SHATTERED BRAINS IN SHACKLES: THE FUTURE OF MENTALLY ILL DEFENDANTS FOLLOWING *KAHLER V. KANSAS*[*]

HANNAH PRICE[**]

INTRODUCTION

Imagine for a moment that you are selected to sit on the jury for a capital murder case. As the defendant—a young male referred to as X—is escorted into the courtroom, you notice something strange—X appears to have one eye shut. When the trial begins, you quickly learn that X does not deny fatally stabbing the victims: his ex-wife, four-year-old son, and one-year-old daughter.[1] X professes that "God wanted him to do it" because the victims were evil—claiming that his ex-wife was a "jezebel" and his son was the "anti-Christ."[2] Subsequently, X's counsel explains that X, compelled to free the victims from the demons within them, cut out their hearts with a knife, and shortly thereafter tried to kill himself to "pay for his own sins."[3] Later on, you also discover that X's eye is not swollen shut. Rather, X, relying on biblical scripture that reads, "If your right eye causes you to stumble, gouge it out and throw it away," dug out his eye with his hands after realizing the gruesome nature of what he had done.[4]

Before closing arguments, the judge presents jury instructions defining the insanity defense as "an affirmative defense to the prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."[5] The instructions are not clear on what constitutes "knowing that one's conduct was wrong at the time of the act." Unfortunately, closing arguments do not provide you with further clarification.

During deliberation, two of the other jurors show strong disapproval towards X due to the brutality of the crime and previous interracial marriage between X and his now-deceased ex-wife.[6] Many of the jurors are fixated on the gruesome

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* Inspiration for title drawn from Elyn Saks, *A Tale of Mental Illness – From the Inside*, TED.COM (June 2012), https://www.ted.com/talks/elyn_saks_a_tale_of_mental_illness_from_the_inside/transcript [https://perma.cc/5FR7-TGQW].

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1. Brandi Grissom, *Trouble in Mind*, TEXASMONTHLY (Mar. 2013), https://www.texasmonthly.com/articles/trouble-in-mind/ [perma.cc/4Y4M-CYZ6] (in-text hypothetical using the comparable facts of this case).

2. *See* Jerrie Whiteley, *15 Years Later: Andre Thomas Case Back in Court*, HERALD DEMOCRAT (Feb. 6, 2020), https://www.heralddemocrat.com/news/20200206/15-years-later-andre-thomas-case-back-in-court [perma.cc/XE42-TT3Y] (in-text hypothetical using the comparable facts of this case).

3. *See* Grissom, *supra* note 1 (in-text hypothetical using the comparable facts of this case).

4. *Id.*

5. TEX. PENAL CODE ANN. § 8.01(a) (Vernon 1994).

6. *See* Whiteley, *supra* note 2 (in-text hypothetical using the comparable facts of this case).

crime scene images shown during the trial; one goes so far as to say, "I knew X was guilty when they revealed pictures of the victims' bodies."[7] Finally, after deliberating for eight hours, you and the other jurors reach a unanimous verdict.

As you are escorted back into the courtroom, all eyes are locked onto you and your fellow jurors. The judge requests the jury foreman to stand and render the verdict as to the defendant, X, on the three charges of first-degree murder. For each charge, the verdict is the same—guilty. Next, the judge tasks you, the jury, with determining the appropriate sentence to impose on X for his crimes. After a mere hour or so, you return with the decision to sentence X to death.

Unfortunately, this hypothetical scenario is more fact than it is fiction. Although not identical, the facts described parallel a case[8] from Texas involving a man named Andre Thomas, who fatally stabbed his ex-wife, Laura; his son, Andre Jr.; and Laura's daughter, Leyha, in 2004.[9] Thomas's battles with mental illness began at a young age, but his symptoms were left untreated for many years—even after several failed suicide attempts.[10] Despite his troubled past, Thomas was sent to death row in Livingston, Texas as punishment for his crimes.[11] Furthermore, the details about X digging out his eye are identical to Thomas's story, but what is arguably more disturbing is that while in his cell during December of 2008, Thomas pulled out his remaining eye and ate it.[12]

Thomas's case is just one of many failed attempts of defendants asserting an insanity defense. Many people struggling with severe mental illness are unable to comprehend the nature of the crime they have committed and sometimes do not understand why they are being punished.[13] Currently, the opportunity to bring a defense of insanity is left in the hands of state legislatures that can craft the standards of the defense as they see fit.[14] Time and time again, the United States Supreme Court has refrained from recognizing that due process requires a minimum standard for insanity[15]; the Court's decision on March 23, 2020,

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7. Grissom, *supra* note 1 (in-text hypothetical using the comparable facts of this case).

8. Thomas v. State, No. AP-75,218, 2008 WL 4531976, at *1-3 (Tex. Crim. App. 2008) (unpublished).

9. *See* Michael Hall, *Is Andre Thomas Too Crazy to Be Executed?*, TEXASMONTHLY (June 4, 2018), https://www.texasmonthly.com/news/texas-murderer-andre-thomas-is-mentally-ill-but-is-he-insane/ [perma.cc/6X97-EYJ6].

10. *Id.*

11. *Id.*

12. *See* Brandi Grissom, *Andre Thomas: Where Mental Health and Criminal Justice Collide*, TEX. TRIB. (Feb. 20, 2013), https://www.texastribune.org/2013/02/20/andre-thomas-mental-health-and-criminal-justice-co/ [perma.cc/P3GP-X5S7].

13. *See* Stephen J. Morse, *Mental Disorder and Criminal Justice*, *in* 1 REFORMING CRIMINAL JUSTICE: A REPORT OF THE ACADEMY FOR JUSTICE BRIDGING THE GAP BETWEEN SCHOLARSHIP AND REFORM 251, 294 (Erik Luna ed., 2018); *see also* SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 30 (Joseph Saunders & James Ross eds., 2003).

14. Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).

15. *See id.* at 1027-29 (referring to the Court's opinions in *Leland*, *Powell*, and *Clark*). *See also*

maintained that notion.[16]

The Supreme Court's decision in *Kahler v. Kansas* has paved the road for states to functionally abandon the insanity defense entirely, threatening the fate of future mentally ill defendants across the country.[17] Through an examination and analysis of psychotic disorders, this Note will discuss current deficiencies in state laws, potential constitutional violations that arise from incarcerating mentally ill defendants, and finally, provisions and practices that could be adopted by all states to ensure mentally ill defendants are treated fairly under the law.

Part I of this Note will provide a history of the insanity defense and an overview of relevant statistics and verdicts commonly associated with insanity and mental illness-related defenses. Part I will also touch on some of the present-day concerns with the insanity defense by looking at various state law interpretations of insanity, and how different states approach mental illness and criminal justice. Part II will provide background on a handful of psychotic disorders and describe the range of symptoms that often accompany these disorders. By looking at the impact of *Kahler*[18] and the role of both the Eighth and Fourteenth Amendments,[19] Part III will demonstrate how the current state of the insanity defense deprives mentally ill defendants of their constitutional rights. Finally, to address the need for legal reform, Part IV will propose standards and strategies that state legislatures should adopt to ensure that mentally ill defendants are treated fairly and equitably across the nation.

I. THE RISE AND FALL OF THE INSANITY DEFENSE

Associating a person's intent with their criminal culpability is not a new phenomenon.[20] Cicero, an influential orator, lawyer, and politician from Ancient Rome,[21] expressed that "[c]rimes are not to be measured by the issue of events but

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Leland v. Oregon, 343 U.S. 790, 799 (1952) (indicating the Court's "reluctan[ce] to interfere" due to the lack of showing that Oregon's policy violates "generally accepted . . . standards of justice"); Powell v. Texas, 392 U.S. 514, 536 (1968) ("[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test"); Clark v. Arizona, 548 U.S. 735, 753 (2006) (holding that "due process imposes no single canonical formulation of legal insanity").

16. *Kahler*, 140 S. Ct. at 1025 ("We hold that the [Due Process] Clause imposes no such [insanity] requirement.").

17. *See* Nina Totenberg, *Supreme Court Allows States to Virtually Eliminate the Insanity Defense*, NAT'L PUB. RADIO (Mar. 23, 2020), https://www.npr.org/2020/03/23/820190552/supreme-court-allows-states-to-virtually-eliminate-the-insanity-defense [perma.cc/UMK8-RRFC].

18. *Kahler*, 140 S. Ct. at 1021-51.

19. U.S. CONST. amends. VIII, XIV § 1.

20. *See* Jacques M. Quen, *The Insanity Defense How Far Have We Strayed?*, 5 CORNELL J.L. & PUB. POL'Y 27, 27 (1995) (indicating that mental health and maturity were factors used by historical groups in evaluating behavioral conduct).

21. *See* Edward Clayton, *Cicero (106-43 B.C.E.)*, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/cicero/ [perma.cc/C7VZ-QB92].

from the bad intentions of men."[22] Throughout history, society's perception of insanity evolved.[23] "Insanity" has taken on various definitions and interpretations; however, it is now used primarily as a legal term of art rather than a meaningful medical diagnosis.[24]

A. Madmen, Wild Beasts, M'Naghten*, and More*

The original legal understanding of insanity was the inability to understand or discern good versus evil.[25] In his 1581 treatise, William Lambard wrote: "If a madman or a natural fool, or a lunatic in the time of his lunacy, or a child that apparently hath no knowledge of good nor evil do kill a man, this is no felonious act . . . for they cannot be said to have an understanding will."[26] It was also common for historical figures to equate "madmen" with "brutes" or "beasts" because they appeared to lack an ability to reason for or understand their actions.[27]

By the mid-1700s, this concept became known as the "wild beast" test after a jury charge posed that a madman is "to be exempted from punishment . . . [if] totally deprived of his understanding and memory, and doth not know what he is doing, no more than . . . a wild beast."[28] One English judge, Sir Matthew Hale, further suggested that humans are "naturally endowed" with both "understanding and liberty of will," and that the will of one's actions is what makes an act "commendable or culpable."[29] Therefore, the deduction was that madmen, brutes, or wild beasts, who could neither form nor comprehend intent, could not be punished under the law for their otherwise criminal actions.[30]

Decades later in 1843, an English ruling established what is commonly referred to as the traditional test for insanity—the *M'Naghten* test.[31] The test is

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22. Quen, *supra* note 20, at 27.

23. *See generally* Janet A. Tighe, *"What's in a Name?": A Brief Foray into the History of Insanity in England and the United States*, 33 J. AM. ACAD. PSYCHIATRY & L. 252, 252-58 (2005) (outlining the evolution of "insanity" from the 19th century to the present day).

24. *See id.* at 253 (showing the transition of insanity from a universally used term to a predominantly legal one).

25. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1032, 1035 (2020) (comparing good and evil with the modern take of right and wrong); *see also id.* at 1041 (Breyer, J., dissenting) (noting several historical commentators that used good and evil to describe a person's criminal culpability).

26. Quen, *supra* note 20, at 28; *see also Kahler*, 140 S. Ct. at 1041 (Breyer, J., dissenting).

27. *See* Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility*, 1 ISSUES CRIMINOLOGY 1, 3, 5 (1965) (discussing Judge Henry de Bracton's writings from 1256 and other judicial accounts predating the 20th century).

28. *See Kahler*, 140 S. Ct. at 1033 (quoting Rex v. Arnold, 16 How. St. Tr. 695, 764-65 (1724)).

29. Quen, *supra* note 20, at 28.

30. *See id.* at 29 (summarizing Hale's interpretation of criminal culpability as requiring the "will to commit an offense").

31. *See* 1 JENS AVID OHLIN, WHARTON'S CRIMINAL LAW § 17:2 (16th ed. 2021) (discussing the

split into two prongs: (1) cognitive incapacity and (2) moral incapacity.[32] Cognitive incapacity examines "whether the defendant knew what he was doing," while moral incapacity looks further to determine if the defendant "ha[d] the capacity to know that [his action] was wrong."[33] Soon after *M'Naghten* was established, the test was adopted by many American courts and legislatures with little modification.[34]

However, one modification gained popularity due to concerns that *M'Naghten* failed to address the issue of self-control.[35] Courts commonly refer to this modification as volitional incapacity or the "irresistible-impulse" test.[36] The irresistible-impulse test's end goal is to determine whether a defendant's mental defect or illness created the inability to control his criminal conduct.[37]

Though widely well-received, not every state welcomed the *M'Naghten* test with open arms.[38] In 1871, a New Hampshire court decision created yet another test for insanity—the "product" test.[39] However, New Hampshire's "product" test did not get considerable attention from other jurisdictions until 1954,[40] when the United States Court of Appeals for the District of Columbia delivered its opinion in *Durham v. United States*.[41] Even so, the "product" test failed to gain popularity and is currently used exclusively in New Hampshire.[42]

Some legal scholars suggest that four states—Kansas, Montana, Utah, and Idaho—have successfully abolished or "abandoned the *traditional* insanity

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origin of the M'Naghten rules and providing details of the case); *see also Kahler*, 140 S. Ct. at 1038 (Breyer, J., dissenting).

32. *Kahler*, 140 S. Ct. at 1038 (2020) (Breyer, J., dissenting).

33. *Id.*

34. David Murdock & Miri Navasky, *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS FRONTLINE (Oct. 17, 2002), https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html [https://perma.cc/BX4H-DJ3U].

35. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.2(c)(2) (3d ed. 2020).

36. *See* Clark v. Arizona, 548 U.S. 735, 749 (2006); Parsons v. State, 2 So. 854, 865 (Ala. 1887) (starting the adoption of the volitional incapacity test); *Kahler*, 140 S. Ct. at 1025 (mentioning the growing popularity of volitional incapacity starting in the mid-19th century).

37. *See* 1 LAFAVE, *supra* note 35, § 7.3(a).

38. *Kahler,* 140 S. Ct. at 1025 (2020).

39. *See* State v. Jones, 50 N.H. 369, 369 (1871) (upholding the jury instructions providing that a "not guilty by reason of insanity" verdict should be returned if the killing was the "product of [a defendant's] mental disease"); *see also* 1 LAFAVE, *supra* note 33, § 7.4(a).

40. 1 LAFAVE, *supra* note 35, § 7.4(a).

41. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (likening the court's rule to be "not unlike" the one followed by New Hampshire courts since 1870), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), *superseded by statute*, Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057, *as recognized in* Shannon v. United States, 512 U.S. 573 (1994).

42. *See* Clark v. Arizona, 548 U.S. 735, 751 (2006); *see also Kahler*, 140 S. Ct. at 1046 (Breyer, J., dissenting).

defense."[43] These four states have adopted a narrow "mens rea defense," which only permits evidence of mental disease or defect to demonstrate that a defendant lacked the crime's requisite mens rea element.[44] Because the statutory language for defenses involving mental disease or defect varies between states, the term "insanity defense," as used in this Note, will encompass both the traditional and the more limited mens rea defenses unless otherwise noted.[45]

B. Rarely Used and Often Refused

After John Hinkley Jr.'s acquittal in 1982 for his assassination attempt on then-President Ronald Reagan, the insanity defense earned a bad reputation.[46] Former Indiana Senator Dan Quayle claimed the defense "pampered criminals" and another senator associated it with "a free ride."[47] However, contrary to public concern that the insanity defense is a "'get out of jail free' card," that is often not the case.[48] One survey found that the public believes approximately 38% of defendants in felony cases enter insanity pleas, 45% of those being successful, and further revealed that 92% percent of interviewees felt the insanity defense was used too frequently.[49] In reality, less than one percent of felony cases invoke the defense, and of those, roughly one out of every four is successful.[50] To put this in perspective, this means that approximately nine out of every one thousand felony cases involve an insanity plea, and of those nine cases, only two are successful.[51]

One eight-state study found that of the successful cases, a mere seven percent resulted from jury verdicts.[52] Given the public's general apprehension toward the insanity defense, it is not surprising that very few juries return acquittals. Additionally, a group of researchers studying jury prejudices found a common

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43. CLIFFORD S. FISHMAN & ANNE T. MCKENNA, 7 JONES ON EVIDENCE § 55:14 (Dec. 2020) (emphasis added); *see also* DAVID L. FAIGMAN ET AL., 2 MOD. SCI. EVIDENCE § 8:8 (Dec. 2021).

44. FISHMAN & MCKENNA, *supra* note 43, § 55:14.

45. *See* FAIGMAN ET AL., *supra* note 43.

46. *See* Mac McClelland, *When 'Not Guilty' is a Life Sentence*, N.Y. TIMES MAG. (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html [https://perma.cc/P9AQ-2486] (referring to the anger expressed by U.S. citizens when Hinckley Jr. was found not guilty for reason of insanity (NGRI) for his failed attempt to assassinate President Reagan, hoping "to win [actress] Jodie Foster's heart").

47. *Id.*

48. *See id.*

49. Michele Meitl, *"Not Guilty by Reason of Insanity": A Review of the Literature*, 51 CRIM. L. BULL. (2015).

50. *Position Statement 57: In Support of the Insanity Defense*, MENTAL HEALTH AM. (June 2020), https://www.mhanational.org/issues/position-statement-57-support-insanity-defense [https://perma.cc/Y5UQ-36PK] [hereinafter "*Position Statement 57*"].

51. *See* PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS § 3.3, Westlaw (May 2021 update).

52. 2 CRIMINAL PRACTICE MANUAL § 39:5, Westlaw (Nov. 2021 update).

belief among jurors: insane people act strangely at all times.[53] Consequently, jurors were less inclined to accept an insanity defense if the accused had, at any point during the defendant's lifetime, acted rationally or lucidly.[54] In fact, the data revealed that trials involving psychotic defendants (those who "look and act 'crazy'") or irrational offenses (crimes seemingly "'more bizarre'" than others) were more likely to succeed with a mental defense.[55]

Nevertheless, pleading insanity is not a preferred affirmative defense; it comes with several hurdles and risks. For example, a study of capital murder cases in California revealed that defendants who pleaded insanity had a higher likelihood of being sentenced to death than other defendants.[56] Demographically speaking, if the defendant pleading insanity is elderly or female, the probability of acquittal is much higher than a male or younger defendant attempting the defense.[57] Taking a chance on the insanity defense also puts defendants at risk of longer time spent in prison than defendants who refrain from raising insanity.[58] Given these problems, several states have attempted to address the perceived defects in the insanity defense by adopting an alternative, middle-ground, "guilty but mentally ill" (GBMI) verdict.[59]

C. NGRI or GBMI: Defining Guilt

"If you're a *criminal*, you should be in *prison*. If you're *sick*, you should be in the *hospital*."[60] Although this concept may appear straightforward, the lines are blurred when someone is both *sick* and a *criminal*. This widespread belief indicates consistent and fervent societal opposition to the idea that criminal acts can be excused by mental illness, suggesting that criminal behavior should be punished regardless of the offender's mental status.[61]

Originally, insanity defense cases generally consisted of two possible verdicts: (1) guilty, or (2) "not guilty by reason of insanity"—otherwise known as "NGRI."[62] A verdict of NGRI results in a defendant's acquittal and is often accompanied by a court-ordered commitment to an inpatient mental health

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53. *Id.* § 39:10.

54. *Id.*

55. *Id.*

56. *Id.* § 39:5.

57. Meitl, *supra* note 49.

58. *See* Scott Brooks, *Guilty by Reason of Insanity: Why a Maligned Defense Demands a Constitutional Right of Inquiry on Voir Dire*, 20 GEO. MASON L. REV. 1183, 1201 (2013).

59. Bradley D. McGraw, *The Guilty but Mentally Ill Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 120-21 (1985).

60. Andrew Wasicek, *Mental Illness and Crime: Envisioning a Public Health Strategy and Reimagining Mental Health Courts*, 48 CRIM. L. BULL. (2012) (emphasis added) (quoting Judge Lerner-Wren of the Broward County, Florida mental health court).

61. *See id.* (contributing the opposition to negative media attention and preconceived notions of insanity).

62. *See generally id.* (explaining that successful insanity defenses result in an NGRI verdict).

facility[63]—contrary to the popular presumptions that NGRI verdicts release dangerous persons back on the streets[64] or operate as "get out of jail free" cards.[65]

Nevertheless, public skepticism eventually led to the creation of a new verdict. To satisfy the public's concern, the "guilty but mentally ill" ("GBMI") verdict was created, acting as the missing puzzle piece for cases involving the mentally ill and criminal actions.[66] When a GBMI verdict is rendered, "the defendant is legally guilty and [can] be punished like any other convicted offender."[67] Before serving the sentence, a defendant is typically examined by mental health professionals to determine if she first requires treatment; otherwise, she goes directly to prison.[68]

There are many misconceptions about the GBMI verdict,[69] resulting in scrutiny of its use by both legal and medical groups.[70] The "but mentally ill" portion of a GBMI verdict merely indicates the existence of mental disease or defect during the commission of a crime, but does nothing to diminish a defendant's culpability under the law.[71] Two commonly held concerns are that GBMI options create "'false treatment expectations'"[72] and a means for juries to avoid moral discomfort while reaching the same practical result for defendants.[73] But contrary to popular belief, a GBMI conviction does not guarantee "special" treatment compared to an ordinary guilty verdict.[74]

Inmates who receive GBMI convictions are given the same treatment opportunities as all other convicted persons.[75] But, as a result of misleading statutory language, both the general public and legal professionals often falsely assume that a GBMI verdict ensures appropriate mental health services.[76] These false interpretations and post-conviction expectations can lead juries to return a GBMI conviction when an NGRI acquittal would be more appropriate.[77] Because

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63. 2 PAUL H. ROBINSON ET AL., CRIM. L. DEF. § 173 (2021).

64. *See* Meitl, *supra* note 49.

65. *See* McClelland, *supra* note 46.

66. Meitl, *supra* note 49; *see also* Wasicek, *supra* note 60.

67. Wasicek, *supra* note 60.

68. Meitl, *supra* note 49.

69. *See generally* Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 375, 382–85 (1999) (starting at "More Drastic Proposals: The 'Guilty but Mentally Ill' Plea" and ending before "Abolition of the Insanity Defense").

70. Meitl, *supra* note 49 (noting opposition from the American Bar Association, American Psychiatric Association, and other professional groups).

71. Borum & Fulero, *supra* note 69, at 383.

72. *Id.* at 384.

73. *See Position Statement 57*, *supra* note 50.

74. Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 513 (1985).

75. *See* Borum & Fulero, *supra* note 69, at 384; *see also Position Statement 57*, *supra* note 50.

76. *See* Borum & Fulero, *supra* note 69; *see also* Slobogin, *supra* note 74.

77. *See* Borum & Fulero, *supra* note 69; *see also* Slobogin, *supra* note 74.

of that misled mentality, the GBMI verdict tends to worsen, rather than mitigate, the handling of severe mental illness in the criminal justice system.

II. INSANE BRAINS

"Variability is the law of life, and as no two faces are the same, so no two bodies are alike, and no two individuals react alike and behave alike under the abnormal conditions which we know as disease."[78] To be legally insane, a defendant's mental illness must typically create a lack of substantial capacity to either realize the criminal nature of his actions or behave in accordance with the law.[79] In other words, avoiding a guilty verdict when asserting an insanity defense requires more than the mere existence of mental disease or defect. That is, unlike the medical community, the legal system uses a narrow lens to determine whether the presence of a defendant's mental disease or defect caused his criminal behavior or his inability to comprehend the nature of the crime or crimes committed.[80] Nevertheless, knowledge of the mental illnesses that often accompany an insanity defense is necessary to examine the unique relationship between insanity and criminal behavior.

A. Psychotic Disorders: Population and Prison Prevalence

The psychiatric community no longer employs the term insanity on account of numerous failed attempts in establishing a common ground between the legal and medical communities.[81] Instead, insanity found a new home in the legal arena, leaving the interpretations and definitions of mental disease or defect for the medical and psychological universes. Although the law does not provide an explicit list of illnesses or symptoms that qualify for insanity,[82] defendants with schizophrenia or symptoms of psychosis are more likely to bring a successful insanity plea.[83]

Schizophrenia is a complex chronic brain disorder that affects approximately 1.5 million adults in the United States annually.[84] The most common symptoms associated with schizophrenia include delusions, hallucinations, disorganized

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78. *See* R. Shane Tubbs, *Variability is the Law of Life*, 26 CLINICAL ANATOMY 919, 919 (2013) (quoting Canadian physician, Sir William Osler).

79. MODEL PENAL CODE § 4.01 (AM. L. INST. 2019).

80. *See* John F. W. Meagher, *Crime and Insanity: The Legal as Opposed to the Medical View, and the Most Commonly Asserted Pleas*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 46, 46 (1923) (comparing the medical and legal interpretations of insanity).

81. *See* Tighe, *supra* note 23, at 255 (acknowledging psychiatry's abandonment of the term insanity).

82. *See* 1 LAFAVE, *supra* note 35, § 7.2(b)(1).

83. *See* Meitl, *supra* note 49.

84. *See* Felix Torres, *What is Schizophrenia?*, AM. PSYCHIATRIC ASS'N (Aug. 2020), https://www.psychiatry.org/patients-families/schizophrenia/what-is-schizophrenia [perma.cc/H944-2AA9]; *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/mhstats [https://perma.cc/X5G7-76B5] (last updated Sept. 2019).

speech, trouble thinking, and lack of motivation.[85] Although the disorder has a low prevalence, schizophrenia is accompanied by several substantial health, social and economic difficulties. Virtually half of those diagnosed with schizophrenia also have comorbid mental or behavioral disorders.[86] Living with the disorder is often costly, both directly—treatment, medications, therapy, etc., and indirectly—potential justice system encounters, social service needs, and other similar expenses.[87] Other severe mental diseases, such as bipolar disorder, can face similar challenges as well.[88]

Alarmingly, the prevalence of serious psychiatric disorders, including schizophrenia and bipolar disorder, is higher in prison and jail populations than within the general public. In 2018, a report revealed that 14% of prisoners, in state and federal facilities, and 26% of inmates in local jails met the criteria for "serious mental health conditions" compared to 5% of the general population.[89] In forty-four states, a single jail or prison contains more mentally ill persons than their largest state-operated psychiatric hospital; furthermore, in every U.S. county "with both a county jail and a county psychiatric facility," there are more individuals with severe mental illness incarcerated than hospitalized.[90]

B. Profiling Psychosis

Symptoms of psychosis often involve disruptions in an individual's typical daily functions including, but not limited to, thinking, perception, mood, and interpersonal skills.[91] These symptoms can manifest as disorganized thoughts or speech, inaccurate auditory or visual inputs, or noticeably poor social skills.[92] Problems occur when a person experiences intense episodes of the symptoms, causing the individual to cross over into active psychosis—the "loss of contact with the objective world" and the display of "impaired reality testing."[93] When impaired reality testing occurs, a person often suffers from one, or a combination of, the following symptoms: "delusions, hallucinations, disorganized thinking,

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85. *See* Torres, *supra* note 84.

86. *Schizophrenia*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/schizophrenia.shtml [https://perma.cc/Z3KG-LLLT] (last updated May 2018).

87. *Id.*

88. *Bipolar Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml [https://perma.cc/E8ZF-H2AP].

89. Ed Lyon, *Imprisoning America's Mentally Ill*, PRISON LEGAL NEWS (Feb. 4, 2019), https://www.prisonlegalnews.org/news/2019/feb/4/imprisoning-americas-mentally-ill/ [https://perma.cc/P7TK-HFP4].

90. TREATMENT ADVOCACY. CTR., OFFICE OF RESEARCH & PUB. AFFAIRS, SERIOUS MENTAL ILLNESS (SMI) PREVALENCE IN JAILS AND PRISONS 1 (2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf [https://perma.cc/39QV-C8M9].

91. *See* FAIGMAN ET AL., *supra* note 43, § 8:16.

92. *Id.*

93. *Id.*

grossly disorganized or abnormal motor behavior, and negative symptoms."[94]

It is important to understand the difference between hallucinations and delusions because it is a fundamental part of scrutinizing the status of the insanity defense post-*Kahler*. Hallucinations are characterized by experiencing sensory phenomena that are not actually present[95]—for example, hearing sounds or seeing figures that are not there. Delusions, on the other hand, are "fixed false beliefs held despite clear or reasonable evidence that they are not true"[96]—for example, believing that the mafia is spying on you through your electronic devices. As later illustrated, a defendant suffering from specific types of delusions may not fare well under the recently upheld Kansas statute.[97]

Psychotic episodes are quite complex; "[s]ymptoms vary from person to person and may change over time."[98] An individual with psychosis can exhibit mild symptoms, such as feeling apathetic or difficulty forming coherent thoughts, or more severe symptoms such as hallucinations or delusions.[99] Although research has identified factors that influence an individual's risk of developing psychosis, research cannot predict the specific psychotic symptoms an individual will experience.[100] Unfortunately, those unpredictable symptoms are often the deciding factors in determining if a defendant can properly raise an insanity defense.[101]

C. Myth: Mental Illness Causes Violent Behavior

Contrary to popular belief, individuals with severe mental illness are not more violent than the general population—the rate of serious crime for the two groups is roughly the same.[102] Mentally ill persons are more likely to be the victims of violence rather than the perpetrators.[103] Additionally, violence is largely

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94. *Id.* (emphasis removed).

95. *See* Torres, *supra* note 84.

96. *Id.*

97. KAN. STAT. ANN. § 21-5209 (West 2020) ("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."). *See* discussion, *infra* Section III.

98. *What are the Symptoms of Psychosis?*, YALE SCH. MED., https://medicine.yale.edu/psychiatry/step/psychosis/symptoms/ [https://perma.cc/5X38-3SKC] (last updated Sept. 24, 2019).

99. *See Psychosis*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions/Psychosis [https://perma.cc/TKA7-PJD9] (last visited Mar. 25, 2022).

100. *Id.*

101. *See* discussion, *infra* Section III.A.

102. *See* Morse, *supra* note 13, at 260 (providing the rate of serious criminal behavior for both cohorts to be approximately three to four percent).

103. *See* Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 122 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/pdf/wpa020121.pdf [https://perma.cc/2466-GNBR] (indicating that over four months, 8.2% of individuals with severe mental

determined by demographic and economic factors such as age, gender, and income, *not* solely the presence of mental illness.[104] The misconception arises when mentally ill persons are placed into prisons and jails because inmates with mental health issues are more likely to commit rule violations, physically or verbally assault correctional staff or other inmates, and experience an injury as the result of a fight.[105]

It has been estimated that anywhere from 45%-56% of individuals in prison have some sort of mental illness; moreover, 10%-25% of the prison population in the United States suffer from severe mental illnesses, such as schizophrenia.[106] These individuals have a substantially heightened risk of recidivism—i.e., reincarceration or rearrest—compared to their non-mentally ill counterparts.[107] With proper treatment, however, there is strong evidence that the likelihood of recidivism decreases for mentally ill inmates.[108]

Access and adherence to treatment are major factors that influence the potential for violent behavior in persons with severe mental illness. In June of 2016, the Treatment Advocacy Center compiled the results of several studies that focused on the relationship between several mental illnesses and treatment regimens.[109] One study showed that individuals who received treatment following their first episode of psychosis showed a gradual decrease in "overall prevalence of violence . . . to rates close to those of the general population."[110] A Turkish study found that forty-two of forty-nine individuals with schizophrenia who had committed murder reported that they "were not using their medication regularly and that treatment compliance was considerably low."[111] In New York, a group

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illness were criminally victimized compared to the annual rate of 3.1% for the rest of society).

104. *Id.*

105. *See* DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 10 (2006) (giving the respective percentages for mentally ill inmates versus inmates without mental health issues).

106. NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 205 (Jeremy Travis et al., eds., 2014).

107. *See* Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 105, 107 (2009) (suggesting from collected data that individuals with major psychiatric disorders are at high risk for recidivism, especially those with bipolar disorder).

108. *See* E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., TREAT OR REPEAT: A STATE SURVEY OF SERIOUS MENTAL ILLNESS, MAJOR CRIMES AND COMMUNITY TREATMENT 101 (Sept. 2017), https://www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf [https://perma.cc/8DWA-ZBCW] (revealing that treatment can reduce rearrest from approximately 40%-60% percent to 10% or less); *see also infra* Section IV (discussing the relationship between treatment and mentally ill inmates in greater depth).

109. *See* TREATMENT ADVOCACY CTR., OFFICE OF RESEARCH & PUB. AFFAIRS, RISK FACTORS FOR VIOLENCE IN SERIOUS MENTAL ILLNESS 1 (2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-and-risks-for-violence.pdf [https://perma.cc/A86A-7GKD].

110. *Id.* at 6.

111. *Id.* at 7.

of researchers found that "medication non-compliance and lack of awareness of illness both played significant roles in causing . . . violent behavior."[112]

When left untreated, severe mental illness can sometimes lead to violent behavior.[113] To prevent violent acts by individuals with severe mental illness, it would appear more effective to treat their conditions sooner rather than later. By taking a proactive approach, mentally ill individuals could receive proper treatment and, subsequently, would be less prone to violent behavior. As such, states should consider taking preventative measures by making mental health services available and accessible to everyone rather than addressing mental illness after a violent crime occurs.

III. DEPRIVING MENTALLY ILL DEFENDANTS OF CONSTITUTIONAL RIGHTS

Through the Tenth Amendment,[114] states essentially have complete control over the creation of their criminal laws.[115] Consequently, the states have broad discretion in interpreting the role of mental illness when drafting requirements for their respective criminal defenses. However, this authority is not limitless because states are still required to abide by provisions found within the U.S. Constitution, such as the Eighth and Fourteenth Amendment.[116]

The Fourteenth Amendment protects a defendant from a state law that attempts to "deprive any person of life, liberty, or property, without due process of law" or deny "equal protection of the laws,"[117] and the Eighth Amendment prohibits a state from inflicting "cruel and unusual punishments."[118] Unfortunately, the Supreme Court recently upheld a Kansas statute that arguably deprives mentally ill defendants due process, denies equal protection of the laws and could subject those defendants to cruel and unusual punishment if convicted.[119]

*A. Potential Problems Post-*Kahler

On March 23, 2020, Justice Kagan delivered the Supreme Court's *Kahler* opinion, holding that Kansas's version of the insanity defense does not violate the Due Process Clause of the Constitution.[120] The petitioner, Kahler, argued that "Kansas's treatment of insanity fails to satisfy due process."[121] Kahler, and the dissent, used the legal history of insanity to establish *M'Naghten's* moral

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112. *Id.*

113. *Id.* at 1.

114. U.S. CONST. amend. X.

115. *2.1 Federalism*, LUMEN LEARNING, https://courses.lumenlearning.com/suny-criminallaw/chapter/2-1-federalism/ [https://perma.cc/M4CC-YRMY].

116. *See* U.S. CONST. amends. VIII, XIV.

117. *Id.* amend. XIV, § 1.

118. *Id.* amend. VIII.

119. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1038-39 (2020) (Breyer, J., dissenting).

120. *Id.* at 1024.

121. *Id.* at 1029.

incapacity prong as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[122] However, the majority opinion preferred to focus on the *existence* of an insanity defense rather than its *formulation*. Accordingly, the majority held that due process does not require states to adopt a specific version of insanity; instead, due process essentially provides the right to an insanity defense, leaving states free to interpret insanity as they see fit.[123]

The most troublesome aspect of the majority opinion arises from the Court's acknowledgment that Kansas's insanity rule discriminates against a certain type of delusion.[124] Currently, Kansas law applies only the cognitive incapacity prong of the *M'Naghten* test—the moral incapacity prong cannot play any role in determining a defendant's guilt.[125] This means that a defendant in Kansas's jurisdiction may bring evidence that his mental disease or defect made it impossible to comprehend *what* he was doing but not to assert that he did not understand *why* his conduct was wrong or illegal.

To better illustrate that approach, pretend for a moment two defendants—C and K, both on trial for killing their respective spouses—are raising an insanity defense. Both defendants have a severe mental illness, but they experience different symptoms. C claims visual hallucinations caused him to believe his spouse was a wolf, but K, suffering from auditory hallucinations and delusions, states that a wolf told him that he must kill his spouse to save the world.[126] Under the traditional *M'Naghten* two-prong test, both C and K have a similar chance of obtaining an NGRI verdict, but under the current Kansas statute, the defense would fail for K.[127]

The statutory language of Kansas's insanity defense discriminates against an individual who has delusions that create a firmly held belief that his actions, although criminal, are morally justified. As previously mentioned, the specific causes of psychotic episodes are unknown, and the symptoms a person experiences can vary between different episodes and other individuals.[128] Therefore, it unjust to allow states to draft insanity laws that favor specific manifestations of psychosis, given that symptoms experienced by an individual

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122. *Id*. at 1039 (quoting Leland v. Oregon, 343 U.S. 790, 798 (1952)).

123. *Id.* at 1031-32, 37 ("That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule . . . was ever so settled as to tie a State's hands centuries later.").

124. *Id.* at 1031 ("In Kansas's judgment, that [type of moral] delusion does not make an intentional killer entirely blameless.").

125. *Id.* at 1026; *see also* KAN. STAT. ANN. § 21-5209 (West 2020) (defining the limits for a defense of mental disease or defect).

126. *See Kahler*, 140 S. Ct. at 1048 (Breyer, J., dissenting) (providing a similar comparison to express the dissent's view on moral responsibility).

127. *See U.S. Supreme Court Sides with Kansas Over Insanity Defense*, A.B.A. (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/6ZV9-4J77] (describing the *Kahler* majority and dissenting opinions of the Court).

128. *See* discussion *supra* Section II.B.

are out of his control.

The broad discretion given to states has created a phenomenon where a defendant's odds of obtaining an NGRI verdict can be very high in one state but potentially nonexistent in another state. For example, Kansas law prevents mentally ill defendants who experience hallucinations or delusions—which create an inability to appreciate or understand why their behavior was criminal—to bring such evidence for an insanity defense.[129] In Arizona, the law is the opposite.[130] To claim insanity in Arizona, a defendant must demonstrate that "at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."[131] Both states chose to remove one of the prongs from *M'Naghten*: Kansas removed moral incapacity; Arizona removed cognitive incapacity. In essence, a defendant who fulfills only one of the traditional insanity defense prongs would have a high chance of acquittal in one state but would be barred from raising insanity in the other.

Although the Supreme Court acknowledges that the defendant in *Kahler* "would have preferred Arizona's kind of insanity defense,"[132] the majority chose to alternatively focus on the mere existence of an insanity defense, rather than the defense's components.[133] *Kahler* goes further to explain that "[d]efining the precise relationship between criminal culpability and mental illness . . . is a project for state governance, not constitutional law."[134] Unfortunately, the Court's holding permits states to craft laws that exclude certain psychotic symptoms as admissible evidence for an insanity defense.[135] For the majority, "fairness" appears to take a backseat to federalism.

B. Unfair Trials and Unusual Punishments

Even though the Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law,"[136] defendants who attempt an insanity defense risk a potentially inadequate trial. Procedurally speaking, due process has often been held to include the right to a fair trial with an impartial jury.[137] In light of the public's false presumptions regarding the insanity defense,[138] obtaining a truly impartial

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129. KAN. STAT. ANN. § 21-5209 (West 2020).

130. *See* ARIZ. REV. STAT. ANN. § 13-502 (West 2020).

131. *Id.; see also* Clark v. Arizona, 548 U.S. 735, 747-48 (2006) (describing the history of Arizona's insanity rule).

132. Kahler v. Kansas, 140 S. Ct. 1021, 1031 (2020).

133. *Id.* at 1030-36.

134. *Id.* at 1037.

135. *Id.*

136. U.S. CONST. amend. XIV § 1.

137. Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976); *see also* Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965).

138. *See* discussion *supra* Section I.B.

jury can be difficult.

According to a 2018 study from the University of Nevada, Reno, white jurors tend to have more positive attitudes towards mentally ill defendants and are often more accepting of insanity claims compared to non-white jurors.[139] Furthermore, jurors who are not affiliated with a religious group typically have more positive attitudes towards mental illness, the existence of mental insanity, and insanity as a legal defense as opposed to religiously affiliated jurors.[140] Political party affiliation also revealed bias, with Republicans having the most negatives attitudes toward mental illness compared to Democrats and Independents.[141]

The aforementioned data can be problematic for a defendant attempting an insanity defense if his attorney is unaware of these potential biases or unable to adequately question the potential jurors. The Supreme Court has indicated that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*"[142] but is "particularly within the province of the trial judge."[143] Consequently, the odds of raising a successful insanity defense can be heavily diminished if the jury consists of multiple non-white, religious jurors and the defense attorney is unable to sufficiently question such jurors for their biases.

Per the Eighth Amendment, "cruel and unusual punishments"[144] for crimes are forbidden in the United States. When it comes to insanity, only the defendants who successfully bring such a defense will be spared from any cruel and unusual punishment.[145] Individuals who are considered insane are "those who are unaware of the punishment they are about to suffer and why they are to suffer it."[146] This concept limits itself to only include those who bring an effective insanity defense.[147] Because the threshold for effectiveness is determined by the elements in a state's insanity defense, defendants with severe mental illness who do not meet state standards are excluded from the Eighth Amendment's protection against cruel and unsual punishment.[148]

The problem with the standard for insanity is that it overlooks several factors

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139. Charles P. Edwards & Monica K. Miller, *How Individual Differences Relate to Attitudes Toward the Mentally Ill: Implications for Trial Lawyers*, 29 JURY EXPERT (May 31, 2018), http://www.thejuryexpert.com/2018/05/how-individual-differences-relate-to-attitudes-toward-the-mentally-ill-implications-for-trial-lawyers/ [https://perma.cc/9GHU-86VW].

140. *Id.*

141. *Id.*

142. Skilling v. United States, 130 S. Ct. 2896, 2917 (2010) (citing United States v. Wood, 299 U.S. 123, 145-46 (1936)).

143. *Id.* (quoting Ristaino v. Ross, 424 U.S. 589, 594-95 (1976)).

144. U.S. CONST. amend. VIII.

145. *Cf.* Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (holding that the Eighth Amendment bars states from executing people who are insane).

146. Shaila Dewan, *Does the U.S. Execute People with Mental Illness? It's Complicated*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/us/mental-illness-death-penalty.html [https://perma.cc/BB84-EZBG] (last updated April 11, 2017).

147. *Id.*

148. *See id.*; U.S. CONST. amend. VIII.

that go along with severe mental illness. An individual who experiences psychosis is not always psychotic; instead, they typically have episodes of psychosis, which if severe enough, can sometimes lead to criminal behavior.[149] As discussed earlier, juries have a hard time understanding that a person who is calm and collected on the stand could ever be "insane" enough to receive an NGRI verdict.[150] Additionally, potentially biased jurors can slip through the cracks during voir dire if the defense attorney does not ask the right questions to have those jurors dismissed.[151] Even with the apparent issues, only a few states have taken measures to address the appropriateness of certain punishments for defendants with mental illness.[152]

To help protect defendants who have severe mental illness and are on trial for capital murder, eight states have put forth legislation to bar the execution of those defendants, even if they are not found to be legally insane.[153] The proposed bills vary between the states, but they generally include diseases such as "schizophrenia and schizoaffective disorder, bipolar disorder, major depressive disorder, post-traumatic stress disorder[,] and traumatic brain injury."[154] Although these bills seem promising, their focus is only on preventing the execution of severely mentally ill individuals. Those individuals are still at risk of being thrown into the criminal justice system where they may not receive the treatment they require, and as such, states should reconsider how they handle mental illness and punishments for crime.

IV. TREATING TROUBLED MINDS: LOSE THE LOTTERY AND RENDER REFORM

Existing methods of mental health treatment in the criminal justice system are unacceptable, with less than one out of five inmates suffering from psychiatric illness receiving treatment during incarceration.[155] With the complex system and unpredictable outcomes associated with raising insanity, many defendants refrain from raising the defense, and even if they attempt the defense, the likelihood of success is trivial.[156] Furthermore, the Supreme Court has continuously upheld state insanity laws, even when evidence of potential bias exists.[157] The most

149. *See* discussion *supra* Section II.A.

150. *See* discussion *supra* Section I.B.

151. *See* discussion *supra* Section III.B.

152. *See generally* Dewan, *supra* note 146 (noting that only eight states have laws protecting individuals with severe mental illness from receiving capital punishment).

153. *Id.*

154. *Id.*

155. *See* Wasicek, *supra* note 60.

156. *See* discussion *supra* Section I.B.

157. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1031 (2020) (acknowledging that Kahler would have preferred Arizona's version of insanity, while Clark would have preferred the Kansas rule); *see also* Leland v. Oregon, 343 U.S. 790, 799 (1952) (referring to the Court's "reluctan[ce] to interfere" due to the lack of showing that Oregon's policy violates "generally accepted…standards of justice"); Powell v. Texas, 392 U.S. 514, 536 (1968) (stating "[n]othing could be less fruitful than for this Court

efficient way to solve the various problems surrounding the insanity defense would involve adopting a universal, or at least minimum, standard nationwide.

Due to the inherent right of a state to choose and draft its criminal statutes, in addition to the Supreme Court's disdain for requiring a state insanity defense standard, other avenues addressing the mental health crisis in the criminal justice system should be considered. The Court has determined that when "the State's affirmative act of restraining [an] individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty"[158] the protections afforded by the Due Process Clause provide "that the State be required to care for him."[159] To this end, states have a constitutional duty to ensure that all incarcerated individuals receive fair and adequate treatment under the law. Hence, due process extends beyond the courtroom and imposes a duty on states to provide adequate treatment services to incarcerated individuals with mental illness.

A. Uniform Laws, Uniform Results

Kahler creates a hypothetical lottery for defendants who plan to pursue an insanity defense. Two major factors are in play: (1) the symptoms a defendant experienced due to their mental illness and (2) the laws of the state where the defendant is being charged. As demonstrated earlier, a defendant whose delusion renders him unable to appreciate the criminal nature or wrongfulness of his actions could claim insanity under Arizona law but would be barred under Kansas law.[160] The American Psychiatric Association (APA) and the American Bar Association (ABA)—along with several other institutions—expressed concerns about allowing states to use limited, nontraditional versions of insanity in their amicus briefs in support of the petitioner in *Kahler*.[161] Both the APA and the ABA condone the "mens rea approach" because it removes an aspect of the insanity defense that is deeply rooted in legal history.[162]

States that use a mens rea approach, or a similar standard, *limit* the consideration given to an individual's mental illness when assessing criminal responsibility.[163] The majority opinion in *Kahler* attempted to narrow the scope

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to be impelled into defining some sort of insanity test"); Clark v. Arizona, 548 U.S. 735, 753 (2006) (holding that "due process imposes no single canonical formulation of legal insanity").

158. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

159. *Id.* at 199.

160. *See* discussion *supra* Section III.A.

161. *See* Brief for American Bar Ass'n as Amicus Curiae in Support of Petitioner, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135), 2019 WL 2433234 [hereinafter Brief for ABA]; Brief of American Psychiatric Ass'n et al. as Amici Curiae in Support of Petitioner, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135), 2019 WL 2451207 [hereinafter Brief of APA et al.].

162. *See* Brief for ABA, *supra* note 155, at 11-18; Brief of APA et al., *supra* note 155, at 10-16.

163. *See* Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1521-22 (2002).

of the APA's position on the mens rea approach to insanity by stating "the American Psychiatric Association took no position one way or the other."[164] On the contrary, the APA "does not favor any . . . insanity defense [standard] over another, so long as the standard is broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability."[165] For the APA—and other professional groups—the issue in *Kahler* was not whether due process requires a specific insanity standard for states, but rather whether states should be allowed to limit the "consideration of the impact of serious mental disorders on individual culpability."[166]

As indicated in the various amicus briefs, allowing states to employ a mens rea approach to insanity results in wrongfully incarcerated individuals.[167] The fate of a mentally ill defendant who ends up in the criminal justice system should not be determined by the location of his trial. Alarmingly, the Supreme Court recognizes in *Kahler* that the views associated with a mens rea approach are "contested and contestable" and that "other States—*many others*—have made a different choice."[168] Instead of ensuring all mentally ill defendants—regardless of their symptoms—are able to raise an insanity defense, *Kahler* reinforced the concept of federalism by allowing states to draft insanity laws as their governments see fit.[169]

Having a uniform, or at least minimum, standard for insanity would give defendants in every state an equal opportunity to bring evidence of their mental disease or defect. This would eliminate situations similar to the Supreme Court's observation that "Kahler would have preferred Arizona's kind of insanity defense (just as Clark would have liked Kansas's)."[170] Laws like the mens rea approach prevent an individual who experiences specific psychotic symptoms, such as delusions, from using those symptoms as evidence to show that he could not appreciate or understand the wrongfulness of his criminal actions.[171]

The specific symptoms a person experiences during a psychotic episode are out of their control, and therefore, the law should not punish those individuals who experience a specific set of symptoms. It is clearly unjust—and unusual—that a defendant with severe mental illness could be precluded from bringing an insanity defense in one state but allowed in another based solely on the symptoms he experiences. Thus, all states should—at a minimum—include the two prongs of the traditional insanity defense to protect against any discrimination that arises from limiting certain evidence of mental disease or defect.

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164. Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).

165. Brief of APA et al., *supra* note 161, at 24.

166. *Id.; see also* Brief for ABA, *supra* note 162, at 3, 18-20.

167. *See* Brief for ABA, *supra* note 162, at 3-4; Brief of APA et al., *supra* note 165, at 25.

168. *Kahler*, 140 S. Ct. at 1031-32 (emphasis added).

169. *See id*. at 1037.

170. *Id*. at 1031.

171. *See* Nusbaum, *supra* note 163, at 1521 (noting that the mens rea approach only allows evidence of mental illness to demonstrate an inability to form a crime's requisite mens rea).

B. Prescribing Programs, Not Punishment

Instead of focusing solely on reforming the insanity defense, states should also consider creating policies to address mental illness within their criminal justice systems. The Supreme Court has held that the Due Process Clause requires states to provide incarcerated individuals with the services necessary to maintain their health and general well-being.[172] Without proper treatment, an individual's mental illness can worsen while incarcerated.[173] Subsequently, an individual may become a "greater threat to [himself] and to others" upon release, which creates a "threat to public safety."[174] While the Supreme Court has yet to comment on a state's responsibility to provide services for recently released inmates, other courts, such as the Ninth Circuit, have held states responsible for ensuring their inmates have access to necessary medical services for a reasonable amount of time upon release.[175] Nevertheless, it would be in every state's best interest to ensure that mentally ill inmates are effectively reintegrated into society by providing inmates with adequate treatment while incarcerated and establishing post-release programs to reduce recidivism.

Various programs can be implemented by states to provide individuals proper treatment and reduce the risk of mentally ill persons ending up behind bars or reoffending. These programs can include the following: conditional release, psychiatric security review boards (PSRBs), forensic community treatment teams, and assisted outpatient treatment.[176] A little over half of the states have implemented such programs, many of which are still in need of improvement, but the remaining states on the other hand, have made little to no effort to create any programs to address mental health concerns.[177]

Conditional release allows a "partial discharge" of an individual from a hospital or other entity as long as the person adheres to a specific treatment plan.[178] If the person on conditional release fails to comply, he will be returned to the original entity.[179] Data has shown that this method reduces the likelihood of recidivism.[180] PSRBs are state bodies "with central authority to oversee treatment and placement decisions for individuals found NGRI" and often result

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172. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 198-200 (1989).

173. *Addressing Mental Illness in the Criminal Justice System*, DEP'T OF JUST.: BLOG ARCHIVE (Dec. 1, 2009), https://www.justice.gov/archives/opa/blog/addressing-mental-illness-criminal-justice-system [https://perma.cc/YW88-489S].

174. *Id.*

175. *See* Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999); *see also* Lugo v. Senkowski, 114 F. Supp. 2d 111, 115 (2000) ("The Court finds the Ninth Circuit's reasoning in *Wakefield* persuasive and holds that it applies to these circumstances as well.").

176. *See* TORREY ET AL., *supra* note 108, at 17.

177. *Id.* at 2-3.

178. *Id.* at 17.

179. *Id*.

180. *Id.*

in lower recidivism and re-arrest rates.[181] Forensic community treatment teams are involved with the reentry and transition process for individuals with severe mental illness after they are released from jail or prison.[182] Collectively, the aforementioned programs can reduce re-arrest rates for individuals with severe mental illness "from 40%–60% to 10% or less."[183]

Typically, Medicaid coverage is canceled when an individual is incarcerated.[184] This can be very problematic for an individual who requires medication for their mental illness but loses his Medicaid benefits upon incarceration. States that have opted to suspend Medicaid coverage, instead of terminating benefits, can allow an individual to regain access to his Medicaid coverage approximately two to three months sooner upon release from prison.[185] A few states have chosen to implement protocols and procedures to assist inmates with mental health needs with re-enrollment in Medicaid.[186] In 2007, Oklahoma took a different approach by creating a program to facilitate the application process for inmates that qualify for Medicaid.[187] Given that roughly half of the inmates in the United States have some form of mental illness and 10%-25% of inmates experience severe mental illness, revoking Medicaid benefits upon incarceration can prevent these individuals from being able to access the necessary treatment to manage their illnesses.[188]

States can also take measures to prevent arrests of mentally ill individuals by implementing crisis intervention teams (CITs).[189] CITs are the product of police departments and mental health providers teaming up to "ensure responding personnel are trained to identify, assess[,] and de-escalate mental health crisis situations."[190] Decreased arrest rates are one of the many benefits to implementing CITs in state criminal justice systems.[191] Officers that are required to attend CIT-related training are better able to identify the presence of a mental illness (or use of psychotropic medications) and can suggest community treatment resources when necessary.[192]

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181. *Id.* at 106, 131.

182. *Id.* at 21.

183. *Id.* at 2.

184. *What Happens to My Health Coverage If I Go To Prison?*, DISABILITY BENEFITS CTR., https://www.disabilitybenefitscenter.org/faq/health-insurance-in-prison [https://perma.cc/D7AM-SYR3] [hereinafter *Health Coverage*].

185. Richard Williams, *Addressing Mental Health in the Justice System*, 23 NAT'L CONF. ST. LEGISLATURES LEGISBRIEF, no. 31 (Aug. 2015), https://www.ncsl.org/research/civil-and-criminal-justice/addressing-mental-health-in-the-justice-system.aspx [https://perma.cc/CQY2-SRXA].

186. *Id.*

187. Williams, *supra* note 185.

188. NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 205 (Jeremy Travis et al. eds., 2014).

189. Williams, *supra* note 185.

190. *Id.*

191. *Id.*

192. *Id.*

The aforementioned programs and procedures are beneficial for many reasons including, but not limited to, providing treatment or access to mental health services, reducing recidivism rates, managing mental health crises safely, and helping mentally ill individuals transition smoothly from prison back to society. Although these programs provide a glimmer of hope for repairing the relationship between the mentally ill and the criminal justice system, the addition of mental health courts could provide a more central method for handling crimes committed by mentally ill individuals.

C. Mental Health Courts: A Safe Harbor for Mentally Ill Defendants

"Prisons have really become, in many ways, the de facto mental health hospitals . . . . But prisons weren't built to deal with mentally ill people; they were built to deal with criminals doing time."[193] As mentioned earlier, the standard criminal justice system appears to lack an understanding of how to accommodate individuals with severe mental illness. Additionally, prisons oftentimes lack the necessary resources and mental health personnel to meet the needs of each and every inmate who experiences mental illness.[194] Mental health courts are one way to help address this issue because they aim "to improve public safety by reducing criminal recidivism[,] to improve the quality of life of people with mental illnesses and increase their participation in effective treatment[,] and . . . [to provide] an alternative to incarceration."[195]

Surprisingly, mental health courts have been around since 1997 and, as of 2015, over three hundred courts currently exist across the United States.[196] However, laws in at least eighteen states permit mental health courts and some courts only allow mentally defendants who are charged with non-violent crimes to participate.[197] For example, the Broward County mental health court located in Florida, which was created in 1997, initially "accepted only individuals charged with a nonviolent misdemeanor, ordinance violation, or criminal traffic offense."[198] Thankfully, the trend today is becoming increasingly accepting of a wider range of offenses.[199]

At their inception, mental health courts focused on less severe crimes due to "unanswered public safety concerns about releasing into the community

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193. Etienne Benson, *Rehabilitate or Punish?*, 34 AM. PSYCHOL. ASS'N 46, 46 (2003) (quoting Thomas Fagan, Ph.D., a former prison psychologist).

194. *Id.*

195. LAUREN ALMQUIST & ELIZABETH DODD, U.S. DEP'T OF JUSTICE, NCJ 228274, MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 2 (2009), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_MHC_Research.pdf [https://perma.cc/2E3T-UYZL].

196. Williams, *supra* note 185.

197. *Id.*

198. ALMQUIST & DODD, *supra* note 195, at 8.

199. *Id.* (noting a 2003 national survey of twenty mental health courts that revealed only four had blanket exclusions rules for anyone with a history of violence).

individuals who might otherwise be incarcerated."[200] Mental health courts showed policymakers and practitioners that, by providing an alternative avenue for justice, more individuals would be likely to adhere to their medication and treatment regimens.[201] As the courts proved to be a success, some mental health courts gradually began to relax their restrictions to allow violent offenders to participate as well.[202]

While mental health courts loosened some restrictions, most have established other requirements for mentally ill individuals charged with felony crimes before they can receive the benefits of the programs.[203] The majority of mental health courts that permit individuals charged with felonies "require them to plead guilty" before they are allowed to use the services or receive treatment.[204] Problems can arise when an individual is required to plead guilty before being eligible to participate in mental health courts.

The San Francisco Behavioral Health Court (BHC), one that is more flexible than most, has indicated two reasons for not requiring a guilty plea.[205] First, BHC notes that requiring a guilty plea that results in a criminal conviction can be detrimental for a participant upon release from the mental health court because it makes it difficult for the participant to find a job or adequate housing.[206] Second, BHC views the guilty plea requirement as unfair because it forces participants "to give up certain constitutional rights . . . in order to access needed mental health treatment."[207] The notions held by the BHC acknowledge the repercussions that can occur when a mental health court conditions an individual's eligibility for treatment on adjudication.

By overlooking potential repercussions, most mental health courts fail to consider the limitations a criminal conviction places on an individual when he is reintroduced back into society. After all, while treatment is crucial for rehabilitating mentally ill individuals, it is hard to stay on track if they are barred from housing or stable jobs as a result of their conditioned conviction. As such, mental health courts should all consider adopting the values and standards held by the BHC to ensure that the benefits of the programs extend beyond the time an individual spends within the court.

Given the variety of standards used by mental health courts, individuals with severe mental illness may have limited, or no, access to mental health courts. Mental health courts that do not impose narrow restrictions on eligibility or condition participation upon entering a guilty plea would allow for more individuals to obtain the treatment and help they need to become healthy, law-abiding citizens. By refusing to accept individuals charged with felonies, some

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200. *Id.* at 9.
201. *Id.*
202. *Id.*
203. *Id.* at 13.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*

mental health courts fail to see the long-term benefit of their services. Other mental health courts that permit individuals with felony charges, inadvertently place limitations on their participants by requiring individuals to plead guilty before granting them eligibility.

Providing treatment to those with mental illness has been shown to reduce recidivism rates,[208] and further, a clean criminal record provides for more job and housing opportunities. As such, mental health courts should reevaluate their eligibility requirements to ensure that we, as a society, focus on treating and rehabilitating individuals with severe mental illness instead of excluding them from mental health court services or forcing them to waive certain rights to receive such services.

CONCLUSION

Defendants who are severely mentally ill need to be treated, not punished for their criminal acts. Psychosis is a complex phenomenon that can inhibit an individual's ability to distinguish right from wrong or cause a "loss of touch with reality."[209] Likewise, delusions can lead a person to falsely believe their child is the anti-Christ and that he must kill his child to save the world, whereas hallucinations may cause someone to shoot and kill another person because he saw a monster instead of a human being.[210] Permitting states to liberally craft the laws governing the use of a defendant's mental illness at trial allows states to discriminate against certain manifestations of psychosis.

Because it is rarely used and often refused, the insanity defense is in dire need of reform.[211] Outcomes of trials involving sufficiently raised insanity defenses can be rejected based on the demographics of the jury.[212] This was the outcome for Andre Thomas when the jurors had already made up their minds about his guilt and believed Thomas should be sentenced to death.[213] Moreover, many studies have revealed that mentally ill defendants who receive treatment rather than punishment are less dangerous, to themselves and society; but, more importantly, they exhibit a profound decrease in rearrest and incarceration rates.[214] Therefore, the laws regarding the insanity defense must be amended to ensure that defendants who experience severe mental illness receive treatment, not punishment.

Until another case regarding insanity makes its way before the Supreme Court, states are free to disqualify certain mentally ill defendants from raising an insanity defense. Although federalism has its perks, its flaws are clearly visible when considering current state insanity defense laws. To some extent, mental

208. *See* discussion *supra* Section II.C.
209. Torres, *supra* note 84.
210. *Id.*
211. *See* discussion *supra* Section I.B.
212. *See* discussion *supra* Section III.B.
213. Whiteley, *supra* note 2.
214. *See* discussion *supra* Section II.C.

illness is similar to a lottery or game of chance; an individual has no control over whether he will develop, or be diagnosed with, a mental illness. Similarly, state insanity laws have created another lottery, one that limits individual freedoms and rights, based solely on where a person is located. But the difference here is quite simple: individuals have no control over their outcome in the "mental illness lottery," but states have control over how they choose to draft laws that impact individuals with mental illness.

Among other things, the Constitution guarantees a person equal protection of the laws and forbids the infliction of cruel and unusual punishment.[215] Subjecting mentally ill individuals to the "state law lottery" creates an environment where shattered brains are at risk of being shackled, not treated. Changes in state laws and practices would ensure that mentally ill individuals are treated fairly. States should review and revise their relative insanity defense statutes and research programs to help mitigate and prevent mental health problems in prisons. Instead of locking up mentally ill defendants, the sentence for their crimes would be better spent in a treatment center, rather than a prison cell—the statistics support this, now it is time for the laws to do the same.

215. U.S. CONST. amend. XIV, § 1; *id*. amend. VIII.