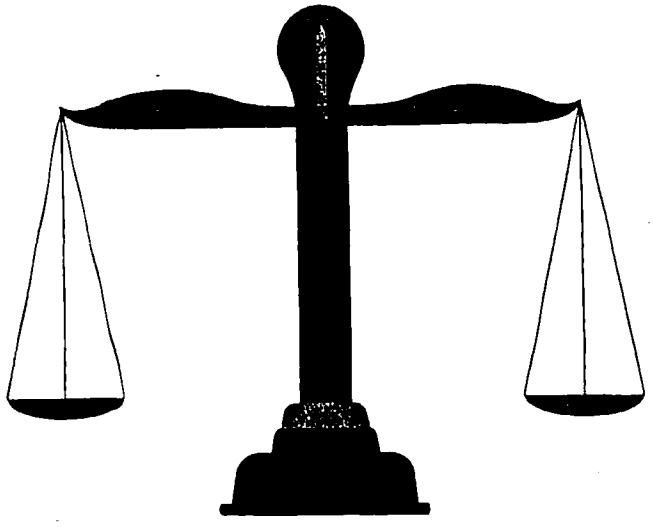

Farewell to Insanity

A Return to *Mens Rea*

By Raymond L. Spring

For nearly 2,000 years there has been legal recognition that only conduct that is the product of a blameworthy state of mind is appropriately classified as criminal and that blame can only be affixed where the mind is capable of understanding the law's commands. Just over 150 years ago, in poorly charted waters on a troubled sea, law's course took a monumentally wrong tack, sailing into a storm of controversy over this basic principle that has continued to this day. Ever since the trial of Daniel M'Naghten in 1843 the so-called separate defense of insanity has generated confusion and frustration with the law as well as suspicion that the law's processes do not serve public objectives. In 1995 the Kansas Legislature took a heading out of the storm, enacting K.S.A. 22-3220, which declares:

"It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense. The provisions of this section shall be in force and take effect on and after January 1, 1996."

Thus ended the separate defense of insanity in Kansas, represented by the *M'Naghten* rule since at least 1884.[1] In taking this action, Kansas has joined sister states Montana,[2] Idaho[3] and Utah[4] in a serious attempt at reform.

The roots of the insanity defense

The principle of blameworthiness, or *mens rea*, was clearly spelled out in the sixth-century Code of Justinian:

"There are those who are not to be held accountable, such as a madman and a child, who are not capable of wrongful intention. ..."[5]

Even earlier, the second-century Talmud contained the same idea, providing that deaf mutes, imbeciles and minors were not culpable "for with them only the act is a consequence while the intention is of no consequence."[6] With the fall of the Roman Empire, however, the principle of blameworthiness, like much of the scholarly work of classical antiquity, became obscured. Largely this came about because crime, as we think of it today, was subsumed by ideas akin to what we now call tort; thus one who suffered harm at the hand of another was recognized as having the right to respond in kind, without reference to niceties such as fault or blame, much less a forum to resolve the dispute.

Medieval Europe gave birth to the feudal system of private armies engaged in blood feuds. It may well be that the latter gave rise to the former. In any event, this was the law brought to Britain by the Saxons in the latter half of the first millennium. Still, as Justice Oliver Wendell Holmes once observed, "even a dog distinguishes between being stumbled over and being kicked."[7] By the latter days of the Saxon period, possibly through the influence of Christian ethics and Roman jurisprudence left with the subject Britons, a recognition that different treatment of seriously mentally disordered offenders was necessary crept back into the law. At first this took the form of clemency, but by early in the 13th century, as the common law was gaining ascendency under the Normans, Bracton would write:

"... for a crime is not committed unless the will to harm be present ... And then there is what can be said about the child and the madman, for the one is protected by his innocence of design, the other by the misfortune of his deed. In misdeeds we look to the will and not the outcome. ..."[8]

The criminal trial of Bracton's day was a far cry from that which we know today, however; the focus of the law was upon what should be done with the mentally disordered offender. There was no need for the articulation of tests for determining who fell into that category. The law dealt with the clearly deranged.

Searching for definition

As the common law developed, the role of the jury evolved. Originally the jury was called as a body of "twelve good men and true" who would inform the king's justices of the facts in any case through their knowledge of the people and events of their community. By the 15th century, however, the jury's role had become that of trier of the facts, much as we know it today. And since the king and his justices were still rulers of the law, it was necessary to advise the jurors on the law to be applied in finding the facts and in reaching a verdict. In short, the new role of the jury gave rise to the need for instructions by the court; a need which, in its turn, sometimes gave rise to a tendency "for the learned and great judges to bestow their learning very liberally upon the ignorant and degraded jury. ..."[9] Easy it was for these judges to find statements of learned scholars at law decrying the conviction of *non compos mentis*; harder, much harder, to find the means of identifying who he was! The justices themselves had little experience with the subject and thus seized upon any available means that seemed logically to explain the principle of *mens rea* as applied in such cases. The theme most often sounded was one taken from the Christian ethic: the ability to distinguish good and evil. Without this ability, judges reasoned, it was impossible to exercise free will and this was fundamental to *mens rea*. A 13th-century comment by Bracton expressing the idea that a "madman lacks mind and reason, and is not much removed from a brute"[10] found its way into an instruction given by Justice Tracy some 500 years later:

"... it is not every kind of frantic humour, or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and does not know what he is doing, no more than an infant, than a brute or a wild beast, such a one is never the object of punishment ..."[11]

Thus the idea of total deprivation of capacity to reason, though successfully challenged by the brilliant Lord Erskine

FOOTNOTES

1. *State v. Nixon*, 32 Kan. 205, 4 P. 159 (1884).
2. Montana Code Ann. Stat. 46-14-102 (1979) provides: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have the state of mind which is an element of the offense." With the enactment of this section Rev. Code Montana, 95-501(a), which stated the traditional separate defense of insanity using the ALI test, was repealed.
3. Idaho Code, Stat. 18-207 (1982).
4. Utah Code Ann. 76-2-305 (1990).
5. Carrithers, David, "The Insanity Defense and Presidential Peril," 22 Society, No. 5, p. 23 (July/August 1985).
6. Weiner, Barbara A., "Not Guilty by Reason of Insanity: A Sane Approach," 56 *Chicago-Kent L. Rev.* 1057, 1058 (1980).
7. Holmes, Oliver, *The Common Law*, Boston, Little, Brown & Co. (1881), p. 3.
8. Finkel, Norman J., *Insanity on Trial*, New York, Plenum Press (1988), p. 8.
9. Letter of Charles Doe to Isaac Ray, May 18, 1868, cited in Reik, "The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease," 63 *Yale L. J.* 189 (1953).
10. Maeder, Thomas, *Crime and Madness*, New York, Harper & Row (1985), p. 6.
11. *Rex v. Arnold*, 16 How. St. Tr. 695 (1724).

in his defense of James Hadfield, continued to dominate the ideas expressed in judicial instructions to juries through the reported English cases well into the 19th century. But it remained for the case of Daniel M'Naghten to provide the catalyst for standardization.

The questions framed by lords had been drawn in terms of one who acted under the influence of an "insane delusion" ...

The *M'Naghten* rule

On Jan. 20, 1843 a 28-year-old Glasgow woodturner named Daniel M'Naghten walked up behind Edward Drummond on a London street, placed a pistol in Drummond's back and fired, inflicting a wound from which Drummond died three months thereafter. Immediately apprehended by a nearby policeman, M'Naghten was placed on trial just more than a month later. The case attracted wide attention, because M'Naghten clearly had mistaken Drummond for England Prime Minister Robert Peel and had intended the bullet for Peel. The defense was insanity, and nine medical witnesses described the defendant as suffering from extreme paranoia "entangled in an elaborate system of delusions,"[12] through which he believed the Tory party responsible for all of his personal difficulties. The crown offered no medical opinion to the contrary. Lord Chief Justice Tindal, after virtually (but not quite) directing a verdict of acquittal, submitted the case to the jury with the following language:

> "The point I shall have to submit to you is, whether on the whole of the evidence you have heard, you are satisfied that at the time the act was committed ... the prisoner had that competent use of his understanding as that he knew what he was doing, by the very act itself, a wicked and a wrong thing? If the prisoner was not sensible at the time ... that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act ... If on balancing the evidence in your minds, you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not ... then you will probably not take upon yourselves to find the prisoner guilty. If this is your opinion, then you will acquit the prisoner."[13]

The verdict was not guilty on the ground of insanity, and M'Naghten was committed to a mental institution where he spent the rest of his life as a model patient.

If the verdict was satisfactory to Tindal, it certainly was not so to the Queen. She had been (and would again be) the target of assassination attempts, as had the Price Consort and other high ranking members of the government. "The law may be perfect," she complained, "but how is [it] that whenever a case for its application arises, it proves to be of no avail."[14] Public sentiment, as evidenced in the press, was on the side of the queen and the matter came before the House of Lords to consider whether Parliament should act to define insanity. The 15 judges of Queen's Bench were summoned to answer a series of questions regarding the law as applied in M'Naghten's trial.

The judges were reluctant. It was not the business of courts, they argued, to decide hypothetical cases devoid of real facts and the competing arguments of counsel on each side. In the end, however, hoping that judges hearing cases in the future would recognize their response to lords for what it was and not accord it precedential authority, they responded:

> "... [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not 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."[15]

With respect to "wrong," the judges said it was their understanding that the term implied legal wrong as opposed to moral wrong.[16] The questions framed by lords had been drawn in terms of one who acted under the influence of an "insane delusion," and thus the response of the judges was so limited.[17] Whether insanity was recognized by the law in any other form or would be subject to any other test was not discussed. It was not relevant to the inquiry.

It is at least interesting that, had the jury in M'Naghten's trial been so instructed, he would have (or at least presumably should have) been convicted. Certainly he knew that by his act he was likely to kill another, for his clear intent was to kill the prime minister. No suggestion was raised that he did not know that to be a violation of law. He may have suffered delusions, but if so they were about the nature and source of his personal and financial troubles. But Tindal had charged the jury in terms including consideration whether the defendant knew his to be a wicked act, summoning the moral issue. It is not difficult to recognize that there is conduct which, though understood to be illegal, would not be considered wicked by the actor. The leaders of the American Revolution, who certainly understood that their actions were treason under English law, would not have thought for a moment that they were in any sense *wicked*.

In any event, the response satisfied the members of lords and with a few nicely chosen words of gratitude to the judges for clarifying the matter, the debate ended. The response at the bar and in the medical world was quite another matter, for, try though they did to guard against it, the judges had indeed established a fixed test of insanity that soon spread to the entire common law world. The wrong course was set, for the discussion shifted from the objective to the language. The basic idea that mental impairment might be great enough to exclude the possibility of

12. Simon, Rita J., *The Jury and the Defense of Insanity*, Boston, Little, Brown & Co. (1967) p. 20.
13. 8 Eng. Rep. 718, 719 (1843)
14. Benson, A.C. (ed.), *The Letters of Queen Victoria*, New York, Longman's, Green & Co. (1907) vol. I, p. 587.
15. 67 HANSARD'S PARLIAMENTARY DEBATES 722 (1843)
16. 8 Eng. Rep. 722 (1843)
17. *Id.*, at pp. 720, 722.

mens rea was soon to be lost in the debate over which words would adequately define that mental impairment. The forest was soon to be obscured by the trees.

The 150-year debate

No sooner were the judges responses made known than the attack on the new (albeit unintended) "rule" began. In the medical community it was thought that the law had undertaken to define the undefinable; that it was impossible to put into words that which medical men themselves yet little understood. The response from the bar was that the medical niceties were of no concern; that the law sought to define a rule of social conduct, not a medical condition. Yet it could not be gainsaid that there were medical overtones to the rule; it spoke in terms, after all, of "disease of the mind." What, then, did that mean, if not a medically identifiable and recognized disease? And if so, did it include every such disease? Why were only those who suffered from impaired *cognition* covered by the rule? That there were those who, though they knew what they did, were unable because of mental disease to control their conduct had been recognized in cases predating *M'Naghten*.[18] Had it been the judges' intention, then, to exclude them from coverage by this "new" test of insanity? The language itself was criticized as confusing and limiting. What was meant by "wrong"? The judges, of course, had left no doubt; they had said what was meant by wrong in a legal sense; that the conduct was against the law. But many still argued that a broader interpretation should be given, for one who is deprived by mental disease of his moral compass cannot reasonably be judged by the same standard as one in full possession of all mental faculties. Other questions were to be raised with respect to use of the word "know" with respect either to the nature of the act or its wrongfulness. Should that term be understood to mean simply sensory awareness or did it imply some deeper emotional appreciation of the gravity of the act?

During the next century the *M'Naghten* rule was solidly established, either by common law or by statute, as the appropriate test of insanity. Argument over meaning, however, was often reflected in varying interpretations of the rule; thus the same words meant different things at different times, even in the same court.[19] The exception was found in the argument that the inability to control conduct because of mental disease or defect should also be considered. A favorable response in several American jurisdictions, resulted in the somewhat inappropriately named "irresistible impulse" test.[20] This was not a replacement for, but rather an addition to the *M'Naghten* test, and in fact took many forms. By the mid-20th century *M'Naghten* was the near universal rule, with a strong minority of states adding an appended control test. Only in New Hampshire did a different rule apply. The supreme court of that state in 1871 adopted a broad test, holding that the issue was whether the defendant's act "was the offspring or product of mental disease."[21] This test did not find favor in another judicial opinion until 1954, when the U.S. Court of Appeals for the District of Columbia adopted that test in *Durham v. United States*.[22] The legislatures of the Virgin Islands[23] and Maine[24] followed suit in 1957 and 1965 respectively. The "product" test was not destined to be the answer to the search for a rational approach, however, for it was soon evident that its terms were so broad as to lead to even wider variation in interpretation. At one extreme it was suggested that any mental disorder would automatically excuse any crime. It survives today only in the Virgin Islands.[25]

... the law sought to define a rule of social conduct, not a medical condition.

The ALI test and an uneasy public

In 1962, following several years of study and numerous drafts, the American Law Institute published its Model Penal Code. Included therein was a new statement of the insanity defense:

> Section 4.01(1). 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.
>
> (2) 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.[26]

The new test was designed to meet the old objections to *M'Naghten* by combining cognitive (appreciate) and volitional (conform) prongs, and by substituting "substantial capacity to ... appreciate" for "know." The change in language relating to cognition was intended to bring into play an understanding of the moral or legal import of the behavior beyond a mere intellectual awareness. Both the American Bar Association and the American Psychiatric Association endorsed the test, and gradually, throughout the next 20 years, all the federal circuits and a number of states adopted

18. *Regina v. Oxford*, 175 Eng. Rep. 941, 950 (1840)

19. Goldstein, Abraham, *The Insanity Defense*, Yale, New Haven and London (1967). For an extensive discussion of the effect of differing interpretations see chapter four.

20. The early leading case in the United States was *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887): "(1) [i]f by reason of the duress of such mental disease, he had so far lost the power to choose between the right and 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."

21. *State v. Jones*, 50 N.H. 369 (1871)

22. 214 F.2d 862 (D.C.Cir. 1954)

23. VI Code Ann. Tit. 14, sec. 14 (1957)

24. Me. Rev. Stat. Ann. 15 sec. 102 (1965)

25. The New Hampshire "product" test is codified at N.H. Rev. St. Ann. 628:2, which provides that a defendant is not responsible if insane at the time of the act. The New Hampshire Supreme Court has held, however, that "the test for criminal insanity is whether insanity negated criminal intent." *State v. Shackford*, 127 N.H. 695, 506 A.2d 315 (1986).

26. American Law Institute, *Model Penal Code*, sec. 4.01, ALI, Philadelphia (1962)

it, either by common law or legislation. A test combining cognition and volition in some form was the majority rule in the states by 1980.

It was clear to all, one juror testified, that Hinckley was "guilty of the act" ...

If the scholars were now satisfied, the public remained suspicious. Concern focused primarily on the disposition of the successful insanity defendant, and the possibility that such a one might rather quickly be released from a hospital after a successful NGRI defense did not sit well. The Michigan Legislature responded to such concerns in 1976 by providing for an additional verdict choice for juries in insanity cases: guilty, but mentally ill.[27] The return of this verdict meant that the defendant would be sentenced just as in the case of a simple guilty verdict but would then be sent to a psychiatric unit in the corrections system for treatment. If released from treatment, the individual would still be required to serve the remainder of the sentence.[28] While a verdict of not guilty by reason of insanity remained an option under the Michigan law, it was no secret that the idea was that the new verdict would become the verdict of choice in cases in which the insanity defense was offered.[29] It fit the public perception that the insanity defense was really a "desperate last hope" for a defendant who clearly "did it."

In Montana a different approach to the problem was developed. While it had long since been settled that questions regarding the mental condition of a criminal defendant could not constitutionally be eliminated from the determination of guilt because of the link to *mens rea*,[30] it was also clear that there was no constitutional requirement for a separate defense of insanity.[31] By eliminating the terms and tests of the insanity defense, the 1979 Montana legislation sought to refocus attention during the determination of guilt on the question of criminal intent.[32] The plausible explanation was that one who acted without criminal intent was, like a child, not guilty of crime. But one who had criminal intent was as guilty as any other, no matter that they might be suffering from some form of mental disorder at the time.

Hinckley and history revisited

If public concerns over the insanity defense had been simmering, the issue came to full boil in 1981 when John Hinckley made it his defense following his attempt to assassinate President Reagan, and it spilled over in outrage when he actually was acquitted on that ground in 1982. In a re-enactment of the drama following the trial of M'Naghten there were public, editorial and political cries for reform or abolition. It was unthinkable that one who clearly knew what he was doing, who planned his act with care, could "get off." Within a week's time a U.S. Senate committee was holding hearings on the insanity defense. Members of the Hinckley jury were invited to testify; the testimony indicated that the focus of jury deliberations had been on the presence of mental illness. It was clear to all, one juror testified, that Hinckley was "guilty of the act," but that the jury had no choice but to return the verdict they did because he was mentally ill.[33] The jurors themselves were not happy with the verdict.

Hinckley's trial was conducted in the District of Columbia, and the applicable test for the insanity defense was the ALI formulation. As in the majority of American jurisdictions, the burden of proof on the issue rested with the prosecution; that is, once evidence of insanity was introduced by the defense it was the prosecution's burden to prove sanity beyond a reasonable doubt. In the search for some rational explanation of the jury's action, the control prong of the ALI test and the placement of the burden of proof became the culprits.

With the enactment of the Insanity Defense Reform Act of 1984,[34] Congress for the first time established a statutory defense of insanity for federal criminal trials. The new federal standard was in fact the old standard, for it was simply a return to *M'Naghten*, albeit retaining the term "appreciate" from the ALI formulation rather than *M'Naghten*'s "know." Reference to inability to control conduct (the volition prong) was gone. In these changes, support was drawn from position papers submitted during congressional hearings by both the American Bar Association[35] and the American Psychiatric Association.[36] While both organizations previously had been leaders in supporting the ALI test, the ABA now concluded that there was "insufficient evidence" to support the idea of volitional incapacity, while the APA suggested that, even if there was, such persons would ordinarily meet the test of impaired cognition, thus rendering a volitional prong superfluous.

Congress went beyond the recommendations of the ABA and APA, however, in defining the insanity defense as an affirmative defense and shifting the burden of proof of insanity to the defendant, by clear and convincing evidence. The Supreme Court of the United States had decided some 30 years earlier that such an approach was constitutionally permissible as long as the state still bore the burden of proof on *mens rea*.[37] The ABA position paper took the rather interesting position that the burden of proof should remain with the prosecution in the case of a *M'Naghten*-type defense but should be with the defense if the ALI standard applied. The APA took no position on the issue at all.

27. M.S.A. sec. 28.1059(1)
28. M.S.A. sec. 28.1059(3)
29. *See* Comment: "The Constitutionality of Michigan's Guilty But Mentally Ill Verdict," 12 U. Mich. J. Law Ref. 188, 198; Sherman, S., "Guilty But Mentally Ill: A Retreat from the Insanity Defense," 7 Am. J. of L & Med 237, 256; Keilitz and Fulton, *The Insanity Defense and Its Alternatives: A Guideline for Policy Makers*, Institute on Mental Disability and the Law, National Center for State Courts, Williamsburg, 1984, p. 42.
30. *See infra*, n. 38
31. *See infra*, n. 39
32. *Supra*, n. 2
33. *New York Times*, June 25, 1982, p. A10
34. 18 U.S.C. sec. 20(a) (1984)
35. *The Insanity Defense: American Bar Association Proposal for Change*, ABA (February 1983)
36. "American Psychiatric Association Statement on the Insanity Defense," 140 Am. J. Psychiatry 681 (1983)
37. *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *see also Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 6914 (1983)

Response in the states

The Michigan experiment with the Guilty But Mentally Ill verdict proved immediately attractive, and 12 additional states had adopted this approach by 1982. Idaho followed Montana's lead and abolished the separate defense, leaving the issue one of *mens rea*. After the *Hinckley* verdict several states moved to narrow the insanity defense in various ways. Some followed the lead of Congress and struck the control test, in effect returning to *M'Naghten*. Several moved the burden of proof to the defense, with two-thirds of the states now taking that position. Utah became the third state to abolish the separate defense and return to a *mens rea* approach, and Kansas has now become the fourth.

... the insanity defense is offered in only about 2 percent of all criminal trials ...

Though commonly identified with the "product" test, it appears that New Hampshire, through recent judicial interpretation of its 1871 statute, may be more properly placed in the *mens rea* group as well. The New Hampshire statute provides a defense if the defendant was insane at the time of the act. The New Hampshire court has held that the test is whether insanity negated criminal intent.[38] If, in the New Hampshire usage, insanity means mental disease or defect (the assumption implicit in identifying New Hampshire's statute as providing a "product" test) then the test is actually the same as the *mens rea* approach. Alaska has adopted what might be called a "half-*M'Naghten*" standard: A defense of insanity is available if the defendant, because of mental disease or defect was at the time of the act unable to appreciate the nature and quality of the act.[39] Neither inability to appreciate wrongfulness nor to control conduct is part of the Alaska defense. Thus the question is only whether the defendant knew what he or she was doing, and this too sounds very much akin to *mens rea*.

Constitutionality of the *mens rea* approach

The first argument raised in response to a proposal to abolish the separate defense of insanity is that it cannot constitutionally be done. That is simply not so. It is true that early in this century three states — Louisiana, Mississippi and Washington — attempted to statutorily prohibit the use of evidence of mental disorder as a defense in a criminal trial and that the supreme court of each state held the statute unconstitutional.[40] But the rationale of those judicial decisions was that the effect of the statutes was to deny to the defendant the use of evidence relevant to the question of *mens rea*, which, as an element of any crime, the prosecution was required to prove beyond a reasonable doubt. Thus the defendant could not be denied access to evidence relevant to the issue. It was precisely the distinction between the *mens rea* issue and a separate defense of insanity that led the U.S. Supreme Court to hold, in *Leland v. Oregon*,[41] that due process was not offended by an Oregon statute placing on the defendant the burden of proof of insanity beyond a reasonable doubt. Since *mens rea* was still required to be proven by the state beyond a reasonable doubt as an element of the crime, the court reasoned, the state was not prohibited from making insanity an affirmative defense. While the Supreme Court has not directly addressed the issue, three current justices of the Court have expressed *in dicta* the view that a separate defense of insanity is not constitutionally required.[42]

The highest courts of Idaho, Montana and Utah have, however, had occasion to consider the *mens rea* statutes of their respective states, and each has concluded that they pass constitutional muster.[43] While it is always dangerous to draw conclusions from a denial of *certiorari*, it is at least worthy of note that the U.S. Supreme Court did recently do so on that issue in a case arising under the Montana statute.[44]

Why return to *mens rea*?

Certainly the questions may be asked: Why was a change in Kansas law necessary? Is the *mens rea* approach better than other alternatives? And isn't it really a tempest in a teapot, since cases involving the insanity defense are rare, and acquittals by reason of insanity much rarer still?

The last and first questions may be answered together. It is certainly true that the insanity defense is offered in only about 2 percent of all criminal trials and is successful in only about 10 percent of those. So it is indeed rare, sufficiently so that one writer on the subject has called the insanity defense a "no consequence issue" for that reason. But if frequency of occurrence determines importance, then the nuclear accidents at Three Mile Island and Cherynobl likewise raise issues of no consequence, and we know that is not so. Public attitudes toward systems for harnessing nuclear energy are far more affected by the rare cases of breakdown than by the day-to-day quiet and efficient operation of the vast majority of nuclear plants. Likewise public impressions of the criminal justice system are formed largely by sensational cases, and cases involving the insanity defense most frequently fall in that category.

Responding to public concerns generated by a few highly visible cases involving the insanity defense, the Kansas Legislature in each of several years prior to 1995 considered various bills aimed at tilting the process more toward public safety. Proposals included adopting the "Guilty But Mentally

38. *State v. Shackford*, *supra*, n. 25
39. A.S. 12.47.010
40. *State v. Lange*, 123 So. 639 (La. 1921); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Strasburg*, 110 P. 1020 (Wash. 1910)
41. *Supra*, n. 37
42. Kennedy, J., dissenting in *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) at 112 S.Ct. 1794; O'Connor, J., concurring in *Foucha* at 112 S.Ct. 1790; Rehnquist, C.J., dissenting in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) at 105 S.Ct. 1100.
43. *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Herrera*, 895 P.2d 359 (Utah 1995).
44. *Montana v. Cowen*, 861 P.2d 884 (Mt. 1993), *cert denied* __U.S.__, 114 S.Ct. 1371, 128 L.Ed. 48 (1994).

Ill" verdict alternative, shifting the burden of proof on the issue of insanity to the defense and providing that an NGRI acquitee, once hospitalized following the verdict, could not be released except upon a judicial finding that the individual "would never again be dangerous." Though each of these proposals was rejected, in some cases more than once, it was clear that the Legislature was seeking to be responsive in a responsible way to the public anxiety. In 1994 the *mens rea* approach was introduced for the first time. The issue was carried over for interim study, and the new law was passed by strong majorities in 1995, to be effective Jan. 1, 1996. In taking this direction, public concerns have been addressed while maintaining the fundamental requirement that a crime involve a coupling of act and criminal intent.

The *mens rea* approach returns consideration of the matter of a defendant's possible mental disorder to the place assigned that issue throughout the development of the law prior to *M'Naghten*. Recall that the judges of Queen's Bench, in responding to the questions put by the House of Lords following *M'Naghten*, appeared to intend neither a change in the law (certainly they discussed no such purpose) nor even a rule of law to cover all cases of mental disorder. But the words they chose were controversial, and the purpose became lost in the controversy.

By focusing on *mens rea* jury confusion should be eliminated or at least reduced substantially. Jurors will be given the instruction defining the crime and its mental state component, as they always are and must be, and they will be told that any evidence they may hear relating to the mental condition of the defendant is to be considered on that issue alone. They will be asked to so state if they find that the defendant is not guilty solely because of mental disease or defect which rendered the defendant incapable of criminal intent. They will no longer be treated to one definition of the mental state required for the crime, another with respect to insanity, and perhaps a third with respect to diminished capacity and its limited application to issues of special intent. Like insanity, diminished capacity disappears as a separate defense. *Mens rea* simply carries diminished capacity to the logical extreme. With the separate definition of insanity gone, there is no barrier to accepting the idea that if one's capacity can be so diminished by mental disorder as to destroy the capacity to form a special intent, then it may in some circumstances be so diminished as to destroy capacity to form any criminal intent at all. That has always been an illogical limitation, thought necessary only to avoid overlap of insanity and diminished capacity.

Since there is no separate defense of insanity, there is no longer an issue about which side should bear the burden of proof on that issue. While, as noted above, three-fourths of the states and federal law now place that burden on the defense, with the approval of the U.S. Supreme Court, there has always been a "red herring" aspect to that matter. If, in the solution approved in *Leland*, the burden is on the prosecution to prove criminal intent beyond a reasonable doubt, but on the defense to prove insanity, how does the juror vote who has doubts about defendant's intent because of evidence of mental disorder, but is not persuaded that the defendant is insane? Logically the only correct vote is a simple "not guilty," which will not trigger the post NGRI hospitalization procedures. This clearly is not what those who have argued for burden on the defense have had in mind. Of course juries do what juries do and perhaps most juries would work their way to a more satisfactory resolution of the scenario suggested in spite of the law. But it would seem the law ought at least attempt to be logical!

By focusing on* mens rea *jury confusion should be eliminated or at least reduced ...

Finally, the *mens rea* approach is better than adopting the verdict choice of Guilty But Mentally Ill because it deals directly with the issue, and because GBMI in fact did not deliver what was expected. GBMI is, by its terms, a detour around the insanity defense rather than a replacement, although, as noted above, the hope by its sponsors was that it would in fact become just that. It did not. In a study conducted five years after adoption of GBMI in Michigan it was discovered that NGRI verdicts were being returned with the same frequency as in the five years before GBMI was adopted, but that an almost equal number of defendants were now found guilty but mentally ill under the new verdict.[45] The result was an almost intolerable burden on Michigan's capacity to provide psychiatric treatment to patients entering treatment facilities through the criminal justice system. Taking the argument for GBMI at face value (even if deceptive of the real purpose) — that a GBMI verdict would ensure that mentally disordered offenders would receive needed treatment — it was never needed in Kansas. Kansas law already provides the authority for the court to order a convicted defendant to a treatment institution for evaluation and treatment if the information available to the court warrants such an action.[46]

Procedure under the new law

Kansas practitioners will observe little procedural change under the new law. Notice of intent to rely on the defense is required not more than 30 days following entry of a not guilty plea, just as before.[47] Evidence of the defendant's mental state at the time of the alleged crime, through expert or lay testimony, is admissible as before except that the focus will be directly on the issue of the required criminal intent for the specific crime. In a jury trial the court does not give an instruction on insanity but does advise the jury that evidence of the defendant's mental condition is to be considered in determining whether the defendant had the state of mind required for the crime.[48] If the defendant is found not guilty solely because of lack of criminal intent as a result of mental disease or defect, a special verdict so stating is returned.[49] This special verdict triggers automatic hospitalization for evaluation and treatment just as before under an

45. Simon, R. and Aaronson, D., *The Insanity Defense*, New York, Praeger (1988) p. 192.
46. K.S.A. 22-3429 *et seq.*
47. K.S.A. 22-3219
48. PIK Criminal 3d 54.10
49. PIK Criminal 68.06

NGRI verdict.[50] The *M'Naghten* rule and the practice thereunder continues to apply in the case of trial of crimes alleged to have been committed prior to Jan. 1, 1996.

Expectations

What should be the expected results from this change in the law? Certainly it is too soon to identify the effect in Kansas. In Idaho there has been no study of results.[51] A study done in Utah two years after adoption of the *mens rea* approach demonstrated only that lawyers and evaluators were either unaware of the change or were ignoring it.[52] A more extensive study was done after five-years experience under the Montana law. That study produced four particularly significant items of information in comparing five years before and five years after *mens rea*: 1) the number of cases in which a defense based on mental disease or defect was utilized increased slightly; 2) the percentage of convictions in such cases increased markedly (from 39 percent to 55 percent); 3) the number of acquittals based on mental incapacity dropped from 32 percent to 3 percent; and, 4) the number of cases in which charges were dismissed increased from 20 percent to 33 percent. What was actually happening, the authors of the study found, was that many of those persons who might have been found not guilty by reason of insanity prior to the change were now being committed to state hospitals before trial as incompetent to stand trial and thus showing up as dismissals even though they continued to be institutionalized.[53]

The dispositional result in Montana matches that found in the minimal Utah study mentioned earlier. There seven cases of NGRI plea were found in the two years following adoption of *mens rea*; none appeared to meet the *mens rea* standard. In each case, however, the NGRI plea was entered and accepted. The defendant was thus institutionalized by agreement without trial. There were no trials in which a defense based on mental disease or defect was identified. The data from both states would seem to suggest, then, that individuals for which disposition without conviction seemed appropriate were being identified and dealt with in a manner that avoided trial. How many of those would have succeeded in a defense under the *mens rea* standard cannot be determined, but those who did try such a defense (Montana) were mostly unsuccessful.

There remains, of course, the conventional wisdom that how jurors deal with the insanity issue has more to do with the nature of the crime and the defendant than with which test of insanity is used. The clearly deranged random killer has never been a good candidate for a successful defense based upon the presence of mental disorder. There is little reason to think that will change. But at least jurors should have a clearer picture of what it is they are asked to do.

50. K.S.A. 22-3428 *et seq.*

51. In a letter of March 11, 1997 the Solicitor General of the Criminal Division, Idaho Attorney General, indicated an impression that the change has "streamlined the process to a considerable degree" and that "appropriate resolutions have generally resulted."

52. Heinbecker, P., "Two Year's Experience Under Utah's Mens Rea Insanity Law," 14 Bull. Am. Acad. of Psych. and Law 185 (1986)

53. Steadman, *et al*, "Maintenance of an Insanity Defense Under Montana's 'Abolition' of the Insanity Defense," Am J. Psychiatry 146:3, March 1989, p. 357.

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Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the *M'Naughten* Approach With the *Mens Rea* Approach, Effectively Eliminating the Insanity Defense [*State v. Bethel*, 66 P.3d 840 (Kan. 2003)]

Jenny Williams*

An act done by me without my will, or in the absence of my will, is not my act.[1]

I. INTRODUCTION

The basis of our criminal law has historically been "punishing the vicious will."[2] It assumed that a person was confronted with a choice to do right or to do wrong and freely chose the latter.[3] For that reason, society's conscience did not inflict punishment unless it could impose blame.[4] Otherwise stated, society recognized that in order "to constitute any crime there must first be a 'vicious will.'"[5]

The passage of section 22-3220 of the Kansas Statutes Annotated in 1995 ended an era of more than 140 years in which mentally ill criminal defendants in Kansas could assert the affirmative defense of insanity.[6] The statute replaced the affirmative insanity defense, which was based on the *M'Naughten* approach, with the *mens rea* (or intent) approach.[7] In 2003, Michael Bethel challenged the validity of the statute in *State v. Bethel*.[8] In *Bethel*, the Kansas Supreme Court examined the interplay between criminal law and mental capacity.[9] In doing so, it held that the statute did not violate due process of law by abolishing the insanity defense, or *M'Naughten* approach, because the defense was not a fundamental principle of our criminal justice sys-

* B.S. 2002, Missouri Western State College; J.D. Candidate 2006, Washburn University School of Law. I would like to thank Professor John Francis and the *Washburn Law Journal* Board of Editors, especially Ed Robinson. I dedicate this work to my sons, Derrell and Darius McLemore.

1. State v. Strasburg, 110 P. 1020, 1024 (Wash. 1910). The Washington court slightly modified the maxim "[a]n act done by me against my will is not my act" in order to demonstrate that the same principle applied in this situation. *Id.*

2. State v. Herrera, 895 P.2d 359, 376 (Utah 1995) (Stewart, J., dissenting) (citing Morissette v. United States, 342 U.S. 246, 250 n.4 (1952)).

3. *Id.* (Stewart, J., dissenting) (citing *Morissette*, 342 U.S. at 250).

4. Halloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945).

5. *Herrera*, 895 P.2d at 376 (Stewart, J., dissenting) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 21 (1898)).

6. Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 253 (1999).

7. *See id.* at 254.

8. 66 P.3d 840, 841 (Kan. 2003).

9. *See id.* at 844-51.

tem.[10] The Kansas Supreme Court's decision that the insanity defense was not a fundamental principle placed Kansas among only three other states that have upheld a statute abolishing the insanity defense.[11]

The court erroneously ruled that the insanity defense was not a fundamental principle.[12] In doing so, it relied on flawed precedent that it did not thoroughly analyze.[13] The court should have held that section 22-3220 was unconstitutional and unenforceable and that the insanity defense was a fundamental principle of law. Furthermore, the court should have found that the *mens rea* (or intent) approach does not adequately protect defendants who intended to commit the crime but could not, due to mental disease or defect, appreciate the wrongfulness and/or consequences of their actions.[14] Due to the court's ruling in *Bethel*, mentally ill criminal defendants will suffer unjust punishment from a criminal justice system, which claims that no state shall "deprive any person of life, liberty, or property, without due process of law."[15]

II. Case Description

On February 7, 2000, a 911 call was made from a home in Girard, Kansas.[16] Law enforcement officers responded, entered the residence, and discovered three victims.[17] Sherrill Davis, Waneta Boatright, and John A. Bethel had all died from gunshot wounds.[18] Officers found Michael Bethel in the kitchen.[19] They placed him under arrest after they saw him reach for a gun lying on the kitchen table.[20]

At the Crawford County Sheriff's Office, he was interviewed by Bruce Adams of the Kansas Bureau of Investigation (KBI) and Stu Hite of the Crawford County Sheriff's Department.[21] The officers *Mirandized* Bethel, and he agreed to answer questions.[22] After a restroom break, the officers *Mirandized* Bethel a second time and inter-

10. *Id.* at 851.
11. Rosen, *supra* note 6, at 254.
12. *See Bethel*, 66 P.3d at 851; Finger v. State, 27 P.3d 66, 84 (Nev. 2001) (concluding that "legal insanity is a well-established and fundamental principle of the law").
13. *See* State v. Searcy, 798 P.2d 914, 926-27 (Idaho 1990) (McDevitt, J., dissenting); State v. Herrera, 895 P.2d 359, 379 (Utah 1995) (Stewart, J., dissenting).
14. *See* Rosen, *supra* note 6, at 262.
15. U.S. Const. amend. XIV, § 1.
16. *Bethel*, 66 P.3d at 842.
17. *Id.*
18. *Id.*
19. *Id.* Officers also found one other person in the residence, Bethel's grandmother, who was restricted to her bed. *Id.*
20. Brief of Appellant at 9, *Bethel* (No. 01-87989-S).
21. *Bethel*, 66 P.3d at 842.
22. *Id.* Bethel also signed a written waiver. *Id.* at 843. The interview lasted about one hour. *Id.*

viewed him again, this time videotaping the interview.[23] The officers asserted that the two interviews were virtually identical.[24]

Bethel's confessions communicated that he shot Ms. Davis in the head; that he shot his father, John Bethel, more than once; and that he shot a nurse, Ms. Boatright, when he discovered she was in the house.[25] Bethel stated that God told him to kill the three victims.[26] He believed he had been instructed by God through television messages to kill the three victims because they were bad people and would be reincarnated as good people.[27] He claimed that he had considered killing John Bethel on several occasions and that Ms. Davis and John Bethel were bad people and caused him to have a rough life.[28] Bethel agreed that he had premeditated the killings and had intended the deaths of the three victims.[29] Additionally, Bethel's brother told Agent Adams that Bethel was on medication for paranoid schizophrenia and had been hospitalized shortly before the murders occurred.[30]

At Bethel's bench trial, the prosecution presented the testimony of Dr. Roy Lacoursiere, who did not interview Bethel but based his opinions on the videotaped interrogation and other reports.[31] The doctor noted that Bethel's medical records did not present a definitive paranoid schizophrenia diagnosis.[32] Bethel had, however, been diagnosed with drug-induced psychosis and major depressive disorder.[33]

The Crawford County District Court found Bethel guilty on two counts of premeditated first degree murder and one count of capital murder.[34] The court sentenced Bethel to one hundred years of impris-

23. *Id.* at 842-43. The second interrogation lasted about forty-five minutes. *Id.* at 843. Dr. John Wisner evaluated Bethel and determined that Bethel was suffering from active psychosis during the interviews. *Id.* The doctor reported that Bethel believed he and the officers were going to transform into "another level of existence." *Id.* Dr. Wisner further reported that Bethel's confession was given involuntarily because Bethel could not understand the effect of his confession. *Id.* After reviewing the videotape, however, the trial court concluded that Bethel responded appropriately to the questions posed to him; he was calm, rational, and alert; and "'did not appear to be responding to unseen stimuli.'" *Id.* (quoting trial court's opinion). During the interview Bethel stated that what was occurring was "'just bullshitting.'" *Id.* (quoting trial court's opinion).

24. *Id.* at 842.

25. *Id.*

26. *Id.*

27. Brief of Appellant at 8, *Bethel* (No. 01-87989-S).

28. *Bethel*, 66 P.3d at 842-43.

29. *Id.* at 843.

30. *Id.*

31. *Id.* at 843-44.

32. *Id.* at 844.

33. *Id.* Dr. Lacoursiere further stated that he did not believe Bethel was suffering from active psychosis at the time of the interrogations. *Id.* Moreover, Dr. Lacoursiere believed Bethel was not suffering from any delusions and was aware of the consequences of making a confession. *Id.*

34. *Id.* at 841.

onment, consisting of two consecutive fifty-year terms and one concurrent fifty-year term.[35]

Bethel appealed his convictions to the Kansas Supreme Court.[36] On appeal, Bethel raised seven issues.[37] Bethel contended that section 22-3220 violated due process of law because it abolished the insanity defense, which was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[38] On appeal, the defense offered the report of Dr. Mark Cunningham, who stated that Bethel could not understand the consequences or wrongfulness of his actions.[39] Based on the facts of the case and Dr. Cunningham's testimony, Bethel likely would have been able to plead insanity if the defense had not been abolished.[40] The Kansas Supreme Court affirmed Bethel's convictions, finding that the insanity defense was not a fundamental right, and thus section 22-3220 did not violate due process of law.[41] Bethel then petitioned for writ of certiorari to the United States Supreme Court, which was denied on November 10, 2003.[42]

III. Background

For nearly two thousand years, the legal community has understood that when actions are not the result of a blameworthy mind, the conduct should not be considered criminal.[43] As a result, a person has historically been blamed for his actions only if his mind could understand what the law prohibits.[44] The federal courts and the majority of

35. *Id.*

36. *Id.*

37. *Id.* The other six issues raised on appeal are not addressed in this comment. The Kansas Supreme Court addressed the following three issues: (1) whether the *mens rea* approach set out in section 22-3220 is unconstitutional because it transfers the burden of proof from the prosecution to the defense on the element of intent after the prosecution has offered evidence of all other elements of the crime; (2) whether section 22-3220 violates the Eighth Amendment to the United States Constitution and section 9 of the Kansas Constitution Bill of Rights because of the statute's focus on "intent"; and (3) whether the district court erred when it denied Bethel's Motion to Suppress his confession. *Id.* at 841-42. The court determined that because the State did not seek the death penalty, Bethel could not raise the remaining three issues: (1) whether the abolition of the insanity defense violates the Eighth Amendment to the United States Constitution by permitting the execution of defendants who are exempt under *Penry v. Lynaugh*, 492 U.S. 302 (1989) and other Supreme Court precedent; (2) whether the death penalty scheme in Kansas and section 22-3220 violates equal protection and due process because it punishes some insane defendants but exempts other similarly situated insane defendants; and (3) whether the death penalty in Kansas and section 22-3220 violate the Eighth Amendment. *Id.*

38. *Id.*

39. *Id.* at 843.

40. *See* Brief of Appellant at 8, *Bethel* (No. 01-87989-S). Before the abolition of the insanity defense, the Kansas Supreme Court held that "[a] defendant is not criminally responsible for his acts if, because of mental illness or defect, he lacked the capacity either (a) to understand the nature of his acts, or (b) to understand that what he was doing was prohibited by law." State v. Ji, 251 Kan. 3, 16 (1992).

41. *Bethel*, 66 P.3d at 851, 854.

42. Bethel v. Kansas, 124 S. Ct. 531, 532 (2003).

43. Raymond L. Spring, *Farewell to Insanity: A Return to* Mens Rea, 66 J. Kan. B. Ass'n 38, 38 (1997).

44. *Id.*

states have an insanity defense based on this principle, the *M'Naughten* model.[45] In contrast, only four states have legislatively abolished the *M'Naughten* approach and replaced it with the *mens rea* (or intent) approach.[46]

A. *Early History of the Insanity Defense*

Starting as early as the second century, *mens rea*, or blameworthiness, was an important principle for determining criminal culpability.[47] The perpetrator must have understood the requirements of the law to be criminally punished, so minors and imbeciles were not culpable.[48] Following the end of the Roman Empire in the fifth century, blameworthiness became obscured by the eye-for-an-eye notion: when one suffers harm caused by another, one may respond in a like manner, regardless of fault or blame.[49] Towards the end of the Saxon period in the eleventh century, the legal community re-embraced the principle that seriously mentally ill defendants must be treated differently.[50] By the early thirteenth century, the form of this principle evolved from clemency to consideration of what the law should do with the clearly deranged.[51]

By the fifteenth century, the common law included the jury as the trier of facts.[52] Judges searched for a way to explain the concept of *mens rea*, or wrongfulness, to the jury.[53] Under this principle, only those who were morally culpable would be found guilty.[54] "The ability to distinguish good and evil" became the popular theory.[55] Judges of this period reasoned that the ability to exercise free will was fundamental to the *mens rea* concept, and without the ability to distinguish between good and evil, one could not exercise free will.[56] By the nineteenth century, judges frequently instructed juries on the theme of "total deprivation of capacity to reason," although a standardized jury instruction did not exist for the insanity defense.[57] The *M'Naughten* case led to this standardization.[58]

45. *See* State v. Herrera, 895 P.2d 359, 365 (Utah 1995); Rosen, *supra* note 6, at 254; Spring, *supra* note 43, at 42.
46. *See* Rosen, *supra* note 6, at 254.
47. *See* Spring, *supra* note 43, at 39.
48. *See id.*
49. *See id.* This principle is similar to current-day tort law. *See id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.*
54. *See* State v. Herrera, 895 P.2d 359, 390 (Utah 1995) (Durham, J., dissenting).
55. Spring, *supra* note 43, at 39.
56. *Id.*
57. *Id.* at 39-40.
58. *Id.* at 40.

B. *The* M'Naughten *Approach*

In 1843, Daniel M'Naughten was tried for killing British Prime Minister Peel's secretary.[59] M'Naughten intended to assassinate the Prime Minister but mistakenly killed his secretary.[60] M'Naughten suffered from a paranoid delusion in which he believed he was going to be assassinated.[61] After several unsuccessful attempts to secure police protection, he believed the only way to stop the ongoing harassment was to kill the Prime Minister.[62] The jury found M'Naughten not guilty by reason of insanity.[63] Following the *M'Naughten* case, Parliament summoned the Queen's Bench judges to respond to questions concerning the application of the law in M'Naughten's trial.[64] The inquiry was directed at determining whether Parliament should define insanity.[65] The judges stated that to be found not guilty by reason of insanity,

> it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not 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.[66]

Additionally, "wrong" meant legally wrong, or prohibited by the law, rather than morally wrong.[67]

Based upon this definition of insanity, a defendant who committed a crime based on a false delusion would not be convicted if the act would have been justified if the delusion was true.[68] For example, the following defendants pleaded insanity under *M'Naughten* and were found not guilty. One defendant gouged out his daughter's eyes and repeatedly stabbed her with scissors, believing the devil was inside

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59. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1202-03 (2000).

60. Spring, *supra* note 43, at 40.

61. Slobogin, *supra* note 59, at 1203.

62. *Id.*

63. Spring, *supra* note 43, at 40. Lord Chief Justice Tindal gave the jury the following instruction:

> The point I shall have to submit to you is, whether on the whole of the evidence you have heard, you are satisfied that at the time the act was committed . . . the prisoner had that competent use of his understanding as that he knew what he was doing, by the very act itself, a wicked and a wrong thing? If the prisoner was not sensible at the time . . . that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act . . . . If on balancing the evidence in your minds, you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not . . . then you will probably not take upon yourselves to find the prisoner guilty. If this is your opinion, then you will acquit the prisoner.

Id. (quoting Queen v. M'Naughten, 8 Eng. Rep. 718, 719 (1843)).

64. *Id.*

65. *Id.*

66. *Id.* (quoting 67 HANSARD'S PARLIAMENTARY DEBATES 722 (1843)).

67. *Id.* (citing *M'Naughten*, 8 Eng. Rep. at 722).

68. State v. Lewis, 22 P. 241, 252 (Nev. 1889).

her.[69] Another defendant pulled all of her daughter's teeth out because she thought the devil was in her daughter's teeth.[70] A third defendant believed his baby was about to be attacked by non-existent assailants so he threw his baby out the first floor window in an attempt to protect him.[71]

On the other hand, if the act would not have been excused, even if the delusion was true, the defendant would be guilty.[72] Consider the following hypothetical: A suffered from a delusion that B was going to kill him, and therefore, A sought out and killed B before B could kill A. Under this hypothetical, A would not be legally insane because his delusion, even if true, would not have justified his actions. In other words, even though A believed he must kill B to protect his own life, A would not have been excused under self-defense because A was not under any immediate threat of harm from B. Indeed, A actually had to go find B in order to kill him. Therefore, he would not be acquitted under *M'Naughten*.[73] Thus, if the defendant would have been entitled to a legal defense if his delusion was true, then he was legally insane; but if he would not have had a legal defense, then he was not insane and would be guilty.[74]

By the middle of the twentieth century, the *M'Naughten* rule was firmly established and used in every state except New Hampshire.[75] The rule functioned as an affirmative defense, which exonerated the defendant even though the allegations charged were presumed true.[76] Thus, even though all the elements of the crime charged may be present, the defendant's act was excused or justified by the defense.[77] Kansas adopted the *M'Naughten* test in 1884.[78] Despite the sweeping acceptance of the *M'Naughten* rule, the legal community debated the rule's appropriate interpretation and application.[79]

C. *Treatment of the Insanity Defense from the 1960s to Present*

By the 1960s, some in the legal community objected that the *M'Naughten* rule did not protect a defendant who could not control

69. Rosen, *supra* note 6, at 261-62 (citing R.D. Mackay, *Fact and Fiction About the Insanity Defense*, 1990 CRIM. L. REV. 247, 250).
70. *Id.* at 262 (citing Mackay, *supra* note 69, at 250).
71. *Id.* (citing Mackay, *supra* note 69, at 250).
72. *Lewis*, 22 P. at 252.
73. *See* Slobogin, *supra* note 59, at 1203.
74. *Lewis*, 22 P. at 252.
75. Spring, *supra* note 43, at 41. In 1871, the New Hampshire Supreme Court adopted what is known as the "product" test, which focused on whether the defendant's act was the product of mental illness. State v. Jones, 50 N.H. 369, 398 (1871).
76. *See* Rosen, *supra* note 6, at 260.
77. *See id.*
78. *See* State v. Nixon, 4 P. 159 (Kan. 1884).
79. *See* Spring, *supra* note 43, at 41. Some states added a control component to the rule to shield from punishment defendants who could not control their actions due to mental disease or defect. *See id.*

his behavior, and only focused on a defendant's intellectual awareness that an act was wrong.[80] In 1962, the American Law Institute (ALI) responded to these objections by drafting the Model Penal Code (MPC).[81] The MPC changed the *M'Naughten* language from "know" to "substantial capacity to appreciate" to go beyond mere intellectual awareness and incorporate an understanding that the act was morally or legally wrong.[82] The MPC rule stated: "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."[83]

In addition, the MPC consisted of a volitional prong and a cognitive prong.[84] Under the volitional prong, a person who lacks substantial capacity to "conform his conduct to the requirements of law" is not responsible for his actions.[85] This means that the defendant's mental illness prevents him from controlling his conduct.[86] The cognitive prong protects the person who cannot appreciate the wrongfulness of his actions.[87] Under this prong, the defendant's mental illness prevents him from understanding that his conduct is unlawful.[88] The federal courts, as well as several states, adopted the MPC test.[89] By 1980, a majority of states had some rule containing a cognitive and volitional component.[90] Kansas, however, did not incorporate the volitional prong into its insanity defense.[91]

In 1981, societal concerns piqued when John Hinckley asserted the insanity defense for his attempted assassination of President Reagan.[92] Although Hinckley knew what he was doing when he committed the crime, he was unable to conform his actions to the requirements of the law.[93] The jury acquitted Hinckley in 1982.[94] One juror stated that the jury knew Hinckley was guilty of committing the crime but that it had to acquit him because he suffered from a mental illness.[95] The public was outraged and blamed the form of the

80. *See id.*
81. *Id.*
82. *Id.*
83. MODEL PENAL CODE § 4.01(1) (1962).
84. Spring, *supra* note 43, at 41.
85. MODEL PENAL CODE § 4.01(1).
86. Spring, *supra* note 43, at 41-42.
87. *See* MODEL PENAL CODE § 4.01(1).
88. Spring, *supra* note 43, at 41.
89. *Id.* at 41-42.
90. *Id.* at 42.
91. *See supra* text accompanying note 40.
92. Spring, *supra* note 43, at 42.
93. *See id.*
94. *Id.*
95. *Id.*

insanity defense used by the trial court.[96] The defense included a volitional prong and placed the burden on the prosecution to prove the defendant's sanity beyond a reasonable doubt.[97] Responding to wide public discontent, Congress enacted the Insanity Defense Reform Act of 1984 (IDRA).[98]

The IDRA codified the insanity defense in federal criminal cases.[99] It discarded the two-prong MPC approach and reestablished *M'Naughten*'s wrongfulness inquiry, but used the term "appreciate" rather than "know."[100] The federal standard did not include a volitional prong.[101] Also, the new statute required the defense to prove insanity by a clear and convincing standard.[102] The statute read as follows:

> (a) Affirmative defense. It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the act constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
> (b) Burden of proof. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.[103]

Interestingly, Congress' response to the attempted assassination of President Reagan mirrored the response by England's Queen's Bench to the attempted assassination of Prime Minister Peel a century earlier in *M'Naughten*.[104]

1. Kansas Adopts the *Mens Rea* Approach

Kansas evidenced its discontent with the results the insanity defense produced for defendants like Hinckley by redefining the defense.[105] One very influential person behind the enactment of section 22-3220 was Professor Raymond L. Spring, who had a background in mental health law.[106] Professor Spring believed that reform was needed and that the *mens rea* (or intent) approach was the answer.[107] In addition, he argued that a separate insanity defense was not needed because, if the prosecution did not prove the defendant had the requi-

96. *See id.*
97. *Id.*
98. 18 U.S.C. § 17 (2000); Spring, *supra* note 43, at 42.
99. *See* Spring, *supra* note 43, at 42.
100. 18 U.S.C. § 17(a); Spring, *supra* note 43, at 42.
101. 18 U.S.C. § 17; Spring, *supra* note 43, at 42.
102. 18 U.S.C. § 17(b); Spring, *supra* note 43, at 42.
103. 18 U.S.C. § 17.
104. *See* Spring, *supra* note 43, at 40, 42.
105. *See id.* at 44. The Kansas legislature changed the law in response to public concerns borne out of high-profile insanity defense cases. *Id.* It wanted to tilt the aim of the criminal justice system toward public safety. *Id.*
106. Rosen, *supra* note 6, at 257.
107. *See* Spring, *supra* note 43, at 44-45.

site intent, the defendant could not be found guilty.[108] Thus, he asserted that the law should focus on intent rather than on mental illness.[109]

Professor Spring also believed that the new *mens rea* approach would reduce or even eliminate jury confusion, because the jury would only consider whether the defendant intended to commit each element of the crime, and need not consider wrongfulness in spite of intent.[110] Therefore, the *mens rea* approach narrowed, but did not eliminate, questions regarding the defendant's mental capacity.[111]

At the Kansas legislature's House Judiciary Committee meeting, Professor Spring proposed that the insanity defense should be replaced by the *mens rea* approach.[112] He provided copies of the Montana, Idaho, and Utah statutes to the House Judiciary Committee.[113] Professor Spring posited that the insanity defense had begun in 1843 with the *M'Naughten* case.[114] The Kansas legislature considered Professor Spring's proposal, and in 1995 it statutorily abolished the insanity defense with section 22-3220.[115] It states, "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."[116]

The statute is based on the *mens rea* (or intent) approach, rather than *M'Naughten*'s wrongfulness inquiry.[117] *Mens rea* focuses on the defendant's intent when the crime was committed.[118] Under *mens rea*, evidence of the defendant's mental state can be introduced at trial; however, the evidence is admissible only to negate intent.[119] Evidence regarding other aspects of the defendant's mental state is inadmissible.[120] In addition, the jury is not given an insanity defense instruction, but rather is instructed to consider the defendant's mental state to determine whether he intended to commit the crime.[121]

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108. *See id.* at 45.
109. *See id.*
110. *See id.*
111. *See* State v. Bethel, 66 P.3d 840, 850 (Kan. 2003) (discussing Professor Spring's article about section 22-3220).
112. *See* Brief of Appellant at 24, *Bethel* (No. 01-87989-S).
113. *Id.* Copies of the statutes were provided as evidence that the *mens rea* approach was constitutional. *Id.*
114. *See id.*
115. *See* Rosen, *supra* note 6, at 254, 257. Section 22-3220 was enacted as a result of the passage of House Bill 2223 on May 13, 1995. State v. Jorrick, 4 P.3d 610, 617 (Kan. 2000). The bill's focus was on removing the insanity defense from Kansas criminal law. *Id.*
116. KAN. STAT. ANN. § 22-3220 (1995).
117. *See* Rosen, *supra* note 6, at 253-54. The statute became effective January 1, 1996. § 22-3220.
118. *See* Rosen, *supra* note 6, at 260.
119. *Id.*
120. *See id.*
121. *Id.*

Under *mens rea*, the defendant's sanity is not considered.[122] The defendant would be excused from his conduct only if he could establish that mental disease or defect prevented him from formulating the intent to commit the crime of which he is accused.[123] The classic illustration of a defendant who would be not guilty under the *mens rea* approach is a woman who strangles her victim believing that she was squeezing a lemon.[124] Since squeezing a lemon is not a crime, the woman would be not guilty because she did not intend to commit any crime.

Issues concerning section 22-3220 were brought before the Kansas Supreme Court in 2000 in *State v. Jorrick*[125] and in 2002 in *State v. Albright*.[126] In *Jorrick*, the court affirmed the trial court's refusal to instruct the jury on diminished capacity, which was no longer a defense under the new statute.[127] In *Albright*, the court declined to consider whether the statute violated due process of law because Albright had not raised the issue at his trial.[128]

2. United States Supreme Court's Consideration of the Insanity Defense

The United States Supreme Court stated in *Palko v. Connecticut*[129] that due process of law protects principles that are fundamental to the basic scheme of justice.[130] Thus, the abolition of a fundamental principle would violate the Due Process Clause. The clause ensures that state laws do not offend canons of decency, which represent society's notions of justice.[131] A fundamental principle is defined as a principle that is "rooted in the traditions and conscience of our people."[132] In order to determine if a principle is fundamental and, therefore, protected by due process, the Court has determined that historical practice is the primary guide.[133] A secondary guide to determining if a principle is fundamental is the unanimity of acceptance of the doctrine.[134] Although such legislative judgments are not the primary test of whether a principle is fundamental, the Court noted in *Penry v. Lynaugh*[135] that we can rely on such legislation as objective

122. *See id.* at 261.
123. *Id.*
124. *Id.* (citing MODEL PENAL CODE § 4.01 cmt. 156 (Tentative Draft No. 4, 1995)).
125. 4 P.3d 610 (Kan. 2000).
126. 46 P.3d 1167, 1176-77 (Kan. 2002); *Jorrick*, 4 P.3d at 617.
127. *See Jorrick*, 4 P.3d at 618.
128. *Albright*, 46 P.3d at 1177.
129. 302 U.S. 319 (1937).
130. *See id.* at 325.
131. Malinski v. New York, 324 U.S. 401, 416-17 (1945).
132. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
133. Montana v. Egelhoff, 518 U.S. 37, 43 (1996).
134. *See* Penry v. Lynaugh, 492 U.S. 302, 335 (1989).
135. 492 U.S. 302 (1989).

evidence of contemporary values, and a national consensus can lead to the conclusion that a principle is required or prohibited by the Constitution.[136] Likewise, in *Montana v. Egelhoff*[137] the Court stated that a fundamental principle would enjoy "uniform and continuing acceptance."[138] Once a principle has been deemed fundamental, a state cannot abolish it without satisfying the strict scrutiny test that must be applied when dealing with a fundamental principle of law.[139]

The United States Supreme Court has not decided whether the insanity defense is a fundamental principle under the United States Constitution.[140] The Court has, however, considered the insanity defense in other contexts.[141] One consistent view the Court has expressed is that it is leaving the particular formulation of the insanity defense up to the individual states.[142]

The Court first discussed the importance of the insanity defense in *Davis v. United States*,[143] when it ruled that a murder conviction required the accused have "such mental capacity as will render him criminally responsible."[144] Subsequently, in *Snyder v. Massachusetts*,[145] the Court stated that procedural issues can be freely regulated by the states, so long as they do not offend fundamental principles of justice.[146] Again, in *Leland v. Oregon*,[147] the Court upheld an Oregon statute that placed the burden of proof on the defendant to prove insanity beyond a reasonable doubt, reasoning that due process did not require any specific insanity defense.[148] Finally, in *Powell v. Texas*,[149] the United States Supreme Court held that it was up to the individual states to decide how best to present legal insanity.[150]

The Court also discussed the insanity defense in *Ake v. Oklahoma*[151] and *Foucha v. Louisiana*.[152] Justice William H. Rehnquist stated in his dissenting opinion in *Ake* that he believed due process did not require the availability of an insanity defense in criminal trials.[153] In *Foucha*, after the Court ruled that a state statute mandat-

136. *Id.* at 335.
137. 518 U.S. 37 (1996).
138. *Id.* at 48.
139. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).
140. State v. Korell, 690 P.2d 992, 999 (Mont. 1984).
141. *See e.g.*, Powell v. Texas, 392 U.S. 514 (1968); Leland v. Oregon, 343 U.S. 790 (1952).
142. Foucha v. Louisiana, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring); *Powell*, 392 U.S. at 535-36; *Leland*, 343 U.S. at 797-99.
143. 160 U.S. 469 (1895).
144. *See id.* at 485.
145. 291 U.S. 97 (1934).
146. *Id.* at 105.
147. 343 U.S. 790 (1952).
148. *See id.* at 797-99.
149. 392 U.S. 514 (1968).
150. *Id.* at 535-36.
151. 470 U.S. 68 (1985).
152. 504 U.S. 71 (1992).
153. *Ake*, 470 U.S. at 91 (Rehnquist, J., dissenting).

ing the defendant's continued confinement violated due process, Justice Sandra Day O'Connor noted in her concurring opinion that the Court was not indicating that the states must make available the insanity defense.[154]

In summary, the United States Supreme Court has stated that a fundamental principle of justice is a principle that is "rooted in the traditions and conscience of our people."[155] The Court has discussed the insanity defense in several cases but has never decided whether it is a fundamental principle.[156] One common theme that runs throughout the cases discussing the defense is that the individual states are free to decide how to define legal insanity in their jurisdictions as long as the formulation they chose does not offend a fundamental principle of justice.[157]

3. Other State Courts' Considerations of the Abolition of the Insanity Defense

Kansas is one of only four states that have legislation effectively abolishing the insanity defense.[158] The Montana, Idaho, and Utah courts all have held that the *mens rea* (or intent) approach was constitutional, and that the insanity defense was not a fundamental principle of the criminal justice system.[159] In contrast, the remaining forty-six states and the federal system have an insanity defense, with the supreme courts of Washington, Louisiana, Mississippi, and Nevada specifically ruling that due process requires an insanity defense.[160]

a. *State Courts that Have Abolished the Insanity Defense*

In *State v. Korell*,[161] the Montana Supreme Court upheld the constitutionality of a Montana statute abolishing the insanity defense.[162] Quoting language from *Powell*, the court noted that the United States Supreme Court had never held that the insanity defense was constitu-

154. *Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring).

155. *Snyder*, 297 U.S. 97, 105 (1934).

156. *See Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring); Powell v. Texas, 392 U.S. 514, 535-36 (1968); Leland v. Oregon, 343 U.S. 790, 797-99 (1952).

157. *See Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring); *Powell*, 392 U.S. at 535-36; *Leland*, 343 U.S. at 797-99.

158. Rosen, *supra* note 6, at 254.

159. *See* State v. Searcy, 798 P.2d 914, 919 (Idaho 1990); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984); State v. Herrera, 895 P.2d 359, 366 (Utah 1995).

160. State v. Lange, 123 So. 639, 641-42 (La. 1929); Sinclair v. State, 132 So. 581, 582 (Miss. 1931); Finger v. State, 27 P.3d 66, 84 (Nev. 2001); State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910).

161. 690 P.2d 992 (Mont. 1984).

162. *Id.* at 1002.

tionally protected.[163] The Montana court also cited *Leland v. Oregon* in support of its holding.[164]

The Montana Supreme Court considered the history of the defense and other state court decisions dealing with its abolition.[165] It found that the legal community did not widely accept the insanity defense until the nineteenth century.[166] Additionally, the court distinguished cases from Louisiana, Mississippi, and Washington, which held that statutes abolishing the defense were unconstitutional.[167] The court reasoned that its state statute was constitutional because it allowed evidence of the defendant's mental capacity as it related to criminal intent, as opposed to the other three states, which excluded *all* testimony on the mental condition of the defendant.[168]

Later, in *State v. Searcy*,[169] the Idaho Supreme Court echoed the Montana court.[170] In addition to the cases mentioned by the Montana court in *Korell*, the Idaho court quoted language from Justice Rehnquist's dissent in *Ake*.[171] Finally, in *State v. Herrera*,[172] the Utah Supreme Court embraced the reasoning behind the *Korell* and *Searcy* decisions and cited to the same cases.[173] The Utah court also quoted language from Justice O'Connor's concurrence in *Foucha*.[174]

b. *State Courts that Have Found the Abolition of the Insanity Defense Unconstitutional*

The Washington, Louisiana, and Mississippi supreme courts have held that abolishing the insanity defense violates the federal Due Process Clause.[175] In *State v. Strasburg*,[176] the Washington Supreme Court held that a Washington statute barring evidence that the defendant could not understand the nature, quality, and/or wrongfulness of his act was unconsitutional.[177] Similarly, in *State v. Lange*,[178] the Louisiana Supreme Court ruled that a Louisiana statute that banned con-

163. *Id.* at 999.
164. *Id.* at 1000 (citing Leland v. Oregon, 343 U.S. 790 (1952)).
165. *Id.* at 999.
166. *Id.*
167. *Id.*
168. *Id.* at 999-1000.
169. 798 P.2d 914 (Idaho 1990).
170. *See id.* at 918-19.
171. *Id.* at 918 (quoting Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting)).
172. 895 P.2d 359 (Utah 1995).
173. *See id.* at 363-66.
174. *Id.* at 365 (quoting Foucha v. Louisiana, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring)).
175. State v. Lange, 123 So. 639, 642 (La. 1929); Sinclair v. State, 132 So. 581, 582 (Miss. 1931); State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910); *see Herrera*, 895 P.2d at 383 (Stewart, J., dissenting).
176. 110 P. 1020 (Wash. 1910).
177. *Id.* at 1021, 1025.
178. 123 So. 639 (La. 1929).

sideration of a defendant's insanity was unconstitutional.[179] Finally, in *Sinclair v. State*,[180] the Mississippi Supreme Court struck down a Mississippi statute that abolished insanity as an affirmative defense in murder trials.[181]

Following *Strasburg*, *Lange*, and *Sinclair*, the Nevada Supreme Court held that the insanity defense is a fundamental principle.[182] In *Finger v. State*,[183] the Nevada court rejected the reasoning of the Montana, Idaho, and Utah courts.[184] In so doing, it held that the Due Process Clauses of the United States and Nevada Constitutions require an insanity defense and that it may not be abolished.[185] As a result, the Nevada statute, attempting to abolish the defense, was unconstitutional and unenforceable.[186] The court reasoned that wrongfulness was an intricate part of the *mens rea* concept, so that *mens rea* includes an element of knowledge that the conduct was wrong.[187] According to the Nevada court, *mens rea* meant that the defendant intended to commit an act that he knew was wrong.[188] The court found that defendants who could not understand the unlawfulness of their actions have been protected throughout history, and thus found that the insanity defense was a fundamental principle.[189]

In summary, a majority of states, as well as the federal courts, follow some variation of the *M'Naughten* model.[190] Although different approaches to the insanity defense are utilized, only four states have gone so far as to eliminate insanity as an affirmative defense.[191]

IV. Analysis

In *Bethel*, the Kansas Supreme Court analyzed whether section 22-3220 of the Kansas Statutes Annotated, which abolished the insanity defense, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[192]

179. *See id.* at 641-42.

180. 132 So. 581 (Miss. 1931).

181. *Id.* at 582.

182. Finger v. State, 27 P.3d 66, 84 (Nev. 2001).

183. 27 P.3d 66 (Nev. 2001).

184. *See id.* at 81-84.

185. *Id.* at 84.

186. *Id.*

187. *See id.*

188. *See id.* at 80. The Nevada court believed *mens rea* included an element of wrongfulness because the murder statute in Nevada required malice. *See id.* at 83-84; Nev. Rev. Stat. 200.010 (2003).

189. *See Finger*, 27 P.3d at 80.

190. State v. Herrera, 895 P.2d 359, 365 (Utah 1995). *See* 18 U.S.C. § 17 (2000).

191. *See* Rosen, *supra* note 6, at 254.

192. State v. Bethel, 66 P.3d 840, 844 (Kan. 2003).

A. *Parties' Arguments*

1. Michael A. Bethel

Bethel argued from a due process standpoint and also made a policy argument. First, Bethel argued that abolishing the insanity defense violated the Due Process Clause.[193] He claimed that the Fourteenth Amendment protected insanity, or the *M'Naughten* approach, as a defense because it was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[194] Bethel contended that section 22-3220 abolished the fundamental principle that to be guilty of a crime, the defendant must be able to appreciate the wrongfulness of his actions.[195] Bethel primarily relied on the Nevada Supreme Court decision in *Finger*.[196]

Bethel next argued that the insanity defense was a fundamental principle because our civilization has used it for centuries.[197] He asserted that *M'Naughten* reaffirmed the centuries-old rule on the insanity defense.[198] Bethel also argued that the history of the defense has common law roots dating back much further than the *M'Naughten* case in 1843.[199]

Next, he asserted that this deeply rooted principle remained in existence from 600 BC until 1983, when Utah became the first governing body to abolish it.[200] Bethel noted that in Kansas the *M'Naughten* approach existed for 144 years before it was abolished in 1995 by section 22-3220.[201] He further asserted that the defense was immediately adopted in Kansas when it became a state.[202] Bethel also argued that a vast majority of states still recognize "criminal non-responsibility" for legally insane defendants.[203]

In addition, Bethel supported his due process argument by referring to the United States Supreme Court and other state courts.[204] He asserted that, even though the Court has declined to mandate any particular test of insanity, the Court ruled in *Davis v. United States* that the United States Constitution required some formulation of a responsibility test in order to satisfy due process of law.[205] Furthermore,

193. *Id.* at 841.
194. *See* Brief of Appellant at 17-18, *Bethel* (No. 01-87989-S).
195. *Id.* at 18.
196. *Id.* at 20-21.
197. *See id.* at 21.
198. *Id.*
199. *See id.* at 21 n.12.
200. *See id.* at 23.
201. *Id.* at 23 n.14.
202. *Id.*
203. *Id.* at 23.
204. *Id.* at 22.
205. *Id.*

Bethel noted that three states, in addition to Nevada, have held that the insanity defense could not be abolished.[206]

Finally, Bethel cited statements made by the American Psychiatric Association (APA) and the American Bar Association (ABA).[207] The APA argued that the defense was constitutionally protected and could not be abolished without a constitutional amendment.[208] In addition, Bethel argued from a policy standpoint.[209] He asserted that the ABA openly condemned the *mens rea* approach, believing it would be an unfortunate result if mental non-responsibility was eliminated as an exculpatory doctrine.[210]

2. State of Kansas

The State argued that abolishing the insanity defense by enacting section 22-3220 did not violate due process of law.[211] It contended that the insanity defense was not a fundamental principle of our legal history.[212] The State asserted that length of time did not determine whether the defense was fundamental.[213] It contended that society has a long history of holding mentally ill persons accountable for their actions.[214] According to the State, the debate has always focused on the degree of mental illness or what type of mental disease is necessary to excuse a person from responsibility for his actions.[215]

The State primarily relied on decisions of the supreme courts of Montana, Idaho, and Utah to support its arguments.[216] These states passed statutes abolishing the insanity defense, and all three withstood constitutional challenges in their highest courts.[217] The State relied heavily on these three states to support its contention that the abolition of the insanity defense, or the *M'Naughten* approach, did not violate constitutional rights.[218]

The State also cited United States Supreme Court cases.[219] It quoted Justice Rehnquist's dissenting opinion from *Ake v. Oklahoma* that "it is highly doubtful" that criminal defendants have a due pro-

206. *Id.* (citing State v. Lange, 123 So. 639, 641 (La. 1929); Sinclair v. State, 132 So. 581, 582 (Miss. 1931); State v. Strasburg, 110 P. 1020, 1025 (Wash. 1910)).
207. *Id.* at 22-23, 24 n.15.
208. *Id.* at 24 n.15.
209. *Id.* at 22-23.
210. *Id.* at 22.
211. Brief of Appellee at 12, *Bethel* (No. 01-87989-S).
212. *See id.* at 21.
213. *See id.* at 12.
214. *Id.*
215. *Id.*
216. *Bethel*, 66 P.3d 846.
217. Brief of Appellee at 13, *Bethel* (No. 01-87989-S) (citing State v. Searcy, 798 P.2d 914 (Idaho 1990); State v. Korell, 690 P.2d 992 (Mont. 1984); State v. Herrera, 895 P.2d 359 (Utah 1995)).
218. *See id.* at 13-16.
219. *Id.* at 12-14.

cess right to plead insanity.[220] It also quoted Justice Hugo Black's statement in *Powell v. Texas* that imposing constitutional rigidity on an area of the law that is not more completely understood would be absurd.[221]

The State argued that the cases upholding statutes replacing the insanity defense, or the *M'Naughten* approach, with the *mens rea* (or intent) approach reasoned that the state legislatures had drawn a bright line between different mental illness types and severities.[222] It quoted language from *State v. Herrera*, which concluded that a defendant who knew he was killing another human being was more culpable than a person who did not realize his victim was a human.[223] The state also quoted language from *State v. Korell*, asserting that the Montana legislature had decided that all defendants who acted with the requisite intent were to be held accountable, regardless of their mental capacities or motivations.[224] The State argued that according to the Montana legislature, this policy was in accord with protecting society, even if it did not deter or prevent crime.[225]

The State contended that due process only required that the prosecution prove each element of the crime charged.[226] It rejected the Nevada court's decision in *Finger v. State*, which held that legal insanity was a fundamental principle and was therefore protected from abolishment by the Due Process Clause.[227] The State argued that the Nevada court read too much into due process requirements by holding that due process mandated that the *mens rea* concept incorporate the principle of wrongfulness.[228] Additionally, the State argued that the Nevada court erroneously concluded that *mens rea* included an element of knowledge that the act was wrong.[229] Thus, the State rejected the Nevada court's contention that the defendant must have intended the act and understood it was against the law in order to have criminal intent.[230]

Finally, the State argued that the Kansas Supreme Court has not indicated that section 22-3220 may be unconstitutional.[231] It asserted that in *State v. Albright*, the court declined to rule on the constitutionality of the statute despite its opportunity to do so.[232] Therefore, the

220. *Id.* at 14 (quoting Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting)).
221. *Id.* (quoting Powell v. Texas, 392 U.S. 514, 546 (1968) (Black, J., concurring)).
222. *See id.*
223. *Id.* (quoting State v. Herrera, 895 P.2d 359, 368-69 (Utah 1995)).
224. *Id.* at 15 (quoting State v. Korell, 690 P.2d 992, 1002 (Mont. 1984)).
225. *See id.* (quoting *Korell*, 690 P.2d at 1002).
226. *Id.* at 17.
227. *See id.*
228. *Id.*
229. *See id.*
230. *See id.*
231. *See id.* at 20-21.
232. *Id.* at 21.

State argued that the court did not believe the defendant in *Albright* was deprived of any due process rights by section 22-3220.[233]

B. *The Court's Opinion*

The Kansas Supreme Court, in an opinion by Justice Donald L. Allegrucci, held that the affirmative defense of insanity was not a fundamental principle of our criminal jurisprudence, and therefore section 22-3220 did not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[234] The court stated that the *mens rea*, or criminal intent, approach did not offend "the common law and our basic principles of ordered liberty . . . ."[235] In reaching its conclusion, the court found persuasive the decisions of the Montana, Idaho, and Utah supreme courts.[236]

The court first considered *State v. Jorrick* and *State v. Albright*, in which the defendants challenged section 22-3220.[237] It noted that in *Jorrick*, the court considered the statute with regards to diminished capacity and held that the statute had eliminated the diminished capacity defense.[238] In *Albright*, the court had declined to consider the constitutionality of the statute because the defendant had presented the issue for the first time on appeal.[239] The court stated that its consideration of the statute in these two cases did not foreclose the inquiry into the constitutionality of the statute in the present case, and went on to independently review its validity.[240]

Having considered all instances in which it had dealt with section 22-3220, the Kansas Supreme Court considered and followed the decisions from Montana, Idaho, and Utah.[241] The Kansas court considered the Montana Supreme Court's decision in *State v. Korell* and the authority the Montana court cited in holding that the insanity defense was not protected by due process of law.[242] It agreed with the Montana court, and likewise distinguished *State v. Strasburg*, *State v. Lange*, and *Sinclair v. State*.[243] In addition, it followed the Montana court's finding that the insanity defense had not been widely recognized until the nineteenth century.[244] The Kansas Supreme Court also considered the *State v. Searcy* and *State v. Herrera* decisions and the

233. *Id.*
234. *Bethel*, 66 P.3d at 851.
235. *Id.*
236. *Id.*
237. *Id.* at 844-45.
238. *Id.* at 844 (citing State v. Jorrick, 4 P.3d 610 (Kan. 2000)).
239. *Id.* at 845 (citing State v. Albright, 46 P.3d 1167, 1176-77 (Kan. 2002)).
240. *Id.* at 846.
241. *See id.* at 846-51.
242. *Id.* at 846-48 (citing State v. Korell, 690 P.2d 992 (Mont. 1984)).
243. *Id.* at 847, 851 (citing *Korell*, 690 P.2d at 999-1000).
244. *Id.* (citing *Korell*, 690 P.2d at 999).

authority cited by each of them.[245] The court noted that the Idaho and Utah supreme courts followed Montana, and it decided to follow Montana as well.[246]

The Kansas Supreme Court considered and distinguished *Finger v. State*, in which the Nevada Supreme Court held that wrongfulness is an integral part of the *mens rea* concept.[247] It found the Nevada court's reasoning unpersuasive because, unlike in Nevada, malice was no longer an element of murder in Kansas.[248] The court determined that a defendant must intend only to kill, rather than intend to unlawfully kill, in order to be guilty of murder in Kansas.[249] Thus, the Kansas Supreme Court found that a wrongfulness component was not necessary under the Kansas murder statute, and decided that *Finger* was distinguishable and inapplicable.[250]

Additionally, the court noted the Nevada court's finding that the concept of legal insanity has been recognized for centuries because, throughout history, defendants have been protected when they did not understand what the law prohibited.[251] In *Bethel*, however, the court based its decision on the existence of the insanity defense, or the *M'Naughten* approach, rather than the concept of insanity, and concluded that the insanity defense was developed in the nineteenth century.[252]

Finally, the court considered Professor Raymond L. Spring's article, *Farewell to Insanity: A Return to* Mens Rea.[253] The court noted Professor Spring's belief that jury confusion would be eliminated or substantially reduced because the jury no longer had to consider whether the defendant acted with wrongful intent, only whether intent was present.[254] The court agreed with Professor Spring that not only was jury confusion reduced by section 22-3220, but also that the insanity defense had not become an affirmative defense until the *M'Naughten* case in 1843.[255]

Adopting the reasoning from Montana, Idaho, and Utah, the Kansas Supreme Court ruled that the insanity defense was not a fun-

245. *Id.* at 847-48.

246. *Id.* at 847-48, 851 (citing State v. Searcy, 798 P.2d 914 (Idaho 1990); State v. Herrera, 895 P.2d 359 (Utah 1995)).

247. *Id.* at 848-50 (citing Finger v. State, 27 P.3d 66, 79 (Nev. 2001)).

248. *Id.* at 850; *see* KAN. STAT. ANN. § 21-3401 (1995). Malice is defined as, "[t]he intent, without justification or excuse, to commit a wrongful act." BLACK'S LAW DICTIONARY 968 (7th ed. 1999).

249. *Bethel*, 66 P.3d at 850; *see also* § 21-3401.

250. *Bethel*, 66 P.3d at 850; *see also* § 21-3401.

251. *Bethel*, 66 P.3d at 849 (citing *Finger*, 27 P.3d at 79-80).

252. *See id.* at 851.

253. *Id.* at 850-51 (citing Spring, *supra* note 43, at 66).

254. *Id.* (citing Spring, *supra* note 43, at 66).

255. *Id.*

damental principle.[256] It also stated that the Kansas legislature had redefined the defense rather than abolished it with the enactment of section 22-3220.[257] The court explained that, under the new statute, a defense existed if the defendant lacked criminal intent due to mental disorder.[258] Additionally, the court found that the Due Process Clause did not mandate any particular insanity test.[259] Therefore, the court held section 22-3220 did not violate due process of law.[260]

C. *Commentary*

In *Bethel*, the Kansas Supreme Court incorrectly upheld the constitutionality of section 22-3220 of the Kansas Statutes Annotated.[261] The court erroneously found that the insanity defense was not a fundamental principle protected by the Due Process Clause.[262] The concept of legal insanity has existed throughout history, and the insanity defense remains in effect in all jurisdictions except four; therefore, the insanity defense has earned a place in American jurisprudence as a fundamental principle.[263] Rather than following the states that have abolished the insanity defense, the court should have followed the states that recognize the insanity defense as a fundamental principle protected by due process of law.[264]

Moreover, the *mens rea* approach to insanity is not a suitable substitute for an affirmative insanity defense.[265] Although no one insanity defense is mandated by the Constitution, the form the state chooses cannot offend the fundamental principle of protecting the legally insane from criminal punishment.[266] The court should have found that the *mens rea* approach is too removed from the insanity defense, or the *M'Naughten* approach, to satisfy constitutional requirements.[267] It does not offer the legally insane a defense or provide the same safeguards, thereby offending a fundamental principle.[268]

256. *Id.* at 851.

257. *Id.*

258. *Id.*

259. *Id.* (citing Leland v. Oregon, 343 U.S. 790, 797-99 (1952)).

260. *Id.*

261. *See id.*

262. *See id.*

263. Finger v. State, 27 P.3d 66, 80 (Nev. 2001); Rosen, *supra* note 6, at 254.

264. *See* State v. Lange, 123 So. 639 (La. 1929); Sinclair v. State, 132 So. 581 (Miss. 1931); *Finger*, 27 P.3d 66; State v. Strasburg, 110 P. 1020 (Wash. 1910).

265. *See* Rosen, *supra* note 6, at 262.

266. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

267. *See* Rosen, *supra* note 6, at 262.

268. *See id.*

1. The Insanity Defense Is a Fundamental Principle of Law and Is Protected by the Due Process Clause

The Kansas Supreme Court incorrectly ruled that the insanity defense was not a fundamental principle of law, and thus was not protected by the Due Process Clause of the Fourteenth Amendment. The court failed to fully analyze the history of legal insanity and failed to consider unanimity when determining whether the principle was fundamental.[269]

According to the United States Supreme Court, due process requires protection of principles that are fundamental to the basic scheme of justice.[270] An enlightened system of ordered liberty would not be possible without due process of law.[271] The Due Process Clause ensures that state laws do not "offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[272] Fundamental principles are "rooted in the traditions and conscience of our people"[273] or "ingrained in our legal system."[274] In determining whether a principle is fundamental, courts consider both the history of the principle and how widely it has been accepted in the legal community.[275]

a. *The Insanity Defense Has Sufficient History to Be Considered a Fundamental Principle*

Historical practice is the primary guide to determine if a principle is fundamental under the Due Process Clause.[276] In *Montana v. Egelhoff*, the defendant was convicted of deliberate homicide and appealed his conviction, arguing that the Montana statute violated due process.[277] The statute in question forbade the jury from considering the defendant's voluntary intoxication when determining if he possessed criminal intent.[278] In considering the issue, the United States Supreme Court stated that historical practice was the primary guide for determining if a principle was fundamental under the Due Process Clause.[279] This guide led the Court to consider the historical evidence of whether the jury should be allowed to consider voluntary intoxica-

269. *See* Penry v. Lynaugh, 492 U.S. 302, 335 (1989); Finger v. State, 27 P.3d 66, 80 (Nev. 2001).
270. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).
271. *See id.*
272. Malinski v. New York, 324 U.S. 401, 416-17 (1945).
273. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
274. State v. Bethel, 66 P.3d 840, 851 (Kan. 2003).
275. *See* Montana v. Egelhoff, 518 U.S. 37, 43, 48 (1996); *Penry*, 492 U.S. at 335.
276. *Egelhoff*, 518 U.S. at 43.
277. *Id.* at 39-41.
278. *See id.*
279. *Id.* at 43.

tion when determining whether the defendant possessed criminal intent.[280]

The insanity defense has existed long enough to be considered a fundamental principle.[281] The concept of legal insanity dates back to the common law.[282] Although it is generally accepted that the affirmative defense of insanity was not widely recognized until the *M'Naughten* case in 1843, the principle of protecting legally insane defendants from criminal accountability dates back further.[283] For the due process protection to apply, a principle should not have to be a formal practice because the Due Process Clause protects fundamental "principles," not fundamental "practices."[284]

Starting as early as the second century, those who could not understand what the law prohibited were protected from criminal punishment.[285] By the thirteenth century, the law had developed from clemency to considerations of how the mentally ill should be treated.[286] During the fifteenth century, judges began instructing juries on the principle that an understanding of wrongfulness was necessary for criminal culpability.[287] Not until the nineteenth century, however, did courts standardize the insanity defense jury instruction.[288] Thus, for centuries, insanity has absolved the mentally ill from criminal culpability just as self-defense has absolved those defending their own lives.[289]

The Kansas Supreme Court failed to recognize how far back the concept of insanity dates.[290] The court considered only the recent history of the insanity defense and held that it was not a fundamental principle because it was a product of the nineteenth century.[291] The court should have considered the history of the *concept* of insanity.[292] The concept of legal insanity has been recognized as a canon of decency for centuries, not just since the nineteenth century.[293]

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280. *See id.* at 45-49.

281. Finger v. State, 27 P.3d 66, 80 (Nev. 2001).

282. *Id.*

283. State v. Bethel, 66 P.3d 840, 851 (Kan. 2003) (citing Cynthia G. Hawkins-León, *"Literature as Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 389-427 (1999)); *see also Finger*, 27 P.3d at 80.

284. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (stating general concept of fundamental principles).

285. *See* Spring, *supra* note 43, at 39.

286. *Id.*

287. *See id.*

288. *Id.* at 40 (explaining that the *M'Naughten* decision caused courts to standardize jury instructions).

289. State v. Herrera, 895 P.2d 359, 374 (Utah 1995) (Stewart, J., dissenting).

290. *See* State v. Bethel, 66 P.3d 840, 849-51 (Kan. 2003).

291. *Id.* at 851.

292. *See* Finger v. State, 27 P.3d 66, 80 (Nev. 2001).

293. *See id.*

b. *The Insanity Defense Is Widely Accepted*

A second test to determine if a doctrine is necessary for the preservation of due process is unanimity of acceptance within American jurisdictions.[294] In *Penry v. Lynaugh*, the defendant appealed his death penalty sentence, arguing that the sentence violated his Eighth Amendment rights.[295] The United States Supreme Court considered whether the execution of a mentally retarded defendant would violate contemporary values and standards of decency.[296] In considering whether the United States Constitution prohibited the defendant's execution, the Court looked to the unanimity of acceptance in American jurisdictions of the principle that mentally retarded defendants should not face the death penalty.[297] The Court explained that state legislation can evidence a national consensus that would indicate that applying the death penalty to mentally retarded individuals is prohibited by the Constitution.[298]

In addition, in *Egelhoff*, the United States Supreme Court stated that a fundamental principle would enjoy continuous and uniform acceptance.[299] Thus, the Court seemed to indicate that a fundamental principle could derive from a coupling of wide acceptance and a long history of acceptance.[300] The Court found that the principle at issue was not fundamental because 20% of the states did not adopt or follow the principle.[301]

Although all other jurisdictions have accepted the insanity defense throughout their histories, Montana, Idaho, Utah, and now Kansas no longer accept the defense.[302] Thus, the overwhelming majority, 92% of the states and the federal court system, have made available the insanity defense to criminal defendants.[303] By sheer numbers alone, the insanity defense has earned a place in criminal jurisprudence as a fundamental principle worthy of due process protection.[304]

Moreover, society began to recognize the need to protect the mentally ill from criminal punishment centuries ago, and this idea evolved into the insanity defense.[305] The defense, which first took the form of *M'Naughten*, was quickly adopted by the American jurisdic-

294. State v. Searcy, 798 P.2d 914, 934 (Idaho 1990) (McDevitt, J., dissenting).
295. *See* Penry v. Lynaugh, 492 U.S. 302, 307 (1989).
296. *Id.* at 335.
297. *Id.*
298. *See id.*
299. Montana v. Egelhoff, 518 U.S. 37, 48 (1996).
300. *See id.*
301. *Id.*
302. *See* State v. Searcy, 798 P.2d 914, 934 (Idaho 1990) (McDevitt, J., dissenting).
303. *See* Rosen, *supra* note 6, at 254; Spring, *supra* note 43, at 42.
304. *See Egelhoff*, 518 U.S. at 48.
305. *See* Finger v. State, 27 P.3d 66, 80 (Nev. 2001).

tions and remains in all but four jurisdictions.[306] Such a long history and wide acceptance of the concept, that one who cannot appreciate the nature or quality of his act or that it is wrong is evidence that the principle has become "so rooted in the traditions and conscience of our people."[307] Therefore, it is fundamental to our criminal jurisprudence and cannot be abolished without violating the Due Process Clause.

The Kansas Supreme Court ruled that the insanity defense was not a fundamental principle of law without considering this second test.[308] The court applied only the historical practice test in its analysis of whether insanity was a fundamental principle.[309] It did not analyze how widely accepted the defense is, nor even mention that a principle may receive fundamental status from being widely accepted in the legal community, especially when coupled with an extensive history.[310]

Because the insanity defense should be protected under the Due Process Clause, the Kansas Supreme Court should have applied strict scrutiny to section 22-3220, which legislatively abolished the insanity defense.[311] Therefore, the final consideration when dealing with a fundamental principle is whether the state can put forth a compelling state interest to justify its abridgement of the principle.[312] The Kansas legislature's justification for abolishing the insanity defense was to protect the public at the risk of depriving mentally ill defendants of adequate protection.[313] This justification does not meet the strict scrutiny test that is required when dealing with fundamental principles.[314] Applying the strict scrutiny test, the state interest must be compelling and not capable of being met in a less restrictive manner.[315] In the case of the insanity defense, the compelling state interest of protecting society from legally insane individuals can be met by less restrictive means. Rather than taking away protection from the legally insane, a defendant who presents a successful insanity defense can be placed in a mental facility until such time that he is no longer a risk to society.[316]

In summary, the court should have found that the insanity defense is a fundamental principle of law and therefore is protected by

306. *See* Rosen, *supra* note 6, at 254; Spring, *supra* note 43, at 41.
307. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *Egelhoff*, 518 U.S. at 48.
308. *See* State v. Bethel, 66 P.3d 840, 851 (Kan. 2003).
309. *See id.*
310. *Egelhoff*, 518 U.S. at 48.
311. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).
312. Roe v. Wade, 410 U.S. 113, 156 (1973).
313. *See* Spring, *supra* note 43, at 44.
314. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
315. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); *Roe*, 410 U.S. at 156.
316. *See* KAN. STAT. ANN. § 22-3428 (1995 & Supp. 2003).

due process.[317] The concept of insanity has existed since the second century and has evolved to become a widely accepted legal principle in our country.[318] Therefore, it has become a fundamental principle worthy of constitutional protection.

2. The Court Erroneously Relied on Misconstrued Language from the United States Supreme Court

In finding that section 22-3220 of the Kansas Statutes Annotated was constitutional, the Kansas Supreme Court erroneously relied on decisions from Montana, Idaho, and Utah, all of which upheld similar statutes.[319] These states based their decisions on language from the United States Supreme Court that was inconclusive and misconstrued.[320] The Kansas Supreme Court should have more carefully analyzed the cases abolishing this defense before relying on them to hold that section 22-3220 did not violate due process of law.

a. *The Decisions From Montana, Idaho, and Utah*

In *State v. Korell*, *State v. Searcy*, and *State v. Herrera*, the respective state courts of Montana, Idaho, and Utah decided that federal due process did not require a state to maintain an insanity defense.[321] Those states' highest courts held that the insanity defense was not a fundamental principle in our criminal justice system because it did not become a widely recognized defense until the nineteenth century, and since then has been the subject of differing views and changing societal values.[322] Since they did not believe the insanity defense was protected by the Due Process Clause as a fundamental principle, the courts in those cases concluded that a *mens rea* (or intent) model was enough to satisfy due process requirements because the state would be required to prove all the elements of the crime.[323]

The highest courts in Montana, Idaho, and Utah also found it significant that the United States Supreme Court has never declared the insanity defense a fundamental right under the United States Constitution.[324] These courts primarily relied on two dicta statements to conclude that the Court would hold that insanity is not a fundamental principle of due process.[325]

317. *See* Finger v. State, 27 P.3d 66, 84 (Nev. 2001).
318. *See id.* at 80; Spring, *supra* note 43, at 39.
319. *See* State v. Bethel, 66 P.3d 840, 851 (Kan. 2003).
320. *See* State v. Searcy, 798 P.2d 914, 926 (Idaho 1990) (McDevitt, J., dissenting); State v. Herrera, 895 P.2d 359, 379 (Utah 1995) (Stewart, J., dissenting).
321. *See Searcy*, 798 P.2d at 919; *Korell*, 690 P.3d at 1002; *Herrera*, 895 P.2d at 366.
322. *See Searcy*, 798 P.2d at 917; *Korell*, 690 P.3d at 999; *Herrera*, 895 P.2d at 365.
323. *See Searcy*, 798 P.2d at 919; *Korell*, 690 P.3d at 1002; *Herrera*, 895 P.2d at 366.
324. *See Searcy*, 798 P.2d at 917; *Korell*, 690 P.3d at 999; *Herrera*, 895 P.2d at 365.
325. Finger v. State, 27 P.3d 66, 81 (Nev. 2001).

b. *The United States Supreme Court's Discussions of the Insanity Defense*

An early discussion of insanity took place in 1895 in *Davis v. United States*, in which the United States Supreme Court recognized the importance of legal insanity.[326] The Court did not mandate a particular insanity defense; however, it did state that a defendant must have been capable of understanding right and wrong at the time of the killing to be found guilty of murder.[327] In the opinion, Justice John Harlan quoted from *Commonwealth v. Rogers*,[328] stating that:

> In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.[329]

The Court in *Davis* further explained that it cannot be said that a person, who at the time of the act could not understand the wrongfulness or criminality of his conduct, acted with deliberate intent.[330] Therefore, even if the defendant intended the particular act, if he did not understand the wrongfulness or criminality of his conduct, society could not say that he effectuated the crime with deliberate intent, and he should not be held responsible and punished as a criminal.[331]

The Court also discussed insanity in *Powell v. Texas*. In *Powell*, the Supreme Court stated:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, INSANITY, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.[332]

This statement is an expression of the Court's position that the individual states should determine the best way to incorporate well-established doctrines into their criminal justice systems.[333] The language in

326. *See* Davis v. United States, 160 U.S. 469, 484-85 (1895).
327. *See id.* at 484-85.
328. 48 Mass. 500 (1844).
329. *Davis*, 160 U.S. at 485 (quoting *Rogers*, 48 Mass. at 501).
330. *Id.*
331. *See id.*
332. Powell v. Texas, 392 U.S. 514, 535-36 (1968) (emphasis added).
333. Finger v. State, 27 P.3d 66, 82 (Nev. 2001).

Powell indicates that it is the individual state's decision how to present legal insanity.[334] The language can be understood to mean that the Court was not prepared to declare that the Constitution mandates one particular formulation of the insanity defense.[335]

Powell did not state that legal insanity should not receive protection under the Due Process Clause as a fundamental principle.[336] *Powell* merely reaffirmed the longstanding general policy that Justice Benjamin Cardozo expressed in *Snyder v. Massachusetts*.[337] In *Snyder*, he stated that a state can freely regulate procedural issues in accordance with concepts of policy and fairness as it sees fit as long as it does not offend fundamental principles of justice.[338]

The idea that states should be permitted to determine how they present legal insanity can also be found in *Leland v. Oregon*.[339] In *Leland*, the United States Supreme Court held that the Oregon statute shifting the burden to the defendant to prove insanity beyond a reasonable doubt did not violate due process.[340] Although the Court in *Leland* did not state that the insanity defense was fundamental, it also did not indicate that the defense was not fundamental.[341] *Leland* stands for the proposition that science has not proven any insanity defense formulation reliable enough to constitutionally prohibit the use of all other formulations.[342] Therefore, *Leland* merely established that the states can chose how they wish to formulate their insanity defense.

Justice Rehnquist also mentioned the insanity defense in his dissent in *Ake v. Oklahoma*.[343] Justice Rehnquist expressed, "It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant"; however, if the defense is available, the defendant can carry the burden of proving it.[344] Although this statement may support the decisions in *Korell*, *Searcy*, and *Herrera*, it is from the dissenting opinion of one Justice and did not represent the opinion of the Court in that case.[345] Additionally, Justice Rehnquist did not express his conclusive opinion, as he only stated that he believed it was "highly doubtful."[346]

334. *Id.*
335. *See id.*
336. *Id.*
337. *Id.* at 83.
338. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
339. Leland v. Oregon, 343 U.S. 790, 799 (1952).
340. *Id.* at 799-800.
341. *Id.*
342. State v. Searcy, 798 P.2d 914, 923 (Idaho 1990) (McDevitt, J., dissenting).
343. Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting).
344. *Id.* (Rehnquist, J., dissenting).
345. *Searcy*, 798 P.2d at 926 (McDevitt, J., dissenting).
346. *Ake*, 470 U.S. at 91 (Rehnquist, J., dissenting).

Finally, the United States Supreme Court discussed the insanity defense in *Foucha v. Louisiana*, in which the defendant was found not guilty by reason of insanity and was committed to a mental facility.[347] He entered remission for his illness but remained confined because he could not prove that he no longer presented a danger to society.[348] The Court held that the Louisiana statute mandating his continued confinement was unconstitutional because it violated due process.[349] Justice O'Connor noted in her concurring opinion that the Court was not "indicat[ing] that States must make the insanity defense available."[350] This statement by Justice O'Connor only indicated that since the Court was not considering the issue of whether the Constitution mandated the availability of the insanity defense, the Court was not expressing such a mandate at that time.

In summary, the Kansas Supreme Court adopted the holdings and reasoning from the Montana, Idaho, and Utah supreme courts without fully analyzing the reasoning from those cases. The courts in *Korell*, *Searcy*, and *Herrera* jumped to conclusions and based their decisions on inconclusive statements made by the United States Supreme Court that cannot accurately predict which way the Court would rule if it ever chose to decide the issue.[351] The only recurring theme in the United States Supreme Court cases is that the states can determine how to formulate their insanity defense, which does not negate that insanity is a fundamental principle.[352] Therefore, the Kansas court should not have adopted the holdings in those cases.[353]

3. The Court Should Have Ruled that the *Mens Rea* Approach is Not Constitutionally Adequate

At the end of its discussion of the validity of section 22-3220, the Kansas Supreme Court stated that "the Kansas legislature has not abolished the insanity defense but rather redefined it."[354] The court further stated that no particular insanity defense was mandated, and thus the statute did not violate due process.[355] Although the court stated that a defense still existed, in "redefining" the *M'Naughten* approach, the Kansas legislature abolished insanity as an affirmative de-

347. Foucha v. Louisiana, 504 U.S. 71, 74 (1992).
348. *Id.* at 74-75.
349. *See id.* at 80-83.
350. *Id.* at 88-89 (O'Connor, J., concurring).
351. *See* Finger v. State, 27 P.3d 66, 83 (Nev. 2001); State v. Herrera, 895 P.2d 359, 379 (Utah 1995) (Stewart, J., dissenting).
352. *See Foucha*, 504 U.S. at, 88-89 (O'Connor, J., concurring); Powell v. Texas, 392 U.S. 514, 535-36 (1968); Leland v. Oregon, 343 U.S. 790, 797-99 (1952).
353. *See* State v. Bethel, 66 P.3d 840, 851 (Kan. 2003); *Finger*, 27 P.3d at 81-84.
354. *Bethel*, 66 P.3d at 851.
355. *Id.*

fense.[356] The court explained that it was only a defense if the individual lacked criminal intent.[357] If indeed he lacked criminal intent, there would have been no crime because not all the elements of the offense would have been present.[358] And if there was no crime, the defendant need not present a defense. Thus, under the new statute, the defendant has no defense, because a defense excuses or justifies the person's actions even though all the elements of the crime were present.[359]

Even though the court labels the new statute a defense, it is not an affirmative insanity defense and therefore cannot serve as a substitute for an affirmative defense such as *M'Naughten*.[360] Despite the fact that the United States Supreme Court has not yet declared legal insanity a fundamental principle, the above analysis indicates that it is. The Court's decisions have indicated that the states can determine the way they define the insanity defense, thus leaving them room to experiment.[361] In light of these United States Supreme Court opinions, the Kansas Supreme Court concluded that the *mens rea* approach was constitutional.[362]

Constitutionally, the states are free to define the insanity defense in different ways.[363] They cannot, however, define it in a manner that offends the principle of legal insanity embedded in an affirmative defense such as the *M'Naughten* approach: the principle that a defendant who cannot appreciate the nature or quality of his acts or that his acts are wrong, because of mental illness or defect, should not be punished by the law.[364] To do so would be unconstitutional because it would offend a fundamental principle.[365] The *mens rea* approach is too far removed from the *M'Naughten* approach to qualify as a constitutionally adequate insanity defense because it abolished protection for legally insane defendants who intended their actions.[366]

To begin, the *mens rea* approach offends the fundamental principle of legal insanity because it does not offer defendants a true defense. The *mens rea* approach does not allow the insane defendant the opportunity to admit the elements of the crime while negating

356. Rosen, *supra* note 6, at 253.
357. *Bethel*, 66 P.3d at 851.
358. *See* Spring, *supra* note 43, at 45 (explaining that in order for a crime to have occurred, there must have been an act coupled with criminal intent).
359. *See* Rosen, *supra* note 6, at 260.
360. *See id.* at 262.
361. *See* Foucha v. Louisiana, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring); Powell v. Texas, 392 U.S. 514, 535-36 (1968); Leland v. Oregon, 343 U.S. 790, 797-99 (1952).
362. *Bethel*, 66 P.3d at 851.
363. *See Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring); *Powell*, 392 U.S. at 535-36; *Leland*, 343 U.S. at 797-99.
364. *See* Finger v. State, 27 P.3d 66, 80 (Nev. 2001).
365. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
366. *See* Rosen, *supra* note 6, at 262.

criminal culpability because of his mental illness.[367] For example, if the defendant had intended to kill the victim but was motivated by an insane delusion, he would nevertheless be guilty, even though his motive for killing was not based in reality.

Second, the *mens rea* (or intent) approach reduces the protection provided to mentally ill defendants so much that it does not produce the same results as the *M'Naughten* approach. Rather than protecting the same defendants who are protected under the insanity defense, the *mens rea* approach protects only those who did not intend the offense.[368] The *mens rea* approach leaves defendants who intended the crime but could not realize the wrongfulness of the offense unprotected.[369] Therefore, it offends the fundamental principle of protecting the legally insane.

For example, the law provides excuses in certain situations that make a killing non-criminal, such as self-defense and defense of others.[370] Although Kansas law would protect a defendant who acted in self-defense when he believed his life was in peril, it would not protect a defendant who believed his life was in peril and acted accordingly if the belief was only based on his delusional mind.[371] Both defendants would have acted without criminal intent. Nevertheless, the delusional defendant would likely have been excused from criminal culpability under the *M'Naughten* approach, but not under the current Kansas insanity approach.[372]

From a policy standpoint, since the *mens rea* approach deprives defendants of an affirmative defense, it subjects them to undeserved punishment.[373] The Mississippi Supreme Court stated in *Sinclair v. State*, "[I]t is certainly shocking and inhuman to punish a person for an act when he does not have the capacity to know the act or to judge of its consequences."[374] A defendant who does not possess criminal intent should not be labeled a criminal and punished accordingly.[375] He should not be punished alongside a mentally competent criminal who knowingly, willfully, and intentionally committed an offense.[376] Under the *mens rea* approach, however, a legally insane defendant could be punished as long as he intended to commit the act, regardless of whether he could understand that what he was doing was wrong.[377]

367. *See id.* at 260.
368. *See id.* at 260-61.
369. *See id.* at 262.
370. State v. Herrera, 895 P.2d 359, 390 (Utah 1995) (Durham, J., dissenting).
371. *See* Rosen, *supra* note 6, at 261-62.
372. *See id.* at 262.
373. *See id.*
374. Sinclair v. State, 132 So. 581, 584 (Miss. 1931) (Ethridge, J., concurring).
375. *See id.* (Ethridge, J., concurring).
376. Finger v. State, 27 P.3d 66, 87 (Nev. 2001) (Leavitt, J., concurring).
377. *See* Rosen, *supra* note 6, at 262.

By failing to find that the *mens rea* approach is not a suitable replacement for an affirmative insanity defense, the court in *Bethel* also ignored that the *mens rea* approach produces less accurate results.[378] Rather than convicting only defendants who acted with evil intent, the new statute may also convict defendants who acted with innocent intent.[379] For example, if a defendant killed because he suffered from a delusion causing him to believe the victim was seconds away from slaying him, and that the only way to protect himself was to kill the victim, he would be guilty under the *mens rea* approach even though he was trying to protect himself.[380] This approach to criminal justice does not separate the criminally culpable from the innocent, but rather punishes them all alike.[381]

In summary, the court should have ruled that the insanity defense cannot be replaced by the *mens rea* approach because it does not provide adequate protection.[382] In addition to finding that the insanity defense is a fundamental principle, the court should have ruled that any attempt to "redefine" it could not eliminate insanity as an affirmative defense.[383] Moreover, any attempt at "redefining" it could not offend the fundamental principle of protecting the legally insane.[384] If the court had considered the injustice the *mens rea* approach produces for criminal defendants and the criminal justice system, it would likely have found that the insanity defense cannot be replaced by the *mens rea* approach.[385]

V. Conclusion

In *State v. Bethel*, the Kansas Supreme Court erred when it held that section 22-3220 of the Kansas Statutes Annotated did not violate due process of law. It further erred when it held that the insanity defense was not a fundamental principle of law and was not protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The court did not fully analyze the issue of whether the insanity defense was a fundamental principle protected by due process of law. In holding that the insanity defense was not a fundamental principle, the court ignored the fact that legally insane defendants have been protected from criminal culpability for centuries. The court also failed

378. *See id.*
379. *See id.*
380. *See id.* at 261-62.
381. *See id.* at 262.
382. *See id.*
383. *See* Finger v. State, 27 P.3d 66, 84 (Nev. 2001).
384. *See id.* at 80.
385. *See* Rosen, *supra* note 6, at 262.

to analyze the insanity defense under the unanimity test for determining if a principle is fundamental.

The court's decision was also not based on a thorough analysis of the cited cases. Although the court relied on decisions from Montana, Idaho, and Utah, courts in those states based their decisions on incomplete and misconstrued interpretations of isolated statements from the United States Supreme Court.

The *mens rea* approach does not provide the protection of an affirmative insanity defense. The *mens rea* approach offends the fundamental principle of protecting the legally insane because it does not protect those who intended their actions but could not realize the wrongfulness of them. For this reason, the court should have found that the *mens rea* approach is not a constitutional approach to defining the insanity defense. Upholding section 22-3220 as constitutional robs mentally ill defendants of a fundamental protection that had been available in Kansas for almost 150 years. Thus, many defendants will suffer criminal punishment even though they are not mentally capable of understanding the nature or consequences of their actions.

As a result of *Bethel*, criminal defendants in Kansas who suffer from mental disease or defect will be punished for crimes that they either did not realize their actions would produce or did not understand were wrong. Many criminal defendants who do not have a blameworthy mind will be punished alongside heinous individuals who intend to inflict harm upon others and know and understand what they are doing and the effect that their actions will have on the victims and society as a whole. Our criminal justice system in Kansas has suffered a grave injury by reverting backward rather than progressing forward.