Kahler v. Kansas: The Constitutionality of Abolishing the Insanity Defense

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The U.S. Supreme Court has not previously ruled on whether the insanity defense, a long-established component of criminal law, is constitutionally required. Five states have abolished the insanity defense, and a challenge to one of those laws reached the court last year. In sharply contrasting opinions, the justices differed on whether the insanity defense is so rooted in Anglo-American jurisprudence as to be deemed fundamental, with the majority finding it not required by the Constitution. Although the decision is unlikely to lead to immediate changes in state laws, it illuminates the Supreme Court's views on the moral basis for criminal punishment.

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No matter how controversial it may be, the insanity defense has been generally accepted as an intrinsic element of U.S. criminal law. Notwithstanding endless debates over the precise standard to be applied, who should carry the burden of proof, and the consequences of an insanity verdict—and periodic arguments for its abolition (1, 2)—the core principle that there should be an insanity defense has found robust acceptance. Initially recognized in case law not long after the founding of the republic and later embodied in statutes, a defense of not guilty by reason of insanity was ultimately codified by every state, along with the federal government and the District of Columbia. But until its most recent term, the U.S. Supreme Court had never ruled on whether the Constitution requires an insanity defense—and hence whether states are free to abolish it if they choose.

Setting the Stage

The occasion for the Supreme Court's consideration of the constitutional status of a defense of not guilty by reason of insanity was *Kahler v. Kansas*, in which the court was asked to rule on the constitutionality of Kansas's abolition of an affirmative defense of insanity (3). The defendant, James Kahler, was facing a divorce petition by his wife, who while having an affair with her female trainer, had taken their three children and left him. Over the next several months, he lost his job and became increasingly distraught, until on Thanksgiving weekend 2009, he drove to the house of his wife's grandmother, where the family traditionally gathered, and shot and killed his wife, her grandmother, and their two daughters but allowed his son to escape. Kahler was spotted by police the next day walking down a country road; he surrendered without a struggle and was charged with capital murder (4).

At trial, Kahler wanted to plead insanity. Psychiatric experts hired by both the defense and the prosecution agreed that he was experiencing a major depressive disorder and had obsessive-compulsive, borderline, paranoid, and narcissistic personality traits. The defense expert offered the opinion that Kahler's "capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did" (4). However, in 1996, Kansas had abandoned its long-standing insanity defense, limiting defenses based on mental state to a narrow claim that "as a result of mental disease or defect, [the defendant] lacked the mental state required as an element of the offense charged" and further specifying that "mental disease or defect is not otherwise a defense" (5). Unable to plead that he was incapable of understanding the wrongfulness of his behavior or controlling it, Kahler was found guilty of murder and, in a subsequent hearing, sentenced to death.

Kahler appealed on multiple grounds to the Kansas Supreme Court, including arguing that the 1996 statute, by abrogating the state's previous insanity defense, violated "the [Constitution's] Due Process Clause because it offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (4). The Kansas court had considered a similar claim in 2003 in *State v. Bethel* (6), found it unpersuasive, and declared here that it saw no reason to reconsider that decision. Kahler then filed an appeal to the U.S. Supreme Court. Most observers thought there was little chance that the Court would take the

case, because it had declined to review essentially the same question in a case from Idaho in 2012 (7, 8). But the Supreme Court's actions can be mystifying, and this time the justices agreed to hear Kahler's claims.

Mens Rea and an Affirmative Defense of Insanity

To understand the dueling opinions that ultimately emanated from *Kahler*, it helps to have a sense of the history of criminal defenses based on mental state. The idea that criminal guilt and subsequent punishment should be imposed only on people who were morally responsible for their behavior has ancient roots (9) and strong contemporary support (10). Although approaches varied across time and civilizations, criminal responsibility generally was predicated on some combination of intentional action and the ability to perceive the difference between good and evil—or in more modern terms, right and wrong. The biblically ordained cities of refuge embodied the concept of intentionality, i.e., that accidental behaviors that cause harm should not be punished as crimes; the law's treatment of children demonstrates the importance of the ability to perceive the difference between right and wrong, with children systematically excluded from criminal liability until the point at which they can draw that distinction (9).

In medieval English common law, these two notions were fused in the concept of *mens rea*, a Latin term that denotes a guilty mind. *Mens rea* was a prerequisite for criminal liability, its presence often inferred from the defendant's behavior. For centuries, only defendants with severe impairment due to mental illness were deemed to lack *mens rea* and thus to qualify for exculpation (9). Over time, however, English law began to recognize that what had been subsumed under the concept of *mens rea* actually represented two distinct components and split them apart (10). In contemporary criminal law, the presence of *mens rea,* in the sense of understanding the nature of one's actions and intending to perform them, is considered to be an element of the crime that must be demonstrated by the prosecution. Impairment because of mental illness in the ability to recognize the wrongfulness of one's actions, in contrast, was recognized as an affirmative defense (an "insanity defense") that could be raised by the defendant, who usually bore the burden of proof.

American courts acknowledged a common-law insanity defense in the earliest years of independence, and it was slowly incorporated into statutes. This trend accelerated after 1843, when the House of Lords in England formulated the M'Naghten standard for insanity, which required that as a result of "disease of the mind" the accused was so impaired "as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." Somewhat confusingly, the M'Naghten standard combined a *mens rea* component ("nature and quality of the act") with an insanity standard ("did not know he was doing what was wrong"). Over time most states adopted some version of the M'Naghten standard, with some states adding an irresistible impulse component to the defense and a small number of jurisdictions devising idiosyncratic standards of their own.

Whatever the standard, though, until the late 1970s, every state recognized an insanity defense. Since that time, driven in part by the controversies over abuse of the insanity defense that arose from the trial of John Hinckley for the attempted assassination of President Reagan, five states (Idaho, Utah, Montana, Kansas, and Alaska) have effectively abolished the defense; in a sixth state, Nevada, the courts struck down a statute revoking the defense for violating the state's constitution. In the law at issue in this case, Kansas abolished an affirmative defense of insanity, leaving a defendant only a claim of lacking *mens rea*. That requires defendants to prove that they did not intend their actions, i.e., in Kahler's case that he did not intend what he was doing in killing four human beings, an almost impossible task. As the dissent in *Kahler* noted, "mental illness typically does not deprive individuals of the ability to form intent. Rather, it affects their motivations for forming such intent." Hence, Kahler claimed that limiting him only to showing an absence of *mens rea* denied him the chance to prove that he lacked a key component of moral responsibility.

Denying the Claim of a Fundamental Right to Plead Insanity

In its opinion in *Kahler,* the Supreme Court held by a 6–3 margin that there was no constitutional problem in Kansas's decision to abolish its insanity defense (3). The majority opinion, written by Justice Elena Kagan, conceded that Kansas no longer allowed defendants to plead insanity on the basis of moral incapacity, "for example, that a defendant had killed someone because of an 'insane delusion that God ha[d] ordained the sacrifice.'" However, she argued that a defendant could still show that he did not have the intent needed to commit the charged crime by demonstrating that he did not understand the nature and quality of his actions, such as by showing "that he did not understand the function of a gun or the consequences of its use." She also noted that a defendant could introduce evidence about his mental state at sentencing to mitigate punishment. Thus the state had not entirely deprived a defendant of defenses based on an impaired mental state, she wrote; it had only restricted the scope of the claims that could be made.

Under existing constitutional principles, a restriction such as the one imposed by Kansas would only be unconstitutional under the Due Process Clause if it offended a fundamental principle of justice, as judged by historical practice. Therefore, Justice Kagan launched into a historical review, arguing that until the promulgation of the M'Naghten standard in 1843, *mens rea* had focused primarily on intention to commit the criminal act, not on whether the defendant knew that it was wrong. To be sure, she contended, the M'Naghten

standard had introduced a knowledge-of-wrongfulness test, but she noted that "16 States have reoriented the test to focus on the defendant's understanding that his act was illegal—that is, legally rather than morally 'wrong.' They thereby excluded from the ranks of the insane those who knew an act was criminal but still thought it right." States also added so-called irresistible impulse tests as alternative grounds for insanity findings, and one state simply looks to whether the criminal act was a "product" of the defendant's mental illness to determine insanity. Justice Kagan concluded that the relatively recent M'Naghten standard had never been uniformly adopted, and therefore a moral capacity component (i.e., ability to distinguish right from wrong) could not be considered a fundamental element of American criminal law.

Justice Breyer's dissent undertook an even more extensive historical review. He found that the earliest concepts of *mens rea* had already incorporated something more than a requirement that the criminal act be committed intentionally. He noted that the early sources "all express the same underlying idea: A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime." As a result, "by the time the House of Lords articulated the M'Naghten test in 1843, its 'essential concept and phraseology' were 'already ancient and thoroughly embedded in the law' (quoting [9])." Thus, Justice Breyer concluded, the recognition of an ability to distinguish right from wrong as an essential component of criminal culpability was in fact reflected in the historical record.

Although the majority had expressed no qualms about Kansas's abrogation of a defense for a person who lacked the ability to assess the wrongfulness of a criminal act, the dissent objected strongly to this too. The focus of the M'Naghten standard and related insanity standards on the ability to know that one's actions are wrong "is merely one way of describing something more fundamental. Its basic insight is that mental illness may so impair a person's mental capacities as to render him no more responsible for his actions than a young child or a wild animal. Such a person is not properly the subject of the criminal law" and that under the majority's approach a frankly psychotic person whose offense was driven by delusions or hallucinations will be found guilty and subject to punishment "excises this fundamental principle from . . . law entirely."

Not the End of the Insanity Defense

Although the Supreme Court's decision in *Kahler* affords states permission to do away with an insanity defense, its impact is likely to be greatest in the states that have already taken that step. Those jurisdictions can continue to preclude defendants from any mental state claim other than lack of *mens rea*. However, it seems unlikely that other states will rush in the same direction. Kansas was the most recent state to abolish the defense, now a quarter-century ago. Barring another groundswell of support for limiting insanity claims similar to what followed the Hinckley verdict, widespread abolition of the defense seems unlikely. But the Supreme Court's willingness to allow states to punish defendants who lack moral responsibility for their actions could raise troubling questions about the legitimacy of the criminal law.

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