

# A NEW TEXTUALISM PERSPECTIVE: DOES ABOLISHING INSANITY AS AN AFFIRMATIVE DEFENSE VIOLATE THE FOURTEENTH AND EIGHTH AMENDMENTS?

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I. INTRODUCTION

In the recently decided case, *Kahler v. Kansas*, the U.S. Supreme Court “decline[d] to require that Kansas adopt an insanity test turning on a defendant’s ability to recognize that his crime was morally wrong.”<sup>1</sup>

*Kahler* raised the controversial issue of whether the U.S. Constitution permits a state to abolish the insanity defense. Five states—Idaho, Utah, Montana, Alaska, and Kansas—have abolished, or effectively abolished, insanity as an affirmative defense and only allow evidence pertaining to the defendant’s mental condition for the purposes of establishing diminished capacity, also called the *Mens Rea Model*.<sup>2</sup> There is a stark difference between utilizing insanity as an affirmative defense and utilizing it as a component to establishing diminished capacity: while the former negates a defendant’s criminal liability, the latter simply assists a defendant in escaping a higher charge.<sup>3</sup> It is my belief that abolishing the insanity defense violates the Fourteenth Amendment’s Due Process Clause, which debatably implicates the Eighth Amendment’s Cruel and Unusual Punishment Clause, particularly in circumstances resulting in criminal punishment. Though a few cases with similar premises to that of *Kahler* had been tried before the Supreme Court, the *Kahler* Court directly addressed whether abolishing the insanity defense violates the Constitution for the first time. Though it came as no surprise given the Court’s jurisprudence, the majority’s decision to rule in favor of Kansas nonetheless was upsetting.

This Note is the first to evaluate whether there would have been a different outcome had the Court analyzed *Kahler* under a novel modality of constitutional interpretation: *New Textualism*. Part I offers an overview of *Kahler* and its procedural history, as well as background information and insight into *New Textualism*. Part II provides a brief history of insanity as an affirmative defense, its variations across the U.S. legal system, and the

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<sup>1</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1037 (2020).

<sup>2</sup> R. Michael Shoptaw, *M’nighten Is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1103–05, 1112 (2015); Stephen M. Leblanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1283 (2007) (nothing that Alaska still uses the *M’nighten* test, but abandoned its moral blameworthiness component, effectively making it the same as the *Mens Rea Model*).

<sup>3</sup> Shoptaw, *supra* note 2, at 1103–04.

differences between the *Mens Rea Model* and the traditional insanity defense. It also looks at relevant federal and state cases to juxtapose against *Kahler's* alternative hypothetical outcome using *New Textualism*. Part III examines why abolishing the insanity defense violates the Fourteenth and Eighth Amendments. Lastly, Part IV evaluates whether the Supreme Court would have ruled differently in *Kahler* if the majority had interpreted the Fourteenth and Eighth Amendments using *New Textualism*.

Ultimately, a *New Textualist* interpretation of both amendments supports constitutional protection of insanity as an affirmative defense—but that is *not* to be confused with substantiating a federal mandate that each state adopt an exclusive legal definition or test for insanity in criminal procedures.

## II. KAHLER V. KANSAS AND NEW TEXTUALISM

### A. KAHLER: FACTS AND PROCEDURAL HISTORY

In November 2009, James Kahler shot and killed his wife Karen, Karen's grandmother, Dorothy, and his two teenage daughters.<sup>4</sup> Dorothy's medical-alert device recorded the audio of the shootings as well as Kahler saying, "I'm going to kill her."<sup>5</sup> Kahler was charged with four counts of first-degree murder, and at trial in Kansas, the jury sentenced him to death.<sup>6</sup> Because Kansas abolished insanity as an affirmative defense in 1995 to instate the *Mens Rea Model*, Kahler was not afforded the opportunity to raise evidence concerning his mental disability in an attempt to escape *all* criminal liability.<sup>7</sup> He purportedly suffered from extreme narcissism and emotional disturbance that separated him from reality, distorted his rational judgment, and sometimes led to insane outbreaks.<sup>8</sup> Kahler advocated for the definition of an "insane" person as one who is nonculpable because he or she cannot differentiate right from wrong or good from evil—even when acting intentionally.<sup>9</sup> The jury, however, found he had the "minimal mental state required to commit the offense."<sup>10</sup> Still, Kahler maintained he was not

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<sup>4</sup> Amy Howe, *Argument Preview: Justices to Hear Challenge to Lack of Insanity Defense*, SCOTUSBLOG (Sept. 30, 2019, 4:18 PM), <https://www.scotusblog.com/2019/09/argument-preview-justices-to-hear-challenge-to-lack-of-insanity-defense> [https://perma.cc/TJQ5-334A].

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

<sup>6</sup> *Id.*

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

<sup>8</sup> Brief for Petitioner at 17, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (No. 18-6135).

<sup>9</sup> Reply Brief for Petitioner at 20, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (No. 18-6135).

<sup>10</sup> Brief for Petitioner at 12, 13, *Kahler v. Kansas*, 139 S.Ct. 1318 (2019) (No. 18-6135).

culpable because he could not appreciate right from wrong.<sup>11</sup> On appeal to the Kansas Supreme Court, Kahler contended that prohibiting him from raising insanity as an affirmative defense violated his Fourteenth Amendment rights.<sup>12</sup>

The Kansas Supreme Court affirmed Kahler's sentence, and on October 7, 2019, the U.S. Supreme Court heard oral argument on the constitutionality of Kansas's abolishment of the insanity defense.<sup>13</sup> In his brief, Kahler argued that though the Supreme Court "defers to the states in the administration of 'criminal' justice," a state's criminal proceedings cannot offend the essential canons embedded in the Constitution.<sup>14</sup> Thus, Kahler contended that Kansas violated the Constitution by barring criminal defendants from using insanity to excuse themselves from criminal liability.<sup>15</sup> Legal insanity, he maintained, is an essential canon embedded in the Constitution and protected by the Due Process Clause.<sup>16</sup> He also explained that punishing an insane person is disproportionate, and thus "cruel and unusual" under the Eighth Amendment because it does not serve any "accepted penological justifications for punishing criminal conduct."<sup>17</sup> Punishing the mentally ill exacerbates their illness, in contrast to proportionate practices that instead include committing them to mental institutions.<sup>18</sup> To further substantiate his claim, Kahler pointed out that the Founding generation also would have deemed criminally punishing mentally impaired people "cruel and unusual" as both "England and the Colonies universally recognized the insanity defense . . . [and] believed that the insane should not be subjected to the legal process at all."<sup>19</sup>

Kahler emphasized that criminal defendants should have the opportunity to show the jury that they were unable to distinguish right from wrong.<sup>20</sup> The Court seemed to be closely divided during oral argument.<sup>21</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Howe, *supra* note 4.

<sup>13</sup> Howe, *supra* note 4; Amy Howe, *Argument Analysis: Justices Open New Term with Questions and Concerns About Insanity Defense*, SCOTUSBLOG (Oct. 7, 2019, 3:58 PM) [hereinafter *Argument Analysis*], <https://www.scotusblog.com/2019/10/argument-analysis-justices-open-new-term-with-questions-and-concerns-about-insanity-defense> [https://perma.cc/8D4M-UK58].

<sup>14</sup> Brief for Petitioner at 16, 17, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (No. 18-6135).

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

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

<sup>17</sup> *Id.* at 29 (noting that these justifications include retribution, deterrence, incapacitation, and rehabilitation).

<sup>18</sup> *Id.* at 64.

<sup>19</sup> *Id.* at 55.

<sup>20</sup> Howe, *Argument Analysis*, *supra* note 13.

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

Justice Alito feared that a general rule which allows defendants to escape conviction if they believed that their actions were moral, would lead to several people raising an insanity defense as a basis for their mistaken moral belief.<sup>22</sup> Another main concern was whether ruling for Kahler would make a difference in his case because the facts were not necessarily indicative of insanity and thus could not support that Kahler did not know right from wrong.<sup>23</sup> On the other hand, more liberal justices like Justice Sotomayor feared that Kansas's rule would lead to the conviction of defendants with mental illnesses who lack the mental and physical capacity to say no.<sup>24</sup>

Concerns articulated by the Justices centered on possible consequences of ruling for or against Kahler. Had the Court ruled for Kahler, the remaining four states that had effectively abolished the insanity defense—Idaho, Utah, Alaska, and Montana—also would be required to reinstate it because the *Mens Rea Model* would violate the Fourteenth and Eighth Amendments. In a 6-3 opinion, however, the Court affirmed the Kansas Supreme Court's holding: it denied that Kansas's law violates the Fourteenth and Eighth Amendments, thus reinforcing the states' authority to implement their own insanity defenses within the bounds of the Constitution.<sup>25</sup> The outcome largely depended on the Court's interpretation of the Fourteenth and Eighth Amendments and whether those Amendments fundamentally encompass the insanity defense.

Based on the facts of the case, it seems that Kahler would not have escaped criminal liability even if he raised insanity as an affirmative defense. The question at hand, however, is not whether Kahler would have prevailed, but rather whether Kahler should have been afforded the *opportunity* to raise the affirmative defense. While insanity defense jurisprudence hinted that the Court would rule in favor of Kansas, this Note explores a possible alternative outcome when analyzing the issues in *Kahler* under *New Textualism* and whether this is a preferable method of interpretation.

## B. A LOOK INTO NEW TEXTUALISM

*New Textualism* provides a novel way of interpreting broad provisions in the Constitution such as the Fourteenth and Eighth

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Ariane de Vogue & Devan Cole, *Supreme Court Says States Can Bar Insanity Defenses*, CNN POLITICS (Mar. 23, 2020), <https://www.cnn.com/2020/03/23/politics/supreme-court-insanity-defense/index.html> [https://perma.cc/5KZF-X55S].

Amendments, and subsequently applying those interpretations to current issues. Nonetheless, *New Textualism* is not a commonly employed method of interpretation amongst judges, like Originalism and Progressive Constitutionalism.<sup>26</sup> Originalists once used the Framers' original intent to interpret the Constitution, but many have shifted gears to using the "objective, public meaning of the text at the time it was enacted," referred to as "original meaning" or "textualism."<sup>27</sup> Spearheaded by the late Justice Scalia, original meaning has been criticized by academics for relying on the expectations of the Framers rather than the language in the document.<sup>28</sup> For example, in interpreting open-ended provisions like the Cruel and Unusual Punishment Clause in the Eighth Amendment, originalists ask whether "a particular punishment was considered cruel and unusual at the time the Eighth Amendment was adopted."<sup>29</sup> While this interpretation constrains judicial discretion, it also arguably translates open-textured provisions of the Constitution into specific, enumerated rights and powers.<sup>30</sup> Instead of narrowly relying on the original meaning to interpret open-textured provisions of the Constitution, Progressive Constitutionalists maintain that open-ended provisions establish general principles that do not change.<sup>31</sup> What can change, however, is the application of those principles based on societal changes.<sup>32</sup> Thus, the Constitution remains a flexible document by establishing general principles that demand consideration of the present context.<sup>33</sup> Progressive Constitutionalists have been criticized as well, particularly for disregarding the text all together.<sup>34</sup> This brings us to *New Textualism*, a new modality of constitutional interpretation that uses original-meaning originalism as support for progressive results.<sup>35</sup>

*New Textualism* utilizes the Constitution's broad provisions to establish general principles "which invite consideration of changed

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<sup>26</sup> See David A. Strauss, *New Textualism and Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1154 (1998) (explaining that the text itself is the starting point for a New Textualist interpretation, but instead today's judges and lawyers typically start with evaluating principles and precedents).

<sup>27</sup> James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1532 (2011) (referencing Justice Scalia's definition of original meaning).

<sup>28</sup> *Id.* at 1533–34.

<sup>29</sup> *Id.* at 1534.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1539.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1545.

<sup>35</sup> *Id.* at 1546–47.

circumstances when applied to contemporary legal disputes.”<sup>36</sup> Akhil Amar, who scholars deem the “father of *New Textualism*,” relies on the Constitution’s text, structure, and history for a holistic approach of constitutional interpretation that provides “the most plausible reading.”<sup>37</sup> Amar uses history broadly to understand the purpose of including certain language in the Constitution and structure by considering how later amendments to the Constitution alter or explain the meaning of earlier ones.<sup>38</sup> Ultimately, Amar’s method of interpretation gives “due weight to the fact that the Constitution was not ratified by the American people clause by clause, but as a whole.”<sup>39</sup> In other words, each clause should be read through the prism of the Constitution’s “overarching structures and purposes” and not in isolation.<sup>40</sup> Though Amar does not offer a unitary method of constitutional interpretation, he provides guidance to readers by likening it to a biography.<sup>41</sup> Just as a biographer might shed light on his subject’s deepest convictions in conjunction with her outward actions, Amar explores the Constitution’s “external impact and its internal structure.”<sup>42</sup> He refers to its internal structure as its personality.<sup>43</sup>

The Supreme Court’s decision in *Kahler* ultimately rested on its interpretation of the Fourteenth and Eighth Amendments. Under a New Textualist lens, the Justices may have interpreted these vague provisions differently than they would under an Originalist or Progressive lens. James Ryan, author of *Laying Claim to the Constitution: The Promise of New Textualism*, explains that constitutional adjudication requires first “determining the meaning of the constitutional provision at issue as precisely as possible and then applying that meaning to the issue at hand.”<sup>44</sup> Following in Amar’s footsteps, Ryan argues that since the Constitution cannot offer exact answers to contemporary constitutional issues, it is often necessary to utilize stare decisis, history, structure, and broad theories of

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<sup>36</sup> Ryan, *supra* note 27, at 1533. See generally William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1269 (2011) (discussing how societal changes influenced the Court in both *Reynolds* and *Brown* to interpret the meaning of equality in a progressive light that would not have been apparent to the Framers of the Constitution).

<sup>37</sup> Ryan, *supra* note 27, at 1548–49.

<sup>38</sup> *Id.* at 1548.

<sup>39</sup> Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 (2006).

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

<sup>41</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, 1, 471 (2005).

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

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

<sup>44</sup> Ryan, *supra* note 27, at 1560–61.

adjudication when applying open-textured provisions to present-day issues.<sup>45</sup> For example, Amar argues that in giving women the right to vote, the Nineteenth Amendment made clear that “women fell within the scope of the protections offered in the Fourteenth Amendment.”<sup>46</sup> Here, Amar uses “structure” by showing how later amendments modify the meaning of earlier amendments. Though its adopters may not have intended to enfranchise women when adopting the Fourteenth Amendment, the Nineteenth Amendment expanded the former Amendment’s sphere of concern to include sex discrimination. These later amendments have in large part resulted from progressive reforms and represent the overall progression of the Constitution, which Amar urges readers to consider when interpreting the text.<sup>47</sup>

If the Supreme Court Justices similarly utilized the factors of history, structure, precedent, and progressive reform efforts to interpret the Eighth and Fourteenth Amendments, would they have determined that the Amendments *do* encompass the insanity defense and subsequently that Kansas acted unconstitutionally in abolishing it?

Prior to addressing this question, I will provide an overview of the insanity defense, its historical context, presence in American jurisprudence, and current academic commentary on its abolition to provide context on applying a *New Textualism* interpretation.

### III. BRIEF HISTORY OF THE INSANITY DEFENSE AND RELEVANT CASES

#### A. HISTORY

Since before the founding of the Constitution, criminal defendants have raised insanity as an affirmative defense to escape of criminal liability.<sup>48</sup> While the insanity defense had a place in the courtroom as early as the thirteenth century, it was only in 1843 that the first legal test for insanity, the *M’Naghten* test, was born.<sup>49</sup> The test directly resulted from the *M’Naghten* case and remains the predominant standard for insanity in the United States.<sup>50</sup> Under *M’Naghten*, accused defendants are excused from

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<sup>45</sup> *Id.* at 1569–71.

<sup>46</sup> *Id.* at 1548–49.

<sup>47</sup> *Id.* at 1549.

<sup>48</sup> Shoptaw, *supra* note 2, at 1106–09.

<sup>49</sup> *Id.* at 1106.

<sup>50</sup> Legal Info. Inst., *Insanity Defense*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/insanity\\_defense](https://www.law.cornell.edu/wex/insanity_defense) [<https://perma.cc/YY2W-DPEY>] (stating



criminal liability if, at the time of committing the crime, they were incapable of understanding what they were doing, or if they knew what they were doing but their mental illness prevented them from understanding that it was wrong.<sup>51</sup>

In response to widespread critique that the *M’Naghten* test should have incorporated a behavioral component, the American Law Institute (“ALI”) in 1962 published its Model Penal Code, which broadened the *M’Naghten* test by recognizing people’s volitional capacity in addition to their cognitive capacity.<sup>52</sup> Hence, it added an additional exception for people with the inability to control their conduct due to their mental illness. This new, expanded test also lowered the *M’Naghten* test’s threshold by altering the language from “knowing wrongfulness” to lacking a “substantial capacity” to appreciate wrongfulness.<sup>53</sup>

#### B. A SHIFT TO THE “MENS REA MODEL”

Utah, Idaho, Montana, and Kansas have abolished the separate affirmative defense of insanity and only admit evidence of mental disease to negate the mens rea required for the offense charged.<sup>54</sup> The *Mens Rea Model* allows juries to hear evidence regarding a defendant’s mental condition, but only to establish whether the defendant possessed the requisite intent at the time the crime was committed.<sup>55</sup> Thus, a defendant who was aware of his actions can still be culpable and subject to conviction even if he was incapable of understanding that his actions were wrong.<sup>56</sup> Essentially, the defense can present evidence of mental illness to rebut prosecutorial evidence that the defendant had the requisite mens rea at the time of the crime, but the defense cannot present such evidence as an

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Daniel M’Naghten shot and killed the British Prime Minister and was acquitted by reason of insanity); see Shoptaw, *supra* note 2, at 1109 (noting the M’Naghten Rule is adopted in its entirety by 17 states as well as the Federal Government, partially adopted by 10 states, and adopted along with a volitional capacity test by 3 states).

<sup>51</sup> Shoptaw, *supra* note 2, at 1106; see Jenny Williams, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M’Naghten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense* [State v. Bethel, 66 P. 3D 840 (Kan. 2003)], 44 WASHBURN L.J. 213, 218–221 (2004).

<sup>52</sup> See generally Raymond L. Spring, *A Farewell to Insanity: A Return to Mens Rea*, J. KAN. BAR ASS’N, 38, 41–42 (1997).

<sup>53</sup> *Id.* (The ALI’s test as codified in the Model Penal Code has been adopted by fourteen states).

<sup>54</sup> 1 WAYNE R. LAFAVE & DAVID C. BAUM, *SUBSTANTIVE CRIMINAL LAW* § 7.1(d) (3d ed. 2020).

<sup>55</sup> See generally Spring, *supra* note 52, at 45 (explaining jury instructions in relation to the *mens rea* approach).

<sup>56</sup> *Delling v. Idaho*, 133 S. Ct. 504, 505 (2012) (Breyer, J., dissenting in denial of certiorari).

independent defense for purposes of exoneration.<sup>57</sup> In Kansas, for example, so long as a criminal defendant intentionally kills someone—even if he believes the victim was a monster or a Russian spy sent to assassinate him—he is guilty of murder.<sup>58</sup> Accordingly, Kansas can criminally punish an insane person who was unable to appreciate the wrongfulness of his conduct at the time the crime was committed.

Several challenges to the *Mens Rea Model* have been made at the state level, but the Supreme Court had refrained from addressing specifically the constitutionality of the model until 2019, when the Court granted certiorari to hear *Kahler*.<sup>59</sup> Though the Court directly addressed the constitutionality of abolishing insanity as an affirmative defense for the first time with its review of *Kahler*, it had addressed the constitutionality of a state’s authority “to substantially *limit* the defense” in *Clark v. Arizona*.<sup>60</sup> Arizona’s modified standard for insanity eliminated the first prong of the *M’Naughten* test—cognitive incapacity—and limited insanity to a question of moral incapacity, effectively functioning as the reverse of the *Mens Rea Model* in *Kahler*.<sup>61</sup> Unlike the *Mens Rea Model* in *Kahler*, the Arizona statute provided the defendant with an affirmative defense if he could establish that the severity of his mental disease prevented him from knowing his conduct was wrong.<sup>62</sup> The Court concluded that Arizona’s narrowed version of the *M’Naghten* test did not violate the Fourteenth Amendment’s Due Process Clause, thereby giving states the power to establish and define their own insanity defenses.<sup>63</sup> In its reasoning, the Court relied on the absence of a constitutionally recognized definition of insanity and pointed to the varying definitions of insanity in Anglo-American history, indicating diverse standards across the nation.<sup>64</sup> It held, moreover, that evidence of cognitive incapacity was sufficient to prove moral incapacity, meaning a test including moral *and* cognitive capacity is unnecessary.<sup>65</sup> In other

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<sup>57</sup> *State v. Searcy*, 798 P.2d 914, 917 (Idaho 1990).

<sup>58</sup> See Brief for Petitioner at 15, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (No. 18-6135).

<sup>59</sup> Compare Tyler Ellis, *Comment, Mental Illness, Legal Culpability, & Due Process: Why the Fourteenth Amendment Allows States to Choose a Mens Rea Insanity Defense over a M’naughten Approach*, 84 MISS. L.J. 215, 228 (2014) (claiming that the Supreme Court has denied certiorari on every case calling the Mens Rea Model into question), with Leblanc, *supra* note 2, at 1284 (claiming that there have been few exceptions in which the Supreme Court accepted certiorari).

<sup>60</sup> Leblanc, *supra* note 2, at 1293.

<sup>61</sup> Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 479 (2008).

<sup>62</sup> *Id.* at 457.

<sup>63</sup> See *Clark v. Arizona*, 548 U.S. 735, 752 (2006).

<sup>64</sup> *Id.* at 750.

<sup>65</sup> *Id.* at 754.

words, “if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act.”<sup>66</sup>

There also is reason to believe that two sitting Justices on the Supreme Court would find that there is a “fundamental right to a traditional insanity defense” premised on a defendant’s moral blameworthiness.<sup>67</sup> Justice Breyer, joined by Justice Sotomayor and the late Justice Ginsburg, dissented from the Court’s denial of certiorari in *Delling v. Idaho*, emphasizing that it would have been proper to evaluate whether Idaho’s adoption of the *Mens Rea Model* is “consistent with the Fourteenth Amendment’s Due Process Clause.”<sup>68</sup> Consistent with past jurisprudence, Justice Breyer delivered the dissenting opinion on behalf of himself, Justice Sotomayor, and Justice Ginsburg in the Court’s recent decision in *Kahler*.<sup>69</sup> In his dissent, Justice Breyer vehemently described why Kansas’s law violates values that are fundamentally rooted in American history and tradition.<sup>70</sup>

Additionally, the implications of abolishing insanity as an affirmative defense on the Fourteenth and Eight Amendments have been addressed at the state level.<sup>71</sup> For example, in *State v. Herrera*, Thomas R. Herrera was charged with the murder of his ex-girlfriend, Claudia, as well as attempted murder of Claudia’s mother and brother.<sup>72</sup> According to a forensic psychiatrist, Herrera’s paranoid schizophrenia led him to believe that the Mafia replaced Claudia with a non-human double at the time he shot her.<sup>73</sup> He was found not guilty of murdering Claudia because, in accordance with the *Mens Rea Model*, he did not knowingly cause the death of a human being.<sup>74</sup> Herrera nevertheless was found guilty of two counts of attempted murder as he knowingly tried to kill Claudia’s mother and brother, even though he acted under irresistible impulse resulting from his psychosis.<sup>75</sup> Standing before the Supreme Court of Utah, the defendant argued that Utah’s *Mens Rea Model* violates due process because it permits conviction of an offender who lacks conscious awareness that his actions

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<sup>66</sup> *Id.* at 753.

<sup>67</sup> *Delling v. Idaho*, 133 S. Ct. 504, 505 (2012).

<sup>68</sup> *Id.* at 506.

<sup>69</sup> *See generally* *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (Breyer, J., dissenting) (joined by Sotomayor & Ginsburg, JJ.).

<sup>70</sup> *Id.* at 25.

<sup>71</sup> Leblanc, *supra* note 2, at 1284.

<sup>72</sup> *State v. Herrera*, 895 P.2d 361, 361 (Utah 1995), *aff’d on other grounds*, 993 P.2d 854, 858 (Utah 1999).

<sup>73</sup> *State v. Herrera*, 993 P.2d 854, 858 (Utah 1999).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

are wrong.<sup>76</sup> In holding that Utah's *Mens Rea Model* does not violate the defendant's due process rights, the *Herrera* court reasoned that the U.S. Supreme Court "declined to adopt any specific insanity test as a requirement under federal due process" due to the inconsistent history of the insanity defense.<sup>77</sup> Moreover, the Court explained that *Herrera* also would have been found guilty of attempted murder in states that used the *M'Naghten* test because it was clear he knew the wrongful nature of his conduct.<sup>78</sup>

Another influential case is *State v. Searcy*, in which the defendant, Barry Searcy, was convicted of first-degree murder and sentenced to life in prison without possibility of parole.<sup>79</sup> In his appeal to the Supreme Court of Idaho, Searcy claimed that the insanity defense is a "fundamental principle of liberty and justice which lie at the base of our civil and political institutions," thus prohibiting defense infringes on his right to due process.<sup>80</sup> The Supreme Court of Idaho upheld Searcy's conviction, emphasizing, like in *Herrera*, that because the U.S. Constitution does not define a specific test for insanity, the defense is not constitutionally mandated.<sup>81</sup> In support, the *Searcy* court also relied on precedent from the U.S. Court of Appeals for the Ninth Circuit that the Eight Amendment "does not require mental illness to be considered as a mitigating circumstance."<sup>82</sup>

Similarly, in *State v. Korell*, Korell maintained on appeal that the insanity defense is embedded deeply in legal history, and as such, it is a fundamental right derived from the common law.<sup>83</sup> The Supreme Court of Montana ruled in favor of the state and held that the insanity defense is not a constitutional right and rejected that the insanity defense has been recognized since "the earliest period of the common law."<sup>84</sup>

Judges seemingly have addressed why the insanity defense is not protected by the Constitution using two main lines of reasoning: the insanity

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<sup>76</sup> *Herrera*, 895 P.2d at 363.

<sup>77</sup> *Id.* at 364.

<sup>78</sup> *Herrera*, 993 P.2d at 861.

<sup>79</sup> *State v. Searcy*, 798 P.2d 914, 916 (Idaho 1990).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 918.

<sup>82</sup> *State v. Searcy*, 798 P.2d at 926–27 (NcDevitt, J., dissenting) (discussing majority's analysis of *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1989)). Arguably, the *Searcy* court cited the *Harris* case erroneously because mitigating factors are considered *after* trial (in the post-conviction sentencing) and the issue in *Searcy* was the constitutionality of abolishing a defense raised *during* trial. *Id.* Analyzing mitigating factors in post-conviction sentencing is irrelevant "to the question of whether the Constitution permits an individual [lacking moral culpability] to be held accountable in the first instance[.]" *Id.*

<sup>83</sup> *State v. Korell*, 690 P.2d 992, 998 (Mont. 1984).

<sup>84</sup> *Id.* at 999 (reasoning that insanity only became generally recognized as an independent, affirmative defense in the nineteenth century).

defense is not protected by the Constitution because (1) there is no listed test in the Constitution's text and (2) Anglo-American law does not demonstrate use of a cohesive test, but rather inconsistent and varied definitions of insanity. *New Textualism*, however, goes beyond the text by also considering history, structure, precedent, and progressive reform efforts to interpret the Constitution. Accordingly, this method may have yield alternative outcomes in *Kahler*.

Certain academic commentary, as described below, provides key insight into the varying interpretations of the Fourteenth and Eighth Amendments as they relate to the insanity defense. I will summarize this commentary for purposes of later using it to analyze the history, structure, and reform efforts relating to both amendments and ultimately determine whether the Amendments set forth general principles that would support Kahler's claim.

#### IV. ACADEMIC ANALYSIS

Most academic commentary argues that abolishing insanity as an affirmative defense is unconstitutional because the insanity defense is a "fundamentally legal principle" rooted in the Constitution.<sup>85</sup> As such, commentators contend that replacing it with the *Mens Rea Model* violates the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against Cruel and Unusual Punishment.

##### A. REASONS WHY ABOLISHING THE INSANITY DEFENSE VIOLATES THE FOURTEENTH AMENDMENT

The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."<sup>86</sup> Yet, the amendment's vague language combined with the Court's refusal to establish a specific test for insanity has largely influenced state courts to uphold the *Mens Rea Model* as not violating, or implicating, due process rights.<sup>87</sup> Academics, however, critique this reasoning often by arguing that the *Mens Rea Model* directly violates due process because it strictly refers to intent and eliminates the moral blameworthiness component of mens rea, which they argue is intrinsic to our justice system.<sup>88</sup> Academics maintain

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<sup>85</sup> See Ellis, *supra* note 59, at 218–219.

<sup>86</sup> U.S. Const. amend. XIV, § 1

<sup>87</sup> See Phillips & Woodman, *supra* note 61, at 472.

<sup>88</sup> *Id.* at 485.

that because the dual nature of mens rea can be traced back to ancient history and is rooted in English common law, “which has guided American law in determining fundamental principles of law,” it is a fundamental principle of justice.<sup>89</sup> Consequently, moral blameworthiness is a precondition for criminal liability and “deeply rooted in the notion of human free will which lies at the heart of our criminal law, and is therefore protected by the Due Process Clause.”<sup>90</sup> For example, the Talmud (a collection of Jewish civil and ceremonial laws from biblical times) mentions that “a deaf mute, an imbecile, or a minor” is not culpable because he lacks consequential intent, revealing an ancient attempt to connect criminal culpability to one’s mental abilities.<sup>91</sup> Consequently, the *Mens Rea Model* violates this fundamental principle of justice, infringing on due process by abolishing moral blameworthiness as a precondition for criminal responsibility.<sup>92</sup>

Moreover, by adopting the *Mens Rea Model*, Idaho, Montana, Kansas, and Utah eliminate the *separate affirmative defense* of insanity, which could otherwise be raised by the defense to exonerate the offender.<sup>93</sup> In contrast, under the *Mens Rea Model*, an offender may only use mental-disability evidence to refute the mens rea element of the offense.<sup>94</sup> Therefore, “if the prosecution proves all elements of the case beyond a reasonable doubt, the defendant is convicted irrespective of whether his disease was sufficiently severe to satisfy a traditional insanity test.”<sup>95</sup> A traditional insanity test, according to critics of the *Mens Rea Model*, serves as a complete defense that can result in acquittal, even if the prosecution “proved all elements of the crime beyond reasonable doubt.”<sup>96</sup> These critics ultimately contend that the *Mens Rea Model* denies defendants their due process rights by depriving them of a “meaningful opportunity to present a complete defense.”<sup>97</sup>

Nevertheless, there remain a few scholars that advocate for the *Mens Rea Model*, believing that it does not violate due process and that it reduces juror confusion substantially.<sup>98</sup> Proponents of the *Mens Rea Model* detail historical inconsistencies in defining and applying the insanity

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<sup>89</sup> Jessica Harrison, *Idaho’s Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 599 (2015).

<sup>90</sup> Phillips & Woodman, *supra* note 61, at 494.

<sup>91</sup> Harrison, *supra* note 89, at 579.

<sup>92</sup> Phillips & Woodman, *supra* note 61, at 461.

<sup>93</sup> Leblanc, *supra* note 2, at 1290.

<sup>94</sup> *Id.* at 1289.

<sup>95</sup> *Id.* at 1290.

<sup>96</sup> *Id.* at 1287.

<sup>97</sup> *Clark v. Arizona*, 126 S. Ct. 2709, 2743 (2006) (Kennedy, J., dissenting).

<sup>98</sup> Ellis, *supra* note 59, at 247; *See Spring*, *supra* note 52, at 45.

defense to illustrate that history never embraced one uniform version of the defense.<sup>99</sup> In fact, they argue that mens rea, as it relates to criminal intent, preceded the recognition of the cognitive ability to know right from wrong, that is moral blameworthiness.<sup>100</sup> In response to critics who assert the insanity defense was present as early as the thirteenth century, proponents point out that those early definitions of insanity focused on whether a person knew what he or she was doing, not a person's moral blameworthiness.<sup>101</sup> These advocates reason that because no particularized insanity defense is "deeply rooted enough in history and tradition to raise it to the level of a fundamental right," the *Mens Rea Model* does not violate due process.<sup>102</sup> Moreover, they assert that "due process imposes no single canonical formulation of legal insanity" because specified boundaries for the concept of a mental disorder do not exist.<sup>103</sup> Thus, "formulating a constitutional rule would reduce, if not eliminate, [the States'] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold."<sup>104</sup>

Furthermore, the *Mens Rea Model* substantially alleviates jury confusion by allowing the jury to focus on one definition of mens rea.<sup>105</sup> Adopting the *Mens Rea Model* eliminates insanity as a separate defense. Consequently, jurors are given a single instruction which "defin[es] the crime and its mental state component . . . and [the jury] will be told that any evidence they may hear relating to the mental condition of the defendant is to be considered on that issue alone."<sup>106</sup> In effect, the jury is not provided with varying definitions detailing both the mental state required for the crime and the mental state required for the insanity defense.<sup>107</sup>

#### B. ABOLISHING THE INSANITY DEFENSE VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment

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<sup>99</sup> Ellis, *supra* note 59, at 248–250.

<sup>100</sup> *Id.* at 231.

<sup>101</sup> *See id.* at 231–233.

<sup>102</sup> *Id.* at 230.

<sup>103</sup> *Id.* at 248 (citation omitted).

<sup>104</sup> *Powell v. Texas*, 392 U.S. 514, 536–37 (1969) (alteration in original).

<sup>105</sup> *See Spring*, *supra* note 52, at 45.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

inflicted” and applies to the states through the Fourteenth Amendment.<sup>108</sup> The Supreme Court interprets the Eighth Amendment as protecting defendants from barbaric punishments and ensuring the punishments they do receive are not excessive.<sup>109</sup> To determine whether a punishment is excessive, courts evaluate if the punishment both “contributes to acceptable penal goals” and is proportional to the crime committed.<sup>110</sup> At a minimum, what constitutes as “cruel and unusual” includes what was considered cruel and unusual at the time the Bill of Rights was adopted.<sup>111</sup>

There is minimal scholarship regarding how abolishing the insanity defense implicates the Eighth Amendment. Academic writings, however, conclude generally that abolishing the defense constitutes a violation of the Eighth Amendment. In particular, scholars argue that in determining whether capital punishment is proportional to a crime committed, it is necessary to determine the offender’s culpability or blameworthiness.<sup>112</sup> Stephan M. Leblanc, for example, utilizes the holdings in *Atkins v. Virginia* and *Roper v. Simmons* to support his argument that sentencing an insane defendant to capital punishment is excessive and violates the Eighth Amendment.<sup>113</sup> In *Atkins*, the Court ruled that the imposition of capital punishment on “mentally retarded” defendants was a violation of the Eighth Amendment.<sup>114</sup> Following this logic, the Court held in *Roper* that executing juveniles also violates the Eighth Amendment because individuals under the age of eighteen are mentally immature and more vulnerable to harmful influences.<sup>115</sup> Like the mental deficiencies represented in both *Atkins* and *Roper* that render a defendant ineligible for the death penalty, Leblanc argues that insanity should also bar the death penalty.<sup>116</sup> Even further, he contends that *any* criminal punishment of an “insane offender,” not only those involving capital punishment, constitutes a “disproportionate punishment” and is therefore cruel and unusual.<sup>117</sup>

Another critic advocating against the *Mens Rea Model* points to the Court’s holding in *Ford v. Wainwright* as a pathway to proving that the

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<sup>108</sup> U.S. CONST. amend. VIII; Leblanc, *supra* note 2, at 1295.

<sup>109</sup> Leblanc, *supra* note 2, at 1295.

<sup>110</sup> *Id.* at 1295–96.

<sup>111</sup> *Id.* at 1297.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1328.

<sup>114</sup> *Id.* at 1302.

<sup>115</sup> *Id.* at 1305.

<sup>116</sup> *Id.* at 1309.

<sup>117</sup> *Id.* at 1327.



mens rea approach is cruel and unusual.<sup>118</sup> In *Ford*, the Court noted that the Eighth Amendment recognizes “evolving standards of decency that mark progress of a maturing society.”<sup>119</sup> In *Perry v. Lynaugh*, the Court notes the most reliable exemplar of a maturing society’s contemporary values “is legislation enacted by the [federal] legislature[.]”<sup>120</sup> Given that only four states have abandoned insanity as an affirmative defense, contemporary values arguably prefer the existence of such a defense.<sup>121</sup> Accordingly, states that abolished the insanity defense have deviated from society’s contemporary values, rendering capital punishment to defendants lacking moral blameworthiness violates the Eighth Amendment.

One critical concern is that absent the insanity defense, an insane defendant’s culpability will not be considered; thus, any sentence rendered thereafter will be disproportionate to the crime and a violation of the Eighth Amendment.<sup>122</sup> Proportionality, it is argued, largely relies on the degree of a criminal’s culpability.<sup>123</sup> However, the *Mens Rea Model* holds defendants criminally responsible for their actions so long as they intentionally committed them.

Drawing on the above commentary, the next step in this evaluation is to assess whether the history and structure of the Fourteenth and Eighth Amendments support finding that both amendments encompass the insanity defense.

## V. THE NEW TEXTUALISM PERSPECTIVE

Although the Constitution does not define insanity, it is arguable that the Court would have ruled differently in *Kahler* had the Justices used history and structure to interpret the Fourteenth and Eighth Amendment. History, in this case, refers to the evolution and purpose of both the Fourteenth Amendment’s Due Process Clause and the Eighth Amendment. Structure refers to the interaction of the language of the Constitution and word patterns, defined by Amar as *Intratextualism*.<sup>124</sup>

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<sup>118</sup> 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 (2002).

<sup>119</sup> *Id.* at 1570 (citation omitted) (alteration in original).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under Graham v. Florida*, 61 DEPAUL L. REV. 1, 54–55 (2011).

<sup>123</sup> Anne S. Emanuel, *Guilty but Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 61 (1989).

<sup>124</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

Whether Kahler was constitutionally entitled under the Fourteenth or Eighth Amendment to raise insanity as an affirmative defense was the issue at hand, not whether he would have prevailed using the affirmative insanity defense. Under a *New Textualist* lens, the Constitution may protect the insanity defense as a fundamental interest embraced by the Fourteenth Amendment. Assuming this is correct, abolishing the insanity defense violates due process and the Eighth Amendment by disproportionately sentencing criminal defendants without affording them the opportunity to raise a complete defense.

If *New Textualism* derives general principles from the Constitution's broad provisions, like "cruel and unusual punishment" and "equal protection," then what are the general principles of the Fourteenth and Eighth Amendments, and do they support finding that the Amendments encompasses the insanity defense? Using the history and structure of the Fourteenth Amendment, precedent, and societal pushback, I will determine the general principles and subsequently the level of generality at which to interpret the language so as to uphold them.

Ultimately, Kahler would likely not prevail as the facts of his case do not support his claim of insanity. He contended that moral blameworthiness is a necessary component in raising a complete defense; however, the facts indicated that he was capable of determining right from wrong at the time of the crime and showed substantial motive to kill his wife.<sup>125</sup> Again, whether Kahler is guilty of murder is *not* the issue at hand, but rather whether his contention is constitutionally supported.

#### A. USING HISTORY AND STRUCTURE TO DETERMINE WHETHER THE FOURTEENTH AMENDMENT ENCOMPASSES THE INSANITY DEFENSE

Akhil Amar uses the history and structure of the Fourteenth Amendment to show that the overall purpose of its adoption was to protect individual rights.<sup>126</sup> In fact, the Bill of Rights did not considerably protect individual rights prior to the adoption of the Fourteenth Amendment.<sup>127</sup> Amar contends that the Fourteenth Amendment transformed the nature of American federalism by limiting state action from encroaching on

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<sup>125</sup> *State v. Kahler*, 410 P.3d 105, 113 (Kan. 2019) (noting that Kahler's wife was engaged in extramarital affair and the disintegration of his marriage shortly followed), *aff'd*, 140 S. Ct. 1021 (2020).

<sup>126</sup> Lackland H. Bloom, Jr., *Long Live the Bill of Rights! Long Live Akhil Reed Amar's the Bill of Rights!*, 33 U. RICH. L. REV. 313, 318 (1999).

<sup>127</sup> *Id.*

constitutionally-guaranteed individual rights.<sup>128</sup> As such, due process of law as written in the Fourteenth Amendment was intended to provide all individuals with evenhanded and proper legal procedures, even if those procedures generated a broad range of results.<sup>129</sup> For purposes of this analysis, I will refer to Amar's analysis of the Due Process Clause's intended purpose as *the general principle*. Consistent with *the general principle*, constitutional protection of insanity as an affirmative defense depends partly on the level of generality applied to interpreting the Amendment. If the level of generality applied is high, then it is more likely that the insanity defense can be read into the Amendment than if the level of generality applied to the Clause is low.

The intratextual relationship between the Due Process Clause and other provisions in the Constitution provides little assistance in determining how generally to interpret the Fourteenth Amendment in the context of criminal procedure. Amar explains that the framers and ratifiers of the Fourteenth Amendment were expressing the same ideas in both the Due Process Clause and the Equal Protection Clause, but this may not bring us closer to determining the level of generality at which to interpret the Fourteenth Amendment. It simply points out consistent *general principles* of limiting encroachment on individual rights.<sup>130</sup> On the other hand, if due process and equal protection express the same ideas, then would Amar not agree that by depriving defendants from raising a complete defense, Kansas is violating the Equal Protection Clause and consequently the Due Process Clause? Though providing defendants with the opportunity to raise a complete insanity defense, one that includes a moral culpability component, is not an enumerated right, it is clearly a fundamental interest that states should implement through the Equal Protection Clause. Subsequently, because we have determined that the Equal Protection Clause "elaborate[s]" the same idea[s]" represented in the Due Process, depriving defendants from raising insanity as an affirmative defense (a fundamental interest), violates both clauses.<sup>131</sup> This is a much more comprehensive and relevant understanding of the insanity defense as applied to the *general principles* of due process.

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<sup>128</sup> Douglas G. Smith, *Reconstruction or Reaffirmation? Review of "The Bill of Rights: Creation and Reconstruction"*, 8 GEO. MASON L. REV. 167, 168 (1999).

<sup>129</sup> *Intratextualism*, *supra* note 124, at 772 (explaining that "law" is equal and impartial, and that the process that generates law must "respect that nature").

<sup>130</sup> *See id.*

<sup>131</sup> *Id.* at 773. (describing that the framers and ratifiers of the Fourteenth Amendment intended for the Equal Protection Clause to provide a "clarifying gloss" on due process).

Moreover, while not explicitly drawing from the Fourteenth Amendment, Amar's work on criminal procedure and the Constitution implicates the Fourteenth Amendment.<sup>132</sup> Amar advocates for federal criminal procedure guarantees to protect innocent citizens from wrongful punishment, and in doing so he uses the intratextual relationship between the Fourth, Fifth, and Sixth Amendments to support his interpretation.<sup>133</sup> Because the Fourteenth Amendment's Due Process Clause "was designed to make applicable to the states the same concept of due process that the fifth amendment's due process clause traditionally had made applicable to the federal government," Amar is implicitly using the relationship between the Fourth, *Fourteenth*, and Sixth Amendments.<sup>134</sup> Consequently, in an alternative world in which the Justices employed *New Textualism*, there is substantial structural support for Kahler's claim. A historical analysis of the Fourteenth Amendment in conjunction with academic commentary on abolishing the insanity defense may provide even more guidance in ascertaining the level of generality that should be applied to the Due Process Clause.

As detailed in Part III, critics maintain that depriving criminal defendants of the opportunity to raise the insanity affirmative defense violates the Due Process Clause by denying them the opportunity to raise a complete defense. If *the general principle* of the Fourteenth Amendment's Due Process Clause is to provide individuals with equitable legal procedure(s) and protect those procedures from state encroachment, then surely *New Textualism* would concur with the academic commentary expressed by critics of abolishing the defense. Following this school of thought, Kansas's abolition of the insanity defense constitutes state encroachment on an individual's fundamental right to raise a complete defense. However, it is unclear—based on the historical context of the Fourteenth Amendment—whether the Due Process Clause intended to provide *explicit* criminal procedure guarantees beyond those incorporated from the Bill of Rights; it seems more unlikely than not.

The Fourteenth Amendment, ratified in 1868, provided the Court for the first time "with the constitutional device for reviewing state law," but not one person in the ratifying state legislatures attempted to define its

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<sup>132</sup> See George C. Thomas III, *Remapping the Criminal Procedure Universe the Constitution and Criminal Procedure: First Principles*, 83 VA. L. REV. 1819, 1822–23 (1997).

<sup>133</sup> *Id.* at 1823 (Thomas explains that reading "specific Bill of Rights guarantees into the Due Process Clause of the Fourteenth Amendment and making them enforceable against the states" is not substantively coherent. He claims that we only have our individual intuitions that determine how much we should favor the state or the individual, and this is not sufficient to solve issues of interpretation).

<sup>134</sup> Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 273–74 (1982).

broad language, including the Due Process Clause.<sup>135</sup> At that time, subject to few exceptions, criminal law was thought to be exclusively delegated to the States.<sup>136</sup> Consequently, forfeiture of the States right to conduct criminal trials as they saw fit violated state sovereignty.<sup>137</sup> Nevertheless, the Due Process Clause continued evolving to include guaranteed fundamental fairness in criminal proceedings.<sup>138</sup> Under the Warren Court in the 1960s, the Fourteenth Amendment experienced its most radical transformation when it selectively incorporated individual Bill of Rights guarantees.<sup>139</sup> Thus, the Due Process Clause of the Fourteenth Amendment protected individuals' guaranteed rights under the Fourth, Fifth, Sixth, and Eighth Amendments from state violations.<sup>140</sup> It is clear that the general purpose of the Due Process Clause is to protect individual rights from State encroachment, and as applied to contemporary constitutional cases, the general purpose has thus expanded the Due Process Clause to include more protections.

Yet, it is inconclusive whether the historical context substantiates Kahler's claim that abolishing insanity as an affirmative defense violates the Due Process Clause. Though federal courts have intervened in the states' criminal justice systems, intervention has been confined to the provisions in the Bill of Rights deemed intrinsic to the "American scheme of justice."<sup>141</sup> In this context, the insanity defense would have to be determined as fundamental to the American scheme of justice. Otherwise, constitutionally protecting the defense would open the floodgate to like-minded claims, and judicial resources would be spent on essentially creating a criminal justice system for all states to employ. The issue with this is that interpreting the Due Process Clause as having authority to mandate states adopt a specific insanity test requires interpreting the Due Process Clause at a high level of generality. But Kahler's argument was not that Kansas should adopt any specific legal definition of insanity, rather it was that

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<sup>135</sup> George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting*, 100 MICH. L. REV. 145, 146–147 (2001).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 148.

<sup>138</sup> See Stacey Kime, *Can A Right Be Less Than the Sum of Its Parts? How the Conflation of Compulsory Process and Due Process Guarantees Diminishes Criminal Defendants' Rights*, 48 AM. CRIM. L. REV. 1501, 1501 (2011).

<sup>139</sup> Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 304 (2001).

<sup>140</sup> *Id.* at 305.

<sup>141</sup> David A. Martland, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1685 (1985) (referencing almost all the criminal procedure guarantees in the Bill of Rights).

abolishing the second part of the *M'Naughten* test unconstitutionally limited the defense. Accordingly, the requisite level at which to interpret the Due Process Clause in this context seems intermediate—and is how Justice Breyer seemingly interpreted the Clause in his dissent, opining that Kansas's abolition offended entrenched “moral principles underpinning our criminal laws.”<sup>142</sup> Though the *Kahler* majority held that the *Mens Rea Model* is constitutional because a “moral capacity” component to insanity was never uniformly legally recognized, the dissent showed that *M'Naughten* was the historically prominent test.<sup>143</sup> *New Textualism* does not consider whether one test has been exclusively implemented, but rather which test has been historically dominant and popular in accordance with the general principles of the Fourteenth Amendment. Consequently, *New Textualism* would likely yield not only a different result in *Kahler*, but also a different result in Part II's cases because the history and the structure of the Fourteenth Amendment appear to substantiate *Kahler*'s claim.

Furthermore, relying on precedent and societal pushback to interpret the Due Process Clause also would likely produce a different outcome in *Kahler*. As critics of abolishing the insanity defense contend, denying a criminal defendant the opportunity to a full defense violates the Due Process Clause. Though current jurisprudence dictates that the insanity defense is not defined in the Constitution and thus does not implicate the Fourteenth Amendment, applying the *general principle* may encourage justices to look beyond the text, history, and structure. The majority in *Kahler* overlooks *the general principle* and instead emphasizes the significance of the continuously evolving relationship between law and psychology and its influence on each states' criminal procedures.<sup>144</sup> Writing for the majority, Justice Kagan is misguided in prioritizing the States' “fruitful experimentation” with defining insanity over ensuring that criminal defendants are afforded the opportunity to raise a complete defense.<sup>145</sup> The two are not mutually exclusive; medical knowledge about the relationship between mental illness and criminal culpability can continue evolving in each state without denying defendants from raising insanity as an affirmative defense.

*The general principle* protects individual rights from state encroachment, but it probably does not support imposing upon states through the Due Process Clause “one test rather than another for

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<sup>142</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1048 (2020).

<sup>143</sup> *Id.* at 31.

<sup>144</sup> *Id.* at 34–35.

<sup>145</sup> *Id.* at 34.

determining criminal culpability.”<sup>146</sup> Again, it must be restated that Kahler was not arguing that Kansas adopt a specific test. Though *New Textualism* cannot support taking away states’ freedom to determine the extent at which mental illness should excuse criminal conduct, it likely supports that each state afford criminal defendants the opportunity to raise a complete defense if they so choose, and that a complete defense (according to the history and structure of the Fourteenth Amendment) would include a moral culpability component.

That being said, what purpose would this serve for defendants like Kahler who look morally culpable? Some argue that courts would hear the defense’s argument for the sake of preserving the due process notion of a “complete defense,” but it would merely serve as a courtesy, which carries no weight and wastes judicial resources on defendants who had the requisite intent for the crime and were also morally blameworthy. Nonetheless, the issue at hand does not involve rendering judgment on the accused. The purpose is not to give guilty defendants the opportunity for a last-ditch effort to escape criminal liability, but rather to afford every defendant a holistic, complete defense. Wishing to afford every defendant subject to criminal punishment a holistic defense is integral to the pushback against abolishing the insanity defense; as evidenced in this Note, pushback is present in states with the *Mens Rea Model* and in academic commentary. If progression indicates that moral blameworthiness is an essential element in a defendant’s right to raise a complete defense, then similar to the plight for women’s suffrage, this social reform movement might influence constitutional protection of insanity as an affirmative defense. This would support interpreting the Fourteenth Amendment at a high level of generality to fulfill the Amendment’s general purpose based on societal progression.

#### B. USING HISTORY AND STRUCTURE TO DETERMINE WHETHER THE EIGHTH AMENDMENT ENCOMPASSES THE INSANITY DEFENSE

Abolishing the insanity defense is less controversial in its implication of the Eighth Amendment than in its implication of the Fourteenth Amendment. Amar makes the structural argument that the Fourteenth Amendment’s incorporation of the Cruel and Unusual Punishments Clause shows how the former fundamentally transformed the

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<sup>146</sup> *Leland v. State of Oregon*, 343 U.S. 790, 803–05 (Frankfurter, J., dissenting) (agreeing with the majority on this point).

Clause's meaning.<sup>147</sup> In 1868, governments in the South lagged behind the Federal Government in their administration of punishment.<sup>148</sup> Their abusive practices might have been deemed "usual" based on consistent application, but when judged by national norms of liberty as established in the Fourteenth Amendment, those punishments were hardly usual.<sup>149</sup> Consequently, the interaction between the Fourteenth and Eighth Amendments sheds light on the concept of "usual" as written in the Cruel and Unusual Punishment Clause.

A stronger argument in Kahler's defense, however, points to the relationship between culpability, which inherently implicates the Fourteenth Amendment, and the Cruel and Unusual Punishment Clause. Culpability is used to determine whether a punishment is excessive, and culpability itself is determined by a defendant's mental state at the time of the crime.<sup>150</sup> By applying the general principle of the Fourteenth Amendment, the level at which to interpret the Eighth Amendment seems reasonable: culpability and punishment must be proportional to protect individuals from cruel and unusual punishment.

LeBlanc, as mentioned above, uses *Enmund v. Florida* to support his assertion that abolishing the insanity defense prevents the Court from considering a defendant's culpability, which violates the Eighth Amendment.<sup>151</sup> The facts in *Enmund*, however, differ substantially from those in *Kahler*. *Enmund* was charged with felony murder and sentenced to death, even though he did not kill the victim, attempt to kill the victim, or intend to kill the victim.<sup>152</sup> Clearly, sentencing *Enmund* to death would be unjustifiably excessive and thus violate the Eighth Amendment. But in *Kahler*, there was no question as to what his intent was, nor was he deprived of using insanity as a means of achieving a diminished sentence. Consistent with the critic's theory, diminished capacity is an insufficient defense and does not accurately account for a defendant's culpability. LeBlanc's structural connection between the Fourteenth and Eighth Amendments, thus, requires the state to adopt insanity as an affirmative defense.<sup>153</sup>

This supports a *New Textualist* structural interpretation of the Eighth Amendment, but it comes in direct contention with the history and

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<sup>147</sup> Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 881 (2013).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982).

<sup>151</sup> LeBlanc, *supra* note 2, at 1314.

<sup>152</sup> *Enmund*, 458 U.S. at 795.

<sup>153</sup> See LeBlanc, *supra* note 2, at 1295.



purpose of the Eighth Amendment. American draftsmen, based on statements made during various state conventions to ratify the Federal Constitution, were primarily concerned with proscribing barbaric methods of punishment.<sup>154</sup> Nonetheless, purpose behind the Cruel and Unusual Punishment Clause progressed based on evolving standards of decency and in accordance with the general principle of protecting individual rights.<sup>155</sup> While there is no indication that these evolving standards of decency expand the Eighth Amendment to require that states adopt specific affirmative defenses, ignoring moral culpability in determining the proper punishment for a criminal defendant, especially in cases of capital punishment, is nothing if not cruel and unusual. Some argue that the *Mens Rea Model* approach to insanity “would not have been considered cruel and unusual at the time of the founding” because the affirmative defense, which included moral blameworthiness, did not fully develop until the Nineteenth Century.<sup>156</sup> The Supreme Court in *Ford*, however, defined the Eighth Amendment as evolving in accordance with contemporary values.<sup>157</sup> Thus, critics that look to what was cruel and unusual at the founding of the Constitution disregard instructions from the highest court in the nation. Contemporary values support a moral blameworthiness component to determine criminal punishment in the nearly nationwide adoption of the *M’Naghten* test. Using history to interpret that insanity (as an affirmative defense) is *required* by the Fourteenth Amendment to prevent cruel and unusual punishment (as protected by the Eighth Amendment) necessitates analysis at a high level of generality, but when supplemented with evolving contemporary values, it seems unconstitutional to deny a defendant such a defense.

## VI. CONCLUSION

Though James Kahler did not prevail in his fight against Kansas’s abolition of the second part of the *M’Naghten* test, *New Textualism*, as eloquently explained by scholars like Akhil Amar and James Ryan, could have provided an alternative outcome to Kahler’s defeat. After diving into the history of both the Eighth and Fourteenth Amendments, analyzing the structure of the text, evaluating current jurisprudence, and considering societal values, I find myself at a crossroads between morality and the law. Under this modality of interpretation, there is sufficient support rooted in

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<sup>154</sup> *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

<sup>155</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

<sup>156</sup> Brief for Respondent at 49, *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (No. 18-6135).

<sup>157</sup> *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

the text, its history, and its structure to support federal recognition of a moral component in defining insanity within the legal field. Crucial to this determination is understanding that requiring states to consider moral blameworthiness in their respective legal definitions of insanity does *not* equate to mandating that they adopt insanity as an affirmative defense. Instructing states to adopt certain criminal procedures not otherwise referenced to in the Bill of Rights violates the fundamental values of federalism, which are intrinsic to the American justice system. In essence, the Supreme Court would be creating law without Constitutional support if it were to create an exclusive insanity defense and subsequently require each state to implement that defense. *New Textualism* surely does not support such a wide reading of the Fourteenth Amendment. However, this new modality of interpretation *does* endorse the notion that the insanity defense is a fundamental interest historically and structurally embraced in the Fourteenth Amendment. Moreover, as Amar urges his readers, it is necessary to take heed of social reform. It seems to me that *New Textualism* demands us to interpret the Amendments at a high level of generality for the purpose of adhering to the overarching progress and purpose of the Constitution.

The Due Process Clause does not necessarily have to adopt certain affirmative defenses, require that states implement insanity as an affirmative defense, or adopt a constitutionally enforced definition of insanity. Instead, the Clause could prevent states from completely abolishing affirmative defenses in criminal proceedings. Rather than denying a defendant from raising a defense and adopting a strict, limited test to determine guilt, Kansas, and the other four states that adopted the *Mens Rea Model*, could abandon both. These states would have the autonomy to determine their own definitions of legal insanity, but not to the extent that it violates the constitutional protection of affording a defendant the opportunity to raise a complete defense, which includes a moral culpability component.

To protect individuals from wrongful incarceration or cruel and unusual punishment, defendants should be afforded a full arsenal of defenses, but this is futile if the Court adheres to stringent guidelines and determines that those defenses are not constitutionally mandated. The opportunity to raise insanity as an affirmative defense does not lead to immediate acquittal; there is still a burden of proof to meet.

Has society not reached the point where there is little disagreement over whether morality plays a part in cognitive ability as it relates to criminal liability? Should States even be “fruitful[ly] experiment[ing]”

with the definition of insanity in the legal field?<sup>158</sup> If, as Justice Kagan writes in *Kahler*, medical knowledge of the inner workings of the brain is continuously advancing, why should state legislatures be able to place limits on it in criminal procedures?<sup>159</sup> It seems that the only justification for such arbitrary limitations is that the Constitution itself does not explicitly define insanity or mention the use of the insanity defense in criminal proceedings. Such a narrow reading of the Constitution not only violates rights that *are* enumerated, but it also contradicts federal recognition and prominent implementation of the *M'Naghten* test. There must come a time when outdated modalities of interpretation are put aside to achieve the greater purpose of the Constitution and its purposefully open-textured provisions. This seems like as good a time as any.

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<sup>158</sup> *Powell v. Texas*, 392 U.S. 514, 536–37.

<sup>159</sup> *See Kahler v. Kansas*, 140 S. Ct. 1021, 1024 (2020).