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*Fourteenth Amendment — Due Process Clause —  
Insanity Defense — Kahler v. Kansas*

Imagine two prosecutions for murder. In both, the defendant is mentally ill. In the first, the accused “thought the victim was a dog”; in the second, the accused “thought that a dog ordered him to kill the victim.”<sup>1</sup> One might think that one, both, or neither of the defendants should have the right to raise insanity as a defense. Regardless, fear that a successful insanity plea would unleash “dangerous” individuals back onto the street could outweigh any empathy the public might have for either defendant.<sup>2</sup> Coalition-pleasing lawmakers may be afraid to defend a broad insanity defense, even if they know their constituents’ fears are unfounded. Who better to protect these unpopular individuals in the majoritarian legislative process than the judiciary, which is tasked with enforcing “those [very] political processes ordinarily to be relied upon to protect minorities”?<sup>3</sup> Last Term, in *Kahler v. Kansas*,<sup>4</sup> the Supreme Court neglected this charge. The Court refused to constitutionalize moral incapacity as an insanity defense, focusing on the limited question of whether history established a substantive due process right to this version of the insanity defense. In the process, however, it missed troubling signs that Kansas’s law and others like it represent the type of political process failure that modern constitutional law seeks to prevent.

In 2008, James Kahler was living with his “perfect family” in Weatherford, Texas.<sup>5</sup> But only a year later, during the Thanksgiving weekend of 2009, Kahler fatally shot his wife, his wife’s grandmother, and his two daughters — leaving only his son unharmed.<sup>6</sup> At trial, the defense made no attempt to dispute that Kahler had shot the victims<sup>7</sup> but rather argued the insanity defense.<sup>8</sup> In the year leading up to the shootings, Kahler’s wife had engaged in an extended affair, filed for divorce, and then filed a battery complaint against Kahler, resulting in his

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<sup>1</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1038 (2020) (Breyer, J., dissenting). This hypothetical comes from Justice Breyer’s dissent in the case, where he argued that it would be inappropriate to provide the insanity defense to the first but not the second defendant. *Id.*

<sup>2</sup> See, e.g., Fox Butterfield, *Dispute Over Insanity Defense Is Revived in Murder Trial*, N.Y. TIMES, Mar. 4, 1996, at A10 (describing, in the context of another murder trial where the defendant raised the insanity defense, “a public outraged by rising crime rates and worried that some guilty people may be getting away with murder”); Tony Rogers, *Juries’ Reluctance to Accept Insanity Pleas Linked to Fear, Experts Say*, L.A. TIMES (Apr. 18, 1993), <https://www.latimes.com/archives/la-xpm-1993-04-18-mn-24446-story.html> [<https://perma.cc/7L6Q-E63A>].

<sup>3</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>4</sup> 140 S. Ct. 1021.

<sup>5</sup> *State v. Kahler*, 410 P.3d 105, 113 (Kan. 2018) (per curiam).

<sup>6</sup> *Id.* at 112–13.

<sup>7</sup> Two of the victims identified Kahler as the shooter before dying. *Id.* at 114.

<sup>8</sup> *Id.*

arrest.<sup>9</sup> Kahler had also been fired from his job.<sup>10</sup> According to the defense, these events had all triggered a “severe major depression” that had “degraded [Kahler’s capacity to manage his behavior] so that he couldn’t refrain from doing what he did.”<sup>11</sup> Despite Kahler’s insanity plea, the jury convicted him of capital murder.<sup>12</sup> At the sentencing phase, the same jury recommended the death sentence.<sup>13</sup>

Kahler appealed, arguing, among other things, that Kansas’s statutory approach to the insanity defense was a violation of constitutional due process.<sup>14</sup> The Kansas Supreme Court, in a per curiam decision, rejected his challenges and affirmed his murder conviction and death sentence.<sup>15</sup> Kansas law provided that a mental illness may negate mens rea, but “[m]ental disease or defect is not otherwise a defense.”<sup>16</sup> In Kansas, a mentally ill defendant who lacks “cognitive capacity” (who, for example, thinks the person she is killing is a hat<sup>17</sup>) can argue that she lacked mens rea, but a defendant who lacks “moral capacity” (who, for example, believes she is justifiably drowning her children to save them from eternal hell<sup>18</sup>) has no “insanity defense.”

This statute is a notable departure from the widely accepted *M’Naghten*<sup>19</sup> formulation of the insanity defense, which applies when the defendant lacks either the (1) cognitive or (2) moral capacity to understand her actions.<sup>20</sup> The Kansas legislature had abandoned the second prong, the test of whether a defendant knew what she was doing was morally “wrong.” Could the legislature constitutionally deprive defendants of the ability to argue this prong? The Kansas Supreme Court held that it could. The court referred back to its earlier decision in *State v. Bethel*,<sup>21</sup> where it had reasoned that a non-mens rea, “affirmative

<sup>9</sup> *Id.* at 113.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 114 (citing testimony by forensic psychiatrist Dr. Stephen Peterson for the defense).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 114, 124. The Kansas Supreme Court rejected Kahler’s categorical Eighth Amendment challenge to imposing the death penalty on individuals with severe mental illness, *id.* at 130, as well as a number of challenges to the lower court’s procedure, *see, e.g., id.* at 122.

<sup>15</sup> *Id.* at 133.

<sup>16</sup> KAN. STAT. ANN. § 22-3220 (2007). This provision has since been recodified at KAN. STAT. ANN. § 21-5209 (2018 Cum. Supp.), but the language remains “materially identical.” *Kahler*, 140 S. Ct. at 1025 n.2.

<sup>17</sup> *See generally* OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* (1985).

<sup>18</sup> *See, e.g.,* Carol Christian & Lisa Teachey, *Psychiatrist Says Mom Delusional*, HOUS. CHRON. (Feb. 23, 2002, 6:30 AM), <https://www.chron.com/news/article/Feb-23-Psychiatrist-says-mom-delusional-2103360.php> [<https://perma.cc/GBY4-JKZK>].

<sup>19</sup> *M’Naghten’s Case* (1843) 8 Eng. Rep. 718 (HL); *see, e.g., Kahler*, 140 S. Ct. at 1051–59 (Breyer, J., dissenting).

<sup>20</sup> *Kahler*, 410 P.3d at 125 (citing *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991)).

<sup>21</sup> 66 P.3d 840 (Kan. 2003).

insanity defense . . . is not so ingrained in our legal system [as to be] . . . fundamental” and thus was not mandated by due process.<sup>22</sup> In the absence of any novel arguments by Kahler that would alter the precedent in *Bethel*, the court reaffirmed the statute’s constitutionality.<sup>23</sup>

Justice Johnson dissented<sup>24</sup> from the court’s holding.<sup>25</sup> Although he largely agreed with the court’s dismissal of Kahler’s numerous procedural challenges,<sup>26</sup> he disagreed with the majority’s constitutional analysis of the statute.<sup>27</sup> Justice Johnson drew a sharp distinction between the precedent the majority had thought dispositive, *Bethel*, and the current case because the death penalty was not on the table in *Bethel*.<sup>28</sup> At a minimum, Justice Johnson urged that the court should have “independently analyze[d] whether the procedure of replacing the insanity defense with the mens rea approach undermines . . . the jury’s determination to impose the *death penalty*.”<sup>29</sup>

Kahler appealed, and the U.S. Supreme Court granted certiorari.<sup>30</sup> The Court focused on a narrow question — whether the Kansas statute, which limited the insanity defense to negating mens rea (*cognitive* capacity), was unconstitutional.<sup>31</sup> Writing for the majority, Justice Kagan<sup>32</sup> held that the statute did not violate constitutional due process.

The opinion began with a simple statement of the Court’s test for due process in substantive criminal law: “[A] state rule about criminal liability . . . 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.’”<sup>33</sup> This test set an especially high bar in the context of the insanity defense, where “uncertainties about the human

<sup>22</sup> *Id.* at 851.

<sup>23</sup> *Kahler*, 410 P.3d at 125.

<sup>24</sup> Justice Biles also wrote an opinion, joined by Justice Stegall, that concurred in part and dissented in part. The opinion departed from the majority only on its evaluation of the trial judge’s conduct but made no mention of the insanity-defense question. *Id.* at 133–34 (Biles, J., concurring in part and dissenting in part).

<sup>25</sup> *Id.* at 134 (Johnson, J., dissenting).

<sup>26</sup> *See, e.g., id.* at 134, 136.

<sup>27</sup> Justice Johnson disagreed with both the insanity defense and Eighth Amendment rulings. *Id.* at 135–39. On the latter, he argued that the court should have reconsidered its own precedent on applying the death penalty to the mentally ill. *Id.* at 136–39.

<sup>28</sup> *Id.* at 135.

<sup>29</sup> *Id.* at 136 (emphasis added). Justice Johnson also argued that the death penalty itself might be unconstitutional under Kansas’s *state* constitution, even though Kahler did not make this challenge. *Id.* at 139–40.

<sup>30</sup> *Kahler v. Kansas*, 139 S. Ct. 1318, 1318 (2019) (mem.).

<sup>31</sup> *See Kahler*, 140 S. Ct. at 1024.

<sup>32</sup> Justice Kagan was joined by Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh.

<sup>33</sup> *Kahler*, 140 S. Ct. at 1027 (emphasis added) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

mind loom large.”<sup>34</sup> In the absence of judicial certainty about the foundations of the insanity defense, the Court had twice before refused to constitutionalize particular conceptions of the defense. In *Leland v. Oregon*,<sup>35</sup> the Court refused to require states to acquit defendants on the basis of “volitional[ ] incapacity.”<sup>36</sup> In *Clark v. Arizona*,<sup>37</sup> the state of Arizona took the opposite approach of Kansas and discarded the “cognitive incapacity”<sup>38</sup> prong of *M’Naghten*; again, the Court rejected the challenge in favor of leaving a state’s insanity rule “substantially open to state choice.”<sup>39</sup>

Moving to Kahler’s present request that the Court constitutionalize a moral-incapacity test, Justice Kagan established what Kahler would need to prove — that this particular version of the insanity defense is so “fundamental” to the legal system that it is required by due process.<sup>40</sup> It would not be sufficient to prove only that *some* version of the “insanity defense” was fundamental because, to Justice Kagan, Kansas’s approach did not completely abolish the insanity defense.<sup>41</sup> After all, Kansas had both retained negation of mens rea as a defense and allowed defendants to introduce evidence of insanity at the sentencing phase.<sup>42</sup> Thus, history would need to consistently affirm the moral-incapacity prong in particular. The opinion’s historical tour of relevant cases, however, turned up a mixed record.<sup>43</sup> One thing was clear to Justice Kagan: “[T]he moral-incapacity test has never commanded the day.”<sup>44</sup> In fact, even the moral-incapacity test itself wavered throughout time; some states had transformed the test instead into evaluating “the defendant’s understanding that his act was *illegal* — that is, legally rather than morally ‘wrong.’”<sup>45</sup>

Faced with what she considered an ambiguous historical record at best, Justice Kagan emphasized the importance of judicial restraint. Where “hard [policy] choices among values” are required, defining the contours of the insanity defense is “a project for state governance, *not*

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<sup>34</sup> *Id.* at 1028.

<sup>35</sup> 343 U.S. 790.

<sup>36</sup> *Kahler*, 140 S. Ct. at 1028; *see id.* at 1028–29 (citing *Leland*, 343 U.S. at 800–01).

<sup>37</sup> 548 U.S. 735 (2006).

<sup>38</sup> *Kahler*, 140 S. Ct. at 1029.

<sup>39</sup> *Id.* (quoting *Clark*, 548 U.S. at 752).

<sup>40</sup> *Id.* at 1031.

<sup>41</sup> *Id.* at 1030–31.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1032.

<sup>44</sup> *Id.* at 1036 (citing *Clark*, 548 U.S. at 749).

<sup>45</sup> *Id.* at 1035. The dissent disagreed, finding no “meaningful difference” between legal and moral wrongs and citing past cases that suggested a defendant’s knowledge that the law forbids an act will usually permit the inference that morals forbid the act as well. *Id.* at 1046 (Breyer, J., dissenting); *see, e.g.*, *People v. Schmidt*, 110 N.E. 945, 949 (N.Y. 1915).

constitutional law.”<sup>46</sup> Thus, the Court would not ask Kansas to implement a particular prong of the defense where history did not clearly require it.

Justice Breyer dissented.<sup>47</sup> He did not take issue with the majority’s basic legal test (was the right “fundamental”?)<sup>48</sup> but read the cases surrounding and following *M’Naghten* differently. To Justice Breyer, the historical evidence of a deeply embedded insanity defense that centered on *moral* awareness was clear. He cited sources spanning from the writing of “preeminent common-law jurists”<sup>49</sup> to eighteenth-century English case law that required a defendant to “distinguish whether he was doing good or evil.”<sup>50</sup> Despite the wide berth states had to define their own substantive criminal law, states could not flout the historical requirement that convicted defendants have “a higher degree of individual culpability than the modern concept of *mens rea*,” namely, that defendants must have the moral capacity to be considered culpable.<sup>51</sup>

Even if these historical findings proved only that states are required to maintain some iteration of the insanity defense, Justice Breyer found that Kansas had essentially confessed to abolishing the insanity defense in totality.<sup>52</sup> He highlighted the severity of Kansas’s statute, which would “require[] conviction of a broad swath of defendants who are obviously insane.”<sup>53</sup> Admitting evidence of insanity at sentencing was no substitute for defending against conviction altogether.<sup>54</sup> Thus, Justice Breyer disagreed with the majority’s reading both of the historical case law and of the Kansas statute, including whether the statute retained some meaningful form of insanity defense.

The *Kahler* opinions dig through a centuries-long historical record in search of evidence that the moral-incapacity defense is a “fundamental” tradition of the American criminal law. The opinions justified this approach as deferring to states’ choices about the contours of their substantive criminal liability.<sup>55</sup> But what the opinions failed to consider is that such deference presumes not only that the state legislatures did not

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<sup>46</sup> *Kahler*, 140 S. Ct. at 1037 (emphasis added).

<sup>47</sup> Justice Breyer was joined by Justices Ginsburg and Sotomayor.

<sup>48</sup> See *Kahler*, 140 S. Ct. at 1038 (Breyer, J., dissenting) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)); see also *id.* at 1039.

<sup>49</sup> *Id.* at 1040.

<sup>50</sup> *Id.* at 1043 (quoting *Rex v. Arnold*, (1724) 16 How. St. Tr. 695, 765 (Eng.)).

<sup>51</sup> *Id.* at 1048.

<sup>52</sup> *Id.* at 1047 (citing *State v. Bethel*, 66 P.3d 840 (Kan. 2003), in which the Kansas Supreme Court acknowledged that Kansas law provides for “no consideration . . . of whether wrongfulness was inherent in the defendant’s intent,” *id.* at 850).

<sup>53</sup> *Id.* at 1048.

<sup>54</sup> *Id.* at 1049–50.

<sup>55</sup> *Id.* at 1037 (majority opinion); see also Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 490 (2017) (describing a long history of using federalism as a presumption in substantive criminal law).

abrogate a historical substantive right, but also that they both (1) made deliberative legislative choices and (2) safeguarded the interests of politically vulnerable minorities. Since the famous 1938 *Carolene Products*<sup>56</sup> footnote four,<sup>57</sup> the Court has recognized this duty to reinforce the legislative process, a duty that it has upheld in cases such as those voiding overbroad criminal statutes that can amplify discrimination against minority groups.<sup>58</sup> Criminal defendants who plead the insanity defense are one such “discrete and insular minorit[y]”<sup>59</sup> requiring judicial protection, especially given the long history of state legislatures’ sensitivity to public opinion — and public ignorance — about mentally ill defendants.<sup>60</sup> The *Kahler* majority’s logic would allow Kansas to punt deliberate legislative value judgments about the insanity defense to the judiciary at the sentencing phase. Thus, the *Kahler* Court missed worrying signals that statutes narrowing the insanity defense, such as Kansas’s, may arise out of a defective political process.

Despite their divergent outcomes, the *Kahler* majority and dissent agreed on how to approach the case — the fundamental test was whether history demonstrates the existence of a *substantive* right. To both, the relevant legal test in *Kahler* was whether Kansas’s choice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>61</sup> Moreover, both opinions recognized this analysis’s default presumption in favor of federalism. The opinions therefore diverged only on the clarity of the historical record itself, the topic on which both sides spilled the most ink. To the majority, the record was “messy”<sup>62</sup> as to the moral-incapacity prong, whereas to the dissent, it was clear that this prong has been “long inherent in the nature of the criminal law itself.”<sup>63</sup> Regardless of the historical interpretation, the analyses foregrounded the question of whether the moral-incapacity prong is substantively foundational to criminal law.

Long before *Kahler*, the Court had justified similarly narrow historical inquiries in substantive criminal law cases by grounding them in deference to state legislatures. In the longstanding view of the Court, “‘doctrine[s] of criminal responsibility’ must remain ‘the province of the

<sup>56</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>57</sup> *Id.* at 152 n.4.

<sup>58</sup> See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1313–14, 1321 (1998).

<sup>59</sup> *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

<sup>60</sup> See, e.g., Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR (July 28, 2016, 10:20 AM), <https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea> [<https://perma.cc/9SPT-XZ6L>].

<sup>61</sup> *Kahler*, 140 S. Ct. at 1027 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)); *id.* at 1038 (Breyer, J., dissenting) (quoting *Leland*, 343 U.S. at 798).

<sup>62</sup> *Id.* at 1032 (majority opinion).

<sup>63</sup> *Id.* at 1038 (Breyer, J., dissenting).

States.”<sup>64</sup> Since *Leland*,<sup>65</sup> the earliest insanity-defense case brought on constitutional grounds, members of the Court have been committed to respecting a State’s “determination of its policy.”<sup>66</sup> This through line has extended across substantive criminal law cases on topics ranging from the intoxication defense<sup>67</sup> to the definition of manslaughter.<sup>68</sup> Even in the Court’s most recent entry before *Kahler* into the constitutional dimensions of the insanity-defense doctrine, it reaffirmed that “the insanity rule . . . is substantially open to state choice.”<sup>69</sup>

But this federalism-protecting stance is insufficient to protect criminal defendants from the excesses of substantive criminal law.<sup>70</sup> Because notions of criminality naturally shift over time<sup>71</sup> and historical research does not always reliably explain the present,<sup>72</sup> the Court has struggled to find a substantive right of criminal defendants so consistent throughout history as to outweigh an emphasis on protecting state choice. Indeed, a long lineage of criminal law scholars has identified and “lamented [this] failure to forge a relationship between the Constitution and substantive criminal law.”<sup>73</sup> This critique originates in large part from the Court’s myopic emphasis on federalism.<sup>74</sup> Such substantial deference to the states should not be limitless.<sup>75</sup>

Deference to state legislatures rests on assumptions about the legislative process. Professor Louis Bilonis has identified two such assumptions: (1) functional “political and discretionary institutional safeguards” and (2) “deliberative legislative choice.”<sup>76</sup> In situations where either is absent, the Court has invalidated criminal liability statutes, even despite a strong deference to state decisionmaking.<sup>77</sup>

<sup>64</sup> *Id.* at 1028 (majority opinion) (alteration in original) (first quoting *Powell v. Texas*, 392 U.S. 514, 534 (1968); and then quoting *id.* at 536).

<sup>65</sup> *See id.*

<sup>66</sup> *Leland*, 343 U.S. at 799.

<sup>67</sup> *See Powell*, 392 U.S. at 535–37 (plurality opinion) (declining to recognize a constitutional right to an intoxication defense in light of “essential considerations of federalism,” *id.* at 535).

<sup>68</sup> *See Patterson v. New York*, 432 U.S. 197, 201, 210 (1977) (upholding state law that placed the burden of proving affirmative defenses to murder on the defendant).

<sup>69</sup> *Clark v. Arizona*, 548 U.S. 735, 752 (2006).

<sup>70</sup> *See Fissell*, *supra* note 55, at 493.

<sup>71</sup> *See generally, e.g.*, Lloyd E. Ohlin, *The Effect of Social Change on Crime and Law Enforcement*, 43 NOTRE DAME LAW. 834 (1968); Vincent F. Sacco, *The Effects of Mass Media on Perceptions of Crime: A Reanalysis of the Issues*, 25 PAC. SOCIO. REV. 475 (1982).

<sup>72</sup> *See generally* Paul Lawrence, *Historical Criminology and the Explanatory Power of the Past*, 19 CRIMINOLOGY & CRIM. JUST. 493 (2019).

<sup>73</sup> Bilonis, *supra* note 58, at 1271; *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 430–31 (1958).

<sup>74</sup> *See, e.g.*, Bilonis, *supra* note 58 at 1271; Fissell, *supra* note 55, at 501–02.

<sup>75</sup> *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 527 n.96 (2001) (“Once one understands [the] incentives [to overcriminalize], one may conclude that courts are more likely than legislatures to capture social value judgments accurately.”).

<sup>76</sup> Bilonis, *supra* note 58, at 1322.

<sup>77</sup> *Id.*

This idea of procedural “process[ ]reinforcement,” or “the corrective role of judicial review over dysfunctions in the safeguards of process,”<sup>78</sup> traces its roots back to *Carolene Products* but has extended into modern case law.<sup>79</sup> The Court has demonstrated such a commitment to protecting vulnerable minorities and requiring deliberative legislative choice in a variety of criminal cases. In *Papachristou v. City of Jacksonville*,<sup>80</sup> the Court struck down a vague antivagrancy ordinance precisely because such laws “are nets making easy the roundup of so-called undesirables,” or minorities traditionally unprotected by the legislative process.<sup>81</sup> Similarly, in an Eighth Amendment death penalty case, some Justices worried that juries’ unchecked discretion to impose the death penalty would “be selectively applied, feeding prejudices against the accused if he is . . . a member of a suspect or unpopular minority.”<sup>82</sup>

As to deliberative legislative choice, the Court tends to reject statutes where legislators abdicate political responsibility by leaving difficult, potentially unpopular policy choices to other parties’ discretion. For example, in cases such as *Kolender v. Lawson*,<sup>83</sup> the Court has struck down antiloitering statutes because they are so vague as to “set a net large enough to catch all possible offenders,” leaving the judiciary to make political judgments about who to convict.<sup>84</sup> Such overbroad statutes “to some extent[] substitute the judicial for the legislative department of government”<sup>85</sup> such that “the qualities of deliberative legislation seem . . . markedly absent” from the legislative process.<sup>86</sup>

<sup>78</sup> *Id.* at 1328 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)).

<sup>79</sup> See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996). Procedural-process reinforcement is not *substantive* due process because this means of judicial protection does not require creating a novel substantive right. See Bilionis, *supra* note 58, at 1317–18. Some have already discussed substantive due process in the context of *Kahler* to argue that a ruling for *Kahler* would have been impermissible judicial overreach to invent a new substantive right under the penumbra of “due process.” See, e.g., 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, 103 (2020). This comment does not intend to weigh in on the substantive due process debate but rather examines the procedure-focused interpretation of due process that would protect vulnerable groups in the political process.

<sup>80</sup> 405 U.S. 156 (1972).

<sup>81</sup> *Id.* at 171.

<sup>82</sup> *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring); see also *id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”).

<sup>83</sup> 461 U.S. 352 (1983).

<sup>84</sup> *Id.* at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

<sup>85</sup> *Id.*

<sup>86</sup> Bilionis, *supra* note 58, at 1325; see also John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 197 (1985) (arguing that the vagueness doctrine “bar[s] wholesale legislative abdication of lawmaking authority and thus works, albeit irregularly, as a goad toward effective advance specification of criminal misconduct”).



Laws such as the Kansas statute at issue in *Kahler* that restrict the insanity defense betray signs of both types of process flaws. First, criminal defendants who plead insanity are a particularly vulnerable minority because the law of insanity is especially reactionary to public opinion. After all, “public impressions of the criminal justice system are formed largely by sensational cases, and cases involving the insanity defense most frequently fall in that category.”<sup>87</sup> The insanity defense has always stirred up a deluge of controversy, misconceptions, and even mythmaking, exacerbated by the law’s reluctance to incorporate evolving empirical and psychiatric principles.<sup>88</sup> John Hinckley’s notorious insanity-based acquittal after his attempted assassination of President Ronald Reagan caused multiple states to change their statutory approaches to the insanity defense.<sup>89</sup> To this day, the most frequent policy counterarguments against expanding the insanity defense are based largely on misinformation, such as exaggerated concerns about public safety and about use of the insanity defense to “beat the rap.”<sup>90</sup> In one of the Court’s own reckonings with the insanity defense, it acknowledged that the law at issue was “prompted . . . by an acquittal by reason of insanity in a murder case”<sup>91</sup>; scholars also noted that the statute arose out of an “emotional” movement.<sup>92</sup> Kansas’s own abolition of the moral-incapacity prong, at issue in *Kahler*, followed “public concerns generated by a few highly visible cases involving the insanity defense.”<sup>93</sup>

<sup>87</sup> Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, 66 J. KAN. BAR ASS’N 38, 44 (1997).

<sup>88</sup> See generally Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RESV. L. REV. 599 (1989).

<sup>89</sup> See generally HENRY J. STEADMAN, MARGARET A. MCGREEVY, JOSEPH P. MORRISSEY, LISA A. CALLAHAN, PAMELA CLARK ROBBINS & CARMEN CIRINCIONE, BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM (1993).

<sup>90</sup> See Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. AM. ACAD. PSYCHIATRY & L. 488, 493–95 (2013). Even the Justices are not free from the anxiety that seems to permeate insanity-defense discussions, as Justice Alito raised the question of how many people an expansive insanity defense could potentially exonerate at the *Kahler* oral argument. Transcript of Oral Argument at 11–12, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (No. 18-6135), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-6135\\_k536.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-6135_k536.pdf) [<https://perma.cc/H9V8-HJEC>] (“So we’re talking about 60 plus — 60 million plus people. All of them could go to the jury on the question of whether they had the capacity to know that what they were doing when they committed the crime was morally wrong.”).

<sup>91</sup> *Clark v. Arizona*, 548 U.S. 735, 748 n.6 (2006). In *Clark*, as in *Kahler*, the Court was unfazed by the signs that Arizona’s insanity-defense law was dangerously reactionary.

<sup>92</sup> Renée Melançon, Note, *Arizona’s Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 290 (1998).

<sup>93</sup> Spring, *supra* note 87, at 44. It should be noted that there is a “lack of legislative history” surrounding the passage of Kansas’s law, Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL’Y no. 2 (1998), at 253, 254, though some have suggested that this particular “[l]egislature was seeking to be responsive in a responsible way,” Spring, *supra* note 87, at 45 (emphasis added). Given this possibility, it may be that the Kansas statute in *Kahler*

Because defendants raising the insanity defense tend to be, like the “undesirables” in *Papachristou*, unprotected by traditional institutional safeguards, the relevant statutes are ripe for judicial evaluation.<sup>94</sup>

Second, under the *Kahler* majority’s own reasoning, Kansas eschewed deliberative legislative choice by moving evidence of moral incapacity to the sentencing stage, where judicial discretion reigns supreme. To the majority, Kansas’s statute was constitutional in part because it does not abolish the insanity defense.<sup>95</sup> Rather, the state allows defendants to raise a cognitive-incapacity defense at trial and to present evidence of moral incapacity only at sentencing.<sup>96</sup> As the dissent pointed out, however, leaving the evaluation of this evidence to a sentencing judge’s discretion is not the same as giving defendants the right to introduce the evidence before conviction.<sup>97</sup> This postconviction restriction turns the insanity defense into “a matter of judicial discretion, not of right.”<sup>98</sup> This critique echoes the Court’s admonition of overbroad statutes that “substitute the judicial for the legislative,”<sup>99</sup> as well as its caution in capital punishment cases against “untrammelled discretion” in capital sentencing schemes.<sup>100</sup> A deliberative legislature should not leave difficult policy judgments that “demand[] hard choices among values”<sup>101</sup> to the unbridled discretion of sentencing judges, so the *Kahler* majority is incorrect to suggest that Kansas’s statute is rescued by raising moral-incapacity evidence at sentencing.

*Kahler* may or may not have been “deserving” of a guilty verdict, or even the death penalty. But, before making a determination about *Kahler*’s substantive right to the moral-incapacity defense, the Court should have recognized the worrying indications that the Kansas statute represented a failure in the legislative process to make deliberative policy choices and protect criminal defendants pleading insanity. Federalism has rarely been a “friend of liberal society.”<sup>102</sup> The states have a strong interest in determining the meaning of substantive criminal liability within their territories, but the Court should be careful not to automatically prize federalism at the expense of judicial-process reinforcement.

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arose out of a proper deliberative process and therefore that process reinforcement was not needed. The lack of attention to such concerns about process in the *Kahler* opinions is, however, still notable.

<sup>94</sup> Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 398–400 (1992) (describing ways in which legislative processes fail to protect the interests of people with psychiatric disabilities).

<sup>95</sup> *Kahler*, 140 S. Ct. at 1030–31.

<sup>96</sup> *Id.* at 1031.

<sup>97</sup> *Id.* at 1049–50 (Breyer, J., dissenting).

<sup>98</sup> *Id.* at 1049.

<sup>99</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)); see *supra* notes 85–86 and accompanying text.

<sup>100</sup> *Furman v. Georgia*, 408 U.S. 238, 248 (1972) (Douglas, J., concurring).

<sup>101</sup> *Kahler*, 140 S. Ct. at 1037.

<sup>102</sup> Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1566 (2002).