

## I17 Psychosis and Psychopathy: Two Conditions That Have Determined the Form and Function of the Insanity Defense

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**Learning Overview:** After attending this presentation, attendees will have a greater appreciation of how not one but two conditions, psychosis and psychopathy, have determined the form, function, and political acceptance of the insanity defense.

**Impact on the Forensic Science Community:** With a parallel understanding of how both psychosis and psychopathy have historically and continue today to pertain to rational and moral capacities respectively, this presentation will impact the forensic science community by helping attendees gain a more refined conceptualization of the presumptions that define and justify the insanity defense.

For over one-and-three-quarter centuries, enduring conceptions of the function and purpose of the insanity defense have basically involved two conditions, psychosis and psychopathy. Yet these two conditions are seldom analyzed together. This presentation will do so and will argue that rational capacity, more than cognitive and moral capacities, is fundamental to the importance and continuing existence of the insanity defense in the United States.

A contrary conception of criminal responsibility would allow the defects of psychopathy, without the psychotic loss of rationality, to qualify for the insanity defense. Psychopathy and related conditions such as antisocial personality disorder have long been a part of the scientific discourse on criminal responsibility. In 1838, in *The Medical Jurisprudence of Insanity*, Ray argued that offenders with moral insanity should not be held responsible for their crimes.<sup>1</sup> Rather, to protect the public, they should be civilly committed to a mental hospital. One hundred years later, Gregory Zilboorg made essentially the same argument.<sup>2</sup> Now in the 21<sup>st</sup> century, Stephen Morris maintains that defendants with severe psychopathy should be found not criminally responsible for their criminal acts because they cannot make moral decisions.<sup>3</sup> He too recommends civil commitment rather than criminal punishment. Studies indicate that individuals with psychopathy can intellectually solve moral dilemmas, but they are not motivated to behave morally because of a Central Nervous System (CNS) defect that may involve the amygdala.<sup>4,5</sup>

This study argues that a push toward broadening the insanity defense to include psychopathy could strengthen opposing arguments and sentiments against the insanity defense.<sup>6</sup> Growing disdain for the insanity defense can lead to it becoming less available for those who are most deserving of this excuse—defendants who acted out of psychotic irrationality. In other matters, the law follows a principle of normative functionalism.<sup>7</sup> Individuals are not expected to do what they cannot do. The question of the quality and severity of a defect needed to provide an excuse is normative, determined by rules established by government reflecting both scientific knowledge and public sentiment. The Supreme Court has required rationality as essential to trial and execution competence.<sup>8,9</sup> From this perspective, even as psychopathy influences one's thinking and behavior, it is reasonable for the consequential threshold to be rational capacity beyond simple factual awareness.

This past year, in *Kahler v. Kansas*, the United States Supreme Court found that a state's abolition of its insanity defense was constitutional because the state afforded defendants a *mens rea* defense, which requires cognitive capacity.<sup>10</sup> Moral capacity, as required by most state insanity standards, is not constitutionally required. Unexpected, unnecessary, and scientifically erroneous was the Court's reference to psychopathy in a footnote to further support its holding. The Court reasoned that the moral capacity insanity standard was not fundamental because several states did not include moral capacity in their insanity standards. State standards were too diverse for any one standard to be considered as fundamental. Moreover, several states included the American Law Institute's Second Paragraph excluding psychopathy from consideration for the insanity defense, which the Court opined was inconsistent with the defendant's position that a moral capacity insanity test was fundamental.<sup>11</sup> The Court's premise that those who repeat their criminal conduct, even those who are psychopathic, are unable to make moral decisions was erroneous. The Court's more serious error, however, was its failure to consider rational capacity, which is essential to all insanity standards and historically fundamental as well, a capacity that can be profoundly defective in psychosis, but not in psychopathy.

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3. Morse, S. Psychopathy and criminal responsibility. *Neuroethics*, 2008, 1, 205-212 DOI: 10.007/s12152-008-9021-9.
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8. *Dusky v. United States*, 362 US 402 (1960).
9. *Panetti v. Quarterman*, 551 U.S. 930 (2007).
10. *Kahler v. Kansas* (slip opinion), 589 U.S. \_\_\_\_ (2020).
11. American Law Institute, 1962, Model Penal Code. Philadelphia: American Law Institute. 4.01.

### Forensic Science, Insanity Defense, Rational Capacity