"Still [Not] Crazy after All These Years": *Kahler v. Kansas* and the Intersection of Criminal and Constitutional Law

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Law schools customarily offer separate courses in criminal law and procedure, perhaps because they appear to raise distinct issues regarding the justification for and the operation of the criminal justice system—like the difference between the highway rules-of-the-road and the guardrails. Occasionally, however, a case poses an issue that stands astride the two disciplines. It asks society to decide whether and how the government may treat someone who, through no fault of his own, committed a horrendous crime, perhaps one that killed several other people, without knowing that his conduct was wrongful. The decision last term by the Supreme Court of the United States in *Kahler v. Kansas* was, ostensibly at least, one such case.[1]

Kahler involved the insanity defense. A criminal defendant can raise a host of defenses to prove his innocence or reduce his responsibility for a charged crime.[2] Insanity, however, excites the most academic and popular interest.[3] One reason might be that insanity,

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[1] 140 S. Ct. 1021 (2020).

[2] See, e.g., 1 & 2 Paul H. Robinson, Criminal Law Defenses (1984).

[3] See, e.g., Richard J. Bonnie, John C. Jeffries, Jr. & Peter W. Low, A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr. (3d ed. 2008); Herbert Fingarette & Ann Fingarette Hasse, Mental Disabilities and Criminal Responsibility (1979); Abraham S. Goldstein, The Insanity Defense 19 (1967); Norval Morris, Madness and the Criminal Law (1982).

like crime, has been with us since our earliest days.[4] Another is that, while the mentally ill have always been an object of fear and fascination, they are even more so now since the deinstitutionalization movement of the 1970s shifted them from mental institutions onto public streets, parks, and subways in places like San Francisco, Los Angeles, Seattle, and New York City.[5] Finally, some of the people who asserted the insanity defense—such as Ted Bundy, Kenneth Bianchi, Ed Gein, Andrea Yates, John Wayne Gacy, and Jeffrey Dahmer—committed unspeakable crimes, including ghastly torture or serial murders, that lent themselves to professional, public, or media fascination.[6] Whatever the reason, cases involving an insanity plea touch on issues concerning who should be deemed "mad" rather than "bad," how the criminal process should distinguish the one from the other, and what we should do with people who wind up in each category. The answers come freighted with normative judgments, but also require us to consider how our legal system should implement our underlying values. This article will describe how *Kahler* answered those questions and what those answers signify for the insanity defense and the criminal law.

In *Kahler*, the Court was asked whether Kansas's statutory redefinition of the insanity defense was unconstitutional. In most states, a defendant can claim that a severe mental illness kept him from knowing either (1) what he was doing at the time of the crime

[4] See, e.g., 1 Samuel 21:12–15 (King James) (pretending to be insane, David pounded his head on the city gate and foamed at the mouth); Mark 5:1–20 (King James) (Jesus interacted with a man described as "possessed with the devil" but whose symptoms closely resemble ones characteristic of mental illness); Andrew Scull, Madness in Civilization: A Cultural History of Insanity from the Bible to Freud, from the Madhouse to Modern Medicine (2015); Daniel L. Robinson, Wild Beasts & Idle Humors: The Insanity Defense from Antiquity to the Present (1998).

[5] See, e.g., Rael Jean Isaac & Virginia C. Armat, Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill (1990); D.J. Jaffee, Insane Consequences: How the Mental Health Industry Fails the Mentally Ill (2017); E. Fuller Torrey, The Insanity Offense: How America's Failure to Treat the Seriously Mentally Ill Endangers Its Citizens (2008); Clayton E. Cramer, Madness, Deinstitutionalization, and Murder, 13 Engage 37 (2012).

[6] See, e.g., David Abrahamsen, Confessions of Son of Sam (1985); Donald T. Lunde & Jefferson Morgan, The Die Song: Journey into the Mind of a Murderer (1980); Donald Singleton, "In Chilling Letter, Son of Sam Tells Jimmy Breslin 'You Will See My Handiwork,'" N.Y. Daily News, June 4, 1977, https://www.nydailynews.com/news/crime/son-sam-not-asleep-article-1.3215974.

(a cognitive impairment defense) or (2) that his conduct was wrongful (a normative impairment defense). Kansas defines insanity differently. There, a defendant can offer evidence that a mental disease denied him the ability to form the mental state that Kansas law requires for proof of guilt (in the case of murder, premeditation on an intent to kill), but *not* that any such disease robbed him of the ability to know that his conduct was wrongful (in the case of murder, that it is immoral). A defendant can raise that claim at sentencing, just not at the guilt stage.[7] James Kraig Kahler argued that the Kansas insanity defense was unconstitutional because Anglo-American criminal law has always allowed a defendant to escape guilt by raising a normative impairment defense. The U.S. Supreme Court disagreed and rejected his argument.

Before analyzing *Kahler*, some background might be helpful—not the history of the insanity defense (that will come later), but the ongoing relationship between the U.S. Supreme Court and the state criminal justice systems and how *Kahler* fits into that model. Parts I and II will set that stage. Parts III and IV will then speculate about the significance of *Kahler* for the insanity defense and the criminal law, respectively. *Kahler* quite likely shut the door to constitutionalization of the centuries-old insanity defense but might have left the door slightly ajar for the reconsideration of some 20th-century substantive criminal law doctrines—in particular, strict liability.

I. A Different Type of Cold War

We have become accustomed to seeing the Supreme Court actively regulate the state criminal justice system through the U.S. Constitution. The Court began its superintendence in 1915 when it ruled in *Frank v. Magnum*, quite modestly enough, that a trial dominated by a lynch mob was not the "due process of law" envisioned by the Fourteenth Amendment.[8] Over time, the Court gradually expanded its management function by invoking the Due Process Clause to

[7] 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.").

[8] 237 U.S. 309, 335 (1915). *Frank* hardly stated a novel rule of law. See United States v. Shipp, 203 U.S. 563 (1906) (a criminal contempt prosecution against private parties who lynched a state prisoner protected by a federal court order).

condemn other, comparable abuses. Among them were trying the accused before a judge with a financial interest in the outcome, using perjured testimony against the defendant, coercing a confession from a suspect through torture, conducting a trial in a circus-like atmosphere, and forcing someone to trial where adverse pretrial publicity had poisoned the jury pool.[9]

The Court took its supervisory role to a new level in the 1960s, however, when it "incorporated" the Fifth, Sixth, and Eighth Amendments—the Bill of Rights provisions governing the operation of the federal criminal justice system—against the states.[10] Defendants in state cases now routinely raise Self-Incrimination, Confrontation, and Compulsory Process Clause claims regarding the admission or exclusion of evidence, along with (particularly in capital cases) Cruel and Unusual Punishment Clause challenges to their convictions or sentences.[11] Yet, that is not all. The Court has also invoked the Constitution to regulate the plea-bargaining process that results in 90-plus percent of the judgments of conviction in state

[9] See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (ruling that a defendant was denied a fair trial due to massive and prejudicial pretrial publicity); Estes v. Texas, 381 U.S. 532, 534–35 (1965) (ruling that live broadcasting of defendant's trial violated due process); Brown v. Mississippi, 297 U.S. 278 (1936) (ruling that the admission of a defendant's confession coerced from him via torture violates due process); Mooney v. Holohan, 294 U.S. 103 (1935) (ruling that the prosecution's knowing use of perjured testimony to incriminate the defendant would violate due process); Tumey v. Ohio, 273 U.S. 510, 514–15, 523 (1927) (holding unconstitutional a state law allocating a trial judge's compensation based on the number of convictions in his court).

[10] See, e.g., Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (incorporating the Jury Trial Clause); Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967) (same, Speedy Trial Clause); Pointer v. Texas, 380 U.S. 400, 403 (1965) (same, Confrontation Clause); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (same, Counsel Clause); Robinson v. California, 370 U.S. 660 (1962) (same, the prohibition on cruel and unusual punishment). See generally Paul J. Larkin, Jr., The Lost Due Process Doctrines, 66 Cath. U. L. Rev. 293, 315 (2017). For a general explanation of the incorporation doctrine, see McDonald v. Chicago, 561 U.S. 742 (2010).

[11] See, e.g., Miller v. Alabama, 567 U.S. 460 (2012) (Cruel and Unusual Punishment Clause); Salinas v. Texas, 570 U.S. 178 (2017) (Self-Incrimination Clause); Williams v. Illinois, 567 U.S. 50 (2012) (Confrontation Clause); Taylor v. Illinois, 484 U.S. 400 (1988) (Compulsory Process Clause). Eighth Amendment claims in noncapital cases, by contrast, do not fare well. See, e.g., Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Hutto v. Davis, 454 U.S. 370 (1982).

criminal cases.[12] Even the state criminal appellate process has not escaped the Supreme Court's grasp. The Court has not demanded that the states establish an appellate review process (not yet at least),[13] but the Court has given the states orders how to apply the ones they have.[14] Finally, the Court has regulated the number of prisoners that a state may confine, as well as their treatment while in custody.[15] The result is that there is hardly any feature of the state criminal justice system not primarily governed by federal constitutional law.[16]

The Supreme Court constitutionalized the state criminal justice process for several reasons. One was the concern with racially motivated conduct by actors throughout the criminal justice system.[17] Another reason is that, at one time, the "third degree" was a standard practice in police interrogation.[18] The bottom line is that the Court did not trust state officials to enforce the law in anything approaching a fair, even-handed, responsible, humane manner. The Court saw

[12] See, e.g., Missouri v. Frye, 566 U.S. 134 (2012) (defense counsel has a duty to communicate a plea bargain offer to the defendant); Padilla v. Kentucky, 559 U.S. 356 (2010) (defense counsel must advise the accused that a guilty plea could result in his deportation); Santobello v. New York, 404 U.S. 257, 257–58, 262, 263 (1991) (due process requires a prosecutor to keep his end of a plea bargain resulting in a guilty plea); Brady v. United States, 397 U.S. 742 (1970) (plea-bargain-induced guilty pleas are not inherently coercive).

[13] See McKane v. Durston, 153 U.S. 684, 687–88 (1894) (a convicted defendant has no constitutional right to an appeal of his conviction and sentence).

[14] See, e.g., Roe v. Flores-Ortega, 528 U.S. 470 (2000) (defendant's attorney violated his client's rights by not filing a notice of appeal).

[15] See, e.g., Brown v. Plata, 563 U.S. 493 (2011) (prison overcrowding); Hutto v. Finney, 437 U.S. 678 (1978) (prison conditions that would have made Dante blanche, including use of a punishment device called a "Tucker telephone" that Alexander Graham Bell certainly did not invent); Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners' medical treatment).

[16] See Edwin Meese III & Paul J. Larkin, Jr., Reconsidering the Mistake of Law Defense, 102 J. Crim. L. & Criminology 725, 733 (2012).

[17] See, e.g., Davis v. Mississippi, 394 U.S. 721 (1969) (holding unconstitutional the detention of a person for fingerprinting based simply on his race); Rogers v. Alabama, 192 U.S. 226 (1904) (ruling that the state may not discriminate based on race in the selection of grand jurors); Neal v. Delaware, 103 U.S. 370 (1880) (same, selection of trial jurors).

[18] See, e.g., Chambers v. Florida, 309 U.S. 227 (1940) (the defendant was subjected to days of intensive grilling before confessing); Brown v. Mississippi, 297 U.S. 278 (1936) (the defendant exhibited rope burns and scars from where he had been hung and whipped until he confessed).

the state systems, not as a mechanism for accomplishing impartial "justice," but as a Potemkin village or "pious charade."[19]

By contrast, the Supreme Court has left state substantive criminal law largely untouched. The Court has directed the local police to give a suspect the *Miranda* warnings that have become part of our popular culture, but the Court has not limited the crimes that the police can investigate. The Court has ordered state prosecutors to present their witnesses at trial, but the Court has not limited the charges that prosecutors can bring. Aside from cases involving an express provision of the Bill of Rights like the Free Speech Clause,[20] the states have been free to define the elements of crimes and the defenses that someone may raise largely without the Court's interference. The few times that the Supreme Court has addressed the relationship between the Constitution and state law have been in connection with some type of claimed mental illness, and the Court has refused to tell the states how they must define crimes and defenses.[21] The contrast is quite stark between the Court's readiness to tell the states what procedures they must follow and its willingness to accept whatever definitions of crimes states adopt.

Two factors might explain the Court's forbearance. One would be the Court's recognition that underlying a legislature's substantive decisions as to what conduct should be a crime are a community's moral judgments about what conduct should be *verboten*.[22] Communities have followed those judgments for at least a millennium[23]

[19] Anthony G. Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. Rev. 785, 806 (1970).

[20] See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (a state cannot make it a crime to burn the U.S. flag in protest).

[21] See, e.g., Clark v. Arizona, 548 U.S. 735 (2006) (rejecting the argument that due process requires a state to create a diminished capacity defense to a specific intent crime); Montana v. Egelhoff, 518 U.S. 37 (1996) (same, an intoxication defense); Powell v. Texas, 392 U.S. 514 (1968) (same, alcoholism); Leland v. Oregon, 343 U.S. 790, 798–801 (1952) (same, an "irresistible impulse" defense).

[22] See, e.g., Powell, 392 U.S. at 536 (plurality op.) (recognizing that the definitions of crimes and defenses reflect the "changing religious, moral, philosophical, and medical views of the nature of man").

[23] 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, 126 (2020).

(likely more than one[24]), so there would be a crush of history for the Court to set aside were it to invent a new moral code. The other factor might be that the Court could invalidate those legislative decisions only by ruling that the community's underlying moral judgments are so alien to American society that they are not defensible on any remotely legitimate ground and can only be the product of the type of arbitrary exercise of state power that Magna Carta buried in 1215 or the Fourteenth Amendment sought to inter in 1868.[25] That judgment is a matter of *substantive*, not *procedural*, due process, however, and the Court has been reluctant to deny states the freedom to regulate their own affairs when no specific Bill of Rights provision stands in the way.[26] To be sure, the Court has trimmed the edges of state criminal law when a jurisdiction has legislated (or adjudicated) in a manner that denies the average person fair notice of what is a crime.[27] Nevertheless, the Court has (generally[28]) avoided butting heads with the states over what conduct can be labeled immoral and what immoral conduct can be punished through the criminal law rather than by administrative or civil sanctions or left entirely to private criticism, obloquy, and shunning. Perhaps the justices have been saving their gunpowder for different battles. Or maybe they have concluded that nullifying state crimes is a bridge too far.

That said, the Supreme Court has never surrendered its ability to second-guess a state legislature's judgment as to the content of its penal code. (Of course, even if the justices once had provided any such assurance, the changing membership of the Court over time would rob any such disclaimer of credibility.) After all, when the Court incorporated criminal procedure elements of the Bill of Rights against the states in the 1960s, the Court overturned its *own* earlier decisions ruling that those guarantees do *not* apply in state

[24] Exodus 20:1–17 (the Decalogue).

[25] Larkin & Canaparo, *supra* note 23, at 100–03.

[26] *Id.* at 110–11.

[27] See, e.g., Bouie v. City of Columbia, 378 U.S. 347 (1964) (holding unconstitutional a state court's unforeseeable retroactive expansion of an otherwise clear criminal law); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (ruling that a statute making it a crime to be "a member of a gang" is unconstitutionally vague).

[28] But see *infra* note 84.

criminal prosecutions.[29] Even *Kahler* undertook a serious analysis of the constitutionality of the Kansas insanity defense rather than saying that its proper definition was entirely in the state's hands.[30] Accordingly, no one should confuse the Court's reluctance to define constitutional limits on criminal responsibility with a confession of its inability or unwillingness to do so. Put differently, "hasn't" doesn't mean "can't" or "won't." In fact, the Court's repeated interference with the states' operation of their criminal justice systems, along with the Court's episodic reliance on substantive due process principles to nullify substantive state moral judgments on contentious issues such as abortion,[31] always left open the possibility that five justices could be cobbled together to find a state criminal offense unconstitutional. A sort of Criminal Law Cold War existed between the Supreme Court and the states, and the war could presumably turn hot with the right triggering event.

II. *Kahler v. Kansas*: A "Hot" War Averted

Last term's decision in *Kahler v. Kansas* threatened to disrupt the status quo—not because the facts were sympathetic to Kahler; they clearly were not. Consider what he did.[32] Using a rifle, James Kraig Kahler intentionally, methodically, and systematically moved throughout the home where he knew that three family members and an in-law who had angered him would be present for Thanksgiving. As he found each target, he shot each one separately and at close range. There was no doubt about what had happened that night or that Kahler had pulled the trigger. The facts of the case also unquestionably established that Kahler acted intentionally and with premeditation, elements of the offense of murder under Kansas law. The case against Kahler was open and shut.

[29] See, e.g., Palko v. Connecticut, 302 U.S. 319 (1937) (no double jeopardy protection in state criminal cases), abrogated by Benton v. Maryland, 395 U.S. 784 (1969); Maxwell v. Dow, 176 U.S. 581 (1900) (no right to a jury trial in state criminal cases), abrogated by Duncan v. Louisiana, 391 U.S. 145 (1968).

[30] As the Court did when it rejected a defendant's claim that he had a constitutional right to an appeal of his conviction and sentence. See McKane, 153 U.S. at 687–88.

[31] See, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Roe v. Wade, 410 U.S. 113 (1973).

[32] Larkin & Canaparo, *supra* note 23, at 93–94, 124–26.

That was what posed the threat to constitutional law—viz., the risk that the Court would manufacture an extraordinarily broad (and constitutionally required) insanity defense to reach Kahler's claim. To rule in Kahler's favor, the Court would have to construct a novel legal doctrine that might not only enable him to escape taking (figuratively speaking) a long drop with a short rope, but also completely muck up the law. The Court has done that before, and the results have not been pretty.[33] Making a hash out of another body of law would not improve the situation.

Kahler's only chance to avoid conviction and life imprisonment or execution was to claim that he was not mentally responsible at the time of the crimes, but he did so more by challenging the constitutionality of the Kansas insanity defense than by relying on it. Kahler argued that Kansas's test for insanity violated the Due Process Clause because it arbitrarily truncated the defense case. Kansas allows a defendant to use evidence of a mental disease in two ways.[34] At the guilt stage, a defendant can offer it to defeat the state's proof of the mental state required for a conviction.[35] If that fails, he can re-offer the same evidence at sentencing in the hope of being confined in a

[33] Consider the absolute mess that the Court's decision in *Furman v. Georgia* made of the law governing the imposition of capital punishment, a penalty that the Constitution expressly contemplates as permissible in four separate components of the Fifth and Fourteenth Amendments. 408 U.S. 238 (1972). The Court's jurisprudence has all the coherence and predictability of Brownian motion. Compare, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (ruling that the Eighth Amendment does not prohibit the execution of an offender who was a minor at the time of the crime), with, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (overruling *Stanford*); compare, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989) (ruling that the Eighth Amendment does not prohibit the execution of a mentally retarded offender), with, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (overruling *Penry*); compare, e.g., Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989) (ruling that a judge may override a jury's recommended sentence), with, e.g., Hurst v. Florida, 136 S. Ct. 616 (2016) (overruling *Spaziano* and *Hildwin*); compare, e.g., Jurek v. Texas, 428 U.S. 262 (1976) (upholding the Texas capital sentencing procedure), with, e.g., Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (faulting the Texas capital sentencing procedure). At one time, the Supreme Court would apologize for the utter confusion that it has created in capital sentencing law. See, e.g., Lockett v. Ohio, 438 U.S. 586, 597–602 (1978) (plurality opinion). Now, perhaps to avoid sounding like a broken record or confessing that it has no serious intention of changing its ways, the Court has stopped that practice.

[34] See David W. Louisell & Geoffrey C. Hazard, Jr., Insanity as a Defense: The Bifurcated Trial, 49 Cal. L. Rev. 805 (1961) (describing the multi-stage trial in an insanity case).

[35] Kan. Stat. Ann. § 21-5209 (West 2020).

mental institution rather than prison.[36] Kansas, however, does not permit a defendant to avoid conviction on the ground that a mental disorder kept him from realizing that his conduct was immoral. Put differently, Kansas law exonerated a defendant if a severe mental disorder eroded his *cognitive* judgment, but not if only his *normative* judgment was impaired. That limitation, Kahler said, was unconstitutional because Anglo-American legal history has always entitled a defendant to show that a mental illness robbed him of the ability to know right from wrong.

Stop right there for a minute and evaluate the facts of his case. Kahler did not deny shooting his victims, and the jury rejected (how could they have done otherwise?) his claim that he did not premeditate on an intent to kill each of his four victims. That left him with only one defense, and it was a doozy. Kahler maintained that he did not know that the intentional and premeditated murder of four innocent people was immoral. He did not claim that God had ordered him to kill.[37] He also did not claim to be a soldier in combat. And he did not claim that any of his four victims posed an immediate threat to his life or anyone else's. Defendants with those claims at least would be in the ballpark of people who could reasonably believe that killing was morally justified. Kahler also did not select his victims at random, which might suggest that he was incapable of rational planning. Kahler knew who his victims were and where he could find them. They were family members, and his wife had told him they would spend Thanksgiving at her grandmother's house. Kahler also had a clear motive for murder: revenge. He disliked each victim—his wife, for her infidelity and initiating divorce proceedings; his daughters, for having taken his wife's side in those proceedings; and his grandmother-in-law, for offering them refuge at Thanksgiving.[38] Kahler also was discriminating in whom he chose to kill. He saw his son Sean at the home, but he left Sean unharmed because Kahler believed that his son was on his side. Despite all that, Kahler asserted that his personal

[36] *Id*. §§ 21-6815(c)(1)(C), 21-6625(a).

[37] As did the defendant in the famous case of People v. Schmidt, 110 N.E. 945 (N.Y. 1915). See *infra* text accompanying notes 71–78.

[38] Larkin & Canaparo, *supra* note 23, at 124–25.

family trauma kept him from knowing that murdering his victims was immoral.[39]

It is difficult to take that claim seriously. What Kahler did "has been immoral since Cain killed Abel and has been a crime since Moses came down from Mount Sinai with the Ten Commandments."[40] That is significant because, as Oliver Wendell Holmes wrote in *The Common Law*, "crimes are also generally sins,"[41] meaning "if you knew the Decalogue, you knew the penal code."[42] The English and American common law and the criminal codes of every state have always outlawed murder because Anglo-American society has always deemed the taking of innocent life a heinous offense.[43] There is a firm consensus still that such a crime is immoral.[44] Kahler therefore essentially asked the Court to reject as unconstitutional a rule of law

[39] Kahler's brief in the Supreme Court described his mental state as follows: "When [James] Kraig Kahler killed four members of his family, he was experiencing overwhelming obsessive compulsions and extreme emotional disturbance, and may have dissociated from reality. He had long suffered from a mixed obsessive-compulsive, narcissistic, and histrionic personality disorder, and had recently lapsed into a severe depression, causing him to reach the point of decompensation." Br. for Petitioner at 6, Kahler v. Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135). Kahler's assertion that he "may have dissociated from reality" can't be taken seriously because he did not claim that he was holding a banana or that he believed he was shooting Satan and his minions. Plus, if a "narcissistic" personality disorder renders one insane, every elected official nationwide would qualify. (Although, that might explain a great deal of why they do what they do.)

[40] Larkin & Canaparo, *supra* note 23, at 126.

[41] Oliver Wendell Holmes, The Common Law 100 (Mark DeWolfe Howe ed., 1963) (1881).

[42] Larkin & Canaparo, *supra* note 23, at 127 (footnote omitted).

[43] *Id*. at 126–27.

[44] "In the case of common crime, a large body of research indicates that there *is* in fact a value consensus. People of all races and classes agree we should shun theft, violence, sexual assault, and aggression against children. They give very similar ratings to the seriousness of various kinds of offenses, and they agree to a surprising extent on how stiff the punishments ought to be for violations of the law. The issue of what is criminal has been settled politically in debate over the criminal code, and within law-abiding society there is broad consensus on such matters. These middle-class values are just about everyone's values." Wesley G. Skogan, Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods 5 (1990); see also Mark D. Yochum, The Death of a Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex), 13 St. John's J. Legal Comment. 635, 636 (1999) ("[E]vil is fundamentally known. . . . Ignorance that murder is a crime is no excuse for the crime of murder."); Larkin & Canaparo, *supra* note 23, at 126–27.

holding everyone to knowledge of the most fundamental value judgment in the history of Western Civilization.

The Supreme Court declined Kahler's invitation in an opinion by Justice Elena Kagan for a six-justice majority.[45] Kahler was correct, Kagan said, that Anglo-American legal history has always distinguished parties who are "mad" from those who are "bad," reserving criminal punishment for only the latter.[46] To that extent, Kahler's premise was sound. Nonetheless, his argument from that premise contained two fundamental flaws that required the Court to reject his submission.

Kahler's first mistake was in claiming that Kansas law does not allow a defendant to argue that, because of a mental disease or defect, he could not tell right from wrong. It is true, Kagan noted, that Kansas law disallows that defense at the guilt stage of a criminal case. The Kansas criminal code permits a defendant to argue that, due to a mental illness, he could not form the mental state necessary to commit the charged offense. Otherwise, an alleged mental disease or defect does not excuse a crime.[47] Yet, "[t]hat partly closed-door policy changes once a verdict is in."[48] At the sentencing stage, a defendant has "wide latitude" to adduce proof of his normative impairment to argue that the judge should lessen his punishment or order him confined in a mental institution instead of a prison.[49] While Kansas law does not consider a defendant's normative impairment when determining if he is guilty of a crime, it does make that issue relevant when deciding where and for how long to confine him after conviction. That was sufficient, the majority concluded, because a defendant who successfully raises an insanity defense could also land in a mental institution.[50] In *Kahler* itself, Kahler used that evidence at the sentencing stage in an effort to persuade the jury not to impose the

[45] Kahler v. Kansas, 140 S. Ct. 1021 (2020). Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor.

[46] *Id.* at 1030.

[47] Kan. Stat. Ann. § 21-5209 (West 2020) (quoted *supra* note 7).

[48] Kahler, 140 S. Ct. at 1026.

[49] *Id*. (citing Kan. Stat. Ann. §§ 21-6815(c)(1)(C), 21-6625(a), 22-3430 (West 2020)).

[50] *Id*.

death penalty. He was unsuccessful, but he nonetheless had the opportunity to make his case.[51]

Kahler's second mistake lay in his claim that Anglo-American legal history has always exonerated someone whose normative judgment was impaired by mental illness. At the outset, the majority explained that Kahler had a steep hill to climb. Because the definition of crimes involves uniquely moral judgments, Kahler had to establish that the historical record was so wide and so deep, "so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another."[52] In making that determination, "the primary guide" was "historical practice," as illuminated by "eminent common-law authorities" and "early English and American judicial decisions."[53] After canvassing those authorities, the Court found that Kahler had misread the relevant history.

The conclusion that Kahler drew from history was overbroad. In part, that was because the relevant history was not as uniform as Kahler represented. As the Court put it, the "historical record is, on any fair reading, complex—even messy."[54] States had experimented with different tests for insanity over time.[55] Prior to the mid-19th century, "the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule."[56] Moreover, the historical practice revealed that scholars drew two very different conclusions from a person's normative impairment.[57] Before 1843, some courts and treatise writers believed that a severe mental illness could exonerate a defendant because it prevented him from forming the mental state necessary for a crime. By contrast, some others wrote that mental illness could excuse criminality because it kept him from realizing that his conduct

[51] *Id.* at 1027 ("At the penalty phase, the court permitted Kahler to offer additional evidence of his mental illness and to argue in whatever way he liked that it should mitigate his sentence. The jury still decided to impose the death penalty.").

[52] *Id.* at 1029.

[53] *Id.* at 1027.

[54] *Id.* at 1032.

[55] As the Court had previously noted. See Clark, 548 U.S. at 749–50.

[56] Kahler, 140 S. Ct. at 1034.

[57] *Id.* at 1032–35.

was immoral.[58] There was no consensus on why mental illness mattered, even if there was agreement that it did. The year 1843 was an important dividing line because that was the occasion of the famous Daniel M'Naghten decision by the English House of Lords. The House of Lords adopted an insanity test containing both cognitive and normative elements.[59] Since then, however, the law has not been so monolithic as to demonstrate that only one standard is permissible. "States continued to experiment with insanity rules, reflecting what one court called 'the infinite variety of forms [of] insanity' and the 'difficult and perplexing' nature of the defense."[60] No one rule emerged as the consensus choice. Some jurisdictions modified the M'Naghten test to ask whether a defendant knew that he was committing an immoral act or a crime.[61] Others abandoned the M'Naghten test altogether in favor of a test that focused on whether mental illness had eroded a person's volitional capacity.[62] There has been as much diversity in the post-M'Naghten period as there was before it.[63]

At the end of the day, the Court decided, how to treat the intersection of criminal conduct and mental illness is "a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time," let alone over centuries.[64] States have the responsibility to make those choices, and states may choose one way today and another way tomorrow if they weigh their

[58] *Id*. at 1034.

[59] See M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL) ("[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.").

[60] Kahler, 140 S. Ct. at 1035 (quoting Roberts v. State, 3 Ga. 310, 328, 332 (1847)).

[61] *Id.* at 1037.

[62] *Id.* at 1035; see, e.g., Commonwealth v. Cooper, 106 N.E. 545 (Mass. 1914).

[63] In fact, Kagan noted with some irony, the Supreme Court had twice previously rejected claims that were essentially "the flipside" of Kahler's—viz., claims that it is unconstitutional to *use* the normative incapacity that he said was required—on the ground that there is no one unique definition of insanity. *Id.* at 1028–29 (discussing Clark, 548 U.S. 735, and Leland, 343 U.S. 790).

[64] *Id*.

values differently.[65] "No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later."[66]

The Criminal Law Cold War therefore remains cold, at least for now.

III. *Kahler* and the Future of the Insanity Defense

Over the past 70 years, the Supreme Court has ruled on three occasions that the Constitution requires no one particular insanity standard for every jurisdiction.[67] The definition of insanity is not like the speed of light, certain, fixed, and immutable for everyone, everywhere, and all time. The issue, then, is what other insanity-related issues remain open after *Kahler*. There are two possibilities, but neither one looks promising.

The first issue is whether a state must allow a defendant to offer proof of a mental illness–caused normative incapacity at sentencing. Kansas law did, and the Court relied on that factor to reject Kahler's argument that the state arbitrarily barred him from proving that he did not know right from wrong. Yet, the Court's carefully written opinion did not describe that feature of Kansas's law as being indispensable to its constitutionality, and it probably is not.

In *Kahler*, the Court approvingly highlighted the wide variety of approaches taken throughout history to identify the proper treatment of mental illness by the criminal justice system. The Court also noted that some jurisdictions had abandoned normative inquiries in favor of discerning whether a defendant knew that he was breaking the law or lacked the volitional capacity to stop himself from committing a crime even if he knew precisely what he

[65] *Id.* at 1037.

[66] In his dissent, Justice Breyer concluded that Kansas had exceeded the limits of its "broad leeway" to define its penal code because "it has eliminated the core of a defense that has existed for centuries: that the defendant, *due to mental illness*, lacked the mental capacity necessary for his conduct to be considered morally blameworthy." *Id*. at 1038 (Breyer, J., dissenting) (emphasis original). The "basic insight" of the famous M'Naghten test was its recognition 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," who are "not properly the subject of the criminal law." *Id*. at 1039. The flaw in the Kansas insanity statute, according to Breyer, was not that it chose the wrong test to make that judgment, but that it rendered the matter entirely irrelevant by making no judgment at all. *Id*. at 1039–50.

[67] See also Clark, 548 U.S. 735; Leland, 343 U.S. 790.

was doing. That divergence, the Court said, demonstrated a willingness to experiment with different standards to find the best one. Demanding now that every state allow a defendant to adduce the same type of evidence that Kahler presented would retroactively render those approaches unconstitutional, even though the *Kahler* majority relied on them to uphold the Kansas insanity defense. Atop that, forcing every state to treat evidence like Kahler's as relevant to disposition would have the effect of imposing on ordinary sentencing proceedings in state and federal courts the same rules that apply in capital sentencing proceedings. A defendant staring at a jury entrusted with deciding whether he lives or dies can offer virtually whatever evidence he can think of to save his life.[68] That rule does not apply, however, when the choice is other than life or death. On several occasions, the Supreme Court has held that Congress and the states may impose mandatory sentences fixing a specific term of imprisonment regardless of the mitigating evidence that a defendant can muster.[69] In *Harmelin v. Michigan*, the Court also expressly rejected a defendant's effort to apply capital-sentencing rules to his own noncapital sentencing process because state law fixed a mandatory sentence of life imprisonment without the possibility of parole.[70] Requiring a state to consider reducing an offender's noncapital sentence due to mental illness would extend the law in a direction that the Court so far has been unwilling to go.

The second issue involves what some courts have labeled a "deific decree" defense. *Kahler* did not squarely pose the type of case that makes insanity the topic of exquisite intellectual debate: How should

[68] See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality op.) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted; emphasis original). The Court later choked off that potential exception when it prohibited a state from imposing a mandatory death penalty on a prisoner who is convicted of murder while already serving a life sentence. See Sumner v. Schuman, 483 U.S. 66 (1987).

[69] See, e.g., Ewing v. California, 538 U.S. 11 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Chapman v. United States, 501 U.S. 453, 467 (1991); Ex parte United States, 242 U.S. 27 (1916).

[70] Harmelin, 501 U.S. at 994–96.

society respond to someone who carries out a sincerely held but delusional belief in a divine command to commit murder? The problem has arisen in a small number of cases,[71] and it taxes the limits of our willingness to punish or excuse the mentally ill. Kansas law bans all insanity claims based on an alleged impairment of one's normative judgment, and it does not carve out an exception for any such defense. Kahler also did not raise that claim. Apparently, he did not have the chutzpah to allege that God had ordered him to murder his family. Since Kahler did not raise that issue, the Court could have passed on it, reserving it for another day when a defendant squarely made that claim. That would have left a hole in the majority's rationale, however, one that might be difficult to endorse in a later case, given the strong ecclesiastical hue to the defense. Perhaps for that reason, the majority effectively rejected the defense without expressly saying so.

The leading case discussing that defense is Justice (then-Judge) Benjamin Cardozo's 1915 opinion for the New York Court of Appeals in *People v. Schmidt*.[72] Arrested for murder, Schmidt repeatedly confessed and pleaded insanity. He told the examining psychiatrists that "he heard the voice of god calling upon him to kill [the victim] as a sacrifice and atonement."[73] The jury was unpersuaded, and the court sentenced Schmidt to death. At that time, New York law applied the M'Naghten insanity defense, which allowed a defendant to claim that mental illness eliminated his normative judgment. On appeal, Schmidt argued that the trial judge shortchanged his defense by leading the jury to believe that it could not acquit him if it found that Schmidt knew that his conduct was illegal, even if it also concluded that he was following a divine command. Cardozo upheld Schmidt's conviction in a lengthy opinion canvassing the scope of the insanity defense. In so doing, Cardozo noted the oddity of convicting someone for doing what the Almighty had ordered, concluding that, "If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man can

[71] The most famous case is People v. Schmidt, 110 N.E. 945 (N.Y. 1915) (Cardozo, J.), but it has arisen in other cases too. See, e.g., Lundgren v. Mitchell, 440 F.3d 754, 784–87 (6th Cir. 2006) (Merritt, J., dissenting) (collecting "deific decree" cases); People v. Serrano, 823 P.2d 128, 135–40 (Colo. 1992) (same); Larkin & Canaparo, *supra* note 23, at 129 n.228.

[72] 110 N.E. 945 (N.Y. 1915).

[73] *Id*. at 946.

know that it is wrong for him to do it."[74] Cardozo therefore agreed with Schmidt that the insanity defense must include cases involving a true deific decree.[75] Nonetheless, Cardozo ruled that Schmidt was not entitled to a new trial because he had effectively waived his claim of insanity on appeal.[76]

There is no doubt that the majority was fully aware of that defense. Kagan cited and quoted from *Schmidt* in three separate paragraphs of the majority opinion,[77] and Justice Stephen Breyer cited it in his dissent.[78] It therefore is fair to conclude that the Court knew that the *Schmidt* decision, written by a former Supreme Court justice, supported Kahler's argument. Yet, by upholding a state law that barred any such normative-based claim of insanity, *Kahler* forecloses

[74] *Id.* at 948 (quoting Guiteau's Case, 10 F. 161, 182 (D.C. 1882)).

[75] *Id.* at 949 ("We hold therefore that there are times and circumstances in which the word 'wrong,' as used in the statutory test of responsibility, ought not to be limited to legal wrong. . . . Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong.") (citation omitted).

[76] *Id*. at 946–47 ("The defendant was condemned to death in February, 1914. In July, 1914, he made a motion for a new trial on the ground of newly discovered evidence. In his affidavit, upon that motion, he tells a most extraordinary tale. He now says that he did not murder Anna Aumuller, and that his confession of guilt was false. He says that she died from a criminal operation, and that to conceal the abortion, to which he and others were parties, he hacked the dead body to pieces, and cast the fragments in the river. His crime, he now says, was not murder, but manslaughter. He tells us why he chose to charge himself with the graver offense. He believed that he could feign insanity successfully, and that after a brief term in an asylum he would again be set at large. To confess to the abortion would implicate his confederates, and bring certain punishment to every one. To confess to murder, but at the same time feign insanity, might permit every one to go free. The compact was then made, he says, between himself and his confederates, that he would protect them from suspicion, and play the madman himself. The men and the women who are said to have been the confederates deny that such a compact was made. Whether they were parties or not the fraud upon the court is of little moment at this time; in any event, the defendant now tells us that he was sane; that the tale which he told the physicians, the tale of monstrous perversions and delusions, was false; and that he did not hear the divine voice calling him to sacrifice and to slay. He asks that he be given another opportunity to put before a jury the true narrative of the crime.").

[77] Kahler, 140 S. Ct. at 1025, 1026, 1036.

[78] *Id*. at 1046 (Breyer, J., dissenting).

challenges like Kahler's as well as ones like Schmidt's. To that extent, then, *Kahler* will limit the availability of the insanity defense in a category of cases not specifically at issue in that case.

Otherwise, *Kahler* is not likely to have a large practical effect on the future course of the insanity defense. Despite its prominence in academic literature, films, and prime time television shows, the insanity defense does not play a major role in the criminal law. Defendants do not often raise the defense,[79] largely for two reasons. One is that, unlike some other defenses, such as alibi and self-defense, insanity ordinarily does not offer complete exoneration, enabling a defendant to walk out of the courtroom scot-free. On the contrary, a successful insanity defense typically results in the defendant's automatic commitment to a mental institution until he can prove that he is no longer mentally ill and dangerous to society.[80] In fact, a defendant found not guilty by reason of insanity can wind up being confined for a longer period than if the jury had rejected his defense and found him guilty.[81] The other reason is that, given the often horrifying nature of the crimes to which a defendant pleads insanity and the fear that the accused might eventually be released if he is declared insane, juries generally find insane only those defendants "who had obviously lost touch with reality."[82] The result is that defendants rarely assert an insanity defense unless the proof of their guilt is overwhelming and they are facing either life imprisonment or execution. Both preconditions were certainly true in the case of James Kraig Kahler, so it is not a surprise that he claimed that he was mad. Given the state's proof of his guilt, he had no other defense, and he was not likely to convince a jury that he deserved mercy because most of his family was dead. His options were to prove that he was insane or wind up on death row. Defendants like Kahler will continue to assert that defense. Ones with a better prospect of being released, even if they could offer psychiatric

[79] Larkin & Canaparo, *supra* note 23, at 129 n.228 (noting that amici supporting Kahler made that argument).

[80] See, e.g., D.C. Code § 24-501(d) & (e) (2020); Joseph Goldstein & Jay Katz, Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 Yale L.J. 225 (1960).

[81] See Jones v. United States, 463 U.S. 354 (1983).

[82] Goldstein, *supra* note 3, at 19.

proof of some mental disability, are more likely to opt for a different defense or a plea bargain.

That does not signal the end of all future controversies over the insanity defense. There was considerable debate over the subject before *Kahler*, and that debate will likely continue as psychiatry acquires a greater understanding of the mind. In fact, allowing the states, perhaps influenced by the psychiatric profession and the academy, to mull over the shape of the defense without the restraints imposed by a constitutional rule might well leave the defense better situated to conform to additional learning. Constitutionalizing the defense would more likely have put it in a straitjacket than make it the object of continued study. Wrapping insanity in a due process envelope would have left its development in the hands of judges, who have no particular education, skill, or training in psychiatry or criminology.[83] Their peculiar talent (I use "peculiar" in its full range of meanings) is the interpretation of legal documents, codes, and decisions, a skill that matters little when the clause at issue—"due process of law"—is so Delphic as to allow judges to invest it with virtually any moral content they personally prefer.[84] With the public and legislatures left out of the discussion of the development of criminal responsibility, we not only would have driven from the field the two bodies most qualified to make moral judgments, but also have given the Supreme Court yet another discipline to treat like Silly Putty, something shapeable into whatever form a majority of unqualified decisionmakers think fitting.

There certainly has been no lack of experimentation with different standards of criminal responsibility. As *Kahler* noted, from the 13th century onwards, the law was clear that no "lunatic" or "madman" could be guilty of a crime, but there has been anything but uniformity as to how that status should be defined. Numerous courts and scholars on each side of the Atlantic have developed different standards

[83] Larkin & Canaparo, *supra* note 23, at 150–51.

[84] Exhibit A is the Supreme Court's creation, in *Obergefell v. Hodges*, of a constitutional right of same-sex marriage grounded in the Due Process Clause. 135 S. Ct. 2584 (2015). That claim was (and still is) alien to the concept of marriage that civilization has embraced since the days of Adam and Eve and that, as recently as 1986, the Court had derided as being "at best, facetious." Bowers v. Hardwick, 478 U.S. 186, 194 (1986), abrogated by Lawrence v. Texas, 539 U.S. 558 (2003).

to define criminal responsibility in the face of severe mental illness. Among them are the "wild beast" test,[85] the "total defect of understanding" test,[86] the "right and wrong" test,[87] the M'Naghten test,[88] the "irresistible impulse" test,[89] the "product of mental illness" test,[90] and the American Law Institute test (which is essentially a modernized version of the M'Naghten test).[91] Some courts have still found those formulations of the insanity defense to be inadequate and have created a diminished capacity or responsibility test to supplement it.[92] A few states have chosen an entirely different approach by authorizing a jury to return a verdict of "guilty but mentally ill."[93] The international community is all over the lot.[94] There is no reason to

[85] Arnold's Case, 16 How. St. Tr. 695, 764–65 (1724).

[86] See, e.g., Kahler, 140 S. Ct. at 1032–34; 1 Matthew Hale, The History of the Pleas of the Crown 14–15 (George Wilson & Thomas Dogherty eds., 1800) (1736).

[87] Anthony Platt & Bernard L. Diamond, The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54 Cal. L. Rev. 1227 (1966).

[88] M'Naghten's Case, 8 Eng. Rep. at 722, 10 Cl. & Fin. at 210 (ruling that a defendant pleading insanity must prove that, at the time of the act, he suffered from a mental disease or defect of reason so as not to know the nature of the act or, if he did know it, that it was wrong).

[89] E.g., Parsons v. State, 2 So. 854, 863 (Ala. 1887); State v. Thompson, Wright 617, 622 (Ohio 1834); Regina v. Burton (1863) 176 Eng. Rep. 354, 357, 3 F. & F. 772, 780; Regina v. Oxford (1840) 173 Eng. Rep. 941, 950; 9 Car. & P. 525, 546 ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible."); Hadfield's Case (K.B. 1800) 27 How. St. Tr. 1281, 1314–15, 1354–55.

[90] E.g., Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954); State v. Jones, 50 N.H. 369, 369–70 (1871); State v. Pike, 49 N.H. 399, 402 (1870); John Reid, Understanding the New Hampshire Doctrine of Criminal Insanity, 69 Yale L.J. 367, 369–70 (1960).

[91] Model Penal Code § 4.01 (Am. Law Inst. 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.").

[92] Peter Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827 (1977); cf. Fisher v. United States, 328 U.S. 463, 464–77 (1946) (rejecting the argument that a defendant should be free to use evidence of mental disease short of insanity to disprove the elements of premeditation and deliberation necessary to establish murder).

[93] See, e.g., Clark, 548 U.S. at 756–79.

[94] See Rita J. Simon & Heather Ahn-Redding, The Insanity Defense, The World Over (2006).

believe that stuffing this debate into the four words "due process of law" would improve it. *Kahler* was right to leave well enough alone.

IV. *Kahler* and the Future of Strict Criminal Liability

An equally interesting, and potentially more profitable, inquiry is whether *Kahler* holds any general significance for the criminal law. I am referring in particular to the issues of strict and *respondeat superior* liability, theories that the Supreme Court upheld over constitutional challenges in a handful of cases in the 20th century.[95] If the Court were open to reconsider the constitutionality of those doctrines in light of "historical practice," as illuminated by "eminent common-law authorities" and "early English and American judicial decisions," *Kahler* might offer far more significance for the doctrine of vicarious criminal liability than it does for the insanity defense.

Consider how the Supreme Court went about analyzing the issue in *Kahler*. The Court did not start with the text of the Constitution. If it had done so, the Court could have made short work of Kahler's argument. The Constitution defines only one crime—treason[96]—and mentions only two defenses—prohibitions on bills of attainder and ex post facto laws.[97] None of the three provisions mentions insanity, yet the Constitution quite clearly contemplates that Congress and the states will have a criminal justice system. That is important for several reasons. It shows that the Framers were aware of the use of the criminal law to order society; it recognizes the importance of limiting Congress's power to define the crime most susceptible to legislative and executive abuse; and, by express implication, it left the definition of all other offenses and defenses to Congress.[98] Yet, *Kahler* never once mentioned those provisions. The majority said that "the primary guide" for analysis of the constitutionality of Kansas's law was the common law's treatment of mental

[95] See, e.g., United States v. Park, 421 U.S. 658, 676 (1975); United States v. Freed, 401 U.S. 601, 607–10 (1971); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250, 252–53 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68–69 (1910).

[96] U.S. Const. art. III, § 3.

[97] U.S. Const. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1.

[98] Larkin & Canaparo, *supra* note 23, at 96–99.

responsibility,[99] and it turned straightaway to a dissection of the common-law doctrines. Yet history played a far more important role in *Kahler* than simply wearing the *maillot jaune*. Except for a few passing references to the "uncertainties" and "perennial gaps in knowledge" about the human mind that still characterize psychiatry today,[100] the Court's entire discussion consisted of a detailed analysis of the origins and evolution of the common law's treatment of a person's responsibility for crime when captured by mental illness.[101] The question, then, is whether that approach is significant. Does it suggest a willingness to evaluate other theories of liability in the same manner? If so, strict criminal liability might stand in the dock.

Like insanity, strict criminal liability has roots in the earliest days of the common law, when the definition of crimes was primitive. For example, the criminal law did not distinguish between a death caused intentionally or accidentally, by adults or children. A four-year-old could commit homicide by accidentally opening a door that pushed another child to her death.[102] Since the penalty for every felony was death, royal clemency was the only vehicle to mitigate the law's evident harshness.[103] Over time, just as the common-law courts crafted different tests for insanity, so too the courts fashioned gradations in the definitions of homicide and other crimes to differentiate blameless from blameworthy parties.[104] Principal among those distinguishing factors was the requirement that a person commit an unlawful act with a "guilty mind" or an "evil intent," as expressed in the maxim "*Actus non facit reum nisi mens sit rea*"[105]—a crime consists of "a vicious will" and "an unlawful act consequent upon such

[99] Kahler, 140 S. Ct. at 1027.

[100] *Id*. at 1028, 1037.

[101] See *id*. at 1027–37.

[102] See William F. Duker, The President's Power to Pardon: A Constitutional History, 18 Wm. & Mary L. Rev. 475, 479 (1977) (describing the need for royal clemency to address that incident).

[103] Larkin & Canaparo, *supra* note 23, at 116–17.

[104] See, e.g., Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide I, 37 Colum. L. Rev. 701 (1937); Jerome Michael & Herbert Wechsler, A Rationale of the Law of Homicide II, 37 Colum. L. Rev. 1261 (1937).

[105] Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 974 (1932) ("An act does not make one guilty unless the mind is guilty.").

vicious will."[106] Over time, the criminal law came to treat those elements, also known as *actus reus* and *mens rea*, as indispensable for conduct to be a crime even when capital punishment was no longer the penalty for every felony.[107] The *mens rea* element, in particular, became the critical factor in defending the government's resort to the criminal law, rather than administrative or civil penalties, to encourage compliance. The Supreme Court has consistently reiterated that point when construing potentially ambiguous acts of Congress.[108]

The mid-19th century, however, saw pushback against that longstanding doctrine. Responding to the perceived public health and safety threats from industrialization and urbanization, legislatures in England and the United States harnessed the criminal law to enforce health and safety codes without demanding proof that an offender acted with the "guilty mind" traditionally required for

[106] See, e.g., 4 William Blackstone, Commentaries *21; see also, e.g., Roscoe Pound, Introduction to Francis Bowes Sayre, A Selection of Cases on Criminal Law 8–9 (1927) ("Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.").

[107] See, e.g., Morissette v. United States, 342 U.S. 246, 250–52 (1952); 1 Wayne R. LaFave, Substantive Criminal Law § 5.1, at 332–33 (3d ed. 2017).

[108] See Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019):

> Whether a criminal statute requires the Government to prove that the defendant acted knowingly is a question of congressional intent. See Staples v. United States, 511 U.S. 600, 605 (1994). In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct." United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); see also Morissette v. United States, 342 U.S. 246, 256–58 (1952). We normally characterize this interpretive maxim as a presumption in favor of "scienter," by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1547 (10th ed. 2014).

See also, e.g., Elonis v. United States, 575 U.S. 723 (2015); McFadden v. United States, 576 U.S. 186 (2015); Carter v. United States, 530 U.S. 255, 269 (2000); Staples v. United States, 511 U.S. 600, 605–07 (1994); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994); Liparota v. United States, 471 U.S. 419, 425–27 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 436–37 (1978); Morissette, 342 U.S. at 250–51.

common-law crimes.[109] Called "regulatory offenses" in England and "public-welfare offenses" in this country, violations of pure-food and alcohol regulations, health requirements, building codes, traffic laws, and other sundry low-level measures initially carried only minor penalties, such as small fines. Eventually, imprisonment also became an available punishment despite the lack of any *mens rea* element in the relevant statute. The Federal Food, Drug, and Cosmetic Act (FDCA) is the classic example of a 20th-century regulatory law that carries criminal and civil penalties for a violation of the statute or a rule adopted by the agency responsible for enforcing it, the Food and Drug Administration.[110] The Supreme Court has upheld the constitutionality of the FDCA on more than one occasion.[111] In fact, the Court has even applied the tort doctrine of *respondeat superior* liability in criminal cases without once stopping to see if the common law authorized the extraordinary practice of holding B liable for A's conduct.[112]

Strict liability crimes are wholly out of step with what *Kahler* described as our Anglo-American "historical practice." A legion of "eminent common-law authorities"—criminal-law scholars such as William Blackstone, Lon Fuller, H.L.A. Hart, Herbert Packer, Herbert Wechsler, and numerous others[113]—as well as "early English and

[109] See, e.g., Morissette, 342 U.S. at 25–56; Graham Hughes, Criminal Omissions, 67 Yale L.J. 590, 595 (1958); Paul J. Larkin, Jr., Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause, 37 Harv. J.L. & Pub. Pol'y 1065, 1072–76 (2014); Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 56–67 (1933).

[110] Ch. 65, 52 Stat. 1010 (codified as amended at 21 U.S.C. § 301 et seq. (2019)).

[111] See United States v. Park, 421 U.S. 658, 676 (1975); Dotterweich, 320 U.S. 277; Balint, 258 U.S. at 252–53. The Court has not upheld a sentence of imprisonment for an FDCA conviction, however, over a challenge that incarceration for a strict liability crime is a cruel and unusual punishment. See Larkin, *supra* note 109, at 1102–03 & n.131.

[112] See Park, 421 U.S. at 660, 663–64, 667–76 (ruling that the FDCA makes the president of a nationwide business liable for the rodent droppings at one particular warehouse); Dotterweich, 320 U.S. at 279–85 (construing the word "person" in the FDCA to include the president of a pharmaceutical company that distributed mislabeled drugs even though the president took no part in the distribution).

[113] See, e.g., 4 Blackstone, *supra* note 106, at *21; Lon L. Fuller, The Morality of Law 77 (1964) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, Negligence, Mens Rea, and Criminal Responsibility, in Punishment and Responsibility 136, 152 (H.L.A. Hart ed., 2d ed. 2008) ("strict liability is odious"); Herbert L. Packer, The Limits of the Criminal Sanction 13–31 (1968); Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1109 (1952); see generally Larkin, *supra* note 109, at 1079 n.46 (collecting authorities).

American judicial decisions"[114]—reiterated by the Supreme Court in the last few decades[115]—condemn strict liability crimes. If history is to be the guide, strict criminal liability should be unconstitutional.

Moreover, a strong argument can be made that legislators do not use these offenses because they have made the moral judgment that we no longer deem an evil intent the mark of Cain. Two other factors are at work. One is that regulatory violations have become crimes because tasking local police officers with the enforcement of public-welfare offenses is simpler and less expensive than it is to create and fund an entirely new cadre of civil inspectors. Also related is the reality that the police will not aggressively enforce purely civil infractions.[116] The other factor is that "strict liability offenses make charges remarkably easy to prosecute" because they eliminate any consideration of the defendant's state of mind.[117] What does that mean? It does not mean that a state cannot legitimately use law enforcement officers to investigate public-welfare offenses. Rather, it means that a state's decision to treat regulatory violations as fundraising opportunities does not reflect the same type of normative judgment that underlies common-law crimes.

I have no doubt that some defendant will cite *Kahler* in support of a challenge to the constitutionality of a strict liability crime. I have far less confidence that he or she will prevail. To be sure, there is a strong

[114] See, e.g., Felton v. United States, 96 U.S. 699, 703 (1877) ("But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."); People v. Harris, 29 Cal. 678, 681 (Cal. 1866) ("It is laid down in the books on the subject that it is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.* (1 Bish. on Cr. Law, Secs. 227 and 229; 3 Greenl. Ev. Sec. 13.)."); State v. King, 86 N.C. 603, 606–07 (1882); State v. Carson, 2 Ohio Dec. Reprint 81 (Ct. Common Pleas 1859): Miller v. People, 5 Barb. 203, 203–04 (N.Y. Sup. Ct. Gen'l Term 1849).

[115] See *supra* note 108 (collecting cases).

[116] See *id*. at 1111–16.

[117] *Id*. at 1068 (footnote omitted) (citing Laurie L. Levenson, Good Faith Defenses: Reshaping Strict Liability Crimes, 78 Cornell L. Rev. 401, 404 (1993) ("The strict liability doctrine affords both an efficient and nearly guaranteed way to convict defendants.").

case, grounded in a long history of common-law and contemporary authorities, that no one should be guilty of a crime without having the type of evil intent characteristic of the common-law crimes. Nevertheless, the Supreme Court has upheld strict criminal liability over such challenges on multiple occasions, and today's Court might well be reluctant to say that their numerous predecessors were fundamentally mistaken about the intersection of criminal and constitutional law. Add in the Court's reluctance to overrule its own precedents due to *stare decisis* considerations and you do not have a promising case. The Court might be willing to consider whether imprisoning a defendant guilty of an offense on only a strict liability basis would be a cruel and unusual punishment, and I have urged the Court so to rule.[118] That would only eliminate one potential punishment for such a defendant, though, not his conviction. Still, as Alexander Pope wrote, "Hope springs eternal. . . ."

Conclusion

Kahler v. Kansas had the potential to revolutionize the law of insanity. Kahler urged the Supreme Court to do something that it had actively resisted for decades despite repeated pleas: viz., constitutionalize the insanity defense and select a particular standard as being essential to the criminal law. Fortunately, the Court yet again declined that invitation. That outcome is a good result for everyone but Kahler (who deserves none of our sympathy). The states and Congress remain free to decide how best to reconcile the need to deter crime, as well as punish the people who disregard society's rules, with the need to define the rules of the road in a way that respects our fundamental beliefs about not holding parties accountable for conduct they truly believed was legal or lawful. The balance that Kansas adopted is a reasonable way to accommodate those interests. Of course, other balances also could be struck. Societies have adopted different rules from the distant to recent past, and legislatures are likely to define different rules in the future. *Kahler* allows them to make those decisions without having to wriggle out of federal constitutional restraints. We are better off for that freedom.

[118] See Larkin, *supra* note 109, at 1101–21.