborate false stories surrounding the circumstances of their child's death,[261] and the radical and unannounced transitions between lucid and delusional phases during the psychotic period,[262] it is often almost impossible to determine whether the mother could differentiate between right and wrong at the specific time the act was committed.[263] Furthermore, because *M'Naghten* demands so much reliance on the opinions of physicians and psychologists who remain uncertain regarding the etiology of postpartum psychosis, their inconsistent testimony may only confuse jurors.[264] Critics also argue that astounding medical advancements since the formulation of the *M'Naghten* standard have provided much more information regarding mental illness, and that the antiquated standard employs overly simplistic notions of brain function that no longer

258. *E.g.*, Bernadette McSherry, *The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility*, 15 SYDNEY L. REV. 292, 306 (1993) (describing the proof required for a valid insanity defense).

259. Connell, *supra* note 20, at 147; *see* Fradella, *supra* note 40, at 19 (commenting the *M'Naghten* standard focuses entirely on the defendant's cognitive capacity and ignores their volitional or affective responses).

260. Connell, *supra* note 20, at 148.

261. *See id.* (describing how the infanticidal mothers in both *Clark* and *Commonwealth v. Comitz* told police officers that their children had been kidnapped to hide their murders, and how their respective courts concluded the defendants could differentiate between right and wrong and were not insane under the *M'Naghten* standard).

262. Connell, *supra* note 20, at 148.

263. *Id.*; Stangle, *supra* note 7, at 725; *see also* Wong, *supra* note 20, at 583 (explaining that some women even expect to be punished for their crimes and this further confounds an evaluation of their ability to understand the moral ramifications of their actions).

264. Connell, *supra* note 20, at 149; *see also* Stangle, *supra* note 7, at 726 ("In addition, because medical experts fail to agree on the nature and causes of postpartum psychoses, expert testimony may prove unreliable.").

adequately describe insanity.[265] Given that the majority of states continue to require defendants to satisfy the *M'Naghten* test, most women using postpartum psychosis as the base of their insanity defense will fail.[266]

3. Postpartum Psychosis and the American Law Institute's Model Penal Code

In jurisdictions that employ the ALI's formulation for insanity "the defendant is considered insane if, at the time of the offense, as a result of mental disease or defect [they] lacked substantial capacity either to appreciate the criminality/wrongfulness of [their] conduct or to conform [their] conduct to the requirements of the law."[267] The test essentially broadens the *M'Naghten* test by only requiring "substantial" incapacity and including a volitional prong to the defense.[268] Even so, asserting a postpartum-based insanity test in these jurisdictions remains largely ineffective.[269] As described above, women who acted under the effects of postpartum psychosis will not satisfy the cognitive elements of this test, as it is similar to the *M'Naghten* standard.[270] Furthermore, her mental instability, although capable of creating devastating consequences, will likely not prevent her from tailoring her behavior in order to meet the requirements of the law.[271]

C. *Difficulties Establishing Postpartum Psychosis in Any Jurisdiction*

Implementing postpartum psychosis as a platform for an insanity defense presents a defendant with unique challenges in a criminal setting in every

265. Carrie Quinlan, *Postpartum Psychosis and the United States Criminal Justice System*, 12 BUFF. WOMEN'S L.J. 17, 21–22 (2004); Barton, *supra* note 29, at 597–98.

266. *See* Quinlan, *supra* note 265, at 17 ("Critics of the *M'Naghten* test, the predominant standard for insanity in the United States, believe that it is outdated and does not adequately meet the needs of women suffering from postpartum psychosis.").

267. March, *supra* note 28, at 254–55.

268. Shoptaw, *supra* note 31, at 1110.

269. Carmickle, *supra* note 16, at 590.

270. March, *supra* note 28, at 255; *see* Connell, *supra* note 20, at 148 (asserting the shortcomings of the *M'Naghten* formula for postpartum psychosis defendants).

271. *See* March, *supra* note 28, at 255 ("A key problem is that postpartum psychosis may significantly impair a woman's mental stability while still not rising to the level of an irresistible impulse—thereby not meeting a volitional test, should it apply—and still not meeting the cognitive test required under most states to qualify as an insanity defense.").

state.[272] First, the illness is temporary in nature, which makes it difficult for a jury to gauge the degree of mental disturbance at the time the crime was committed.[273] Additionally, during her psychotic period the defendant may quickly transition between delusional and lucid states, making her disturbance hard to identify by both medical professionals and potential witnesses.[274] Another potential challenge is the public's complex notions of motherhood.[275] While some women might benefit from the belief that only an insane women could be capable of harming her children,[276] others have their mental illness overlooked because the jury perceives the act of harming one's own child as so monstrous that the woman must deserve punishment.[277] Finally, there remains substantial medical disagreement about postpartum psychosis reflected in dueling expert testimony, which confounds a jury's ability to conclusively find the mother insane, even though her mental illness should legally render her so.[278]

IV. A FEMALE-SPECIFIC SOLUTION

It is no wonder that this nation's courts continue to see irregular conviction and sentencing patterns in postpartum psychosis jurisprudence because defendants' symptoms rarely fit into the various insanity formulas they must face, and the unique characteristics of the disease present so many enigmas for judges and juries alike. To further complicate the matter, *Kahler v. Kansas* now implies that states with slightly more accommodating standards have no requirement to continue to implement specific guidelines; evidence of postpartum psychosis could ultimately be prohibited in parts of

272. *See* Melissa L. Nau et al., *Postpartum Psychosis and the Courts*, 40 J. AM. ACAD. PSYCHIATRY LAW 318, 319 (2012) ("Several characteristics of postpartum psychosis differentiate it from psychosis of other etiologies.").

273. Barton, *supra* note 29, at 605; Brusca, *supra* note 230, at 1166; Wong, *supra* note 20, at 585–86; Sandy Meng Shan Liu, Comment, *Postpartum Psychosis: A Legitimate Defense for Negating Criminal Responsibility*, 4 THE SCHOLAR 339, 362 (2002).

274. Perez-Tineo, *supra* note 14, at 213.

275. Connell, *supra* note 20, at 144.

276. *See* Gardner, *supra* note 111, at 954 (exploring common reactions to postpartum psychosis).

277. *See* Wong, *supra* note 20, at 572 (explaining the dichotomized perceptions of women who kill their children); March, *supra* note 28, at 250–51 ("Such a challenge requires a mother to be defined in a binary way—either mad or bad.").

278. *See* Perez-Tineo, *supra* note 14, at 213 (describing the inconsistencies in the medical understanding of postpartum psychosis and commenting that the failure of the DSM to recognize postpartum psychosis as a separate diagnosis only creates more problems at trial).

this nation.[279] To ensure uniform sentencing standards, to grant amnesty where appropriate, and to provide rehabilitative opportunities to this vulnerable population, United States courts and legislatures should recognize and develop a separate, female-specific postpartum insanity defense. [280]

A. *Infanticide in Other Nations*

In response to the growing concern about how courts should treat women affected by this emotional illness, the United Kingdom enacted the Infanticide Act in 1922.[281] It was later revised in 1938, and essentially charges women with the lesser offense of manslaughter if they are convicted of killing their child within the first year after childbirth, as it was presumed that they had not yet recovered from the trauma associated with childbirth and lactation.[282] This legislation recognized that a woman's mental health could be so mangled by the effect of childbirth and subsequent breastfeeding that she should not be held entirely culpable for harm she causes her child.[283] Other countries including Austria, New Zealand, Canada, Germany, and Australia passed similar legislation that allotted these women certain amnesty for the crime of infanticide.[284] Predictably, women convicted in England face a fair and consistent sentencing regime.[285] Despite this reality, the concept of a per se excuse for infanticide makes some commentators hesitant because, although it is true that postpartum psychosis does cause some women to act in frenzied and violent ways, some new mothers who become violent are actually propelled by sinister

279. *See* Dressler, *supra* note 13, at 425 ("We must now wait to see whether legislatures that retain a true insanity defense will use this case as an opportunity to repeal it, and whether they will push the envelope further to see how far they may constitutionally go to bar mental health testimony. For those of us who believe that a full-throated insanity defense is wise policy, however, we cannot rely on the United States Supreme Court to protect the penal interests of the mentally ill.").

280. *See* Barton, *supra* note 29, at 617 ("The most positive aspect of a postpartum psychosis defense is that it offers a just legal option for a woman who truly suffered from the disorder at the time of the killing. Furthermore, a separate postpartum psychosis defense would promote uniformity in decisions and sentencing for mothers suffering from the affliction.").

281. Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCH. PUB. POL'Y. & L. 1098, 1098 (2000); Connell, *supra* note 20, at 163.

282. Dobson & Sales, *supra* note 281, at 1099.

283. *Id.*

284. *Id.*

285. Margaret Ryznar, *Crime of Its Own? A Proposal for Achieving Greater Sentencing Consistency in Neonaticide and Infanticide Cases*, 47 U.S.F. L. REV. 459, 481 (2013).

motives.[286] England's infanticide statute does not require the defendant to provide evidence that mental illness was, in fact, the reason for her devastating acts.[287] Perhaps for these reasons, America's federal government is hesitant to enact any special or sympathizing legislation and believes it must find these women guilty of homicide unless defendants successfully assert a rarely effective defense.[288] There have been a few attempts to initiate similar legislation in the United States, but these bills are typically met with public outrage and never make it out of the committee phase.[289]

B. *Legislative Proposal*

Despite problems with the existing regime and inadequacies of a per se excuse, the fact still remains that "[a] woman who commits infanticide while suffering from postpartum psychosis cannot be held morally culpable if she fell victim to something which she could not control, so punishment under such circumstances would be inappropriate."[290] These women deserve justice, protection, and medical intervention and a female-specific postpartum psychosis defense could be the solution.[291] In 2002, Michele Connell proposed an example of this type of legislation:

> 1. Affirmative defense: The defendant can raise the affirmative defense of insanity based on postpartum psychosis if:
>
> a.) the killing of the defendant's child occurred within one year of the mother giving birth to that child or another child, and
>
> b.) an expert psychiatrist appointed by the court determines that there is a reasonable doubt as to the defendant's sanity.
>
> 2. Elements: The defendant must prove, to the extent determined by state law, that:

286. Manchester, *supra* note 118, at 749; March, *supra* note 28, at 257–58.

287. Connell, *supra* note 20, at 164.

288. Dobson & Sales, *supra* note 281, at 1099; Barton, *supra* note 29, at 597.

289. Ann Rhodes & Lisa Segre, *Perinatal Depression: A Review of U.S. Legislation and Law*, 16 ARCH WOMENS MENT. HEALTH 259, 267 (2013).

290. Liu, *supra* note 273, at 378.

291. *See* Ryznar, *supra* note 285, at 478 ("[S]tatutory separation would be the most effective method for achieving consistent administration of justice within this subset of criminal law.").

> a.) she was suffering from postpartum psychosis, and
> b.) there was a causal connection between the psychosis and the killing, and
> c.) she did not know right from wrong, or, if she did know right from wrong, then she must prove that because of the psychosis, she had lost the ability to choose between right and wrong.[292]

The author of this proposal mimicked provisions of the irresistible impulse test described in Part II of this Comment, thus providing the defendant an opportunity to prove that she was unable to ignore the delusions, hallucinations, and compulsions related to harming her child.[293] Most importantly, after *Kahler v. Kansas*, the defense remains an affirmative and complete defense to the crime of infanticide and if implemented as a separate statutory scheme, evidence of mental illness would be admissible regardless of the presence or absence of *mens rea*.[294] Other commentors have since proposed this specific legislation,[295] but this Comment suggests the proposal be reexamined and implemented in the wake of the Supreme Court's recent decision that allows states to eliminate an affirmative defense to insanity. Despite the proposal's potential for comprehensive and forward-thinking reform, the objectives of such legislation might be better served by including a duty provision that demands—if the defendant knew or had reason to know that she was experiencing symptoms of mental disease—the defendant may not invoke the defense if she did not seek treatment as soon as reasonably possible.[296]

There will, of course, be those who fervently oppose a gender-specific and illness-specific standard for criminal responsibility.[297] One group may support a persuasive feminist theory claiming that applying and enforcing of a gender-specific standard will reinforce the stereotype that women are ridiculous beings, incapable of self-regulation,[298] and the request for special treatment might actually impair women's rights.[299] Others may argue that

292. Connell, *supra* note 20, at 162–63.

293. *Id.*

294. *See id.* (describing the instances when the affirmative defense could be made and listing the elements for the defense).

295. March, *supra* note 28, at 257–58 (quoting Connell, *supra* note 20, at 164).

296. *See* Collins, *supra* note 83, at 54 (offering a duty provision as part of a reform to the traditional insanity defense).

297. *See* March, *supra* note 28, at 259–60 (highlighting the arguments against this type of legislation).

298. Wong, *supra* note 20, at 587–88; Brusca, *supra* note 230, at 1166–67.

299. March, *supra* note 28, at 252 (quoting PATRICIA PEARSON, WHEN SHE WAS BAD: VIOLENT WOMEN AND THE MYTH OF INNOCENCE 167 (1997)); Manchester, *supra* note 118, at 716.

the creation of a postpartum psychosis-specific defense will persuade other groups to push for similar legislation highlighting and excusing the unique characteristics of other mental illnesses.[300] These arguments, although compelling, must be weighed against the injustice of erratically and inconsistently punishing women who act only under the duress of mental illness.[301] Creating a complete, gender-specific postpartum psychosis defense will ultimately prevent punishment of the morally blameless, a tradition that, until recently, had been thoroughly recognized in the United States.[302]

V. CONCLUSION

The insanity regime in the United States desperately needs reform. Persons who suffer mental illness and are fortunate enough to live in jurisdictions that allow an affirmative defense may find some reprieve in the current system, but not with much certainty. Others face a legal regime that no longer recognizes that their unique disability should eliminate culpability, which ultimately strips away the very essence of the insanity defense. Advocates for reform saw an opportunity on the horizon, but after much anticipation, *Kahler v. Kansas* proclaimed that states were free to do as they wish with the insanity defense. Perhaps the Court believed the timing was off, as we still do not know much about the human mind, and a premature constitutional baseline would yoke the legal system to a lacking standard. Perhaps there is something to be said about a state's right to choose how to regulate the criminally insane. Whatever the justification, inaction by the Court is potentially damaging to the mentally ill in states that deny the availability of an affirmative insanity defense. Women who kill due to the complicated and devastating effects of postpartum psychosis will be among the most vulnerable as they had scarcely fit into the insanity regime before it was stripped of its core. The most rational way to prevent future injustice and alleviate the damage done by the Supreme Court's inaction is to implement a separate statutory postpartum psychosis defense. This defense ensures that evidence of mental illness will always be relevant and will give women who suffer postpartum psychosis the baseline opportunity to

300. Barton, *supra* note 29, at 617.

301. *See* Ryznar, *supra* note 285, at 482 ("On the other hand, as was done in foreign jurisdictions, these social costs must be weighed against achieving the fair and consistent administration of justice.").

302. *See id.* at 485 ("In the meantime, in the dearth of such a statute, the only consistency in this subset of criminal law will be its unpredictability.").

establish that they should not be punished because of their mental illness. Essentially, this statute *will* treat women differently, but indeed, a condition that is so fundamentally female deserves distinct and exclusive protection.