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## ESSAY

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### OF DEATH AND DELUSION: WHAT SURVIVES *KAHLER V. KANSAS*?

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*Mental illness is not a crime. That fundamental proposition is threatened by the Supreme Court's recent decision in Kahler v. Kansas, which allows states to abolish the insanity defense. This Essay presents three examples of absurd and discriminatory results that could follow. But the conclusion is a positive one: constitutional constraints not considered in Kahler—the Equal Protection Clause and the Eighth Amendment—should prevent the worst results from materializing.*

#### INTRODUCTION

You are standing over the body of a man you just killed. You thought you acted in self-defense, but the gun he was threatening you with was actually a cellphone. In five states at least, you may be punished more harshly if the gun was a hallucination produced by mental illness than if the mistake was a simple misperception. The Supreme Court in *Kahler v. Kansas* recently approved that result by holding that the traditional insanity defense is not mandated by the Due Process Clause.<sup>1</sup> Reports of the insanity defense's "death," however, are

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<sup>1</sup> *Kahler v. Kansas*, 140 S. Ct. 1021 (2020). Five states have eliminated the traditional insanity defense: Alaska (ALASKA STAT. §§ 12.47.010(a), 12.47.020 (2019)), Idaho (IDAHO CODE ANN. § 18-207(1), (3) (2020)), Kansas (KAN. STAT. ANN. § 21-5209 (2019)), Montana (MONT. CODE ANN. § 46-14-102 (2019)), and Utah (UTAH CODE ANN. § 76-2-305 (West 2016)). More could follow. See Stephen J. Morse & Richard J. Bonnie, *Don't Abolish the Insanity Defense*, THE HILL (May 18, 2020, 9:00 AM), <https://thehill.com/opinion/judiciary/497726-dont-abolish-the-insanity-defense> [<https://perma.cc/SS9J-XPJX>] (explaining that the Supreme Court's ruling in *Kahler* "gave a green light to every state in the union to effectively abolish the insanity defense").

greatly exaggerated.<sup>2</sup> All but a handful of states have a meaningful insanity defense, and most will likely keep the defense even though they are not required to do so by due process. This Essay argues that the principles underlying the insanity defense are so fundamental that other constitutional provisions require government to retain much of the defense's structure and coverage. At a minimum, states must provide the mentally ill with the same access to other criminal law defenses enjoyed by neurotypical individuals.<sup>3</sup>

This Essay proceeds in five parts. The first part summarizes the opinions in *Kahler*, giving particular attention to a pair of hypotheticals posed by Justice Breyer in dissent. The hypotheticals show that, in Kansas, criminal responsibility can arbitrarily turn on the content of one's delusion. Parts two and three offer two more pairs of hypotheticals that are even more damning than the first. In each case, individuals with mental illness are punished for their disease. The final two parts argue that the irrationality and outright discrimination illustrated by the three examples violate equal protection and the Eighth Amendment. The *Kahler* Court let the traditional insanity defense die, but it cannot kill the animating principle of punishment based on culpability.

## I. THE *KAHLER* OPINIONS

James Kahler was convicted of capital murder and sentenced to death.<sup>4</sup> At trial, he was allowed to introduce evidence that his severe depression had prevented him from forming the intent to kill (i.e., that he lacked mens rea), and, at sentencing, he was allowed to offer additional evidence of his mental illness in mitigation.<sup>5</sup> What he was not allowed to do under Kansas law, however, was introduce evidence that, because of his mental illness, he was unable to tell the difference between right and wrong. In other words, he was prohibited from showing that he suffered from "moral incapacity" and was, therefore, not guilty by reason of insanity.<sup>6</sup>

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<sup>2</sup> See Carissa Byrne Hessick, *The Supreme Court Let States Kill the Insanity Defense*, SLATE, (Mar. 24, 2020, 2:39 PM), <https://slate.com/news-and-politics/2020/03/kahler-kansas-insanity-defense-supreme-court.html> [<https://perma.cc/5562-TV88>] ("[T]he Supreme Court dealt a death blow to the insanity defense."); see also Kimberly Strawbridge Robinson & Jordan S. Rubin, *Insanity Defense Claims Curbed by High Court in Murder Case (2)*, BLOOMBERG LAW (Mar. 23, 2020, 5:09 PM), <https://news.bloomberglaw.com/us-law-week/kansas-wins-u-s-supreme-court-dispute-over-insanity-defense> [<https://perma.cc/3XAK-67FU>] (quoting Professor Carissa Byrne Hessick as stating that Kansas's current defense scheme is "not an insanity defense").

<sup>3</sup> Cf. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000) (arguing that the insanity defense should be abolished as a separate defense in favor of other defenses that do not depend on mental disability).

<sup>4</sup> *Kahler*, 140 S. Ct. at 1027.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1026-27.

The United States Supreme Court affirmed Kahler's conviction, holding that Kansas did not violate the Due Process Clause by eliminating the moral incapacity test for insanity.<sup>7</sup> After surveying common-law authorities and early case law,<sup>8</sup> the Court concluded that the moral incapacity standard is not a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>9</sup> The Court conceded that the insanity defense is fundamental, but found that Kansas had not eliminated the defense entirely because it allows mental health evidence to negate *mens rea* (i.e., cognitive incapacity) and to be considered in sentencing.<sup>10</sup> Cognitive incapacity and moral incapacity are alternative paths to insanity under the traditional *M'Naghten* standard.<sup>11</sup> In light of variations in earlier formulations of the insanity defense (like the "wild beast" test),<sup>12</sup> the Court held these choices were permissible. The Court did not opine on the constitutionality of eliminating *both* the cognitive incapacity and moral incapacity tests and expressly declined to entertain Eighth Amendment arguments.<sup>13</sup>

Justice Breyer's dissent offered two hypotheticals to explain the stakes.<sup>14</sup> In both hypothetical murder prosecutions, the accused person shot and killed another person because of a delusion brought on by severe mental illness.<sup>15</sup> In the first case, the defendant thought the victim was a dog (a visual hallucination), and thus did not know that he had killed a human being.<sup>16</sup> This is an example of cognitive incapacity. In the second case, the defendant thought that a dog ordered him to kill the victim<sup>17</sup> (an auditory hallucination); he knew that his victim was human, but the killing occurred under the pressure of the delusion. "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."<sup>18</sup> Kansas law, Justice Breyer suggested at oral argument, makes no sense.<sup>19</sup>

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<sup>7</sup> *Id.* at 1027.

<sup>8</sup> *Id.* at 1032-36.

<sup>9</sup> *Id.* at 1027 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

<sup>10</sup> *Id.* at 1030-31.

<sup>11</sup> *M'Naghten's Case* (1843), 10 8 Eng. Rep. 718; 10 Cl. & Fin. 200.

<sup>12</sup> *Kahler*, 140 S. Ct. at 1032.

<sup>13</sup> *See id.* at 1027 n.4 (noting that the Eighth Amendment claims were not properly before the Court because petitioner did not raise the argument in the state courts).

<sup>14</sup> *Id.* at 1038 (Breyer, J., dissenting).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Transcript of Oral Argument at 38-40, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (No. 18-6135), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-6135\\_5h26.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-6135_5h26.pdf) [<https://perma.cc/2UHR-CE8Y>].

As the second hypothetical reveals, the dissent was not wed to the moral incapacity test:<sup>20</sup> one could feel compelled to follow a dog's order even while recognizing that doing so is wrong. Rather, the dissent in its own survey of early sources found support for the more general proposition that there are circumstances where mental illness negates culpability. What Kansas had done wrong, Breyer asserted, was to jettison that fundamental principle in too wide a swath of cases.<sup>21</sup>

## II. IMPERFECT SELF-DEFENSE

Justice Breyer's dog examples are just the tip of an irrationality iceberg. Consider two additional hypothetical murder prosecutions. In each, the accused person knowingly killed another person upon an unreasonable but actual belief that deadly force was justified.<sup>22</sup> In the first case, the defendant thought the victim held a gun rather than a cellphone because of poor eyesight. In the second case, the defendant thought the victim held a gun rather than a cellphone because the defendant was mentally ill and was experiencing a visual hallucination.

In Kansas, the first defendant is guilty of voluntary manslaughter only,<sup>23</sup> whereas the second defendant is likely guilty of murder. This result flows from Kansas eliminating the moral incapacity test for insanity,<sup>24</sup> in combination with a case, *State v. Ordway*,<sup>25</sup> that predates that abolition. In that case, the Kansas Supreme Court held that the "unreasonable but honest belief" necessary to support the "imperfect right to self-defense manslaughter" cannot be based upon a psychotic delusion.<sup>26</sup> Thus, under Kansas law, the second defendant—who perceived the cellphone as a gun because of a visual hallucination—cannot invoke self-defense manslaughter, and, because Kansas has abandoned the moral incapacity test, has no valid insanity defense to a prosecution for second-degree murder. Yet the second defendant killed for precisely the same *reason* as the first defendant: because he thought the victim's cellphone was a gun.

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<sup>20</sup> *Kahler*, 140 S. Ct. at 1039 (Breyer, J., dissenting) ("I do not mean to suggest that *M'Naghten's* particular approach to insanity is constitutionally required."). Again, *M'Naghten* includes both cognitive and moral incapacity paths to insanity. It was the moral incapacity prong that Kansas removed.

<sup>21</sup> *Id.* at 1048.

<sup>22</sup> This is the standard set forth in the Kansas voluntary manslaughter statute. KAN. STAT. ANN. § 21-5404(a)(2) (2019).

<sup>23</sup> *See id.* (defining voluntary manslaughter as knowingly killing a human being "upon an unreasonable but honest belief that circumstances existed that justified use of deadly force").

<sup>24</sup> Acting based on a delusion that self-defense is justified is a classic example of moral incapacity. *M'Naghten's Case* (1843), 10 8 Eng. Rep. 718, 723; 10 Cl. & Fin. 200, 211.

<sup>25</sup> *State v. Ordway*, 934 P.2d 94 (Kan. 1997).

<sup>26</sup> *Id.* at 104.

*Ordway* contains little reasoning, but other cases provide some: to allow voluntary manslaughter claims based on delusions “would open the flood gates to imperfect self-defense claims based entirely on a subjective state of mind when the objective component is not present.”<sup>27</sup> This “flood gates” argument is unpersuasive. The circumstances justifying deadly force are narrowly defined. For example, a self-defense claim in a homicide case can prevail only where, if the misperception were real, the defendant could “reasonably believe[] that such use of deadly force [was] necessary to prevent imminent death or great bodily harm to such person or a third person.”<sup>28</sup> Moreover, the traditional mens rea (cognitive incapacity) inquiry already turns on the defendant’s subjective state of mind. If the law can accommodate evidence that the defendant believed the victim was a dog, why shouldn’t evidence of other delusions be permissible?

While Kansas’s slippery slope argument is unconvincing, the affirmative case for allowing imperfect self-defense claims based on delusions is compelling. A defendant’s mental state is the same however a misperception arises. In particular, “[a]ny genuine belief in the need for self-defense precludes a murder conviction, because such a belief ‘cannot coexist’ with the mental state of malice, an essential component of the crime of murder.”<sup>29</sup> Thus, imperfect self-defense can arise from a delusion caused by mental illness. At the time it was decided, *Ordway*’s pernicious impact was limited by the availability of the moral incapacity test for insanity, but now its illogic is unconstrained.<sup>30</sup> Other cases that followed the *Ordway* rule cited the existence of the moral incapacity test as a reason for doing so.<sup>31</sup>

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<sup>27</sup> *Commonwealth v. Sheppard*, 648 A.2d 563, 569 (Pa. Super. Ct. 1994); see also *State v. Seifert*, 454 N.W.2d 346, 352 (Wis. 1990) (“The doctrine of imperfect self-defense manslaughter was simply never intended to cover situations such as this one where it is entirely the defendant’s mental disease or defect, not an error in judgment or perception or a negligently-formed perspective of the situation, that motivates the defendant’s actions.”).

<sup>28</sup> KAN. STAT. ANN. § 21-5222(b) (2019); see also *State v. Roeder*, 336 P.3d 831, 848 (Kan. 2014) (explaining that in the case of voluntary manslaughter, “the circumstances which the defendant honestly believed to exist must have been such as would have supported a claim of perfect self-defense or defense-of-others, if true”).

<sup>29</sup> *People v. Elmore*, 325 P.3d 951, 969 (Cal. 2014) (Kennard, J., concurring in part and dissenting in part) (emphasis omitted); see also *Davis v. State*, 28 S.W.2d 993, 996 (Tenn. 1930) (“How then can malice be imputed to a defendant when his reason is not merely obscured, but has been swept away and kept away by an insane delusion under which he acts? How can such a defendant be guilty of murder while his delusion persists?”).

<sup>30</sup> The act of eliminating the moral incapacity test did not eliminate imperfect self-defense because voluntary manslaughter on this ground is a lesser included offense, not a defense. See KAN. STAT. ANN. § 21-5209 (2019) (“It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.”).

<sup>31</sup> See, e.g., *Elmore*, 325 P.3d at 961 n.9.

## III. INVOLUNTARY INTOXICATION

You would not realize it reading the *Kahler* opinions, but Kansas has not actually eliminated the moral incapacity test in toto. The test, oddly, still applies to involuntary intoxication.<sup>32</sup> Consider again two hypothetical murder prosecutions. In each, the accused person intentionally killed another person because they were unable to resist a command from God. The first defendant was mentally ill and the second defendant had unknowingly ingested a hallucinogenic drug. Kansas would hold the mentally ill defendant guilty of murder, but acquit the drugged defendant if his intoxicated condition “rendered [him] substantially incapable of knowing or understanding the wrongfulness of [his] conduct and of conforming [his] conduct to the requirements of law.”<sup>33</sup>

Both defendants are equally blameless.<sup>34</sup> The source of their delusion, like the source of a mistaken belief that a cellphone was a gun, has no bearing on their culpability. One rationale case law provides for this disparate treatment echoes the subjective-objective distinction above: “A person seeking a determination of insanity presents evidence that is primarily subjective, while a person seeking to establish a defense of an intoxicated or drugged condition may present evidence that includes objective or scientific methods, such as a blood test.”<sup>35</sup> This distinction is exaggerated. Objective evidence like blood tests will often not be available; moreover, two people can respond very differently to the same dose of a drug. Assessing intoxication retrospectively “can generate at least as much uncertainty as imprecision or controversy in mental illness categories.”<sup>36</sup> “I was drugged” can be harder to evaluate than “I have schizophrenia.”

But even if the distinction is sufficient to justify channeling mental health evidence into the insanity defense, it cannot support the disparate treatment of two equally blameless defendants once the insanity defense is unavailable. Indeed, the case above that drew the subjective-objective evidence distinction relied expressly on the availability of the traditional insanity defense, including moral incapacity, to reject an equal protection challenge.<sup>37</sup>

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<sup>32</sup> KAN. STAT. ANN. § 21-5205 (2019).

<sup>33</sup> *Id.* § 21-5205(a).

<sup>34</sup> See generally Fredrick E. Vars, *When God Spikes Your Drink: Guilty Without Mens Rea*, 4 CAL. L. REV. CIR. 209 (2013) (describing parallel illogic produced by barring mental health evidence on mens rea).

<sup>35</sup> *People v. Teran*, 818 N.E.2d 1278, 1290 (Ill. App. Ct. 2004) (internal citations omitted).

<sup>36</sup> Vars, *supra* note 34, at 213.

<sup>37</sup> *Teran*, 818 N.E.2d at 1290.

## IV. EQUAL PROTECTION

The three pairs of hypotheticals presented above show that Kansas law is now riddled with irrational classifications. Starting with Justice Breyer's example, it is arbitrary to premise criminal responsibility on the content of a delusion—seeing a dog versus hearing a dog. The Supreme Court of Utah nonetheless rejected an equal protection challenge to this distinction,<sup>38</sup> reasoning that, in Justice Breyer's terms, the person who hears a dog but knows they are killing a person is arguably more culpable than the person who thinks they are killing a dog. This distinction may persuade some courts.

The Utah Supreme Court's reasoning, however, does not apply to the self-defense and intoxication hypotheticals, where the discrimination is based squarely on the fact of mental illness, not the content of a delusion. In both cases, a person with the identical state of mind as a person without mental illness is relieved of criminal responsibility, whereas the mentally ill person is punished for their illness. This disparate treatment of similarly situated defendants is so irrational as to violate equal protection.<sup>39</sup>

The equal protection discussion could end here if the Supreme Court had not actually approved this type of irrational punishment scheme. In *Clark v. Arizona*, the Court upheld Arizona's prohibition on presenting mental health evidence on the issue of intent.<sup>40</sup> Arizona's scheme is Kansas flipped: seeing a dog is no defense, but hearing a dog is. That is because Arizona, along with eight other states, prohibits mental health evidence on mens rea, but allows it to prove an insanity defense.<sup>41</sup> *Clark* relied on perceived differences between mental health evidence and other types of evidence reminiscent of the subjective-objective distinction above. As the dissent correctly observed, however, "[t]here is no rational basis . . . for criminally punishing a person who commits a killing without knowledge or intent only if that person has a mental illness."<sup>42</sup> Sadly, a majority on the high court appears unconcerned about discrimination against people with mental illness in the general criminal law.

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<sup>38</sup> *State v. Herrera*, 895 P.2d 359, 368-69 (Utah 1995).

<sup>39</sup> *Id.* at 384-85 (Stewart, J., dissenting); see also Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 213 (1996) ("The Equal Protection Clause limits the state's ability to define crimes even within the domain unconstrained by the Due Process Clause, and it precludes making arbitrary distinctions among those who kill.").

<sup>40</sup> *Clark v. Arizona*, 548 U.S. 735, 742 (2006).

<sup>41</sup> Arizona (ARIZ. REV. STAT. ANN. §13-502(A) (2009)), Delaware (DEL. CODE ANN. tit. 11 §401(a) (2012)), Illinois (720 ILL. COMP. STAT. 5/6-2(a) (2012)), Indiana (IND. CODE §35-41-3-6(a) (2017)), Louisiana (LA. STAT. ANN. §14:14 (2019)), Ohio (OHIO REV. CODE ANN. §2901.01(A)(14) (West 2019)), South Carolina (S.C. CODE ANN. §17-24-10(A) (1989)), South Dakota (S.D. CODIFIED LAWS §22-1-2(20) (2020)), and Texas (TEX. PENAL CODE ANN. §8.01(a) (West 1994)).

<sup>42</sup> *Clark*, 548 U.S. at 798 (Kennedy, J., dissenting).

## V. EIGHTH AMENDMENT

*Clark*, therefore, appears to have foreclosed the equal protection argument, but the Eighth Amendment provides a backstop. As in *Clark*, Courts accord a particularly high level of deference to legislatures in defining crimes.<sup>43</sup> Two exceptions relevant here are status offenses and the death penalty.<sup>44</sup> Punishment based on status rather than conduct violates the Eighth Amendment. “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>45</sup> Mental illness, like having a cold, cannot be a lawful basis for punishment.<sup>46</sup> That proposition is violated in each of the three pairs of hypotheticals. One cannot control the content of one’s delusions, nor having them in the first place.

No criminal sanction should rest on these distinctions, but certainly not the ultimate sanction. Due process, equal protection, and the Eighth Amendment all prohibit “arbitrary” distinctions,<sup>47</sup> but the word has a special meaning in Eighth Amendment death penalty jurisprudence. To defend against a due process or equal protection claim of arbitrariness, the court need only hypothesize a legitimate rationale of any type: “mental health evidence is confusing” can apparently suffice. To defend against an Eighth Amendment claim of arbitrariness in a death penalty case, on the other hand, there must be a very particular type of reason for more severe punishment: greater culpability. The imposition of a penalty of death must be “directly related to the personal culpability of the criminal defendant,” and “reflect a reasoned *moral* response to the defendant’s background, character, and crime.”<sup>48</sup>

Perhaps the best example of this is *Enmund v. Florida*, in which the Supreme Court held that an accomplice to robbery who neither killed nor intended to

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<sup>43</sup> *State v. Danis*, 826 P.2d 1096, 1099 (Wash. Ct. App. 1992); see also Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and Kahler v. Kansas*, 43 HARV. J.L. & PUB. POL’Y 85, 153 (2020) (“[T]he Constitution leaves entirely to the political process the definition of the penal code because the judgments involved in drafting it involve precisely the type of moral decisions that the public and its elected representatives are fully competent to make.”).

<sup>44</sup> See *Graham v. Florida*, 560 U.S. 48, 60-61 (2010) (cataloguing some of the Court’s categorical rules limiting imposition of the death penalty).

<sup>45</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>46</sup> See *State v. Herrera*, 895 P.2d 359, 385 (Utah 1995) (Stewart, J., dissenting) (“The statutory discrimination between sane persons and insane persons is . . . irrational.”); Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under Graham v. Florida*, 61 DEPAUL L. REV. 1 (2011) (“[T]he absolute abolishment of insanity as an independent defense is unconstitutionally cruel and unusual . . .”).

<sup>47</sup> See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (due process); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (equal protection); *Jones v. United States*, 527 U.S. 373, 381 (1999) (Eighth Amendment).

<sup>48</sup> *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring).

kill could not receive the death penalty.<sup>49</sup> The Court surveyed state law and practice, but ultimately reached its own judgment. Because the defendant's culpability was "plainly different from that of the robbers who killed," treating them alike "was impermissible under the Eighth Amendment."<sup>50</sup>

To be clear, disparate results in similar cases is not itself unconstitutional.<sup>51</sup> What is not permissible is a classification that allows the death penalty for some individuals while arbitrarily excluding individuals who are equally (or more) culpable. Capital punishment must be limited to the most culpable offenders.<sup>52</sup> "It is in regard to the eligibility phase that [the Court has] stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition."<sup>53</sup> Making defendants death-eligible because of their mental illness is arbitrariness that cannot be cured by allowing mental health evidence to support discretionary mitigation at sentencing.<sup>54</sup>

### CONCLUSION

In rejecting a due process challenge to Kansas' elimination of the moral incapacity test for insanity, the *Kahler* majority left in place a thoroughly irrational and arbitrary criminal justice system. People with one kind of dog delusion are punished whereas people with another dog delusion are not. People who feel threatened as the result of a delusion are punished as murderers

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<sup>49</sup> *Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>50</sup> *Id.* at 798.

<sup>51</sup> A petitioner "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987) (emphasis omitted); *see also Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.").

<sup>52</sup> *See generally* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009) (discussing the relationship between capital punishment and culpability, and its relevance to death penalty jurisprudence as it pertains to mental illness).

<sup>53</sup> *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998); *see also* Scott W. Howe, *Race, Death and Disproportionality*, 37 N. KY. L. REV. 213, 239 (2010) ("[A]n exemption from the death penalty based on disproportionality should apply for offenders who were insane at the time of their crimes under nationally prevailing definitions of insanity."). *Cf.* Eric Roytman, *Kahler v. Kansas: The End of the Insanity Defense?*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 43, 43-58 (Feb. 14, 2020) (overlooking the Court's categorical death penalty rules in arguing that *Kahler* could bring only an as-applied Eighth Amendment challenge).

<sup>54</sup> *See* Carissa Byrne Hessick, *The Supreme Court Let States Kill the Insanity Defense*, SLATE (Mar. 24, 2020, 2:39 PM), <https://slate.com/news-and-politics/2020/03/kahler-kansas-insanity-defense-supreme-court.html> [<https://perma.cc/J3UA-Z7M6>] (explaining the difference between a defense and a mitigating factor). Here's what a constitutional sentencing statute might look like: "the death penalty for aggravated murder is precluded when . . . The offense was primarily the product of the offender's psychosis or mental deficiency . . ." *Lockett v. Ohio*, 438 U.S. 586, 612 (1978) (quoting a since-replaced Ohio statute).

whereas people who feel threatened as the result of bad eyesight are not. People whose delusions stem from mental illness are punished whereas people with the same delusions produced by intoxicating substances are not.

These distinctions violate equal protection and the Eighth Amendment and should be stricken across the board. But even if courts creatively imagine “rational” bases for these distinctions, none of the distinctions (especially the second and third examples) have anything to do with culpability. Mental illness must not carry any criminal penalty, and emphatically not a death sentence. Making people death-eligible because their false beliefs arise from mental illness rather than poor eyesight or intoxication is wholly arbitrary and therefore constitutes cruel and unusual punishment under the Court’s death penalty jurisprudence.<sup>55</sup>

The insanity defense cannot be excised from the body of criminal law without tearing holes in its heart, the notion of punishment based on culpability. Due process may permit this butchery after *Kahler*, but equal protection and the Eighth Amendment stitch together many of the holes. The insanity defense is dead; long live the insanity defense.

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<sup>55</sup> Taking the death penalty off the table, while leaving lesser sanctions untouched, would still be a very big deal in the insanity context. The insanity defense is most often raised in serious cases. In a leading study, nearly two-thirds of insanity acquittals involved murder, physical assault, or another crime of violence. Lisa A. Callahan, Henry J. Steadman, Margaret A. McGreevy & Pamela Clark Robbins, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY L. 331, 336 tbl.2 (1991). By comparison, in 1991 (the year the insanity defense study was published), the Bureau of Justice Statistics reported that nineteen percent of all crimes in the twenty-five largest cities were violent. *Selected Crime, Criminal Justice, and Demographic Data - 25 Largest Cities*, Bureau of Justice Statistics, Office of Justice Programs (Nov. 18, 1999), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2059> [<https://perma.cc/H6TE-LFDQ>].