

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)]

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*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-

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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

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

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 unconstitutional.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 canons 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

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 choose 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.

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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.

