The Mental Insanity Defense: Not as Simple as Playing a Get Out of Jail Free Card
A Comparative Analysis

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I. Introduction

"'Actus nonfacit reum nisi mens sit rea' (an act does not constitute guilt unless done with a guilty intention)."[1] Insanity in the realm of criminal law, falls under the umbrella of mental incapacity. "Mental incapacity refers to an absence of or *impairment* in the moral, cognitive, and volitional capacities both assumed and required by the law."[2] Mental incapacity forms a "basis for exculpation, where exculpation is understood in a broad. . . way to mean not holding a person liable for an offence."[3] Insanity is the "[incapability] to form a guilty intention."[4] In the law, "a person. . . is insane. . . [if] at the time he or she commits an act that would otherwise be criminal is not criminally accountable for such act, and will not be convicted or punished for it."[5] The defense of insanity, therefore, is comprised of the mental incapacity to form the requisite mens rea for a crime. The defense of insanity is generally an affirmative defense.[6]

Consider these facts, a man with a mental disease kills another believing he was killing a dog.[7] Under M'Naghten, Kansas law, and the criminal codes of BiH, Portugal, and India the man would not be convicted because he does not understand the nature of his act due to his mental

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[1] SB. Math, CN. Kumar & S. Moirangthem, *Insanity Defense: Past, Present, and Future*. INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE, Oct. 1, 2015, 381-87, http://europepmc.org/article/PMC/4676201#sec1-3 (last accessed Apr. 20, 2021).
[2] Arlie Loughnan, *ARTICLE: MENTAL INCAPACITY DOCTRINES IN CRIMINAL LAW*, 15 NEW CRIM. L. R. 1, *9 (2012).
[3] *Id.* at *2-3.
[4] *Insanity*, BALLENTINE'S LAW DICTIONARY (3rd ed. 2010).
[5] 21 AM. JUR. 2D CRIMINAL LAW §43 (2021).
[6] *Id.*
[7] *Kahler v. Kansas*, 140 S. Ct. 1021, 1039 (2020).

disease. The cognitive capacity element is not established.[8] If an individual does not understand the nature of the act they are committing, they are unable to form the intent to commit the act. Without intent there is no guilt, as such a person cannot be culpable for the act.

Now we change the facts slightly to a man with a mental disease who kills another because a dog told him to kill.[9] Under M'Naghten and the codes of BiH, Portugal, and India, the man would still not be convicted. Here, the man does not understand right from wrong as he knows he is killing another human but does not know this act is wrong. In contrast, under Kansas law, the man could be convicted for murder because the man knows he is killing a human being. Kansas does not recognize the moral capacity prong thus the man not knowing that the killing was wrong can only be used to attempt to mitigate his sentence.[10]

The focus of this paper is to examine the insanity defense in the United States, BiH, Portugal, and the European Court of Human Rights. Part II will discuss the history of the insanity defense and the insanity defense in the United States. Part III will examine similar laws in the BiH, Portugal, and India and compare the Criminal Codes of the Federation, Republika of Srpska, and Brcko District. Part IV will examine insanity defenses in Portugal and India. Part V will provide a comparative recommendation for the mental insanity defense.

[8] *Id.* at 1026 (Cognitive capacity refers to whether the defendant comprehends what he was doing when he committed the act.); Cognitive, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cognitive, (Cognitive: of, relating to, being, or involving conscious intellectual activity such as thinking, reasoning, or remembering).
[9] *Kahler*, 140 S. Ct. at 1039.
[10] *Id.*

II.

A. The Historical Timeline of the Insanity Defense.

For at least a thousand years the legal field has believed "the insane should not be punished for otherwise criminal acts."[11] As early as the ninth century, the publication of the *Dooms of Alfred*[12] provided '"if a man be born dumb or deaf, so that he cannot acknowledge or confess his offenses,' his father must pay his forfeitures."[13] From the ninth to the thirteenth centuries the treatment under the *Dooms of Alfred* continued.[14] In Pre-Norman England, the legal standard for the insane flowed from the *Dooms of Alfred*:

> If a man fall[s] out of his senses or wits, and it come to pass that he kill[s] someone, let his kinsmen pay for the victim, and preserve the slayer against aught else of that kind. If anyone kill him before it is made known whether his friends are willing to intercede for him, those who kill him must pay for him to his kin.[15]

The standards from the *Dooms of Alfred* and Pre- Norman England are not a defense as we know it today. These standards did not absolve the liability for actor as the family had to pay to for the offence, but it is the starting point of the insanity defense because the actors were not criminally punished.[16]

The thirteenth century saw the start of the trial by jury system.[17] The advent of the jury trial led to the dilemma on how to adjudicate insane. The Pre-Norman standard for handling

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[11] Jonas Robitscher & Andrew Ky Haynes, *SYMPOSIUM: LAW AND PSYCHIATRY: PART I: IN DEFENSE OF THE INSANITY DEFENSE*, 31 EMORY L.J. 9, *10 (1982).
[12] Ben Johnson, *Kings and Queens of England & Britain*, HISTORIC UK, https://www.historic-uk.com/HistoryUK/KingsQueensofBritain/ (Last Accessed Feb. 14, 2021) (The *Dooms of Alfred* were promulgated during the reign of Alfred the Great. Alfred reigned from 871 to 899 and established the Saxon Christian rule of most of England).
[13] Robitscher, *supra* at 10 (quoting N. Walker, Crime and Insanity in England 219 (1968)).
[14] *Id.* n. 3.
[15] *Id.* n. 2; *see 1066 And The Norman Conquest*, ENGLISH HERITAGE, https://www.english-heritage.org.uk/learn/1066-and-the-norman-conquest/ (Last Accessed Feb. 14, 2021) (The Normans concurred England in 1066).
[16] Robitscher, *supra* at 10 n. 2B.
[17] *Id.* at *11.

offenses committed by the insane was done without a trial because the local knowledge of how to treat insanity was deemed settled.[18] This standard changed when jury trials began, because the jury was composed of local men, and it was deemed reasonable to have the jury determine if the defendant was insane.[19] In 1353 England, Justice Hill decided not to try a man who had killed four individuals while in an enraged state, rather he let the accused recover his senses in prison. When it was determined the man would not fully regain his senses, King Edward III pardoned the man and set him free.[20] An account from the thirteenth century by the first medieval jurist to deal with crimes provides:

> For a crime is not committed unless the will to harm be present. Misdeeds are distinguished both by will and by intention (and theft is not committed without the thought of thieving). And then there is what can be said about the child and madman, for the one is protected by his innocence of design, the other by his misfortune of deed. In misdeeds we look to the will and not the outcome.[21]

In the years between 1353 and 1505 it was common practice for the insane, being unsound of mind, to be acquitted for their crimes. 1505 is the earliest account of "a jury verdict of an unsound."[22] A handbook from the William Lambard in 1581 recognized that a doctrine of criminal responsibility was well established in England.[23] This doctrine of criminal responsibility provided:

> If a mad man or [apparent fool], or a [lunatic] in the time of his [lunacy], . . . apparently hath no knowledge of good nor [evil] do [kill] a ma[n], this is no felonious act[], nor any thing forfeited by it . . . for they cannot be said to [have] any understanding [will].[24]

[18] *Id.* at *12 n. 7.
[19] *Id.*
[20] *Id.* at *11.
[21] *Id.* at *11.
[22] *Id.* at *11 n. 5.
[23] *Id.* at *12.
[24] *Id.* at *12. (corrected for modern spelling).

The ideas in the doctrine of criminal responsibility from 1581 were set forth in other leading treatises, including Sir Edward Coke's.[25]

The insanity defense became more formal over time, especially during the eighteenth century when the number of recognized capital offenses was growing in England and the United States. The recognition of capital offenses led to defendants pleading insanity to avoid death. The courts of the eighteenth century, "expanded the notion of legal insanity and established procedure for an insane defendant to follow to be acquitted.[26] As the severity of punishments increased, so too did the procedures to protect the insane defendant. Thus, by the end of the eighteenth century the insane defendant was viewed as they are in modern times.[27]

B. The Evolution of the Insanity Defense Doctrines.

The insanity defense has a notable history that led to the development of several defense doctrines. Each defense doctrine is distinctive, and the outcome of a case may vary based on the insanity defense doctrine being used. The first insanity defense doctrine originated in the thirteenth century, as being 'insane' no longer led to automatic acquittal.

1. The Wild Beast Test.

The first insanity defense doctrine to develop was the wild beast test. This doctrine was articulated in the thirteenth century by Justice Tracy, a judge in King Edward's court.[28] Justice Tracy in 1724, during the trial of Edward Arnold who had shot

[25] *Id.* at *12.
[26] *Id.* at *13.
[27] *Id.* at *13.
[28] Henry F. Fradella, *Article: From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 14 (2007).

and wounded a British Lord in a homicide attempt, instructed that the jury should acquit by reason of insanity:

> If it found the defendant to be a madman, which [was] described as a 'man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.'[29]

This doctrine was intended to focus on the lack of intelligence of a defendant, rather than the image of a rabid beast as the phrase seems to portray.[30] Commentators and legal historians have since explained that "brute" as used by Justice Tracy in *Rex v. Arnold* 1724, referred to "farm animals such as 'badgers, foxes, deer, and rabbits.'"[31] The wild beast imagery resulted from a mistranslation of the Latin word "brutis" by Bracton in a thirteenth century treatise that was later translated by Sir Matthew Hale and then used by Justice Tracy when providing jury instructions in *Rex v. Arnold*.[32]

The Wild Beast doctrine would be the standard followed in English courts throughout the eighteenth century.[33] Research yields few results on how the wild beast doctrine was actually applied by the courts, but period commentators "consistently spoke of a requirement that the defendant lack understanding of good and evil or *be devoid of all reason*, and often equated the insane with animals."[34] Interestingly, the use of this doctrine did not result in a special verdict to excuse the defendant of his crimes because

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[29] *Id.* at 14. (citing *Rex v. Arnold*, Y.B. 10 Geo. 1 (1724), reprinted in 16 A Complete Collection of State Trials 695 (Thomas Bayly Howell ed., London, T.C. Hansard 1812)).
[30] Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE. W. RES. L. REV. 559, 645 n. 142 (1990).
[31] *Id.*
[32] Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 1, 2-3; 7-8 (1965) http://www.jstor.org/stable/42912527 (Last Accessed Apr. 20, 2021).
[33] Fradella, *supra* at 14.
[34] *Id.* at 14. (emphasis added).

of his insanity. Trials would result in a conviction from the trier of fact, and then an appeal would be made to the reigning king for a pardon.[35]

A departure from the wild beast doctrine would come in 1800. In 1800 James Hadfield shot King George III and was tried for treason. Hadfield believed he was told to kill the king in orders from God. The defense counsel argued Hadfield's actions stemmed from head trauma, which was corroborated by physicians. Hadfield would be acquitted because he appeared to be under the influence of insanity when he shot the king.[36] The ruling in the Hadfield case was a departure from the wild beast doctrine in two areas. First, the jury acquitted the defendant when he was not fully deprived of his mental facilities; traditionally a defendant would have to be completely devoid of their mental facilities to be acquitted. Second, this was the first verdict in which a verdict by reason of insanity would be a separate verdict of acquittal.[37] The wild beast doctrine would then fade as the next insanity defense doctrine would emerge.

2. The M'Naghten Test.

The second insanity defense doctrine to develop was the M'Naghten test. This test developed in 1843. M'Naghten was charged with first degree murder for the death of Edward Drummond.[38] Drummond was the secretary to the English Prime Minister Sir Robert Peel.[39] M'Naghten intended to kill the Peel but killed Drummond thinking it was Peel.[40] When arrested, M'Naghten told the police "he wanted to kill the Prime Minister 'because the Tories in my city follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They do

[35] *Id.* at 14.
[36] *Id.* at 14-15.
[37] *Id.* at 15.
[38] *Id.* (citing M'Naghten, 8 Eng. Rep. 718 (H.L. 1843). There are twelve different spellings of M'Naghten's last name.
[39] *Id.*
[40] *Id.*

everything in their power to harass and persecute me; in fact, they wish to murder me.'"[41] At trial, the defense asserted M'Naghten suffered from paranoid persecutory delusions.[42] In support of this defense, there were four barristers and nine medical experts.[43] Lord Chief Justice Tindal charged the jury:

> The question to be determined is whether at the time of the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible at the time he committed it, that he was not violating the law of both God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, there were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.[44]

The jury found that M'Naghten was not guilty of murder by reason of insanity and was acquitted.[45] M'Naghten was then committed to the Bedlam Asylum, where he would reside until his death.[46] The acquittal caused public outrage including disapproval from Queen Victoria who had been the target of assassination attempts.[47] This led to the House of Lords enacting the M'Naghten test for insanity.[48] By doing this the House of Lords limited when defendants could use insanity as a defense, and be acquitted despite committing a crime.[49]

Under the M'Naghten test, a person is not liable if at the time of the offense, the defendant suffered from a mental disease or defect. That disease or defect caused the defendant to not to know the nature and quality of the act he or she committed or

[41] *Id.* (internal citations omitted).
[42] *Id.*
[43] *Id.* at 15-16.
[44] *Id.* at 16.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

knowing the quality or nature of the act, the defendant did not know that the act was wrong. [50] When asserting M'Naghten as a defense, it is important to establish the mental defect or disease caused the defendant to have cognitive or moral incapacity.[51] Cognitive incapacity is found when the defendant is incapable of forming a requisite mens rea because they are unable to know what they are doing.[52] Moral incapacity is found when the defendant is aware of their acts but not that those acts are wrong.[53] Moral incapacity was seen in the M'Naghten case, as M'Naghten formed the intent mens rea to kill but did not understand that his act was wrong.

M'Naghten was the defense doctrine that was largely adopted in the United States. This doctrine while still commonly used, is not without short comings. Scholars have "criticized the M'Naughten test because it only looked at the cognitive and moral aspects of the defendant's actions."[54] The scholars assert that there is also a volitional element of insanity that should be accounted for in an insanity defense doctrine. For example, if a defendant has a mental illness and is aware their actions are wrong but is unable to resist from acting, the defendant under M'Naghten would be accountable despite being mentally ill. This has led many scholars to assert the M'Naghten test is incomplete.[55] Scholars also criticize this test is too rigid as it does not provide a defense for a full spectrum of mental deficits. The scholars focus on the text of this test, finding that it would only excuse the defendants who are completely deteriorated mentally.[56] The last criticism, is that this test requires fact finders to make a moral judgement about the

[50] *Id.* at 16-17.
[51] *Id.* at 18.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 19.
[56] *Id.*

defendant because of the focus on right and wrong.[57] These shortcomings, led to some United States jurisdictions creating new insanity defense doctrines.

3. The Irresistible Impulse Test.

Chronologically, the next test to develop was the irresistible impulse test. The irresistible impulse test was adopted in some jurisdictions in the United States in 1887. This test excused otherwise criminal conduct if the actor had a mental defect or illness that prevented them from controlling their actions.[58] The first case in which a court specifically adopted the irresistible impulse test was in *Parsons v. State*.[59] The instructions for the fact finder were such that, "if the jury believe from the evidence that the prisoners. . . was moved to action by an insane impulse controlling their will or judgement, then they are, . . . not guilty of the crime charged."[60] This test was not widely adopted and was overshadowed by the more common M'Naghten rule in most jurisdictions in the United States because the references to this test were ignored or marginalized.[61] Further, this test has been criticized because it is difficult to prove and fails to recognize the mentally ill can plan their crimes.[62]

4. The Durham Rule.

In 1954, the United States Court of Appeals for the District of Columbia created a new insanity test in *Durham v. United States*.[63] Durham was arrested and charged with housebreaking. Durham was determined to be unsound mentally and committed to a hospital for six months. At the six month commitment the hospital released Durham with

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[57] *Id.*
[58] Captain Charles E. Trant, *Article: The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1, *44 (1983).
[59] *Parsons v. State*, 81 Ala. 577 (1887).
[60] Trant, *supra* at *5.
[61] I*d.* at *43.
[62] *Id.* at *46.
[63] Fradella, *supra* at 19; *Durham v. United States*, 214 F.2d 962 (D.C. Cir. 1954).

a certificate that he was mentally competent to stand trial. Durham would then be convicted by the trial court because there were no grounds to support Durham's state of mind as such the presumption of sanity prevailed. The United States Circuit Court of Appeal reversed the conviction because there was sufficient evidence to overcome the presumption of sanity based on testimonial evidence.[64] In Durham, the court held, "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."[65]

The Durham rule was very short lived. The rule broadened the insanity defense as it focused on whether the action was the product of the mental disease and not the cognitive or moral capacities of the defendant. The Durham rule would be overruled in 1972 in a case, *United States v. Brawner*[66], where the court adopted the Model Penal Code standard for the insanity defense.

5. The Model Penal Code.

The Model Penal Code (MPC) was developed in 1962. The insanity test under the MPC provides that "a person is not responsible for criminal conduct if, at the time of such conduct as of a result of a mental disease or defect, the defendant lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[67] This test is a combination of the M'Naghten and Irresistible Impulse tests. It allows the trier of fact to "consider the defendant's moral, emotional, and legal awareness of the consequences of his or her behavior in recognition that there are gradation of criminal responsibility and that the

[64] *Durham*, 214 F.2d 962.
[65] Fradella, *supra* at 19.
[66] *United States v. Brawner*, 471 F.2d 969 (1972).
[67] Fradella, *supra* at 22.

defendant need not be totally impaired to be absolved of such responsibility."[68] A difference between the other insanity defense and the MPC, is that the MPC specifically excludes antisocial personality disorder.

C. The Insanity Defense in the United States today.

"Until 1979, every jurisdiction in the United States allowed mentally ill defendants to assert. . . an insanity defense. . ., to argue that because they did not understand that their actions were wrong, they cannot be held criminally responsible for those actions."[69] Currently, in the United States, there is no set insanity defense doctrine. The United States has several versions of the insanity defense that allow mentally ill defendants to be absolved of criminal culpability.[70] A vast majority of the states, seventeen, have adopted and follow the M'Naghten rule.[71] Fourteen states and the District of Columbia follow the Model Penal Code rule.[72] Eight states follow modified versions of the M'Naghten rule, three of those have adopted an irresistible impulse component to the M'Naghten rule.[73] Six states follow modified model penal code rules.[74] New Hampshire is the sole state following the Durham rule.[75] The four remaining states have abolished the traditional insanity defense tests.[76] Specifically, "Kansas does not recognize a moral-incapacity defense."[77]

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[68] *Id.*
[69] Amy Howe, *Opinion Analysis: Majority Upholds Kansas Scheme for Mentally Ill Defendants*, SCOTUSBLOG (Mar. 23, 2020), https://www.scotusblog.com/2020/03/opinion-analysis-majority-upholds-kansas-scheme-for-mentally-ill-defendants/ (Last Accessed Apr. 20, 2021).
[70] *Kahler*, 140 S. Ct. at 1022.
[71] *The Insanity Defense Among the States*, FINDLAW (Jan. 23, 2019), https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html (Last Accessed Apr. 20, 2021).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Kahler*, 140 S. Ct. at 1023.

The Supreme Court of the United States in 2020, ruled on the constitutionality of a state abolishing the traditional insanity defenses through legislation. In *Kahler v. Kansas,* the plaintiff alleged Kansas's insanity defense violates the Due Process Clause of the Fourteenth Amendment. Specifically, the plaintiff alleged the Kansas statute was unconstitutional because it does "not wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong."[78]

Kahler v. Kansas, arose from the capital murder of four individuals.[79] Kahler's wife had filed from divorce and moved out with the couple's three children.[80] Kahler would become more distressed leading up to the murders.[81] Over Thanksgiving weekend, Kahler drove to his wife's grandmother's home where his family was staying.[82] Kahler entered through the back of the home where he saw his wife and son.[83] He shot his wife twice, then moved through the home shooting his wife's grandmother and both of his daughters while allowing his son to flee.[84] Kahler surrendered himself to the police.[85]

Prior to trial, Kahler filed a motion alleging the "Kansas's treatment of insanity claims violates the Fourteenth Amendment's Due Process Clause." [86] He asserted Kansas '"unconstitutionally abolished the insanity defense' by allowing the conviction of a mentally ill person 'who cannot tell the difference between right and wrong.'"[87] The motion was denied by the trial court, which left Kahler to show he did not form the

[78] *Id.* at 1024.
[79] *Id.* at 1026.
[80] *Id.*
[81] *Id.* at 1027.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* (internal citations omitted).

requisite intent to kill because of severe depression.[88] The trial court jury convicted Kahler of capital murder.[89] During sentencing, Kahler was permitted to introduce additional evidence of his mental illness to mitigate his sentence.[90] The jury despite this additional evidence recommended the death penalty.[91] Kahler appealed the decision; the Kansas Supreme Court rejected Kahler's constitutional argument.[92]

The United States Supreme Court heard the case to determine if the Due Process Clause requires states to adopt an insanity defense that will acquit defendants under a moral capacity test.[93] Thus, are states required to have an insanity defense that will acquit defendants who are unable to differentiate right from wrong when they committed their crime? [94] There is a well settled precedent providing, "a state rule about criminal liability-laying out either the elements of or the defenses to a crime-violates due process only if it 'offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental.'"[95] The Court elaborated precedent provides, "the doctrines of actus reus, mens rea, insanity, mistake, justification, and duress. . . reflect both the evolving aims of the criminal law and the changing religious, moral, philosophical, and medical views of the nature of man."[96] In 1952, 1968, and 2006 the Court consistently

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* (The court held due process does not require a state to adopt a specific insanity defense.); *see also State v. Bethel*, 66 P.3d 840 (2003).
[93] *Id.* at 1027.
[94] *Id.*
[95] *Id.* (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952).
[96] *Id.* at 1028. (internal quotations omitted); *see Powell v. Texas*, 392 U.S. 514, 536 (1968).

held there is not a singular formulation of a defense that must be followed as the test for legal sanity is "best left to each State to decide on its own."[97]

In *Kahler v. Kansas*, the Court in a 6-3 decision, held Kansas's insanity defense is not unconstitutional, and refused to require the state adopt an insanity defense with a moral capacity prong.[98] The Court found that in contrary to Kahler's assertions, Kansas does have an insanity defense that provides a shield from criminal culpability.[99] Kansas law follows the M'Naghten cognitive capacity prong only. The law does not provide acquittal for moral incapacity alone.[100] However, Kansas does not bar evidence of moral incapacity, rather this evidence may be given at sentencing to "mitigate culpability and lessen punishment."[101] The Court leaning on prior precedent determined Kansas is within the Constitution to decide their own insanity defense. Reiterating it is best left to the states, and not constitutional law to determine or make their insanity defense because it is a project with various solutions. The Court posits because societal standards and psychiatry evolve over time. and it is better to allow the states to experiment with the insanity defense than make a blanket rule.[102]

The three dissenting justices agreed that the "Constitution gives the States broad leeway to define state crimes and criminal procedures, including leeway to provide different definitions and standards related to the defense of insanity."[103] These justices asserted, Kansas by removing the moral capacity prong "eliminated the core of the

[97] *Id.* at 1029. *see Leland*, 343 U.S. 790 (1952); *Powell*, 392 U.S. 514 (1968); *Clark v. Arizona*, 548 U.S. 735 (2006).
[98] *Id.* at 1037.
[99] *Id.* at 1030.
[100] *Id.* at 1026.
[101] *Id.* at 1031.
[102] *Id.* at 1029.
[103] *Id.* at 1038.

defense"[104] thus "offending a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[105] The historical evolution of the insanity defense in the United States heavily relies on M'Naghten which includes the moral capacity prong. The dissenting justices relying on this history, have labeled moral capacity as fundamental to the insanity defense and would have Kansas re-incorporate this prong as part of the defense and not an argument to be made at sentencing.[106]

From *Kahler v. Kansas*, it is clear that insanity defenses are under state governance and so long as the defense is not violating a fundamental principle the defense is constitutional. "Due process imposes no single canonical formulation of legal insanity."[107] Montana, Idaho, and Utah are the three other states that have abolished the traditional insanity defense, but all allow defendants to argue deficient mens rea, state of mind.[108] It is unclear if a state may completely abolish all trace of the insanity defense as the Supreme Court has never held that states must provide defendants with an independent insanity defense.[109] However, it is likely if a state completely abolishes all trace of the insanity defense that it would be a violation of due process, because it would "offend [a] principle of justice so rooted in the traditions and conscience of [society] as to be ranked fundamental."[110]

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[104] *Id.*
[105] *Id.* (quoting *Leland*, 343 U.S. at 798 (1952)).
[106] *Id.* at 1047-50.
[107] *Id.* at 1029.
[108] Pamela Lucas, *Abolishment of Insanity Defense*, CONN. GEN. ASSEMB. OFFICE OF LEGIS. RESEARCH (Apr. 28, 1994), https://cga.ct.gov/PS94/rpt%5Colr%5Chtm/94-R-0392.htm (last accessed Mar. 13, 2021).
[109] *Id.*
[110] *Kahler*, 140 S. Ct. at 1028.

III. Insanity Defense in BiH.

a. BiH

In contrast to the United States, BiH follows the civil law tradition.[111] In civil law tradition systems, the laws are found in codes.[112] In BiH there are several codes. Mental capacity is discussed in the BiH criminal code, the criminal code for the Federation of BiH, the criminal code of the Brcko District, and the criminal code for the Republika of Sprska.

The BiH criminal code does not expressly contain an "insanity defense." The code does include an article on mental capacity which is similar to an insanity defense. The code provides, "a mentally incapable person is one who, at the time of perpetrating the criminal [offense], was incapable of comprehending the significance of his acts or controlling his conduct due to lasting or temporary mental disease, temporary mental disorder or retardation (mental incapacity)."[113] Further if an individual's capacity "to comprehend the significance of his act, and his ability to control his conduct was considerably diminished due to [mental disease or defect] . . . he may be punished less severely."[114]

The Criminal Code for the Federation of BiH in Chapter 6 Article 36 sets forth the rules on mental capacity in the Federation of BiH. The code first determines a mentally incapable person is "one who, at the time of coming the criminal [offence], was incapable of comprehending the significance of his acts or controlling his conduct due to a lasting or temporary mental disease, temporary mental disorder or retardation (mental incapacity)."[115] If the offender's capacity to understand the "significance of his act, and his ability to control his

[111] *Field Listing – Legal System*, US CIA, https://www.cia.gov/the-world-factbook/field/legal-system/ (last accessed Apr. 3, 2021).
[112] *Id.*
[113] Code Criminal [CRIMINAL CODE] art. 34(1) (Bosn. & Herz.).
[114] Code Criminal [CRIMINAL CODE] art. 34(2) (Bosn. & Herz.).
[115] Code Criminal [CRIMINAL CODE] art. 36(1) (Bosn. & Herz., Fed'n. of BiH).

conduct was considerably diminished due to any of the mental conditions under paragraph 1 of this Article, he may be punished less severely (considerably diminished mental capacity."[116] However, the offender:

> shall be . . . culpable if, . . . he brought himself into such a state of not being capable to comprehend the significance of his actions or controlling his conduct, and if prior to bringing himself into such a condition, the act was intended by him, or there was negligence on his part . . . where culpability [for the offense may be negligence].[117]

Further, if the offender brings himself to a state as described in paragraph 3, he may not use this state as "grounds for the reduction of punishment."[118]

The Criminal Code for the Brcko District in chapter 6 article 36 is very similar to the criminal code of the Federation of BiH. In the Brcko District, a person is mentally insane if "at the time of perpetrating the criminal offense, was incapable of comprehending the significance of his acts or controlling his conduct due to a lasting or temporary mental disease, temporary mental disorder or retardation (mental insanity)."[119] If the offender's ability to "comprehend the significance of his act, and his ability to control his conduct was considerable diminished due to [mental disease, mental disorder, or mental insanity], he may be punished less severely."[120] An offender shall be:

> culpable if. . . he brought himself into such a state of not being capable to comprehend the significance of his actions or controlling his conduct, and if prior to bringing himself into such a condition, the act was intended by him, or there was negligence on his part, . . . where culpability. . . for such an offense [is found] even if perpetrated out of negligence.[121]

[116] Code Criminal [CRIMINAL CODE] art. 36(2) (Bosn. & Herz., Fed'n. of BiH).
[117] Code Criminal [CRIMINAL CODE] art. 36(3) (Bosn. & Herz., Fed'n. of BiH).
[118] Code Criminal [CRIMINAL CODE] art. 36(4) (Bosn. & Herz., Fed'n. of BiH).
[119] Code Criminal [CRIMINAL CODE] art. 36(1) (Bosn. & Herz., Brcko Dist.).
[120] Code Criminal [CRIMINAL CODE] art. 36(2) (Bosn. & Herz., Brcko Dist.).
[121] Code Criminal [CRIMINAL CODE] art. 36(3) (Bosn. & Herz., Brcko Dist.).

Should the offender have caused his mental insanity, defect or disorder then this condition shall not be used as "grounds for the reduction of punishment."[122]

The Criminal Code for the Republika Srpska similarly includes provisions relating to the mental capacity of defendants. The code, provides a person is mentally incapable if "at the time of committing the criminal office, was incapable of comprehending the significance of his act or controlling his conduct due to a mental disease, temporary mental disorder, mental deficiency or severe mental disorder."[123] The code further provides an "offender whose capacity to comprehend the significance of his act or his ability to control his conduct was considerably diminished due to [mental disease, temporary mental disorder, mental deficiency or severe mental disorder]. . . may be punished more leniently." [124] In the Republika of Srpska, self-induced diminished capacity does not affect punishment.[125]

The language of these codes indicates mental capacity in BiH is focused on understanding the significance of the act committed and the ability to control one's acts. When compared to the United States, the language of the BiH codes represents a mix of the M'Naghten and Irresistible Impulse. The codes state an individual is mentally incapable if they are unable to understand the significance of the act they committed. The codes do not explain what comprehending the significance of the act means, which leaves this ambiguous. In civil law tradition systems, unlike the common law system there is not an emphasis on case law that can provide the interpretation of the code. Thus, it is unclear as to what the phrase comprehending the significance of the act means but is likely very similar to the M'Naghten cognitive and moral capacities.

[122] Code Criminal [CRIMINAL CODE] art. 36(4) (Bosn. & Herz., Brcko Dist.).
[123] Code Criminal [CRIMINAL CODE] art. 29 (Bosn. & Herz., Republika Srpska).
[124] Code Criminal [CRIMINAL CODE] art. 31(1) (Bosn. & Herz., Republika Srpska).
[125] Code Criminal [CRIMINAL CODE] art. 31(2) (Bosn. & Herz., Republika Srpska).

IV. Other Foreign Perspectives on the Mental Insanity Defense.

a. Portugal

Portugal, like BiH, has a legal system based on the civil law tradition.[126] In Portugal, the law is contained in the Portuguese Penal Code. Mental incapacity is discussed in chapter I article 20 of the Portuguese Penal Code. "A person is not imputable, if due to a disease of the mind, he is incapable, at the time of committing the act, to appreciate its unlawfulness or to conform his conduct in accordance with that appreciation."[127] Additionally,

> a person may be declared not imputable if, due to a serious disease of the mind, not accidental and whose effects he cannot control, without being thereby censurable, has, at the time of committing the act, the capacity to appreciate its unlawfulness or to conform his conduct in accordance with the appreciation, sensibly diminished.[128]

"Imputability is not excluded when the disease of the mind has been caused by the agent himself with the intention to commit the act."[129]

The language of this code discusses mental capacity in terms of imputability. Imputability refers to responsibility and liability for an action.[130] Based on this definition of imputability, the code provides an individual is not responsible or liable for his actions if he meets the requirements included in the code. Section one provides two ways a person may not be imputable for his actions because of a mental disease that is present at the time of the act. The first way is, if the individual because of his mental disease cannot understand that the act he is committing is illegal then his is imputable under the code.[131] This is very similar to the cognitive

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[126] *Field Listing – Legal System*, US CIA, https://www.cia.gov/the-world-factbook/field/legal-system/ (last accessed Apr. 3, 2021).
[127] DO CÓDIGO PENAL PORTUGUÊS [PORT. PENAL CODE] art. 20(1) (Port.), https://www.legislationline.org/download/id/4288/file/Portugal_CC_2006_en.pdf (last accessed Apr. 4, 2021).
[128] DO CÓDIGO PENAL PORTUGUÊS [PORT. PENAL CODE] art. 20(2) (Port.).
[129] DO CÓDIGO PENAL PORTUGUÊS [PORT. PENAL CODE] art. 20(3) (Port.).
[130] *Imputation*, BOUVIER LAW DICTIONARY (2012).
[131] DO CÓDIGO PENAL PORTUGUÊS [PORT. PENAL CODE] art. 20(1) (Port.).

capacity prong of the M'Naghten test, which examines the understanding and comprehension of the defendant at the time of the crime. The second way is, if the individual because of his mental illness is unable to maintain his conduct within the bounds that society expects then he is imputable under the code.[132] This is very similar to the moral capacity prong of the M'Naghten test, examining whether the defendant knew right from wrong when committing the act. However, if the person caused their disease of the mind, then his mental capacity is not excused.[133] For example, in Portugal, an individual who when committing the crime had willingly consumed ecstasy and caused his own mentally incapacitated state then he would be unable to use this defense to show immutability. Specifics about how the code may be interpreted are ambiguous because the civil law tradition does not place as much weight on case law as the common law tradition.

b. India

The Indian judicial system follows the common law tradition.[134] As India is a common law country, legal precedent from the Supreme Court of India is binding on the lower courts in the country.[135] The criminal laws in India are contained in the India Penal Code which was originally created in 1860.[136] "The Indian Penal Code (IPC) is the main document which governing all criminal acts and the punishments they ought to be charged with."[137]

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[132] *Id.*
[133] *Id.*
[134] Taruni Kavuri, *Introduction to the Indian Judicial System*, MICH. STATE UNIV. COLL. OF LAW, ANIMAL LEGAL & HISTORICAL CENTER (2020), https://www.animallaw.info/article/introduction-indian-judicial-system#:~:text=Since%20India%20is%20a%20common,source%20of%20law%20in%20India. (last accessed Apr. 7, 2021).
[135] *Id.*
[136] Taruni Kavuri, *Introduction to Criminal Law in India*, MICH. STATE UNIV. COLL. OF LAW, ANIMAL LEGAL & HISTORICAL CENTER (2020), https://www.animallaw.info/article/introduction-criminal-law-india . (last accessed Apr. 7, 2021).
[137] *Id.*

The insanity defense in India is located in the IPC section 84. Specifically providing a defense of an act committed by a person of unsound mind. The code provides, "nothing is an offense which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to the law."[138] This is solely based on the M'Naghten insanity defense.[139] As with M'Naghten for this defense to be utilized the actor must have a mental disease or defect at the time of committing the crime. The actor then needs to meet one of the following: unable to know the nature of the act, unable to know the act is wrong, or unable to know the act is contrary to the law.[140] This defense like those above rests on the notion, that there is "no culpability [for] persons with mental illness because they can have no rational thinking or the necessary guilty intent"[141] for as required by law for liability to stand.

V. Comparative Recommendation for the Mental Insanity Defense

The examination of the various insanity defenses available points to the potential for evolution. My recommendation for BiH is to adopt an insanity defense that includes prongs for cognitive capacity, moral capacity, and volitional control. The addition of the volitional control element creates a more comprehensive insanity defense as it includes individuals who are unable to control their actions due to their mental disease or defect. A representation of this recommendation is most similar to the MPC, in the United States, because it covers insanity based on cognitive capacity, moral capacity, and volitional control.[142]

[138] Indian Penal Code [PEN. CODE], § 84, https://www.iitk.ac.in/wc/data/IPC_186045.pdf (last accessed Apr. 7, 2021).
[139] SB. Math, CN. Kumar & S. Moirangthem, *supra.*
[140] *Id.*
[141] *Id.*
[142] *United States v. Brawner*, 471 F.2d 969 (1972).

The United States Supreme Court has stated a formulation of a single "constitutional rule would reduce, if not eliminate, the States' fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold."[143] However, the codes from BiH, Portugal, and India demonstrate how a country may have just one insanity defense and continue to evolve with the times. A benefit of having a singular insanity defense in the United States, is the predictability it would provide across the jurisdictions as to who can be shielded by the insanity defense. Currently, the United States has five different versions of the insanity defense, thus as we saw with *Kahler v. Kansas*, a defendant who would qualify for the defense in one state may not qualify in another. To unify the current insanity defenses into a singular defense I recommend the adoption of the MPC as it incorporates the traditional M'Naghten prongs and the volitional component of the Irresistible Impulse test.

On paper the insanity defense seems like a great defense for a client. In contrast, statistics show that on average less than one out of 100 defendants (0.85 percent) actually raise the defense in the United States.[144] Out of those who choose to raise the defense, roughly 0.26 percent are successful.[145] For defense counsel who choose to use this defense, I recommend they explain the risk of successfully pleading this defense. As the result of successfully pleading the mental insanity defense is that the defendant can be detained until it is determined they are no longer a risk to themselves or others rather than a set term.[146]

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[143] Kahler, 140 S. Ct. at 1022.
[144] *Insanity Defense: Insanity Defense Statistics, Problems with NGRI, Guilty but Mentally Ill*, https://psychology.jrank.org/pages/336/Insanity-Defense.html (Last Accessed Apr. 20, 2021).
[145] *Id.*
[146] Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, NY TIMES Sept. 27, 2017, https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html (Last Accessed Apr. 20, 2021).

VI. Conclusion

The mental insanity defense, while not perfect, does serve an important purpose. The defense serves to support the maxim that to hold an individual liable for a criminal act they must have the requisite mens rea. Individuals who suffer from mental diseases and defects are, therefore, given a shield against liability if the court finds that the individual because of their mental state was unable to form the requisite mens rea. This defense dates back over 1000 years as such it is ingrained into legal systems and traditions around the world. As times have changed, medical treatments and society's perception of the mentally insane have evolved, so too must the legal insanity defenses.