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THE UNITED STATES SUPREME COURT'S ENDURING MISUNDERSTANDING OF INSANITY

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ABSTRACT

Within mental health law, the legal defense of insanity has received a disproportionate amount of attention. Classified as a legal excuse, the insanity defense generally negates legal blameworthiness for criminal defendants who successfully prove that at the time of the offense, they did not know right from wrong or were unable to conform their conduct to the requirements of the law, due to an underlying mental health condition. The insanity defense has a lengthy history in the United States, with several different formulations and numerous court decisions addressing various aspects of the defense. Despite its firm entrenchment in U.S. criminal law, with almost all states and the federal courts having some version of the insanity defense, the United States Supreme Court has demonstrated a startling level of confusion when deciding cases involving the insanity defense and related but distinct concepts. This article (a) discusses the nature of the insanity defense by distinguishing it from related but distinct mental health law defenses, (b) provides a detailed analysis of United States Supreme Court cases that illustrate the Court's confusion regarding the insanity defense, and (c) explores why the Court's confusion is detrimental in multiple ways and to multiple stakeholders and offers suggestions for how the Court can meaningfully move forward to alleviate the effects of its longstanding confusion.

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INTRODUCTION

Throughout its long history, the Supreme Court of the United States has issued decisions across highly diverse topic areas, ranging from medical[1] and economic[2] to religious[3] and technological.[4] Although the Supreme Court need not develop heightened expertise in each of these (and other) topic areas, it must possess a sufficient degree of substantive knowledge to address the constitutional questions embedded in these diverse content areas. An inadequate understanding of the fields in which the constitutional questions arise can lead to judicial decisions that fail to recognize the nuances in particular contexts and, therefore, fail to provide meaningful judicial guidance for other courts.[5]

Concerns about the Supreme Court's knowledge in particular content areas have become more salient with recent advances in medicine, science, technology, and other areas, which have greatly increased the level of complexity of some of the issues addressed by the Court.[6] Unfortunately, there is empirical evidence that some Supreme Court Justices have exhibited a static or even decreasing level of knowledge and expertise in certain topic areas throughout their tenure on the Court; the obvious concern is that the Court's failure to keep pace with developments in various fields can have a negative impact on the accuracy and utility of its judicial decisions.[7]

One of the areas in which the U.S. Supreme Court has demonstrated a longstanding and startling disconnect between its understanding of the subject matter and its decisions is mental health law.[8] The judiciary has historically had an uneasy relationship with social science research in particular, and mental health evidence

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1. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (addressing constitutionality of abortion); Buck v. Bell, 274 U.S. 200 (1927) (addressing constitutionality of eugenic sterilization).

2. *See, e.g.*, N. Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (addressing constitutional aspects of bankruptcy); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (addressing constitutionality of business monopolies).

3. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (addressing the separation of church and state).

4. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (addressing the constitutionality of the Communications Decency Act which prohibited certain obscene and indecent communications on the internet).

5. Anne Lippert & Justin Wedeking, *Is Judicial Expertise Dynamic: Judicial Expertise, Complex Networks, and Legal Policy*, 2016 MICH. ST. L. REV. 567, 569 (2016) ("[A] lack of expertise may have unhealthy effects on U.S. democracy if they hinder the ability of judges to render just and fair decisions.").

6. *See id.* ("In short, the growing complexity of our legal system and a lack of judicial expertise present an important concern.").

7. *Id.* at 604 ("We found that not all Justices developed expertise as they gained more experience. In fact, some Justices increased their expertise, but others either stayed the same or declined. . . . In particular, the finding that some Justices' expertise declined over time (for whatever reason) suggests that legal policy may have suffered.").

8. *See generally*, GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS, CHRISTOPHER SLOBOGIN, RANDY K. OTTO, DOUGLAS MOSSMAN, & LOIS O. CONDIE, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (4th ed. 2018) (providing overview of many areas in which mental health and law intersect in criminal, civil, and administrative contexts).

more specifically.[9] Although the U.S. Supreme Court has a lengthy tradition of relying on social science data and being attendant to *amicus curiae* briefs submitted by several national mental health organizations (e.g., American Psychological Association,[10] American Psychiatric Association), the Court has inconsistently adopted social science research, often misused the research to support its opinions, and misunderstood key points related to best practices in the mental health professions.[11]

The disconnect between the U.S. Supreme Court's jurisprudence and mental health law is perhaps most evident in a series of decisions over the past nearly forty years that have addressed the law relating to a criminal offender's sanity.[12] The two relevant legal concepts central to the Court's confusion—insanity and *mens rea*—are distinct legal doctrines addressing distinct legal questions with distinct applications. Yet, the U.S. Supreme Court has (a) consistently demonstrated a fundamental misunderstanding of both legal concepts, (b) confused insanity and *mens rea* with unrelated mental health diagnoses and terminology, and (c) mistakenly conflated these distinct legal doctrines.[13] The result is a body of Supreme Court case law, spanning from the mid-1980s to 2020, that provides little meaningful guidance to courts, attorneys, litigants, and mental health professionals.

Given the important role of the insanity defense vis-à-vis culpability and punishment in criminal law, this article examines U.S. Supreme Court jurisprudence related to the legal construct of insanity to demonstrate how the Court's decisions in this area have resulted in a body of mental health case law that is conflicting, confusing, misguided, and not consistent with established best practices in the mental health profession. Part I of this article describes the legal doctrines of insanity and *mens rea*, with a particular focus on how these two legal constructs differ in several

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9. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (9th ed. 2018) (describing the oftentimes challenging relationship between legal decisions and social science evidence, with examples of how courts use and misuse social science data).

10. The American Psychological Association (APA), which is the leading professional organization for psychologists in the United States, has submitted more than 50 amicus briefs to the Supreme Court of the United States. *See* Donald N. Bersoff, *APA's Amicus Briefs: Informing Public Policy Through the Courts*, APA MONITOR ON PSYCHOL. June 2013, at 5 (describing APA's history of submitting amicus briefs to various courts, including the Supreme Court of the United States).

11. *See* Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHICAGO L. SCH. ROUNDTABLE 279 (1995) (analyzing long and convoluted history of the judiciary's use, non-use, and misuse of social science evidence). When describing the relationship between the judiciary and social science research, a prominent legal scholar once stated: "In fact, if that relationship were to be examined by a Freudian, the analyst would no doubt conclude that it is a highly neurotic, conflict-ridden ambivalent affair (I stress affair because it is certainly no marriage)." Donald N. Bersoff, *Psychologists and the Judicial System: Broader Perspectives,* 10 L. & HUM. BEHAV. 151, 155 (1986).

12. *See generally* Lenore E. Walker, David Shapiro & Stephanie Akl, *Criminal Responsibility*, *in* INTRODUCTION TO FORENSIC PSYCHOLOGY, 37–51 (Lenore E. Walker, David Shapiro & Stephanie Akl eds., 2020) (discussing mental state at time of offense); Bailey Wendzel, *Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense*, 57 AM. CRIM. L. REV. 391 (2020) (providing history of insanity cases in United States case law).

13. *See* Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071 (2007) (distinguishing between legal insanity and *mens rea* and discussing Supreme Court's confusion in these areas).

meaningful ways.[14] Part II provides a detailed analysis of several U.S. Supreme Court cases decided over the past forty-plus years that reflect the Court's fundamental and enduring misunderstanding of these concepts (a) through its repeated misunderstanding of the right to psychiatric assistance for criminal defendants in insanity contexts,[15] (b) by allowing jurors to be uninformed about the consequences of a successful insanity defense for criminal defendants and society,[16] (c) through its incorrect conflation of the legal defenses of insanity and *mens rea*,[17] and (d) through its confusion of the distinct legal concepts of insanity and incompetence.[18] Finally, Part III explores why this confusion is detrimental to the law's, mental health professionals', and the public's view of the insanity doctrine as well as why it is detrimental to the continued relationship between psychology and the law.[19] The authors conclude this article by offering some suggestions for a way forward for the U.S. Supreme Court that may alleviate some of the concerns caused by its decisions.[20]

I. CRIMINAL RESPONSIBILITY: INSANITY AND *MENS REA*

Culpability in criminal law is based on the premise that humans, as rational actors, have the capacity to make autonomous decisions and can therefore be held legally responsible if those decisions run afoul of established law.[21] A corollary of this premise is that individuals with reduced mental capacity, stemming from severe mental illness or another disability that affects their capacity to have the requisite state of mind for a crime (e.g., severe intellectual disability), may be less legally blameworthy.[22] These principles provide the foundation for the insanity defense and *mens rea*.

A. Insanity

Criminal law distinguishes between "excuse" defenses and "justification" defenses for unlawful behavior.[23] Whereas excuse defenses focus on the personal culpability of the actor, justification defenses focus on the moral culpability of the

14. *See infra* Part I.

15. *See infra* Part II(A).

16. *See infra* Part II(B).

17. *See infra* Part II(C).

18. *See infra* Part II(D).

19. *See infra* Part III.

20. *See supra* text accompanying note 19.

21. *See* CHRISTOPHER SLOBOGIN, THOMAS L. HAFEMEISTER, & DOUGLAS MOSSMAN, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS (7th ed. 2020) (providing overview of various concepts in mental health law, including basis of criminal responsibility).

22. *See id*. at 634; Stephen J. Morse, *Treating Crazy People Less Specially*, 90 W. VA. L. REV. 353, 370 (1988) (noting complex relationship between mental illness and rational decisions when determining criminal responsibility and imposing punishments).

23. *See* Eugene M. Fahey, Laura Groschadl, & Brianna Weaver, *"The Angels that Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense*, 68 BUFF. L. REV. 805, 811 (2020) (differentiating between justification and excuse, while contextualizing the insanity defense); Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L. J. 1 (2003) (distinguishing between justification and excuse, and critiquing the bases for these two defenses).

act.[24] Common examples of justification defenses include self-defense, defense of others, defense of property, war, execution, and the use of force in effecting arrests, while commonly discussed examples of excuse defenses include duress, involuntary intoxication, automatism, necessity, provocation, and infancy.[25] In short, a claim of justification negates the actor's wrongdoing, while a claim of excuse negates the actor's blameworthiness.[26]

The insanity defense falls into the category of a legal excuse for criminal behavior.[27] When proffering an insanity defense, the defendant admits engaging in the unlawful act (*actus reus*) but nevertheless claims that the imposition of legal responsibility is not appropriate because of the defendant's impaired mental state at the time of the offense.[28] Because of the defendant's impaired cognitive capacity and/or impaired volitional control due to the presence of mental health symptoms, the law concludes that the defendant is not morally blameworthy and that the traditional goals of punishment—deterrence and retribution—would not be furthered by imposing a punishment.[29]

The idea that those without the ability to act rationally should not be held legally accountable for their behavior has a long history dating back thousands of years.[30] Precursors of the modern insanity defense for those who were "non compos mentis,"[31] or not of sound mind, can be traced back to ancient Greek, Roman, and Talmudic civilizations.[32] The belief that criminal responsibility, or legal blameworthiness, should be based on the offender's mental state at the time of the offense is arguably even reflected in Jesus's last words: "Father, forgive them for they know not what they do."[33] From these early beginnings came the four modern insanity tests, described in the next four sections, that have been adopted throughout the United States.[34]

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24. *See* Fahey, Groschadl, & Weaver, *supra* note 23, at 811.

25. *See* Andrew Botterell, *A Primer on the Distinction Between Justification and Excuse*, 4 PHIL. COMPASS 172, 173–74, 179–80 (2009) (critiquing the distinction between justification and excuse as defenses to criminal culpability and civil liability).

26. *See id.* at 180 (quoting first J.L. Austin, *A Plea for Excuses*, 57 PROC. OF THE ARISTOTELIAN SOC, 1, 2 (1957), *reprinted in* J.L. Austin, PHILOSOPHICAL PAPERS 123–52 (1961); and then quoting Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL., 289, 291 (2006)).

27. *See* Fahey, Groschadl, & Weaver, *supra* note 23, at 811.

28. *Id.*

29. *Id.*

30. *See* Nigel Walker, *The Insanity Defense Before 1800*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 25 (1985) (tracing history and evolution of insanity defense); American Academy of Psychiatry and the Law, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. AM. ACAD. PSYCHIATRY AND L. S3 (2014) (describing history of insanity defense from Sixth Century B.C. to modern era).

31. Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 YALE L.J. 2746, 2748 (2015).

32. *See* SLOBOGIN ET AL., *supra* note 21 at 635; *see also* CHARLES PATRICK EWING, INSANITY: MURDER, MADNESS, AND THE LAW (2008) (discussing history of excusing unlawful conduct based on individual's mental functioning at time of act).

33. *Luke* 23:34 (King James).

34. *See* SLOBOGIN ET AL., *supra* note 21 at 636–39.

1. M'Naghten Test

The *M'Naghten* test, which is considered the first modern test for insanity, was developed in England after Daniel M'Naghten's botched assassination attempt of British Prime Minister Sir Robert Peel in 1843; M'Naghten had delusional beliefs that Prime Minister Peel was conspiring with the Tories to persecute him.[35] After a public uproar over the jury's finding that M'Naghten was not guilty by reason of insanity, Queen Victoria asked the fifteen Law Lords in the House of Lords to establish a standard for the insanity defense,[36] which resulted in the following test:

> [T]o establish a defense on the ground of insanity, it must be 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.[37]

The *M'Naghten* test, which became the accepted rule of law in both England and the United States, is considered a cognitive test for insanity (to be contrasted with volitional insanity tests), and it contains both a cognitive incapacity element (i.e., the defendant not knowing the nature and quality of the act) and a moral incapacity element (i.e., the defendant not knowing that the act was wrong).[38]

2. Irresistible Impulse Test

Dissatisfaction with the *M'Naghten* test was immediate and widespread due to the rigidity and obscurity of its focus on cognitive incapacity,[39] particularly among medical and mental health professionals who were tasked with applying the *M'Naghten* test in the context of a criminal case. It did not take long for courts to adopt alternative tests for insanity.[40] An early alternative to the *M'Naghten* test was the irresistible impulse test.[41] The irresistible impulse test, which was developed in England in the early nineteenth century, but not adopted by a U.S. court until 1887,[42] stated that a defendant is not legally responsible for the defendant's unlawful conduct if the two following conditions occur:

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35. *See* Fahey, Groschadl, & Weaver, *supra* note 23 at 814. Although M'Naghten was attempting to kill Prime Minister Peel, a leader in the Tory party, he mistakenly killed Peel's personal secretary, Edward Drummond. *See* American Academy of Psychiatry and the Law, *supra* note 30 at S5; Fahey, Groschadl, & Weaver, *supra* note 23 at 814.

36. *See* American Academy of Psychiatry and the Law, *supra* note 30, at S5 (discussing historical development of the *M'Naghten* test for insanity).

37. M'Naghten's Case (1843) 8 Eng. Rep. 718, 719; 10 CL. & F. 200.

38. *See* SLOBOGIN ET AL., *supra* note 21, at 636.

39. *See* Daniel Ward, *The M'Naghten Rule: A Re-evaluation*, 45 MARQ. L. REV. 506 (1962) (discussing criticism of the *M'Naghten* test).

40. *Id.* at 507.

41. *See* Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952) (discussing history and status of irresistible impulse defense).

42. *See id.* at 991 (discussing adoption of irresistible impulse test by U.S. courts in late nineteenth century).

> (1) If, by reason of the duress of such mental disease he had so far lost the power to choose between the right and the wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.[43]

Whereas the *M'Naghten* insanity test focuses on the defendant's cognitive incapacity, or the defendant's inability to know the nature, quality, and/or wrongfulness of the act, the irresistible impulse test for insanity focuses on the defendant's volitional incapacity, or the defendant's inability to control their behavior; the premise of this test is that offenders who could not control their behavior at the time of the offense and conform their behavior to the requirements of the law due to a mental disease or defect should not be held criminally responsible because it would not further the traditional goals of punishment.[44] Almost immediately after the irresistible impulse test was articulated, courts encountered practical difficulties in distinguishing between impulses that are truly irresistible and impulses that are simply not resisted; the inability to clearly and consistently differentiate between these two types of impulses led many courts and commentators to conclude that the irresistible impulse test was not workable in practice.[45]

3. Durham Rule

The United States Court of Appeals for the District of Columbia Circuit subsequently developed the *Durham* Rule, also known as the Product Test, in 1954.[46] The *Durham* opinion was authored by Judge David Bazelon, a forward-thinking and progressive jurist, who offered a broad and seemingly straightforward test for insanity by concluding that a defendant should not be held criminally responsible if the defendant's unlawful act was the product of mental disease or defect.[47] The *Durham* Rule allows for more flexibility because it lacks both the cognitive component of the *M'Naghten* test and the volitional component of the irresistible impulse test, instead requiring a simple nexus between the mental disease or defect and the unlawful act. Unfortunately, the lack of judicial guidance regarding what satisfies the threshold requirement for a mental disease or defect and how it could be determined that the unlawful conduct was the proximal result of the mental disease or defect led to widespread abuse of the test and dissatisfaction among trial courts faced with proffers of insanity.[48] Despite subsequent modifications of the test

43. Parsons v. State, 81 Ala. 577, 596, 2 So. 854, 866–67 (1887).

44. *See* SLOBOGIN ET AL., *supra* note 21, at 637.

45. *See* Morse & Hoffman, *supra* note 13, at 1095 ("How do we distinguish between an irresistible desire and a desire simply not resisted?").

46. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); *see also* State v. Pike, 49 N.H. 399 (1870). Technically, this test was first articulated by the Supreme Court of New Hampshire in 1870, but it was not adopted by any other jurisdictions until the test was (re)articulated in *Durham*.

47. *See* SLOBOGIN ET AL., *supra* note 21, at 637.

48. *See* American Academy of Psychiatry and the Law, *supra* note 30, at S5 (discussing dissatisfaction with the *Durham* rule and subsequent legal developments to provide more guidance for courts); *see also* Roszel C. Thomsen, *Insanity as a Defense to Crime*, 19 MD. L. REV. 271 (1959) (examining criticisms of *M'Naghten* test and *Durham* Rule when determining criminal responsibility).

(including those by Judge Bazelon) intended to provide trial courts with more guidance,[49] the D.C. Circuit Court abandoned the test in 1972,[50] leaving New Hampshire as the only state to still use the *Durham* Rule.[51]

4. American Law Institute Test

One year after the *Durham* decision, the American Law Institute (ALI)[52] proposed the following test for insanity:

> 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.[53]

The ALI test is viewed as a hybrid formulation of insanity because it has both a cognitive component (similar to the *M'Naghten* test) and a volitional component (similar to the irresistible impulse test).[54] However, a notable difference is that the ALI test uses the phrase "lacked substantial capacity," which signifies that the defendant's cognitive or volitional impairment does not need to be total to satisfy the test; this is believed to enhance the utility and applicability of the test.[55] After the ALI formulated its version of the insanity test, the majority of federal courts adopted the ALI test, although many states remain flexible with regard to the application thereof.[56]

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49. *See* McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (providing narrower definition of mental illness intended to improve application of *Durham* Rule).

50. *See* Brawner v. United States, 471 F.2d 969 (D.C. Cir. 1972) (abandoning *Durham* Rule and adopting ALI Test for insanity).

51. *See* SLOBOGIN ET AL., *supra* note 21, at 638; *see also* John Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 390–93 (1960).

52. The American Law Institute (ALI) is a private, nonprofit organization that publishes Restatements of the Law, Principles of the Law, and Model Codes, with the express intent to remedy the law's uncertainty and complexity. ALI publications are not controlling unless they are adopted by a particular jurisdiction, but courts often view ALI resources as persuasive.

53. MODEL PENAL CODE § 4.01(1) (AM. L. INST. 2020).

54. *See* American Academy of Psychiatry and the Law, *supra* note 30, at S6 (discussing nature of irresistible impulse test); David DeMatteo & Alice Thornewill, *Irresistible Impulse Rule*, *in* THE SAGE ENCYCLOPEDIA OF ABNORMAL AND CLINICAL PSYCHOLOGY (Amy Wenzel ed., 2017) (providing overview of irresistible impulse test and distinguishing it from other test of insanity).

55. *See* SLOBOGIN ET AL., *supra* note 21, at 638.

56. *See* Fahey et al., *supra* note 23, at 819 (noting ALI test was adopted by more than half of the jurisdictions). The ALI Test contains an additional component, known as the caveat paragraph, that was intended to exclude offenders with psychopathic personality from being eligible for the insanity defense; *see also* SLOBOGIN ET AL., *supra* note 21, at 638. The relevant language from the ALI Test states: "As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01(2) (AM. L. INST. 2020).

5. Current State of the Insanity Defense

Most states do not use "pure" versions of any of the four insanity tests, so the tests are best conceptualized as prototypes.[57] Various authorities provide different accounts of how many states have adopted each insanity test,[58] largely based on the way in which certain jurisdictions' tests that contain components from multiple insanity tests are categorized, but the U.S. Supreme Court provided the following tally in its 2020 decision, *Kahler v. Kansas*: "[s]eventeen States and the Federal Government use variants of the *M'Naghten* test . . . [t]hree States have adopted *M'Naghten* plus the volitional test," ten states use the "moral incapacity" element from the *M'Naghten* test, thirteen states and the District of Columbia use the ALI Test, one state uses the *Durham* Rule, one state uses a test that focuses on the defendant's ability to "comprehend the harmful nature or consequences of the conduct" and on any impairment of the defendant's ability to "recognize reality," and five states do not provide an insanity defense.[59] Based on a different categorization of state insanity tests, Slobogin, Hafemeister, and Mossman report that twenty-nine jurisdictions use some version of the *M'Naghten* test (with three adding an irresistible impulse component), seventeen jurisdictions use the ALI Test (13 of which retained the capacity to conform prong), one state uses the *Durham* Rule, and five states have provide no insanity defense and conclude that mental disability is relevant at a criminal trial only on the issue of whether the criminal defendant had the requisite *mens rea* for the offense.[60] It is not uncommon for the Supreme Court to allow different jurisdictions to use different formulations of doctrines based on the legislative beliefs of that community. This is not the issue with the Supreme Court's jurisprudence; rather, the issue is the Court's continued misuse of the term insanity.

B. Mens Rea[61]

The insanity defense and *mens rea* both focus on the offender's mental state at the time of the offense, but there are key differences between these two legal constructs.[62] Unlike the insanity defense, the *mens rea* defense is not an excuse for

57. *See* SLOBOGIN ET AL., *supra* note 21, at 640–41.

58. *See, e.g.*, SLOBOGIN ET AL., *supra* note 21, at 640–41.

59. Kahler v. Kansas, 140 S. Ct. 1021, 1046 (2020) (Breyer, J., dissenting).

60. *See* SLOBOGIN ET AL., *supra* note 21, at 640–41.

61. The *mens rea* defense is alternately referred to as the diminished capacity defense or specific intent defense. *See* Jeff Feix & Greg Wolber, *Intoxication and Settled Insanity: A Finding of Not Guilty by Reason of Insanity*, 35 J. AM. ACAD. PSYCHIATRY L. 172 (2007) (differentiating insanity from *mens rea*). It is important to note that the defense of *mens rea* is not technically a legal defense; rather, it is the inability of the prosecution to prove the *mens rea* element of the charged crime beyond a reasonable doubt. As such, one court concluded that the *mens rea* defense is "not a defense at all but merely a rule of evidence." United States v. Pohlot, 827 F.2d 889, 897 (3d Cir. 1987); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (providing early and interesting discussion of the development of *mens rea*). A related but distinct legal concept is the diminished responsibility defense. This defense, which is sometimes referred to as the partial responsibility defense, permits the court to consider mitigating evidence relating to the offender's mental state at the time of the offense even if that evidence is legally insufficient to successfully establish an insanity defense or *mens rea* defense. The mitigating evidence can be used by the court to impose a lesser sentence. *See* SLOBOGIN ET AL., *supra* note 21, at 697–99.

62. *See* Morse & Hoffman, *supra* note 13, at 1085–91.

the defendant's unlawful behavior; rather, it focuses on the prosecution's inability to prove the required level of intent of the charged offense.[63] If the prosecution cannot meet its legal burden of proving every element of the charged offense beyond a reasonable doubt, it would be legally inappropriate to convict the defendant of that charge.[64]

In most jurisdictions, if the defense demonstrates that the prosecution did not prove beyond a reasonable doubt that the defendant possessed the requisite *mens rea* for the charged offense, the defendant is acquitted of the criminal charge requiring specific intent (e.g., first-degree [premeditated] murder) but can nevertheless be convicted of a lesser charge that requires a lesser degree of *mens rea* (e.g., knowledge, reckless disregard) or general intent (e.g., manslaughter).[65] Another significant difference between insanity and *mens rea* relates to the legal disposition of the offender. The result of a successful insanity defense is typically the long-term and indeterminate incapacitation of the defendant in a maximum-security forensic psychiatric hospital until the individual can show that they are no longer mentally ill or dangerous, whereas a successful *mens rea* defense can result in acquittal, conviction of a lesser crime, or a reduced sentence.[66]

C. Guilty But Mentally Ill

For the sake of completeness, a brief discussion of a related legal concept—guilty but mentally ill (GBMI)—is warranted.[67] Whereas insanity is most often an affirmative legal defense and *mens rea* is the prosecution's failure to prove that the criminal defendant had the requisite mental state for a specific intent crime, GBMI is a verdict (not a defense).[68] There is some variability in how GBMI verdicts, which are currently available in more than twenty states, work in different jurisdictions, but the most common approach is that a defendant who pleads not guilty by reason of insanity can be found guilty, not guilty, not guilty by reason of insanity, or GBMI.[69]

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63. *See* Fahey et al., *supra* note 23, at 819–20.

64. *See id.* at 820.

65. *See* SLOBOGIN ET AL., *supra* note 21, at 679. Criminal law grades culpability by the mental state of the defendant at the time of the offense. Offenders who deliberately engaged in behavior that constitutes a crime are viewed as more culpable that offenders who unintentionally or accidentally committed a crime through their behavior. The term specific intent applies to the former category, while the term general intent applies to the latter category. Stated differently, specific intent means that the offender intended the outcome, while general intent means the defendant was aware or should have been aware of their actions at the time of the offense. There are also strict liability crimes in which mens rea does not have to be proven in relation to the actus reus. *See id.* at 679.

66. *See id.* at 696.

67. *See* Morse & Hoffman, *supra* note 13, at 1122–23; *see also* Christopher Slobogin, *Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985) (analyzing and critiquing GBMI verdict, which was developed in response to the acquittal via an insanity defense of John Hinckley after his attempted assassination of President Reagan in March 1981); John D. Melville & David Naimark, *Punishing the Insane: The Verdict of Guilty But Mentally Ill*, 30 J. AM. ACAD. PSYCHIATRY L. 553 (2002) (critiquing GBMI verdict).

68. *See* SLOBOGIN ET AL., *supra* note 21, at 734. In most states, the defense must prove insanity by a preponderance of the evidence. However, roughly 25 percent of states place the burden on the prosecution to disprove insanity beyond a reasonable doubt. In federal courts, the defendant must prove insanity by clear and convincing evidence. *Id.* at 642.

69. *See id.* at 734.

The GBMI verdict provides a vehicle for a jury to find a defendant guilty of a crime while simultaneously acknowledging that the defendant was not legally insane but was nevertheless experiencing some form of mental illness at the time of the offense.[70]

Of note, a defendant found GBMI is considered fully culpable for the offense, with no concomitant reduction in sentence;[71] a defendant found GBMI can receive any sentence, including a death sentence,[72] that is appropriate for the offense in that specific jurisdiction.[73] Curiously, GBMI is also not a vehicle for providing the convicted defendant with mental health treatment, despite the court's recognition that the defendant is mentally ill.[74] All inmates are entitled to mental health treatment as part of a comprehensive health care system (per the Eighth Amendment), and a GBMI verdict does not entitle the convicted defendant to any additional mental health treatment.[75] Typically, there are no direct benefits to defendants who are found GBMI, although it arguably permits the identification of the defendant's mental health needs and allows the jury to acknowledge the defendant's mental illness.[76] Because the focus of this article is insanity and the related concept of *mens rea*, the authors now turn our attention back to those topics.

As discussed, although insanity and *mens rea* both relate to the defendant's mental state at the time of the offense, there are fundamental differences—in terms of definition, application, and defendant disposition—in these distinct legal constructs. Now that these two legal constructs have been described, the authors turn our attention to cases in which the U.S. Supreme Court has demonstrated a misunderstanding of these legal concepts.

II. UNITED STATES SUPREME COURT CASE EXAMPLES

As noted previously, the U.S. Supreme Court has demonstrated a fundamental misunderstanding of insanity and *mens rea* at every point in the judicial process. This misunderstanding has led to a series of rulings that has infringed upon the constitutional rights of defendants with mental illness, beginning in the early stages of a criminal case involving the insanity defense (e.g., access to mental health assistance in preparing the defense) and continuing through sentencing and execution. The following U.S. Supreme Court case examples highlight the impact of even small errors in language and understanding on essential jurisprudential outcomes.

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70. Fahey et al., *supra* note 23, at 825.

71. Morse & Hoffman, *supra* note 13, at 1122.

72. *See* Anne S. Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37 (1989) (discussing constitutionality under Eighth Amendment of imposing death sentence on defendants found GBMI); People v. Crews, 522 N.E.2d 1167, 1180 (Ill. 1988) (holding defendant found GBMI was still eligible for death sentence).

73. *See* SLOBOGIN ET AL., *supra* note 21, at 734.

74. *See* Morse et al., *supra* note 13, at 1122; *see also* Fahey et al., *supra* note 23, at 825.

75. *See* Morse et al., *supra* note 13, at 1122.

76. *See* SLOBOGIN ET AL., *supra* note 21, at 741–44.

A. Misunderstanding the Right to Mental Health Assistance

The right to mental health assistance can set the stage for the success or failure of a defendant's mental health related claim (insanity or *mens rea*). In *Ake v. Oklahoma*[77] and *McWilliams v. Dunn*,[78] the U.S Supreme Court acknowledged the importance of the right to mental health assistance, but declined to resolve the question of what kind of mental health assistance is required to satisfy due process. In declining to create a uniform rule for the right to mental health assistance, the Court has allowed jurisdictions to decide for themselves. As will be discussed, by failing to provide a uniform description of the right to mental health assistance, whether criminal defendants are entitled to an independent forensic evaluator or a defense consultant, which are very different roles, is largely dependent on the jurisdiction in which the defendant is charged.

1. Ake v. Oklahoma

Ake v. Oklahoma[79] is one of two cases in which the U.S. Supreme Court confuses the roles of forensic mental health experts in criminal cases, specifically the roles of forensic evaluators and forensic consultants. Whereas forensic evaluators are required to be objective in their assessments and opinions related to a defendant's mental health, even if those opinions are ultimately adverse to the legal interests of the party that retained the forensic evaluator, forensic consultants are properly viewed as part of the defense team. Therefore, confusing the roles of evaluator and consultant can have significant repercussions. To wit, in his dissent, Justice Rehnquist states that the Court should have "[made] clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."[80]

In 1979, Glen Burton Ake was arrested and charged with two counts of murder in the first degree and two counts of shooting with intent to kill after murdering a couple and injuring their two children.[81] His behavior while in custody pre-arraignment was "so bizarre" that the trial judge *sua sponte* ordered him to be examined by a psychiatrist to determine whether Ake would need an "extended period of mental observation."[82] The examining psychiatrist diagnosed Ake as a "probable paranoid schizophrenic" and recommended a competency to stand trial evaluation.[83] The competency evaluation designated Ake as "a mentally ill person in need of care and treatment" and concluded that he was incompetent to stand trial.[84] Ake was determined to be competent to stand trial six weeks later and, at the pretrial conference, Ake's attorney informed the court that Ake would raise an insanity defense.[85] Ake's attorney also stated that to effectively prepare and present an insanity defense, Ake needed to be examined by a psychiatrist to determine his

77. 470 U.S. 68 (1985).
78. 137 S. Ct. 1790 (2017).
79. 470 U.S. 68.
80. *Id.* at 87.
81. *Id.* at 70, 72.
82. *Id.* at 71.
83. *Id.*
84. *Id.*
85. *Id.* at 71–72.

mental condition at the time of the offense.[86] Defense counsel further requested that the court either arrange to have a psychiatrist perform the evaluation or provide funds for the defense to do so, given Ake's status as an indigent defendant.[87] The trial court denied the defense request on the basis of the U.S. Supreme Court's decision in *United States ex rel. Smith v. Baldi*.[88]

At trial, Ake presented the sole defense of insanity.[89] Although Ake's defense attorney called to the stand all the psychiatrists who had previously evaluated Ake, there was no mental health expert testimony presented by either side on Ake's mental state at the time of the offense, which is the key legal consideration in insanity cases. Ake had never been examined for that purpose; Ake was instead evaluated based on his behavior while in custody and awaiting arraignment.[90] At the conclusion of the trial, the jury was instructed that "Ake was presumed sane at the time of the crime unless he presented evidence sufficient to raise a reasonable doubt about his sanity at that time."[91] The jury rejected the insanity defense and found Ake guilty on all counts.[92]

At the sentencing hearing, the prosecution asked for the death penalty, and rather than presenting new evidence, the prosecution relied on the testimony of the state psychiatrists who testified during the trial that Ake was "dangerous to society" to establish his likelihood of future dangerous behavior,[93] one of the statutory aggravating requirements necessary for execution in Oklahoma.[94] "The jury sentenced Ake to death on each of the two murder counts and to 500 years' imprisonment on each of the two counts of shooting with intent to kill."[95] On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that he was entitled to the services of a court-appointed psychiatrist to assist in preparation of his insanity defense because he was an indigent defendant.[96] The appellate court rejected Ake's argument stating, "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes."[97] The case was appealed to the U.S. Supreme Court to determine "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to

86. *Id.* at 72.

87. *Id.*

88. 344 U.S. 561 (1953) (holding no additional assistance was necessary to provide to indigent defendant when neutral psychiatrists examined defendant as to his sanity and testified on that subject at trial).

89. *Ake*, 470 U.S. at 72.

90. *Id.*

91. *Id.* at 73.

92. *Id.*

93. *Id.*

94. *See generally* Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCH. REV. 63, 72–73 (2005).

95. *Ake*, 470 U.S. at 73.

96. *Id.*

97. *Id.* at 73–74 (quoting Ake v. State, 663 P.2d 1, 6 (Okla. Crim. App. 1983)).

require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense."[98]

The U.S. Supreme Court first stated broadly that indigent defendants are entitled to "an adequate opportunity to present their claims fairly within the adversary system" and that a criminal trial is "fundamentally unfair" if the State does not make certain that an indigent defendant "has access to the raw materials integral to the building of an effective defense."[99] The Court further elaborated on numerous cases with the common theme of meaningful access to justice for indigent criminal defendants.[100] The Court then analyzed the issue by considering the relevance and importance of three factors: (1) the private interest that will be affected by the action of the State; (2) the governmental interest that will be affected if the safeguard is to be provided; and (3) the probable value of the additionally or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.[101]

In addressing the first two factors, the Court held that both the State and the individual have a compelling interest in accurate dispositions when the case involved a criminal proceeding that places an individual's life or liberty at risk.[102] Turning to the third factor, the Court relied on the fact that "more than [forty] states as well as the federal government have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise."[103] The Court reasoned that "when the state has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."[104] The Court then explained in detail the role that a psychiatrist plays in a criminal defense. However, this is where the Court begins to inappropriately blend the roles of an independent evaluator and a defense consultant:

> In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and

98. *Id.* at 77.

99. *Id.*; *see* Ross v. Moffitt, 417 U.S. 600, 612 (1974).

100. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that once a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal); Burns v. Ohio, 360 U.S. 252, 257–58 (1959) (holding that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction); Gideon v. Wainwright, 372 U.S. 335, 342, 344 (1963) (holding that an indigent defendant is entitled to the assistance of counsel at trial); Douglas v. California, 372 U.S. 353, 355 (1963) (holding that an indigent defendant is entitled to the assistance of counsel on his first direct appeal); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (holding that an indigent defendant's assistance of counsel must be effective).

101. *Ake*, 470 U.S. at 77.

102. *Id.* at 78–79.

103. *Id.* at 79. *See also* 18 U.S.C. § 3006A(e) (stating that indigent defendants shall receive the assistance of all experts necessary for an adequate defense).

104. *Ake*, 470 U.S. at 80.

> they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know *the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers.* Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.[105]

The Court starts by describing the role of an independent, objective evaluator who testifies and informs the factfinder about relevant information relating to the defendant's mental state. Then, the Court shifts to describing a defense consultant when it mentions an expert who aids defense counsel in cross-examination techniques.

It is important to note that leading ethics codes that govern forensic mental health professionals strongly discourage psychologists and psychiatrists from engaging in multiple/conflicting relationships in the same case, including serving as an objective evaluator and consultant.[106] These ethics codes reason that the existence of multiple relationships serves as a threat to the objectivity necessary for competent forensic mental health practice. For example, if a forensic mental health professional was initially asked to serve as a defense consultant and provide assistance with the defense strategy, it would then be strongly discouraged—and inconsistent with common sense—for that expert to serve as an independent, objective forensic evaluator for the same defendant. Not only do these types of multiple relationships constitute a conflict of interest, but the expert would likely have to defend their objectivity during cross-examination, which would be challenging if not impossible.

The Court concludes that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high."[107] The Court ultimately held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate

105. *Id.* at 80–81 (emphasis added) (citation omitted).

106. *See* AM. PSYCH. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, at 6 (2017); AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY, at 10 (2013); AM. PSYCH. ASS'N, SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY, at 11–12 (2011). *See generally* KIRK HEILBRUN, THOMAS GRISSO & ALAN GOLDSTEIN, FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT (2009).

107. *Ake*, 470 U.S. at 82.

examination *and assist in evaluation, preparation, and presentation of the defense*."[108] Again, the court confuses and combines the roles of a forensic evaluator and a defense consultant in its holding.

Justice Rehnquist's dissent directly takes issue with the majority opinion's blending of the roles of independent evaluator and defense consultant. Specifically, he states "all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office."[109] Rehnquist further explains, "I see no reason why the defendant should be entitled to an opposing view, or to a 'defense' advocate."[110] The dissent also took issue with both the idea that due process requires a State to make available an insanity defense to a criminal defendant, and the unclear language associated with requiring a "preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial."[111]

2. McWilliams v. Dunn

In *McWilliams v. Dunn*,[112] the U.S. Supreme Court doubled down on its position in *Ake v. Oklahoma*[113] and declined to clarify what services forensic mental health experts are required to provide to indigent defendants in criminal cases. In his dissent, Justice Alito stated that *Ake* provided no clear guidance one way or the other on whether an indigent criminal defendant must be provided with a defense consultant or a neutral expert and "[t]he most reasonable conclusion to draw from the Court's silence is that the exact type of expert required . . . remain[s] 'an open question in our jurisprudence.'"[114]

One month after the U.S. Supreme Court decided *Ake v. Oklahoma*, James McWilliams was charged with rape and murder.[115] It was agreed by the defense, prosecution, and court that McWilliams was an "indigent defendant," "his mental condition was relevant to the punishment he might suffer," and "his sanity at the time of the offense was seriously in question."[116] The trial court granted defense counsel's pretrial motion for a psychiatric evaluation of McWilliams' sanity, as well as any mitigating circumstances related to his mental condition that should be considered at sentencing, and it ordered the State to convene a "Lunacy Commission."[117] A three-member Lunacy Commission composed of psychiatrists provided the trial court with three conclusions regarding McWilliams' mental state: (1) McWilliams was competent to stand trial, (2) McWilliams had not been suffering from mental illness

108. *Id.* at 83 (emphasis added).

109. *Id.* at 92 (Rehnquist, J., dissenting).

110. *Id.*

111. *Id.* at 90–91.

112. 137 S. Ct. 1790 (2017).

113. 470 U.S. 68 (1985).

114. *McWilliams,* 137 S. Ct. at 1803–04 (Alito, J., dissenting) (citing Carey v. Musladin, 549 U.S. 70, 76 (2006)).

115. *Id.* at 1794 (majority opinion).

116. *Id.* at 1798 (citing Ake v. Oklahoma, 470 U.S. 68, 70, 80 (1985)).

117. *Id.* at 1794.

at the time of the alleged offense, and (3) McWilliams' performance indicated he was "fak[ing] bad" and "grossly exaggerating his psychological symptoms."[118]

After being convicted by a jury during the guilt phase, the same jury recommended imposition of the death penalty after the prosecution presented multiple witnesses, including two of the psychiatrists who were on the Lunacy Commission.[119] In the interim between the jury sentencing hearing and the judicial sentencing hearing, the trial court granted McWilliams' motion for neurological and neuropsychological examinations.[120] Dr. John Goff, a neuropsychologist, examined McWilliams and submitted his report to defense counsel two days before the judicial sentencing hearing.[121] In addition to Dr. Goff's report, defense counsel received both hospital and prison records relating to McWilliams' mental health treatment shortly before the sentencing hearing.[122]

At the sentencing hearing, defense counsel moved for a continuance to review all of the material provided to them in the prior two days and requested "an opportunity to have the right type of experts in this field take a look at all of those records and tell us what is happening with him."[123] The trial court denied the motion, and defense counsel was unable to present any mitigating circumstances.[124] The trial court sentenced McWilliams to death, stating in its sentencing report, "McWilliams was not and is not psychotic, and . . . the preponderance of the evidence from these tests and reports show McWilliams to be feigning, faking, and manipulative."[125]

McWilliams appealed his sentence, arguing that the trial court denied him the right to "meaningful expert assistance" provided by the U.S. Supreme Court in *Ake*.[126] The Alabama Court of Criminal Appeals affirmed McWilliams' sentence, holding that Dr. Goff's examination satisfied *Ake*'s requirement of "provid[ing] the defendant with a competent psychiatrist."[127] The Alabama Supreme Court affirmed the appellate decision, and McWilliams sought a federal writ of habeas corpus.[128] On habeas review, the Magistrate found that Dr. Goff's examination satisfied the requirements of *Ake* because the requested testing was completed.[129] After the United States District Court for the Northern District of Alabama adopted the Magistrate's report and denied the defense's requested habeas relief, and the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision, the U.S. Supreme Court granted McWilliams' petition for certiorari.[130]

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118. *Id.* at 1794–95.

119. *Id.* at 1795. Under Alabama law in 1986, being sentenced to death required a jury recommendation with at least ten affirmative votes and a later determination by the judge.

120. *Id.*

121. *Id.* at 1795–96. The report concluded that McWilliams had neuropsychological deficiencies compatible with the type of injuries previously reported by McWilliams but was also exaggerating his neuropsychological problems. *Id.* at 1796.

122. *Id.* at 1796.

123. *Id.* at 1796–97.

124. *Id.* at 1797.

125. *Id.*

126. *Id.*

127. *Id.* at 1797–98.

128. *Id.* at 1798.

129. *Id.*

130. *Id.*

The issue in this case, as framed by the majority, is "whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which *Ake* entitled him was contrary to, or involved an unreasonable application of, clearly established Federal law."[131] There was some dispute over whether the majority incorrectly framed the issue in this case, with the dissenting judges proposing the issue to be whether *Ake* "clearly established that an indigent defendant whose mental health will be a significant factor at trial is entitled to the assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist both the prosecution and the defense."[132]

After the Court established that the conditions that trigger *Ake* were present in McWilliams' case, it rejected Alabama's argument that *Ake*'s requirements were irrelevant because McWilliams did not expressly ask for additional expert assistance.[133] The Court reasoned that defense counsel's request for a continuance at the sentencing hearing was a request for additional assistance from mental health experts.[134] McWilliams argued that *Ake* clearly established that "a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties."[135] In response, the Court declined to decide whether McWilliams' claim was correct, and instead redirected back to language from *Ake*, stating that "a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in evaluation, preparation, and presentation of the defense."[136] Although the Court acknowledged that the majority of jurisdictions meet the *Ake* standard by providing a "qualified expert retained specifically for the defense team," the Court considered it unnecessary to decide "whether the Constitution requires States to satisfy *Ake*'s demands in this way."[137]

The Court then turned to whether the assistance Alabama provided was contrary to clearly established federal law. The Court reasoned that Dr. Goff's examination of McWilliams, while meeting the examination portion of the *Ake* requirement, failed to meet the requirement to "assist in evaluation, preparation, and presentation of the defense."[138] Of note, the court order did not require this assistance from Dr. Goff; it merely asked for testing to be completed.[139] The Court held that Dr. Goff's assistance fell "dramatically short of what *Ake* requires" and thus, affirming McWilliams' conviction and sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law."[140]

In Justice Alito's dissent, he argued that *Ake* does not provide clear guidance on the type of expert assistance required by the Constitution, and he believed that the Court should affirm the lower court's judgment because the

131. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (1996)).
132. *Id.* at 1801–02 (Alito, J., dissenting).
133. *Id.* at 1799 (majority opinion).
134. *Id.*
135. *Id.*
136. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 83 (1985)).
137. *Id.* at 1800.
138. *Id.* (quoting *Ake*, 470 U.S. at 83).
139. *Id.* at 1801.
140. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (1996)).

standard of "clearly established federal law" is difficult to satisfy.[141] Justice Alito reasoned that "when the lower courts have 'diverged widely' in assessing whether our precedents dictate a legal rule, that is a sign that the rule is not clearly established."[142] Additionally, Justice Alito stated that "the Alabama courts held that *Ake* is satisfied by the appointment of a neutral expert, and it is impossible to say that there could be no reasonable dispute that they were wrong," given how a plethora of courts and commentators have differed.[143]

B. Misunderstanding the Impact of Not Guilty by Reason of Insanity Verdicts on Jurors

When a criminal defendant raises an insanity defense at trial, it is ultimately a jury (in most instances) that determines whether the defense was successful. The fate of a criminal defendant rests in jurors' understanding of the relevant insanity test to be applied and the nature of the defendant's mental illness. When a defendant's mental illness makes them a present danger to the safety of the community, it is understandable that jurors would experience conflict over wanting to acknowledge a defendant's mental illness but not wanting the defendant released into the community to commit further offenses and potentially jeopardize public safety. Relatedly, it is unclear how the U.S. Supreme Court expects jurors to understand the nuances associated with the insanity defense given its own confusion of psychological principles at all stages of the judicial process.

In *Shannon v. United States*,[144] the U.S. Supreme Court held that juries are generally not permitted to be instructed concerning the consequences of an insanity acquittal.[145] In reaching this conclusion, the Court failed to give credence to the danger that juror deliberations may be distorted with incorrect assumptions about the consequences that follow a verdict of not guilty by reason of insanity (NGRI).

Before turning to the facts of *Shannon*, it is important to discuss the Insanity Defense Reform Act (IDRA) of 1984. Prior to the enactment of the IDRA, federal courts generally did not recognize a verdict of NGRI.[146] When defendants successfully asserted an insanity defense, the factfinder would return a verdict of not guilty, and jurors were not given any information about what would happen to a defendant acquitted by reason of insanity.[147] However, in the District of Columbia, a defendant who successfully asserted an insanity defense in a criminal case would

141. *Id.* at 1802 (Alito, J., dissenting).

142. *Id.* at 1804 (quoting Carey v. Musladin, 549 U.S. 70, 76 (2006)).

143. *Id.* at 1806 (quoting Woods v. Donald, 575 U.S. 312, 316 (2015)).

144. 512 U.S. 573, 573 (1994).

145. *Id.* at 575–76. The Court included at the conclusion of its opinion that there may be limited circumstances where a jury instruction is necessary, such as when a prosecutor or witness states that a defendant would "go free" if found not guilty by reason of insanity. *Id.* at 587.

146. *Id.* at 575.

147. *Id.* at 575–76. *See also* United States v. McCracken, 488 F.2d 406, 408–09 (5th Cir. 1974) (holding that the trial court erred by instructing the jury that if the defendant was found not guilty by reason of insanity, he would be would be "turned a loose"); Evalt v. United States, 359 F.2d 534, 538 (9th Cir. 1966) ("It was plain error for the trial court to permit the United States Attorney to tell the jury that if they acquitted Evalt he would walk out of the court a free man.").

be subject to the federal commitment process.[148] Additionally, the United States Court of Appeals for the District of Columbia (D.C.) Circuit endorsed instructing the jury about the consequences of an NGRI verdict.[149] The D.C. Circuit Court reasoned that the doctrine that "the jury has no concern with the consequences of a verdict" did not apply to this situation because while jurors "generally were aware of the meanings of verdicts of guilty and not guilty, they were unfamiliar with the meaning of an NGRI verdict."[150]

The IDRA was enacted after public scrutiny of the insanity defense following the NGRI acquittal of John Hinckley for the attempted assassination of President Reagan in 1981.[151] The IDRA accomplished three main goals: (1) it made insanity an affirmative defense proven by clear and convincing evidence in federal courts, (2) it created a special verdict of NGRI, and (3) it created a comprehensive commitment procedure by which a defendant found NGRI is held in custody pending a court hearing.[152] In enacting the IDRA, Congress may have consulted the already existing District of Columbia Code that established an NGRI verdict.[153]

In 1990, Terry Shannon attempted suicide with a firearm in front of a police officer.[154] Shannon survived the suicide attempt and was indicted for unlawful possession of a firearm by someone previously convicted of a felony offense.[155] At trial, Shannon asserted an insanity defense and requested that the jury be instructed that he would be involuntarily committed to a psychiatric hospital if found NGRI.[156] The United States District Court for the Northern District of Mississippi denied Shannon's request and instead instructed the jury that "punishment should not enter your consideration or discussion."[157] The jury found Shannon guilty, and Shannon appealed his conviction.[158] The United States Court of Appeals for the Fifth Circuit affirmed the conviction, reasoning that under pre-IDRA precedent, juries were not instructed about the consequences of an insanity acquittal and there was no statutory requirement for the jury instruction in the IDRA.[159] On appeal, the U.S. Supreme Court examined "whether federal district courts are required to instruct juries with regard to the consequences of an NGI verdict."[160]

The Court first established that as a general matter juries are not to consider the consequences of the verdicts they hand down.[161] Information about the

148. *Id.* at 576 (citing Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957) *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)).

149. *Id.* at 576–77.

150. *Id.* at 576–77 (quoting Lyles, 254 F.2d at 728).

151. *See* Lisa Callahan, Connie Mayer & Henry J. Steadman, *Insanity Defense Reform in the United States – Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987).

152. *Shannon*, 512 U.S. at 577. The court hearing must occur within 40 days of the verdict and at the conclusion of the hearing, the court determines whether the defendant will be hospitalized or released.

153. *Id.* at 581.

154. *Id.* at 577.

155. *Id.*

156. *Id.* at 577–78.

157. *Id.* at 578.

158. *Id.*

159. *Id.*

160. *Id.* at 579. The verdict NGRI is sometimes referred to as NGI.

161. *Id.*

consequences is both "irrelevant to the jury's task" and can be a distraction "from their factfinding responsibility" or create "a strong possibility of confusion."[162] The Court then addressed Shannon's two arguments in turn: (1) jury instructions about the consequences of an NGRI are "required under the IDRA whenever requested by the defendant," and (2) these jury instructions are required as a matter of general federal practice.[163]

The Court first looked at the text of the IDRA statute and found that jury instructions were referred to once, and it was only to describe the possible verdicts a jury can return.[164] Therefore, the Court stated that the text of the IDRA "gives no support to Shannon's contention that an instruction informing the jury of the consequences of an NGI verdict is required."[165] Shannon additionally argued that by modeling the IDRA on the District of Columbia Code, a canon of statutory interpretation dictated in *Capital Traction Co. v. Hof*,[166] implies adoption of the D.C. Circuit's decision in *Lyles v. United States*,[167] in which the D.C. Circuit Court held that the jury should be instructed (in some contexts) about the consequences of an NGRI verdict. The Court rejected this argument, stating that this canon is "merely a presumption of legislative intention to be invoked only under suitable conditions."[168] The Court reasoned that the conditions are not suitable in this case because Congress departed from the District of Columbia Code in several ways.[169] These differences include the standard of proof both at the guilt phase and the commitment hearing (clear and convincing vs. preponderance of the evidence), the timeline for the commitment hearing (40 days vs. 50 days), the conditions for release once committed (substantial risk of harm to others or property vs. future danger to self or others), and the test for proving the affirmative defense of insanity (i.e., IDRA's definition is more restrictive).[170]

Shannon additionally argued that the Court need not rely on the canon of statutory interpretation because Congress made clear in the IDRA's legislative history that it intended to adopt the *Lyles* practice on informing juries about the meaning of NGRI verdicts.[171] The Court dismissed this argument, reasoning that the "single passage of legislative history" to which Shannon refers is not "anchored in the text of the statute" because it does not explain or interpret any provision of the IDRA.[172]

Shannon's second broad argument is that the jury instruction is "required as a matter of general federal criminal practice."[173] Shannon reasoned, as a matter of policy, that "the instruction is necessary because jurors are generally unfamiliar with

162. *Id.*
163. *Id.* at 579–80.
164. *Id.* at 580.
165. Cap. Traction Co. v. Hof., 174 U.S. 1, 36 (1899).
166. *Id.*
167. 254 F.2d 725, 728 (D.C. Cir. 1957).
168. *Shannon*, 512 U.S. at 581 (quoting Carolene Prods. Co. v. United States, 323 U.S. 18, 26 (1944)).
169. *Id.*
170. *Id.* at 581–82.
171. *Id.* at 580, 583.
172. *Id.* at 583.
173. *Id.* at 584.

the consequences of an NGRI verdict, and may erroneously believe that a defendant who is found NGRI will be immediately released into society."[174] These jurors may then return a guilty verdict in an attempt to ensure that a defendant who poses a danger to the community will not be released, even when a NGRI verdict is more appropriate.[175]

The Court fell back on the "almost invariable assumption of the law that jurors follow their instructions" and relied on the fact that Shannon's jurors were instructed to not consider punishment in their discussion.[176] The Court also compared jurors' effort to ignore the consequences of the verdict to another situation: when the government fails to meet the burden of proof for a dangerous defendant.[177] Additionally, the Court reasoned that an accurate jury instruction may not assuage jurors' fears of the defendant's dangerousness because there is no guarantee the defendant will be held past the 40-day period.[178] Lastly, the Court expressed concern that if jury instructions were provided for every aspect of the criminal sentencing process with which jurors were unfamiliar, the exceptions would soon swallow the rule.[179]

In his dissent, Justice Stevens cited a passage from *Lyles*:

> "[A] verdict of not guilty by reason of insanity has no commonly understood meaning . . . It means neither freedom nor punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others. We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts."[180]

Justice Stevens additionally found it concerning that the Court opted to alter "an established rule that Congress accepted and that protects defendants meaningfully against an obvious risk of injustice. . . . "[181] In support of its conclusion, the majority cited *Rogers v. United States*[182] to show that "juries should not consider the consequences of their verdict."[183] However, *Rogers* actually stands for the opposite proposition and illustrates "how concerned juries are about the actual consequences of their verdicts."[184] Additionally, research suggests that "significant numbers of potential jurors believe that an insanity acquittee will be released at once"

174. *Id.*
175. *Id.*
176. *Id.* at 585 (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).
177. *Id.*
178. *Id.* at 585–86.
179. *Id.*
180. *Id.* at 588–89 (Stevens, J., dissenting) (quoting *Lyles*, 254 F.2d at 728).
181. *Id.* at 590.
182. 422 U.S. 35 (1975).
183. *Shannon*, 512 U.S. at 590 (citing *Rogers*, 422 U.S. at 40).
184. *Id.* at 591 (citing *Rogers*, 422 U.S. 40–41).

and, thus, Justice Stevens concluded, there is no genuine, non-illusory reason to keep this information from jurors, and every reason to make them aware of it.[185]

C. Conflating Insanity and *Mens Rea* at Guilt and Sentencing

As discussed previously, insanity in the criminal context is typically defined as the inability of a defendant with a mental disease or defect to know the difference between right and wrong or to conform their conduct to the requirements of the law at the time of the offense,[186] while *mens rea* refers to the defendant's intent when committing the criminal act and is often a required statutory element that must be proven by the prosecution beyond a reasonable doubt.[187] Though rare, there are situations in which a defendant's mental illness is so severe that it prevents the defendant from forming the requisite intent to kill; however, in most cases, it is possible for an individual to lack an understanding that what they are doing is wrong *but still want to kill*.[188]

Knowing the difference between right and wrong and developing the requisite intent to act are two different legal standards that the U.S. Supreme Court has historically and erroneously conflated, most notably in the cases *Clark v. Arizona*[189] and *Kahler v. Kansas*.[190] Inaccurate application of these standards impacts both the guilt and sentencing phases of a criminal trial. First, considerations related to examining and proving each standard are essential to ensuring the constitutional protections provided in the Due Process Clause. Second, because questions regarding *mens rea* and insanity impact both the guilt phase and the sentencing phase of a trial, the misunderstanding and misapplication of these legal constructs can lead to potentially unconstitutional outcomes for criminal defendants.

1. Clark v. Arizona

Clark v. Arizona presents one notable instance of this confusion between the related, yet distinct, psycho-legal concepts of *mens rea* and insanity. In 2000, Officer Moritz pulled over then 17-year-old Eric Clark after responding to a noise

185. *Id.* at 592–93 (Stevens, J., dissenting) (quoting United States v. Blume, 967 F.2d 45, 52 (2d Cir. 1992) (Newman, J., concurring)).

186. This is the second prong of the *M'Naghten* test – the first notes that where an individual, due to a psychological illness, is unaware of their actions, they are not culpable for the action itself. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 Ct. & F. 200, 210.

187. *Mens rea*, or intent, is often divided into four subcategories, wherein a person may act: (1) purposefully – i.e., with the intention of causing the direct result of the action; (2) knowingly – i.e., with practical certainty that the result will follow; (3) recklessly – i.e., with disregard to the substantial risk resulting from the individual's actions; or (4) negligently – i.e., with gross deviation from the standard of care taken by an individual who should have been aware of the risk their action would cause. *See* MODEL PENAL CODE § 2.02 (AM. L. INST. 2020). *See also Mens Rea*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/mens_rea.

188. LEGAL INFORMATION INSTITUTE, *supra* note 187. A more recent example of this is in the case of *State v. Yates*, where Andrea Yates drowned her five children due to her belief that "[i]f I didn't do it, they would be tormented by Satan." Timothy Roche, *Andrea Yates: More to the Story*, TIME (Mar. 18, 2002), http://content.time.com/time/nation/article/0,8599,218445-1,00.html. Again, Yates had the express intention of killing her children but did not appreciate the wrongfulness of her actions. *Id.*

189. Clark v. Arizona, 548 U.S. 735 (2006).

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

complaint about Clark's music.[191] During the encounter, Clark fatally shot the officer and fled on foot before being apprehended and charged with first-degree murder.[192] To satisfy the elements of first-degree murder in Arizona, the State needed to prove that Clark acted "intending or knowing that [his] conduct [would] cause death to a law enforcement officer."[193] After an initial delay in the trial proceedings due to questions regarding Clark's competence to stand trial, the case proceeded in a bench trial.[194] At trial, Clark raised two separate claims related to his mental illness. He claimed that due to the effects of paranoid schizophrenia:[195] (1) he "did not know the criminal act was wrong," thus satisfying the requirements of an insanity defense;[196] and, alternatively, (2) he did not satisfy the *mens rea* of the charged offense because his delusions precluded him from developing the requisite specific intent to kill Officer Moritz.[197]

Clark presented expert witness testimony that he was exhibiting symptoms of paranoid schizophrenia and that he thought "aliens," including law enforcement officers, were trying to kill him.[198] A psychiatrist testified for the defense that Clark was experiencing a schizophrenic episode when he killed Officer Moritz, concluding "that Clark was incapable of luring the officer or understanding right from wrong and that he was thus insane at the time of the killing."[199] A psychiatrist for the State, however, testified that "Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct," citing Clark's actions before and after the shooting (e.g., playing loud music from his car to "lure the officer" to him and later evading apprehension) as evidence for his assertion that Clark knew his actions were wrong.[200]

The trial court found Clark guilty of first-degree murder and sentenced him to life in prison with the possibility of parole after twenty-five years, noting that, despite his documented diagnosis of paranoid schizophrenia, "the mental illness did not . . . distort his perception of reality so severely that he did not know his actions

191. 548 U.S. at 743.

192. *Id.*

193. ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2009). This version of the law is not substantively different from that in effect in 2000.

194. 548 U.S. at 743. Clark was initially found incompetent to stand trial. After two years in a state hospital, his competency was determined to be restored. *Id.*

195. Perhaps one of the most misunderstood psychiatric diagnoses, "paranoid schizophrenia," as referenced in *Clark* likely refers to Schizophrenia with associated paranoid delusions. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 99–101 (5th ed. 2013) [hereinafter DSM-5].

196. 548 U.S. at 745. The affirmative defense of "insanity," in Arizona, partially quoted here, is outlined in ARIZ. REV. STAT. ANN. § 13-502(A) (2009). Importantly, this is distinct from the traditional test under *M'Naghten*, which defines insanity under a two-part test wherein the defendant must not, due to their mental illness, (1) know the nature and quality of the act, or (2) what that they were doing was wrong. M'Naghten's Case, 10 CL. & F. 200, 8 ENG. REP. 718, 722 (H.L. 1843).

197. *Id.* In this case, the standard was "intentionally or knowingly" killing an officer. ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2009).

198. *Id.* at 745.

199. *Id.*

200. *Id.*

were wrong."[201] Citing *State v. Mott*,[202] the court also held that Clark could not rely on evidence relating to insanity to argue against the *mens rea* element of the crime.[203] After exhausting review at the state level, the U.S. Supreme Court granted certiorari to determine whether due process considerations prohibited Arizona from (1) narrowing the scope of its insanity test, and (2) excluding Clark's proffered evidence related to his mental illness from the issue of establishing the required criminal intent.[204]

On the first issue raised in *Clark*, the Court found that the State had not denied Clark any due process rights by "streamlining" their test for insanity.[205] On the second issue, the Court also found in favor of the State, holding that evidence of mental disease and capacity can be held inadmissible to rebut the prosecution's evidence of the *mens rea* element of the crime.[206] Furthermore, the Court agreed with the State that mental health professionals may be allowed to testify regarding their *observations* of the defendant but not specific diagnoses, essentially rendering them lay witnesses.[207]

Perhaps more important than the outcome of *Clark* is the Court's reasoning in the case. Here, again, the fundamentally distinct psycho-legal constructs of insanity and *mens rea* are inappropriately conflated. The Court cites *Mott* in concluding that due process allows for the exclusion of expert testimony regarding defendant diagnosis in the determination of the *mens rea* element of the crime, noting "only opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which *sanity* depends under the Arizona rule, is restricted."[208] However, the ruling in *Mott* was *not* about insanity but instead about the constitutionality of restricting testimony regarding the *mens rea* element of the

201. *Id.* at 746 (internal quotations omitted) (quoting Joint Appendix, Vol. II at 334, Clark v. Arizona, 548 U.S. 735 (2006) (No. 05-5966)).

202. State v. Mott, 931 P.2d 1046 (Ariz. 1997). In *Mott*, the Arizona Supreme Court held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the *mens rea* element of a crime" and thus "refused to allow psychiatric testimony to negate specific intent." *Id.* at 1051.

203. 548 U.S. at 745.

204. *Id.* at 747. The Court ruled that Arizona's narrowed definition of insanity does not violate due process. A full discussion of its reasoning on that issue is beyond the scope of this article. *Id.* at 747–56.

205. *Id.* at 753. ("[D]ue process imposes no single canonical formulation of legal insanity."). In coming to this conclusion, the Supreme Court characterizes the *M'Naghten* rule as having both a "cognitive" (i.e., awareness of the nature and quality of the act), and "moral" (i.e., awareness of the wrongfulness of the act) component. *Id.* at 747. However, even this proposition is somewhat misguided, as both are cognitive questions based in the defendant's knowledge—either knowing what they are doing (what the Court calls cognitive capacity) and knowing what is wrong (what the Court calls moral capacity).

206. *See id.* at 756–65.

207. *See id.* Under the Federal Rules of Evidence, any witness can testify to their observations or other personal knowledge relevant to the case. FED. R. EVID. 602. Any opinion they offer must be rationally based on said observation, helpful to the case, and not based in specialized knowledge. FED. R. EVID. 701. Expert witnesses, however, are afforded more leeway in their testimony due to their qualifications and training—they are allowed to offer scientific opinions as long as they are grounded in the science in which they are an expert and helpful to the case. FED. R. EVID. 702.

208. *Id.* at 760 (emphasis added). It is important to note that *Mott* centers around a slightly different issue: whether voluntary intoxication may be used to rebut *mens rea*.

crime, specifically separating the rule regarding testimony from circumstances in which the insanity plea is invoked.[209]

When the Court addressed the constitutional issues that arise when testimony regarding the *mens rea* element of the crime is restricted, it again confuses insanity and *mens rea*. In its reasoning on this issue, the Court states, "The presumption of sanity is equally universal in some variety or other being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility." [210] However, this statement is not an axiom—as mentioned previously, the presence of legal insanity does not necessarily equate to the absence of *mens rea* because a defendant may not be able to appreciate the wrongfulness of their actions but may still be capable of forming the specific intent to commit the criminal act in question. This distinction is perhaps best explained in the dissent, which states that "the mens rea element of intent or knowledge may, at some level, comprise certain moral choices, but it rests . . . on a factual determination,"[211] thus highlighting a key distinction between insanity and *mens rea*.

2. Kahler v. Kansas

There are many parallels between the Court's decisions in *Clark* and *Kahler*; in fact, the Court itself heavily cites *Clark* in the *Kahler* opinion. However, these two cases, the reasoning in the cases, and the psycho-legal issues raised in both cases are distinct and should be carefully circumscribed by legal scholars and practitioners. In *Clark*, detailed above, the issue centered on Arizona's definition of legal insanity (i.e., not knowing that a criminal act is wrong),[212] while in *Kahler*, discussed below, the issue centers on Kansas' definition of legal insanity (i.e., lacking the required culpable mental state because of mental illness).[213] In *Kahler*, the U.S. Supreme Court was asked to decide whether the Due Process Clause "compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime,"[214] or, in plainer terms, whether the lack of the "right vs. wrong" element, a component of both the M'Nagthen and ALI insanity tests, to Kansas' definition of legal insanity violates due process.[215] In short, the Court held that it did not.[216]

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209. *Compare* State v. Mott, 931 P2.d 1046, 1051 (Ariz. 1997) ("Consequently, Arizona does not allow evidence of a defendant's mental disorder *short of insanity* either as an affirmative defense or to negate the *mens rea* element of a crime.") (emphasis added) *and Mott*, 931 P2.d at 1054 ("We have previously 'rejected the theory of diminished responsibility which allows evidence of mental disease or defect, *not constituting insanity* under *M'Naghten*, to be admitted for the purpose of negating criminal intent.") (citing State v. Laffoon, 610 P.2d 1045, 1047 (Ariz. 1980)) (emphasis added) *with Clark*, 548 U.S. at 761 ("[A]ll members of the Court agree that Clark's general attack on the *Mott* rule covers its application in confining consideration of capacity evidence to the insanity defense.") (demonstrating some acknowledgement of the correct scope of *Mott*).

210. 548 U.S. at 790.

211. *Id.* At 790 (Kennedy, J., dissenting).

212. ARIZ. REV. STAT. ANN. § 13-502(A) (2009).

213. KAN. STAT. ANN. § 21-5209 (2011).

214. 140 S. Ct. 1021, 1024–25 (2020).

215. *Id.* at 1027.

216. *Id.*

Understanding the facts of the case helps to inform the following legal analysis. Karen Kahler filed for divorce from her husband, James Kahler, in early 2009.[217] After the dissolution of his marriage, Kahler's behavior became erratic and he lost his job as a result.[218] Months later, in November of that same year, James drove to the house where Karen and their children were staying.[219] There, he found his nine-year-old son, who he allowed to escape before killing Karen, her grandmother, and his two teenage daughters.[220] At trial, Kahler presented evidence of severe major depressive disorder, including the testimony of a forensic psychiatrist who stated that Kahler's "capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did."[221] Kahler was convicted of capital murder and sentenced to death.[222]

Under Kansas law, Kahler was permitted to present evidence of mental illness to show that he was unable to "form the requisite intent" required for the criminal charge, but he was not able to use that same evidence to assert that he did not have an appreciation for the consequences or wrongfulness of his actions.[223] Thus, in the terms established by the Court, Kahler's mental illness could be used to establish that he did not have the "cognitive capacity" to commit the crime but not for the purpose of addressing his "moral capacity," at least at the guilt phase of his trial.[224] During the sentencing phase under Kansas law, however, a defendant is permitted to present evidence that, due to a mental illness, they were unable to "appreciate [the] act's moral wrongness" or "criminality" or that the illness prevented them from "conform[ing their] conduct to legal restraints."[225]

The Court reasoned that Kansas' statutory scheme did not run afoul of due process requirements because it allowed Kahler to present evidence that "lessened" rather than "eliminated" moral culpability during the sentencing phase, stating that "sentencing is the appropriate place to consider mitigation: The decisionmaker there can make a nuanced evaluation of blame, rather than choose, as a trial jury must, between all and nothing."[226] Thus, Kansas took Kahler's mental health into account in some way, just not in the way that is most widely accepted.[227]

The Court's decision and reasoning reflect a fundamental misunderstanding of the impact that mental illness has on *mens rea*. Primarily, the Court's decision ignores a fact that is central to the conceptualization of mental illness, and, by extension, legal insanity—i.e., "mental illness typically does not deprive individuals of the ability to form intent. Rather, it affects their *motivations* for forming such

217. *Id.* at 1026.

218. State v. Kahler, 410 P.3d 105, 113 (Kan. 2018).

219. 140 S. Ct. at 1027.

220. *Id.*

221. 410 P.3d at 114.

222. 140 S. Ct. at 1027.

223. *Id.* at 1030–31.

224. *Id.* at 1025.

225. *Id.* at 1026, 1030–31, 1049. *See also* KAN. STAT. ANN. § 21-6625(a)(6) (outlining "[t]he capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired" as a mitigating circumstance).

226. 140 S. Ct. at 1031.

227. Meaning not following the *M'Naghten* rule, outlined above. *Id.* at 1037.

intent."[228] Using the *M'Naghten* case as an example, M'Naghten had the intent to kill the Prime Minister, but his motivations for wanting to kill the Prime Minister were based in his delusions.[229] Regardless, under the Kansas law, as interpreted by the U.S. Supreme Court, M'Naghten would have been convicted of murder.[230] Mental illness rarely renders one incapable of forming intent to act; instead, it impacts cognitive processes in a manner that can manifest in changes in behavioral patterns.[231] As such, limiting the definition of insanity to reflect only a complete breakdown of the ability to form intent severely limits its applicability. It renders the statute essentially useless in many cases where a person with severe mental illness is alleged to have committed a crime, thereby essentially eliminating the insanity defense in Kansas.

Furthermore, examining the Kansas statute, which states "[i]t 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,"[232] a second issue should become immediately clear. If one is to simply ignore the middle clause "as a result of mental disease or defect," the statute states a legal truism—i.e., it is a defense to any crime that the defendant lacked the *mens rea* to commit the crime.[233] Thus, it offers no real insanity defense, but only the rebuttal of an element of the crime itself (which is *mens rea*). Instead of acting as an affirmative defense, a plea of insanity in Kansas does no more than offer a well-formed attack of the prosecution's ability to prove a required element of the crime, again limiting the applicability of the statute in a way that severely and negatively impacts criminal defendants with severe mental illnesses.

Finally, in confining insanity to the realm of *mens rea*, the Court condones a statutory scheme that offers no real relief during the guilt phase to defendants who are severely mentally ill—the impact of their mental illness on culpability (beyond the "all or nothing" approach of their ability to form intent) is confined to the sentencing phase.[234] If "mental disease or defect is not otherwise a defense,"[235] then the vast majority of defendants who are mentally ill will be found guilty under Kansas law. Though, as discussed previously, some relief is offered during the sentencing phase; "tradition demands that an insane defendant should not be found guilty in the first place."[236] Given that sentencing is a discretionary phase, the dissent properly notes that the scheme not only exposes these defendants "to harsh criminal

228. *Id.* at 1048 (Breyer, J., dissenting).

229. *See* M'Naghten's Case (1843) 8 Eng. Rep. 718, 719; 10 Cl. & F. 200, 201. *See also supra* Section I.A.1 for further explanation.

230. *See supra* notes 35–38.

231. This understanding of mental illness is so essential that entire theories of psychology and psychological intervention are predicated on the idea that thoughts (directly or indirectly) impact behavior.

232. KAN. STAT. ANN. § 21-5209; 140 S. Ct. at 1025.

233. This is specifically in regard to legal arguments regarding mental health; for example, some states do not allow voluntary intoxication to negate *mens rea*. In Kansas, voluntary intoxication is not considered a mental disease or defect as defined by the statute, even after *Kahler*. *See* Fredrick E. Vars, *Of Death and Delusion: What Survives Kahler v. Kansas?*, 169 U. PA. L. REV. ONLINE 90, 95 (2020).

234. 140 S. Ct. at 1026.

235. KAN. STAT. ANN. § 21-5209.

236. 140 S. Ct. at 1049 (Breyer, J., dissenting).

sanctions up to and including death," but it also does "nothing to alleviate the stigma and collateral consequences of a criminal conviction."[237]

Thus, the *Kahler* decision, despite its parallels to *Clark*, is uniquely detrimental to the defendants with mental illness the underlying statutory scheme is supposed to protect due to *Kahler*'s misunderstanding of mental illness and conflation of the distinct legal concepts of *mens rea* and insanity.[238]

D. Confusing Insanity and Incompetence to be Executed

Ford v. Wainwright[239] is one of the foundational cases related to issues of mental health, competence, and the death penalty, and it also represents an example of the Court confusing critical mental health terminology.[240] The decision came from a fractured U.S. Supreme Court, with Justice Marshall writing for the plurality.[241] Despite the differences in opinion among the justices, it is clear throughout the opinion that the Court erroneously conflates the fundamentally distinct constructs of insanity and incompetence. Whereas insanity focuses on the defendant's mental state at the time of the offense and is relevant to the legal determination of a defendant's criminal responsibility, competence refers to present-focused abilities (e.g., competence to stand trial) and has no relevance to legal culpability.[242]

Alvin Ford was convicted of murder in 1974 and sentenced to death that same year.[243] At the time of his original trial, he demonstrated no mental health symptoms and no abnormal thinking patterns.[244] However, eight years after he was sentenced, Ford began to exhibit changes in his thought processes and behaviors; he developed obsessions regarding the Ku Klux Klan and delusions of persecution[245]

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237. *Id.* at 1050.

238. *See* Eric Roytman, *Kahler v. Kansas: The End of the Insanity Defense?* 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 43 (2020) (examining whether *Kahler* has essentially eliminated the insanity defense in Kansas).

239. 477 U.S. 399 (1986).

240. *See, e.g.*, McGautha v. California, 402 U.S. 183 (1971) (declaring jury imposition of death penalty without guiding standards unconstitutional); Furman v. Georgia, 408 U.S. 238 (1972) (all current death penalty statutory schemes unconstitutional in violation of the Eighth and Fourteenth Amendments); Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty does not, in itself, violate the Constitution); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death penalty imposition unconstitutional); Atkins v, Virginia, 536 U.S. 304 (2002) (death penalty for intellectually disabled persons unconstitutional); Roper v. Simmons, 543 U.S. 551 (2005) (death penalty for juvenile offenders unconstitutional).

241. As a demonstration of how divided the Court was on the topic, Justice Marshall wrote the opinion for the Court in Part I and II. He was joined in Parts III and IV by Justice Brennan, Justice Blackmun, and Justice Stevens. Justice Powell wrote a concurrence, which was joined by Justice O'Connor, who also wrote her own dissent, which was joined by Justice White. Finally, Justice Rehnquist wrote his own dissent, which was joined by Chief Justice Burger. *See* Ford v. Wainwright, 477 U.S 399.

242. *See* SLOBOGIN, ET AL, *supra* note 21, at 1045; *see generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed. 2003) (providing overview of various competencies in criminal and civil law).

243. 477 U.S. at 401.

244. *Id.* at 401–02.

245. *Id.* at 402. Delusions such as these are called "persecutory delusions," and they are the most common type of delusions an individual may develop. DSM-5, *supra* note 195, at 87. Persecutory

that because of his "Klan work," there was a conspiracy to encourage him to commit suicide.[246] His delusions worsened considerably between 1982 and 1983, eventually culminating in a belief that he was Pope John Paul III, had solved a major crisis that was occurring in the prison,[247] fired the prison officials involved, and "appointed nine new justices to the Florida Supreme Court."[248]

In 1983, Dr. Jamal Amin, a psychiatrist retained by the defense, evaluated Ford and diagnosed him with a mental illness akin to "Paranoid Schizophrenia With Suicide Potential" and noted that the mental health disorder was "severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life."[249] During an evaluation with a second psychiatrist retained by the defense, Dr. Harold Kaufman, Ford told Kaufman that he could not be executed because it was "illegal" after he had won "*Ford v. State*," which prevented the practice.[250] Dr. Kaufman concluded that Ford "had no understanding [that] he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves."[251]

Pursuant to Florida law, Ford's attorneys requested that Ford undergo a competency evaluation in which he would be evaluated by three psychiatrists to determine whether he had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."[252] The panel of psychiatrists appointed by the Florida Governor determined that, despite obviously suffering from severe mental health symptoms, Ford was able to understand his death sentence and what consequences that carried.[253] In response, the Governor signed Ford's death warrant, and the case was eventually appealed to the U.S. Supreme Court to determine "the important issue of whether the Eighth Amendment prohibits the execution of the insane."[254]

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delusions encompass delusions that the individual or someone they know is going to be "conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals" by another entity (individual, organization, government, etc.). *Id.* at 87, 90.

246. 477 U.S. at 402.

247. *Id.* Notable "hostages" included 135 friends and family members, "senators, Senator Kennedy, and many other leaders." *Id.*

248. *Id.*

249. *Id.* at 402–03.

250. *Id.* at 403.

251. *Id.*

252. *Id.* at 403–04 (quoting FLA. STAT. § 922.07(2) (1985)).

253. 477 U.S. at 404. The adequacy of the psychiatrists' evaluations has also been the subject of controversy. All three psychiatrists met with Ford together at a single thirty-minute meeting, after which they each diagnosed him with a different mental health condition (psychosis with paranoia, psychosis, and severe adaptational disorder). *Id.*

254. *Id.* at 404–05. In *Ford*, the Supreme Court conflated insanity with the concept of competence to be executed. *See generally* Patricia A. Zapf, *Elucidating the Contours of Competency for Execution: The Implications of* Ford *and* Panetti *for the Assessment of CFE*, 37 J. PSYCHIATRY & L. 269 (2009) (providing overview of competence to be executed). Of note, the Florida statute in question also conflates the term "insanity" with "competence." FLA. STAT. § 922.07. Although the statute states "When the Governor is informed that a person under sentence of death may be insane, [the Governor] shall stay execution of the

After reviewing the case, a divided U.S. Supreme Court held that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is *insane*."[255] However, a closer look at the reasoning of the Court is warranted. In coming to its conclusion, the Court reasoned, "[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[256] In reviewing the procedure by which Ford was evaluated, the Court discussed the competency panel's "agree[ment] on the ultimate issue of competency" as compared to the report of Dr. Kaufman, which "concluded that the prisoner was not competent to suffer execution."[257] The Court then concluded "that the State's procedures for determining *sanity* [were] inadequate"[258] before reiterating the importance of sound procedure in determining "the prisoner's ability to comprehend the nature of the penalty."[259] In the final paragraph of the opinion, the Court stated that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications," and as such, the "petitioner is entitled to an evidentiary hearing in the District Court, *de novo*, on the question of his competence to be executed."[260]

Throughout the entire opinion in *Ford*, the terms and concepts of insanity and competence are used interchangeably, which is fundamentally incorrect. This theme is carried on through the concurrence and dissents. In Justice Powell's concurrence, he writes, "At least in the context of *competency determinations* prior to execution, this standard is no different from the protection afforded by procedural due process . . . Thus, the question in this case is whether Florida's procedures for *determining petitioner's sanity* comport with the requirements of due process."[261] In Justice O'Connor's dissent, she writes that they are in "in full agreement with Justice Rehnquist's conclusion that the Eighth Amendment does not create a substantive right not to be executed while *insane*" but "cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's *competency* to be executed."[262] Finally, in Justice Rehnquist's dissent, he summarizes that "[i]t is Florida's scheme—which combines a prohibition against execution of the insane with executive-branch procedures for evaluating claims of insanity—that is more faithful to both traditional and modern practice."[263]

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sentence and appoint a commission of three psychiatrists to examine the convicted person," it goes on to explain that "[t]he Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he [or she] understands the nature and effect of the death penalty and why it is to be imposed upon him [or her]." § 922.07(1). This definition follows the standard for competency, not insanity, and is used throughout the statute despite its association with the incorrect use of the legal term "sanity."

255. 477 U.S. at 409–10 (emphasis added).

256. *Id.* at 409.

257. *Id.* at 413.

258. *Id.* at 416 (emphasis added).

259. *Id.* at 417.

260. *Id.* at 417–18.

261. *Id.* at 424 (Powell, J., concurring in part) (emphasis added).

262. *Id.* at 427–28 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

263. *Id.* at 433 (Rehnquist, J., dissenting).

The primary problem with *Ford* is that the legal issue was unrelated to insanity, despite the Court's repeated use of that term, and instead is firmly focused on whether the defendant was competent to be executed. Insanity and competence to be executed are distinct and unrelated legal concepts that pertain to distinct legal questions, with insanity focusing on the offender's mental state at the time of the offense and competence focusing on the offender's functional abilities near the time of execution. Even though Ford was found to have a severe mental illness and, thus, may have met the legal criteria for insanity, he was adjudged to be competent to be executed.

Knowing the nature and/or quality of an action, or whether the act is wrong,[264] is fundamentally different than knowing why you are being punished and knowing the consequences of that punishment.[265] A person, therefore, can be declared legally sane in that they are aware of the quality and wrongfulness of their actions but also legally incompetent in that they are unaware of why they are being sentenced to death and the permanence of that sentence at the time of execution.

Thus, in some ways *Ford* exemplifies the scope of the problem regarding how what may seem like a small misunderstanding or misapplication of psycho-legal principles can have a resounding impact on constitutional issues throughout a defendant's trial. However, the Court's struggle to define how mental health is associated with competence to be executed did not end with *Ford*. *Ford*'s progeny, including *Panetti v. Quarterman*,[266] continue to demonstrate this fundamental misunderstanding.

III. COSTS, CONSEQUENCES, AND MOVING FORWARD

Why does it matter that the U.S. Supreme Court has presented a convoluted picture of insanity from the selection, allegiance, and role of mental health experts (in *Ake* and *McWilliams*) to the legal meaning of the term insanity (in *Ford*), with the Court creating additional confusion surrounding insanity's definition and its differentiation from *mens rea* (in *Clark* and *Kahler),* and what jurors hear about it (in *Shannon*)? It suggests that the Court is fundamentally confused about this doctrine. These misunderstandings have significant implications for the legal field, mental health professionals that work in this area, and the general public who may be called upon to offer decisions in the context of court cases. Noted commentators have argued that "[t]he defense of insanity is probably the most controversial issue in all of criminal law" and that "[t]housands of pages have been written debating the value of a defense that provides an excuse for antisocial actions."[267] This controversy and the extensive scholarship devoted to it are unlikely to decline unless more understandable and comprehensible legal precedents originate from our country's highest court. Without more effective guidance and direction—based on a clear and

264. *See* M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 CL. & F. 200, 210.

265. *See Ford*, 477 U.S. at 422–23.

266. 551 U.S. 930, 958–59 (2007) (broadly defining incompetence to be executed as defendants whose "mental state is so distorted by a mental illness" they lack a rational understanding of the reasoning for their execution while acknowledging "a concept like rational understanding is difficult to define").

267. MELTON ET AL., *supra* note 8, at 195; *see generally*, MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994).

accurate understanding of the relevant legal concepts and constructs—insanity jurisprudence has the potential to further devolve into something resembling other notable "misadventures" of constitutional law, such as the First Amendment's Establishment Clause and nativity scenes in public venues.[268]

The most troubling aspect of the Court's jurisprudence involving insanity is best described as definitional. Allowing jurisdictions to construct (or not—in the jurisdictions that do not currently have an insanity defense) their own explicit, idiosyncratic formulations of insanity's components[269] and to implement their own standards and burdens of proof for insanity is not necessarily problematic. Stated differently, the fact that some jurisdictions use variants of the *M'Naghten* rule while other have adopted aspects of the ALI standard with GBMI as an alternative verdict is not the central issue with this jurisprudence. It is not uncommon for the Court to allow different jurisdictions to use different formulations of doctrines based on the legislative beliefs of that community. However, the Court's fundamental misuse of the term insanity is more troubling, as the construct itself is purely a legal creation.[270] In *Ford*, as noted previously, the Court treats competence to be executed as synonymous with insanity[271] even though the two constructs involve different time periods (mental state at the time of the offense vs. mental state at time of execution) and foundational abilities (knowledge of whether what they did was right vs. wrong or uncontrollable behavior vs. understanding the reasons for being punished). This lack of verbal specificity or verbal misstep will exacerbate confusion for legal actors, mental health professionals, and a public that is already suspicious of the relationship between mental illness and culpability.[272]

Yet, even more troubling and dangerous is the Court's clear misunderstanding of the difference between *mens rea* and the insanity defenses in *Kahler*. In treating the two legal constructs as identical, the Court has either expanded insanity doctrine to include *mens rea* defenses (which is a conflation of distinct legal defenses) or failed to recognize the fundamental differences between the two. Following *Kahler*, Kansas seemingly has an insanity defense, which will be surprising to most psycho-legal scholars who have listed Kansas among the states that does not have one.[273] Given its recency, it is not clear how courts will implement *Kahler*, but it is likely to cause a good deal of confusion among both legal professionals and forensic mental health experts.

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268. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (creating what is known as the "Three Reindeer Rule" which bars municipalities from presenting religious symbols in nativity scenes unless non-secular items such as reindeer are in close proximity). The difficulty and absurdity of this stream of jurisprudence has led one federal judge to quip, "No holiday season is complete, at least for the courts, without one or more First Amendment challenges to public holiday displays." Skoros v. City of New York, 437 F.3d 1, 3 (2d Cir. 2006).

269. *See supra* pp. 9–12 and notes 55–57.

270. *See generally*, MELTON, ET AL., *supra* note 8.

271. It should be noted that psycho-legal scholarship is not immune from lack of clarity with regard to the term "insanity". For example, the seminal article on civil commitment diagnosis, *On Being Sane in Insane Places*, by a leading psychology and law scholar, David Rosenhan, confused civil commitment and insanity. D. L. Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973).

272. *See* MELTON, ET AL., *supra* note 8, at 201.

273. *Id.* at 204. ("[F]our states (Kansas, Idaho, Montana, and Utah) have abolished the defense although expert testimony is still admissible for *mens rea*.").

For mental health professionals who specialize in legal assessments for the courts (i.e., forensic psychologists and forensic psychiatrists), and are ethically obligated to understand laws surrounding their areas of practice,[274] the *Kahler* decision also presents an added layer of difficulty. Should a forensic mental health professional now treat *mens rea* defenses the same as insanity defenses for assessment purposes? Additionally, forensic psychologists have already been noted to evidence lower reliability between examiners when performing insanity evaluations compared to other legal evaluations for the courts,[275] and this revision of insanity law will likely only make their reliability lower.

For a public that is already distrustful of the insanity defense, the additional complexity of the revised legal insanity doctrine they will be asked to apply as jurors will also likely lead to unreliability in decision-making and possible injustice.[276] It may also further cement jurors' lack of understanding of the legal nuance surrounding the insanity defense, causing them to ignore the law completely and instead follow their "commonsense" notions of justice.[277] Jury research demonstrates that this is already occurring with regard to different formulations of the insanity defense (e.g., *M'Naghten*, *Durham*, ALI, no legal standard), with different insanity standards rarely producing different outcomes in experimental studies. Finkel (1995) aptly summarizes this research, noting:

> Tests with markedly different criteria failed to produce discriminably different verdicts, and failed to produce verdicts discriminably different from those produced by a no-test condition . . . jurors do not ignore instructions but they construe instructions, employing their constructs of "sane" and "insane" to determine their verdict, despite the wording of the legal test given to them.[278]

These problems are likely to be confounded and exacerbated by jurors' additional misunderstanding of what happens to defendants who are adjudicated NGRI because courts have no obligation to correct these mistaken notions.[279] More broadly, greater misunderstanding and confusion concerning insanity will surely not lead to more substantial support for insanity laws, and it may lead the public to ask for ill-conceived changes to existing laws. In a legal context already surrounded by controversy and often subject to revision based on the public's knee-jerk reaction to

274. AM. PSYCH. ASS'N, SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY *supra* note 106, at 9.

275. *See* W. Neil Gowensmith, Daniel C. Murrie & Marcus T. Boccaccini, *How Reliable are Forensic Evaluations of Legal Sanity?*, 37 L. & HUM. BEHAV. 98, 100–05 (2013) (finding that three forensic evaluators only reached unanimous agreement regarding legal sanity in 55 percent of cases for 165 criminal defendants). For comparison purposes, a similar research study involving competency to stand trial found 70.9 percent unanimous agreement for three evaluators. W. Neil Gowensmith, Daniel C. Murrie & Marcus T. Boccaccini, *Field Reliability of Competence to Stand Trial Opinions: How Often Do Evaluators Agree, and What Do Judges Decide When Evaluators Disagree?*, 36 L. & HUM. BEHAV. 130, 133–36 (2012).

276. *See generally* NORMAN J. FINKEL, NOT FAIR! THE TYPOLOGY OF COMMONSENSE UNFAIRNESS (2001).

277. *See, e.g.*, NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995).

278. *Id.* at 282.

279. *See* discussion of the *Shannon* decision and accompanying text *supra* pp. 27–33.

high-profile cases, the U.S. Supreme Court's lack of clarity will only further worsen the situation.

Moving forward for the courts, several aspects of the insanity doctrine and legal practice could be improved. First, the courts need to be exceptionally careful concerning the use of the term "insanity" and not fall prey to using it in a colloquial manner rather than in its strict legal sense. Insanity is a term of art that has an explicit legal meaning that needs to be followed when it is used in the legal arena. This will hopefully limit misunderstanding and mistaken notions that exist among legal actors and which can trickle down to the general public through their widespread use.

Second, the Court needs to clarify whether *mens rea* defenses are part of the insanity doctrine or are something distinctly different. The *Kahler* decision raises the specter that something has fundamentally changed about insanity law, and the Court needs to make clear if this is indeed the case. As the authors have hopefully effectively argued in this article, this decision represents a fundamental misstep concerning insanity and *mens rea* that needs to be corrected. Although *mens rea* and insanity both involve mental state at the time of the offense, they call upon different ideas of intentionality, the relationship of mental illness to cognitive and behavioral actions, and legal justification for their use. These differences are fundamentally important to our ideas of justice and need to be consistently recognized by the decisions of the U.S. Supreme Court.

Third, the role of mental health professionals in legal proceedings involving insanity needs to be both better understood and clarified by the courts. Mental health professionals cannot ethically act as both a consultant and evaluator for the defense. The ethical rules of conduct for psychologists clearly state that this behavior represents multiple roles for the psychologist, and such behavior should not occur unless there are substantial reasons that make it necessary. This is almost never the case with regard to insanity evaluations, and the courts need to join the field of psychology in prohibiting (or at least strongly discouraging) such conduct.

Fourth, the public and jurors are especially confused by the insanity defense and its repercussions for the defendant. Allowing jurors to be instructed about what results from a finding of NGRI would likely improve their understanding, without increasing misinformation. It would also encourage and likely increase jurors' ability to follow the law in their decision-making instead of relying on inaccurate misunderstandings. As a result, clear jury instructions concerning the defendant's often automatic psychiatric commitment following an NGRI adjudication is sound and should be implemented.

The U.S. Supreme Court has severely muddled insanity doctrine from start to finish through its decision-making over the last half-century. Through a series of cases, the Court has created widespread confusion concerning: (1) the role and allegiance of mental health professionals in insanity evaluations; (2) juror understanding of the disposition of insanity acquittees following trial; (3) the differences between *mens rea* and insanity defenses; and (4) the equivalency of competence to be executed and insanity. Taken together, this jurisprudence represents a fundamental misstep in guidance and direction in an already controversial area of law. It has further led the legal field, mental health professionals, and the public to have fundamental misunderstandings of this area of law. It is essential that the courts begin the process of remediating these mistakes,

and construct, interpret, and apply insanity laws and procedures that both serve their purpose and correct this rampant confusion.