

Vukan Slavković

University of Montenegro, Kotor, (Montenegro)

e-mail: vukan.s@ucg.ac.me

ORCID: 0000-0002-0151-464X

MENTAL INCAPACITY DEFENSE IN ANGLO-AMERICAN LAW AND THE DEFENDANT'S ABILITY TO APPRECIATE CRIMINALITY OF HIS CONDUCT

Abstract

The purpose of this study is to provide a more complete account of the significant judicial innovations in the handling of family murder cases, with comparable interest in the subject of insanity defense. In order to analyze the determinants of reactions to the trials, the author also explored American federal and State law concerning the verdicts. Although the M'Naghten Rule was the dominant test, after the publication of the *Model Penal Code*, every American state that seriously considered incapacity defense reform legislatively or judicially adopted the MPC test. According to 18 U. S. C. §17, a federal defendant has had to prove that the "severe" mental disease made him "unable to appreciate the nature and quality or the wrongfulness of his acts". Until 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replaced it with a *mens rea* approach. The United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the States to adopt an insanity defense based on a defendant's ability to understand that his crime was morally wrong.

KEYWORDS

mental incapacity, criminal law, family murder, affirmative defense, *mens rea* approach

SŁOWA KLUCZOWE

niepoczytalność, prawo karne, morderstwo rodzinne, obrona oparta na zarzucie niepoczytalności, podejście *mens rea*

‘Who are you?’

‘I’m nobody now’

‘Where have you just come from?’

‘From the house of sorrows.’

‘But you do believe that it is really I?’

‘I must believe, though, of course, it would be much more comforting to consider you the product of a hallucination.’

‘Well, so, if it’s more comforting, consider me that.’

Mikhail Bulgakov, *Master and Margarita*¹

1. INTRODUCTION

History has recognized some form of incapacity defense for thousands of years. Ancient societies distinguished between blameworthy and blameless acts of harm. English *common law* followed the same principles, noting the inability to distinguish good from evil as an excuse for legal insanity. Around the 14th century, there was a shift in which insanity became recognized as a complete defense. By the 18th century, courts commonly used the “knowledge of the good and evil” test in insanity cases.²

The *Criminal Lunatics Act of 1800*,³ drafted in a mere 4 days, contained four sections. The first section provided for the special verdict of insanity, such that, if a person charged with treason, murder or a felony was acquitted of insanity, the court should order him into strict custody until “His Majesty’s Pleasure be Known” [3, p. 1]. The second section of the act concerned persons indicted for any

¹ M. Bulgakov, *Master and Margarita*, Penguin Classics, London, 2001, p. 297

² M. Silvestro, “Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits”, *UIC Law Review*, Vol. 53, No. 3, 2021, p. 638.

³ 39 & 40 Geo. III, c. 94.

offense, who were found to be insane upon arraignment. The court was thereby empowered arbitrarily to hold the person in strict custody until “His Majesty’s Pleasure be Known”. The section also applied to persons who appeared to be insane during a trial, and others discharged for want of prosecution [3, p. 2]. Section 3 of the Act denied bail to any “persons discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing a crime” [3, p. 3].⁴ If a Justice of the Peace declared a person as a “dangerous person suspected to be insane”, that person could not be bailed, unless by two Justices of the Peace.⁵

American efforts to prevent or punish family violence began in New England in the 1640s with the passage of the first laws. Afterward, there have been periods of history that included reforms against family violence and significant efforts to criminalize it.⁶

Part of U.S. law on insanity has its roots in the soil of English jurisprudence from the 17th century through the late 19th century. The bulk of the developed law has derived from the writings of early English scholars and a handful of well-known, frequently referenced cases. Two forms of the insanity defense have English *common law* origins. The *irresistible impulse test* is formally referred to as the volitional impairment test and excuses conduct when a jury finds that a defendant could not conform his conduct to the requirements of law due to mental illness. The so-called *McNaughten* test is a cognitive test to determine a defendant’s culpability according to whether he was able to discern the distinction between right and wrong.⁷

In the modern criminal law of England and Wales, there is no general “diminished capacity” defense, although diminished responsibility is a special partial defense to murder which, if successfully pleaded, reduces the defendant’s liability to (voluntary) manslaughter.⁸ The elements of the insanity defense were established in the *R v McNaughten* case in 1843 (the *McNaughten* rules) and have remained largely unaltered since.

⁴ 1800 Criminal Lunatics Act, <https://filippomposposini.files.wordpress.com/2019/09/1800-criminal-lunatics-act.pdf> (accessed 27 March 2023).

⁵ G. Lilienthal, A. Nehaluddin, “*Deconstructing the Criminal Defense of Insanity*”, *International Journal for the Semiotics of Law*, Vol. 30, No. 1, 2017, p. 163

⁶ E. Pleck, “Criminal Approaches to Family Violence, 1640-1980”, *Crime and Justice*, 1989, Vol. 11, p. 19.

⁷ J. Moriarty, *The Role of Mental Illness in Criminal Trials*, Routledge, New York, 2001, p. XI.

⁸ Homicide Act 1957, p.2 as amended by the Coroners and Justice Act 2009, p. 52.

2. LEGAL INSANITY

Concerning incapacity defense, American courts focused on the defendant's ability to distinguish right from wrong and on the fact that those not fit for punishment must be acquitted.⁹ Virtually every US jurisdiction that permits the defense requires insanity claims to comport with the jurisdiction's general test for criminal responsibility. The affirmative defense of legal insanity has always been controversial, but every state had some form of the defense until the time of *Hinckley*.¹⁰ In the-early part of the 20th century, a few states tried to abolish the defense legislatively¹¹ but all such attempts were rejected by the states' appellate courts. After M'Naghten,¹² virtually all US jurisdictions adopted some form of the English cognitive test, although starting with the Parsons¹³ case in Alabama, a minority of jurisdictions also adopted a control test¹⁴ in addition to the M'Naghten standard. There were, of course, criticisms of M'Naghten. It was allegedly not flexible enough because its test was expressed in all-or-none terms, was not scientific enough, and it unduly limited the scope of expert testimony.

Nonetheless, M'Naghten remained the dominant test until the second half of the 20th century. Jurisdictions were given great freedom to allocate the burden of persuasion at any level, including requiring the defendant to prove legal insanity beyond a reasonable doubt, thus increasing the risk of wrongful conviction. Jurisdictions were permitted to place the persuasion burden on the prosecution beyond a reasonable doubt once the defendant met the production burden, and most did so.¹⁵ In 1962, the American Law Institute published the *Model Penal Code*, in order to bring rigor, and precision to the *common law* of crimes. Its insanity defense provision is as follows:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either

⁹ M. Silvestro, "Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits", *ibidem*, p. 638

¹⁰ *United States v. Hinckley*, U.S. District Court for the District of Columbia - 525 F. Supp. 1342 (D.D.C. 1981).

¹¹ *State v Lange*, 123 So 639, 641-42 (La 1929) (finding a violation of the state due process clause); *Sinclair v State*, 132, pp. 581, 584-87 (Miss 1931) (finding a violation of the federal due process, equal protection, and cruel and unusual punishment clauses); *State v Strasburg*, 110 pp. 1020, 1023-24 (Wash 1910) (finding a violation of the state due process clause).

¹² *Cl & Fin* [1843] 8 Eng Rep 718.

¹³ *Parsons v State*, 81 Ala 577(1887).

¹⁴ These tests are sometimes referred to as "irresistible impulse" or "volitional tests".

¹⁵ S. Morse, "Before and after Hinckley", in: R. Mackay (ed.) *The Insanity Defence: International and Comparative Perspectives*, Oxford University Press, Oxford, 2022, pp. 199-200.

to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.¹⁶

Insanity requires a different sort of incapacity, or rather incapacities: the *cognitive* incapacity to “appreciate the criminality [wrongfulness] of conduct,” and the *volitional* one to “conform conduct to the requirements of the law”. The Code drafters responded to what they perceived as the shortcomings of the then-dominant insanity test, first set out in an advisory English opinion from 1843, *M’Naghten’s Case*.¹⁷ Here is the *M’Naghten* test in its original formulation:

“To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”.¹⁸

The “defect of reason” means that the defendant’s powers of reasoning were impaired, more than to the extent of a simple inability to resist impulses or exercise emotional control.¹⁹

The drafters had consulted with mental health professionals and believed the new test was an improvement on both *M’Naghten* and control tests. It notably included a control prong. It required only a lack of substantial capacity, not a lack of all capacity to appreciate or to conform. Further, its cognitive prong gave lawmakers the choice between appreciation, not knowledge of criminality (legal appreciation) or of wrongfulness (moral appreciation), and did not focus on ‘knowledge’ narrowly conceived. After the publication of the MPC test, every state that seriously considered insanity defense reform adopted the MPC test legislatively or judicially.²⁰

On 21 June 1982, a Washington, D.C. jury found John W. Hinckley, Jr. Not Guilty by Reason of Insanity (NGRI) on all charges arising from his attempted assassination of President Reagan. The public’s negative reaction stimulated

¹⁶ The American Law Institute. 1985. *Model penal code, Official draft and explanatory notes*. Philadelphia: The American Law Institute, pp. 61-62.

¹⁷ 1 C. & K. 130, 4 St. Tr. N.S. 847 (1843). *M’Naghten* set out to assassinate Prime Minister Sir Robert Peel, convinced that spies were following him “night and day”. He killed Peel’s private secretary instead, mistaking him for Peel. After *M’Naghten’s* acquittal on grounds of insanity, the House of Lords asked for clarification of the law of insanity.

¹⁸ M. Dubber, *An introduction to the Model Penal Code*, Oxford University Press, Oxford, 2015, pp. 200-201.

¹⁹ C. Brants, A. Jackson & F. Koenraadt, “Culpability compared: Mental capacity, criminal offences and the role of the expert in common law and civil law jurisdictions”, *Journal of International and Comparative Law*, Vol. 3, No. 2, 2016, pp. 419-420.

²⁰ S. Morse, “Before and after Hinckley”, *ibidem*, p. 200.

reforms of the insanity defense. The day after the Hinckley verdict was reached, the Delaware legislature passed a law providing a Guilty But Mentally Ill verdict alternative in insanity cases.²¹ According to §407 (a) “Where a defendant’s defense is based upon allegations which, if true, would be grounds for a verdict of ‘guilty, but mentally ill’ or desires to enter a plea to that effect, no finding of ‘guilty, but mentally ill’ shall be rendered until the trier of fact has examined all appropriate reports (including the pre-sentence investigation); has held a hearing on the sole issue of the defendant’s mental illness, at which either party may present evidence; and is satisfied that the defendant was in fact mentally ill at the time of the offense to which the plea is entered. Where the trier of fact, after such hearing, is not satisfied that the defendant was mentally ill at the time of the offense, or determines that the facts do not support a ‘guilty but mentally ill’ plea, he shall strike such plea, or permit such plea to be withdrawn by the defendant”.²²

Within a month of the Hinckley verdict, the House and Senate were holding hearings on the insanity defense. A measure proposed shifted the burden of proof of insanity to the defense. Joining Congress in shifting the burden of proof were a number of states. Within three years after the Hinckley verdict, two-thirds of the states placed the burden on the defense to prove insanity, while eight states adopted a separate verdict of ‘guilty but mentally ill’, and one state (Utah) abolished the defense altogether. In addition to shifting the burden in insanity cases, Congress also narrowed the defense itself. *The Insanity Defense Reform Act of 1983* required the defendant to prove a ‘severe’ mental disease and eliminated the ‘volitional’ or ‘control’ aspect of the insanity defense.²³ A federal defendant had to prove that the ‘severe’ mental disease made him “unable to appreciate the nature and quality or the wrongfulness of his acts”.²⁴

To be found NGRI, a defendant must have a mental health condition that so greatly impacts his ability to comprehend his actions that they cannot be held criminally responsible for them. NGRI is raised in about one percent of felony cases and is only successful in fifteen to twenty-five percent of those cases. Separately, an individual can be found incompetent to stand trial if he is not stable enough to participate in the proceedings. Once the individual regains competency, he is considered rehabilitated and can be tried. Alternately, a defendant might be mentally ill but found competent to stand trial, to begin with. At either point, once the defendant is found competent, the district attorney can also offer

²¹ V. Hans, D. Slater, “John Hinckley, Jr. and the Insanity Defense: The Public’s Verdict”, *The Public Opinion Quarterly* 1983, Vol. 47, No. 2, pp. 202-203.

²² An Act to amend Chapter 4 and Chapter 39, Title 11 of the Delaware Code relating to crimes and criminal procedure; and providing for certain verdicts in criminal cases, <https://legis.delaware.gov/SessionLaws/Chapter?id=24068>, (accessed 22 March 2023).

²³ H.R.3771 – Insanity Defense Reform Act of 1983, <https://www.congress.gov/bill/98th-congress/house-bill/3771?s=1&r=99>, accessed 5 April 2023.

²⁴ L. Douglas, “The Trial of John W. Hinckley, Jr.”, *Popular Media*, Vol. 55, 2007.

an NGRI plea arrangement, which accounts for the vast majority of the NGRI cases. If no plea deal exists, however, a defendant's fate will be decided by a jury, who is far less likely to issue a verdict of insanity than judges.²⁵

According to 18 U. S. C. §17, "It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts 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. The defendant has the burden of proving the defense of insanity by clear and convincing evidence".²⁶

3. "SETTLED INSANITY" DOCTRINE AND VOLUNTARY INTOXICATION WITH NARCOTICS

Temporary insanity is a defense that can be used when the defendant believes he shouldn't be held criminally liable for his actions due to a temporary impairment in his ability to make sound judgments. A temporary insanity defense may be suggested by a criminal lawyer when it can be established that the circumstances leading up to the criminal act had an immediate impact on the defendant's state of mind.

To successfully establish a defense of temporary insanity, it must be shown that the defendant was suffering from a mental defect at the time the criminal act occurred and that this defect affected the defendant's ability to differentiate between right and wrong.²⁷

Like the insanity defense generally, but even more so, juries rarely acquit based on temporary insanity. If some courts treated temporary insanity as a special plea during prior periods, the claim no longer possesses much of a distinct character. Like regular insanity claims, virtually every jurisdiction that permits the defense requires temporary insanity claims to comport with the jurisdiction's general test for criminal responsibility. In jurisdictions that follow the M'Naghten test, for example, a defendant pleading temporary insanity must, like any insanity pleader, establish that at the time of the crime, he was unable to understand the nature and quality of his acts or their wrongfulness. In addition, he must establish that the disabling condition was caused by a "diseased mind". Occasionally, legal

²⁵ B. Wendzel, "Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense", *American Criminal Law Review*, Vol. 57, No. 2, 2020, p. 395.

²⁶ Title 18 – Crimes And Criminal Procedure, <https://uscode.house.gov/browse/prelim@title18/part1/chapter1&edition=prelim> (accessed 1 April 2023).

²⁷ *Understanding What It Means to Plea Temporary Insanity*, <https://www.fitch-stahlelaw.com/understanding-what-it-means-to-plea-temporary-insanity> (accessed 6 April 2023).

implications do flow from the decision to plead temporary rather than permanent insanity.²⁸

Each state has the responsibility of determining how it defines and upholds a defense of temporary insanity. There are four basic standards that states follow – the M’Naghten Rule, the Irresistible Impulse Test, the Model Penal Code Test, and the Durham Rule. The temporary insanity defense is a recognized, viable defense in some forty-four states. Four states – Idaho, Kansas, Montana, and Utah – do not recognize insanity as a defense at all. It follows, *a fortiori*, that these states also do not recognize temporary insanity as a defense.²⁹ According to Arizona Revised Statutes, Title 13 – Criminal Code, Section 13-502, Subsection A, “A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct”.³⁰

American courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Early cases held that voluntary intoxication could induce temporary insanity that would relieve a defendant of criminal responsibility if the insanity was of a ‘settled nature’.³¹

The California Supreme Court reached a finding in overturning the conviction of Valerie Kelly, who, after taking mescaline and LSD some fifty to one hundred times over a two-month period, stabbed her mother with an assortment of kitchen knives. Trial testimony established that Kelly was not acting simply as a person who, after ingesting drugs or alcohol, was unable to perceive reality and reason properly. Rather, the drug abuse was deemed the indirect cause of a legitimate, temporary psychosis that would last even when the defendant was temporarily off drugs.³²

²⁸ R. Covey, “Temporary Insanity: The Strange Life and Times of the Perfect Defense”, *Boston University Law Review*, Vol. 91, No. 5, 2011, pp. 1607-1609.

²⁹ The Insanity Defense Among the States, <https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html> (accessed 26 March 2023).

³⁰ Title 13 – Criminal Code, <https://www.azleg.gov/arsDetail/?title=13> (accessed 4 April 2023).

³¹ *People v. Travers*, Supreme Court of California, 5 March 1891, 88 Cal. 233 (Cal. 1891).

³² R. Covey, “Temporary Insanity: The Strange Life and Times of the Perfect Defense”. *Boston University Law Review*, Vol. 91, No. 5, 2011, p. 1630.

The California Supreme Court was called upon to explain the meaning of settled insanity. In *People v. Kelly*,³³ the court was asked to determine whether an eighteen-year-old defendant, who had been continuously using hallucinogenic drugs for approximately one year prior to attacking her mother, could have been legally insane at the time she “repeatedly stabb[ed] her with an array of kitchen knives”. Despite expert testimony that the defendant suffered from an organic brain defect caused by the drugs that rendered her ‘dingy’, the trial court held that the defendant could not meet the definition of legal insanity because her condition was not settled and permanent.

According to the California Supreme Court, the trial court was mistaken in construing ‘settled’ to mean only ‘permanent’. The term ‘settled’ was apparently broad enough to include both permanent and temporary insanity. Under the reasoning of the California Supreme Court, a defendant might be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.

However, Section 25.5 of California’s Penal Code makes the insanity defense unavailable to defendants whose insanity is solely the result of voluntary ingestion of drugs and/or alcohol. Section 25.5 significantly narrows the availability of the insanity defense because ‘temporary’ insanity excuses criminal behavior only if it is at least in part the result of “an organic mental disease or defect”.³⁴

According to Section 120 of the Senate Bill 1171,³⁵ “Section 25.5 of the California Penal Code is amended and renumbered to read: “In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances (Section 29.8.)”.³⁶

Under the ‘settled insanity’ doctrine, insanity that results from habitual or extended use of intoxicants, even if the use of the intoxicants was voluntary, can be a defense if the effects of the extended use of the intoxicants have caused either temporary or permanent mental or physical damage to the defendant.³⁷ In such cases, “the plea of insanity avails the party”, just as with any other reason-inhibiting disease or condition, as long as the defendant can establish the necessary elements of the insanity defense – i.e., that he did “not know at the time he committed the act, that he was doing an immoral and unlawful act”. To assert a settled

³³ *People v. Kelly*, 516 P.2d 875, 883 (Cal. 1973) (holding that the defendant may have been insane at the time she stabbed her mother even if the insanity resulted from “repeated voluntary intoxication”).

³⁴ S. Davoudian, “California Homicide Law: The Basics”, *Loyola of Los Angeles Law Review*, Vol. 36, No. 4, 2003, pp. 1602-1604.

³⁵ SB 1171 (Chapter 162) was passed by the Senate on 6 July 2012.

³⁶ BILL NUMER 1171, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1171_bill_20120723_chaptered.html (accessed 30 March 2023).

³⁷ J. Hall, *General principles of criminal law*, Lawbook Exchange, New York, 1960, p. 112.

insanity claim, the defendant must establish that the triggering cause was the underlying condition brought about by the extended use of intoxicants, and not the effects of the intoxicant when the crime was committed.³⁸

A greater number of temporary insanity claims predicated on intoxication succeed where defendants claim the intoxication was involuntary or pathological. For example, defendants have found some success in cases in which the temporary insanity allegedly resulted from the use of Prozac, Halcion or other selective serotonin reuptake inhibitors (SSRIs). The defendants have been successfully raising a defense of Halcion-induced intoxication to obtain reversals of their convictions.³⁹

Such claims have been permitted, notwithstanding that the drugs were consumed voluntarily, on grounds that the resulting psychological reaction was unanticipated and thus ‘pathological’ in nature. In these cases, courts quite readily concede that the effects of intoxication are often indistinguishable from other disabling causes of cognitive dysfunction.⁴⁰

4. JUDICIAL PRACTICE

4.1. THE *MENS REA* APPROACH

Until March 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replaced it with a *mens rea* approach. The *mens rea* approach will likely lead to more mentally ill, criminal defendants being incarcerated rather than receiving the treatment they need. The purpose of the traditional insanity defense is to ensure that criminal culpability is only imposed upon those individuals who have the mental capacity to comply with the law. The purpose of the *mens rea* approach, however, only allows a criminal defendant to introduce evidence showing the existence of mental disease in order to negate intent.⁴¹

³⁸ R. Covey, “Temporary Insanity: The Strange Life and Times of the Perfect Defense”, *ibidem*, pp. 1629-1630.

³⁹ T. Myers, “Halcion Made Me Do It: New Liability and a New Defense - Fear and Loathing in the Halcion Paper Chase”, *University of Cincinnati Law Review*, Vol. 62, No. 2, 1993, p. 605.

⁴⁰ R. Covey, “Temporary Insanity: The Strange Life and Times of the Perfect Defense”, *ibidem*, pp. 1630.

⁴¹ M. DiSilvestro, *Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits*, *ibidem*, p. 634.

In 1995, the state of Kansas passed a law (Kan. Stat. Ann. § 22-3220) which revoked the traditional insanity defense. Defendants could no longer argue that, because of their mental illness, they were incapable of distinguishing right from wrong. Instead, defendants with mental illness were only permitted to argue that their mental illness prevented them from forming the specific intent (or *mens rea*) needed to commit the crime.⁴²

In early 2009, Karen Kahler filed for divorce from James Kahler and moved out of their home with their two teenage daughters and a 9-year-old son. Over the following months, James Kahler became more and more distraught. On Thanksgiving weekend, he drove to the home of Karen's grandmother, where he knew his family was staying. Kahler entered through the back door and saw Karen and his son. He shot Karen twice while allowing his son to flee the house. He then moved through the residence, shooting Karen's grandmother and each of his daughters in turn. All four of his victims died. Kahler surrendered to the police the next day and was charged with capital murder.⁴³

Under Kansas law, a defendant may raise mental illness to show that he "lacked the culpable mental state required as an element of the offense charged". Kansas does not recognize any additional way that mental illness can produce an acquittal, although a defendant may use evidence of mental illness to argue for a lessened punishment at sentencing. Prior to trial, Kahler filed a motion arguing that Kansas' treatment of insanity claims violates the Fourteenth Amendment's Due Process Clause.⁴⁴ He asserted that Kansas had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong". The trial court disagreed and the jury returned a conviction. During the penalty phase, Kahler was free to raise any argument he wished that mental illness should mitigate his sentence, but the jury still imposed the death penalty. The Kansas Supreme Court affirmed. The United States Supreme Court granted *certiorari*.⁴⁵

A challenge like the Kahler's case must achieve high standards. Under well-settled precedent, due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of American people

⁴² 2006 Kansas Code – 22-3220, https://law.justia.com/codes/kansas/2006/chapter22/statute_12094.html#:~:text=Defense%20of%20lack%20of%20mental,is%20not%20otherwise%20a%20defense (accessed 21 March 2023).

⁴³ STATE v. KAHLER (2018), <https://caselaw.findlaw.com/ks-supreme-court/1888978.html> (accessed 7 April 2023).

⁴⁴ Due Process Clause is found in both the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit the deprivation of "life, liberty, or property" "by the federal and state governments, respectively, without due process of law.

⁴⁵ R. Barkow *et. al.*, *Casenote Legal Briefs for Criminal Law, Keyed to Dressler and Garvey*, Aspen Publishing, 2022, p. 110.

as to be ranked as fundamental [*Snyder v. Massachusetts*, 291 U.S. 97 (1934)].⁴⁶ According to Kahler, Kansas has impermissibly jettisoned the moral-incapacity test for insanity. Both *Clark*⁴⁷ and *Leland*⁴⁸ described that test as coming from *M'Naghten*. But Kahler stated that the moral-incapacity inquiry emerged centuries before that decision, thus forming part of the English common-law heritage this country inherited. The test served for all that time and continues into the present as the touchstone of legal insanity. Kansas has altogether “abolished the insanity defense”, in disregard of hundreds of years of historical practice. So Kahler concluded that the moral incapacity standard is a “principle of justice so rooted in the traditions and conscience of American people as to be ranked as fundamental”.

The Kansas Supreme Court rejected his argument, relying on an earlier precedential decision. There, the court denied that any single version of the insanity defense was so “ingrained in the American legal system” as to count as “fundamental”. The court thus found that “due process does not mandate that a State adopt a particular insanity test”.⁴⁹

On 7 October 2019, the United States Supreme Court heard arguments about the case *Kahler v. Kansas*,⁵⁰ discussing questions and concerns about the constitutionality of abolishing the insanity defense. On 23 March 2020, the Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the States to adopt an insanity defense based on a defendant’s ability to understand that his crime was morally wrong.⁵¹

4.2. THE AFFIRMATIVE INSANITY DEFENSE

4.2.1. THE MODEL PENAL CODE RULE

The New York state uses the Model Penal Code rule as a general test for criminal responsibility. The burden of proof is on the defendant.⁵² According to Section 40.15 of the New York Penal Code (Mental disease or defect), “In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the

⁴⁶ *Snyder v. Massachusetts*, 291 U.S. 97 (1934), <https://supreme.justia.com/cases/federal/us/291/97/>, (accessed 29 March 2023).

⁴⁷ *Clark v. Arizona*, 548 U.S. 735 (2006).

⁴⁸ *Leland v. Oregon*, 343 U.S. 790 (1952).

⁴⁹ *Kahler v. Kansas*, <https://casetext.com/case/kahler-v-kansas-1>, (accessed 3 April 2023).

⁵⁰ *Kahler v. Kansas*, 140 S. Ct. 1021, 206 L. Ed. 2d 312 (2020).

⁵¹ 18-6135 *Kahler v. Kansas* (03/23/2020), https://www.supremecourt.gov/opinions/19pdf/18-6135_j4ek.pdf (accessed 8 April 2023).

⁵² The Insanity Defense Among the States, <https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html> (accessed 26 March 2023).

time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. the nature and consequences of such conduct; or
2. that such conduct was wrong”.⁵³

The New York Penal Law became effective on 1 September 1967. It was “the first major and comprehensive revision of the Penal Law since 1881”.⁵⁴ According to Section 1046 of the prior Penal Law of the state of New York, second-degree murder was characterized as killing with a design to produce death but without accompanying deliberation and premeditation.⁵⁵ The New York Law Revision Commission found that the law of murder had been rendered “vague and indefinite” and that “bare intent to kill” had been “confounded with deliberation”.⁵⁶ The first statute which graded murder was enacted in Pennsylvania in 1794. It subsequently became a model in many other jurisdictions for similar legislation, dividing murder into two degrees and limiting capital punishment to the higher degree. The Pennsylvania Act provided that “all murder which shall be perpetrated by means of willful, deliberate and premeditated killing shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. In view of the dictionary meanings of the words ‘deliberate’ and ‘premeditated’, those who drafted the statute undoubtedly had in mind that only those murders which were thoughtfully conceived well in advance of the actual killing would fall within the first-degree category.⁵⁷ “To deliberate” means “to weigh in the mind; to consider the reasons for and against; to consider maturely; to reflect upon; ponder”. “To premeditate” means “to think on and revolve in the mind, beforehand; to contrive and design previously”.⁵⁸

According to Section 125.25 of the current New York Penal Law, a person is guilty of murder in the second degree when:

1. with intent to cause the death of another person, he causes the death of such a person or of a third person;
2. under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person;

⁵³ New York Penal Law 1 September 1967 (revised 16 March 2013), <https://ypdcrime.com/penal.law/article40.php#p40.15> (accessed 7 April 2023).

⁵⁴ H. Levine, “The New York Penal Law: A Prosecutor’s Evaluation”, *Buffalo Law Review*, Vol. 18, No. 2, 1968, p. 269.

⁵⁵ J. Joseph, “Deliberation and Premeditation in First Degree Murder - Cummings v. State”, *Maryland Law Review*, Vol. 21, No. 4, 1961, pp. 352-353.

⁵⁶ R. Byrn, “Homicide Under the Proposed New York Penal Law”, *Fordham Law Review*, Vol. 33 No. 2, 1964, p. 178.

⁵⁷ J. Joseph, *Deliberation and Premeditation in First Degree Murder – Cummings v. State*, *ibidem*, pp. 350-351.

⁵⁸ N. Webster, *Webster’s Third New International Dictionary of the English Language*, Merriam-Webster, Springfield, 1981.

3. acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants;

4. under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person; or

5. being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.⁵⁹

If the defendant intentionally or recklessly caused the death of another person, he could face a homicide charge. There are several different offenses in the New York criminal code related to taking the life of another person including homicide, manslaughter and murder. Of all of the crimes related to homicide, the most serious are murder in the first degree, murder in the second degree, and aggravated murder. Each is a class A-I felony, meaning that if someone is convicted, he could be sentenced to life.⁶⁰

4.2.1.1. THE MURDER OF DEFEO FAMILY

Ronald Joseph DeFeo, Jr. was an American mass murderer, the eldest son of the family, who was tried and convicted for the killings of his father, mother, two brothers and two sisters.⁶¹ On 13 November 1974, all of the victims were shot with a .35 caliber lever action Marlin 336C rifle at around three o'clock in the morning.

He was taken to the local police station for his own protection after suggesting to police officers at the scene of the crime that the killings had been carried out by a mob hit man, because there was animosity between them and the Defeos regarding the car dealership.⁶² DeFeo was placed in protective custody as the police followed up on his story and investigated.

⁵⁹ New York State Law, <https://ypdcrime.com/penal.law/article125.php#p125.25> (accessed 6 April 2023).

⁶⁰ NY Penal Law § 125.25: Murder in the second degree, <https://criminaldefense.1800nynylaw.com/new-york-penal-law-125-25-murder-in-the-second-degree.html> (accessed 27 March 2023).

⁶¹ *People v. DeFeo*, Indictment No. 1251/74, at 1-2 (N.Y. Sup.Ct., Suffolk County, Jan. 6, 1993).

⁶² V. Plaza, *American mass murderers*, Lulu Press, Morrisville, 2015, p. 136.

However, a further search of the DeFeo residence turned up an empty box in Butch DeFeo's room that was for the .35 caliber Marlin 336C rifle that he had purchased of late.⁶³ An interview with DeFeo at the station soon exposed serious inconsistencies in his version of events. When pressed by the detectives regarding the sequence of events and estimated time of deaths of the victims, DeFeo's story about the murders quickly became contradictory.⁶⁴

The following day he confessed to carrying out the killings himself, and the alleged hitman had an alibi proving he was out of state at the time of the killings.⁶⁵ DeFeo said that he discarded blood-stained clothes, the Marlin rifle and cartridges into a storm drain on his way to the dealership, where he arrived at around six a.m. At the time, DeFeo was on probation and under surveillance as a drug user.⁶⁶

DeFeo's trial began on 14 October 1975. His lawyer mounted an affirmative defense of insanity, with DeFeo claiming that he killed his family in self-defense because he heard their voices plotting against him.⁶⁷ Representing the New York State was Suffolk County Assistant District Attorney. While the defense psychiatrist argued in support of DeFeo's claims of insanity, suggesting that he was "neurotic and suffered from dissociative disorder", the prosecution psychiatrist asserted that DeFeo abused LSD and heroin and suffered from antisocial personality disorder, but was certainly aware of his actions at the time of the crime and able to distinguish right from wrong. On 21 November 1975, the insanity defense failed to convince the jury, as with a unanimous vote, Ronald DeFeo, Jr. was convicted on six counts of murder in the second degree. On 4 December 1975, he was sentenced to six concurrent terms of twenty-five years of imprisonment.⁶⁸

On 27 March 1978, the Appellate Division, Second Department, unanimously affirmed the conviction⁶⁹ and on 23 May 1978, the Court of Appeals denied leave to appeal.⁷⁰

⁶³ R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short)*, CreateSpace, Scotts Valley, 2017.

⁶⁴ V. Plaza, *American mass murderers*, *ibidem*, p. 136.

⁶⁵ Ten years have passed since a similar case and the greatest mass murder that happened in Serbia. On 9 April 2013, a murderer in the village Velika Ivanca, near Mladenovac, killed 13 relatives and neighbours in cold blood. It was around 5 a.m. when the shooting began. Most of the villagers were sleeping in their homes and some of them tried to escape, but they fell down under the bullets. The chain of murders, which lasted around half an hour, ended with the arrival of the police and the attempt of the perpetrator to commit suicide. He later succumbed to injuries in the hospital.

⁶⁶ R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short)*, *ibidem*.

⁶⁷ V. Plaza, *American mass murderers*, *ibidem*, p. 136.

⁶⁸ R. Flowers, *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short)*, *ibidem*.

⁶⁹ *People v. DeFeo*, 61 A.D.2d 1141, 403 N.Y.S.2d 165 (2d Dep't 1978).

⁷⁰ *People v. De Feo*, 44 N.Y.2d 952, 408 N.Y.S.2d 1032, 380 N.E.2d 342 (1978).

4.2.2. THE M'NAGHTEN RULES

4.2.2.1. ATTEMPTED MURDER OF KEAL FAMILY AND "COMMAND DELUSION"

In Keal [2022] EWCA, the England and Wales Court of Appeal decided that the defense of insanity is not available to a defendant who, owing to a disease of the mind leading to a defect of reason, believed that his actions were being externally controlled. Any other answer would require an inappropriate departure from the M'Naghten rules.

Robert Keal attempted to kill his father, mother and grandmother with weapons including knives, scissors and a cricket bat, during a sustained attack at their shared home. There were moments during the attack when Keal apologized to his victims and stated that he was unable to stop himself. To his mother, at one point he said, "I'm sorry, this isn't me, it's the devil". At trial, the psychiatric experts agreed that Keal was seriously unwell and in a psychotic state at the time of the offence. He satisfied the first two requirements in the M'Naghten rules that a defendant who claims insanity must prove that he was, at the time of the alleged offence, (1) suffering from a "disease of the mind", (2) leading to a "defect of reason". However, the experts also agreed that Keal understood the "nature and quality" of his actions, ruling out a defense under requirement (3a) of the rules. In order to qualify as insane, therefore, Keal had to prove the alternative limb, (3b) that he "did not know that what he was doing was wrong"; a test that was itself paraphrased in M'Naghten in terms of the accused not being "conscious that the act was one which he ought not to do". Experts disagreed on this last issue and Keal was convicted. On appeal, defense counsel rehearsed an argument, rejected by the trial judge, that Keal's belief that he lacked control over his actions was relevant to whether he satisfied limb (3b).⁷¹

The appellant had a history of mental health problems, ADHD and drug addiction. He had struggled with drug addiction from late adolescence. Tindal Lord Chief Justice, giving the majority judgment, said that the answer must depend on the nature of the delusion. However, making the assumption that he acted under such partial delusion only and was not in other respects insane, they thought his actions had to be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment.⁷²

⁷¹ M. Grainger, "Insanity and command delusions", *The Cambridge Law Journal*, Vol. 81, No. 3, 2022, pp. 467-468.

⁷² *R v Keal* [2022] EWCA Crim 341 – Mental Health Law Online, <http://www.bailii.org/ew/cases/EWCA/Crim/2022/341.html> (accessed 25 March 2023).

The four expert psychiatrists produced a joint report which was placed before the jury. They identified areas of agreement in the following terms (in line with the questions arising under the M’Naghten rules): At the time of the incident, the defendant was seriously mentally ill (psychotic and deluded) and this impaired his capacity for rational thought. He was suffering from a disease of the mind that led to a defect of reason, but the defendant knew the nature and quality of his actions. The experts disagreed to what extent his disordered mental state impaired his ability to know that what he was doing was wrong.

The conclusion of two psychiatrists that the appellant did know that what he was doing was wrong was based on the following feature. He was apologizing whilst carrying out the attacks. When his father asked him to stop, he was able to reappraise the situation. The presence of delusions does not necessarily mean that free will has been removed.

The other two psychiatrists said that the psychotic events happened over a period of time and the feeling of compulsion would not necessarily be constant. The intensity of the compulsion can wax and wane over time. The fact that he was feeling sorry for what he was doing did not mean that he was not compelled to do it. The extent of the appellant’s mental illness was such that the rational ability to decide right and wrong was damaged. To apply rational views to episodes of psychosis misses the point. The effect of the psychotic incident is to disorder thoughts.⁷³

The judge heard argument concerning the legal directions in respect of the defense of insanity, and in particular on the meaning of ‘wrong’ within the M’Naghten Rules. Mr Campbell-Tiech Queen’s Counsel for the appellant submitted that the defense of insanity was available to a psychotic and deluded defendant who was aware that his act was wrong but believed himself to be compelled to perform it. The prosecution submitted that this argument was an extension of the definition of ‘wrong’, for which there was no legal foundation.⁷⁴

On appeal, it was contended that the trial judge had misdirected the jury by failing to direct them that even if the appellant knew what he was doing was wrong (inferred from his apologies), the defense of insanity would be established if he believed that he had no choice but to commit the act in question.⁷⁵ The Court of Appeal revisited the scope and applicability of the M’Naghten rules on the scope of the defense of insanity and held that those rules meant that the defense

⁷³ KEAL, R. V., <https://www.casemine.com/judgement/uk/6234d015b50db9e904de8e2c>, (accessed 31 March 2023).

⁷⁴ *R v Keal* [2022] EWCA Crim 341 – Mental Health Law Online, <http://www.bailii.org/ew/cases/EWCA/Crim/2022/341.html> (accessed 25 March 2023).

⁷⁵ Serious Crime Bulletin No. 1 – London, <https://redlionchambers.co.uk/wp-content/uploads/2023/02/RLC-SERIOUS-CRIME-BULLETIN-issue-1-Feb-20235.pdf> (accessed 28 March 2023).

was not available to a defendant who, although he knew what he was doing was wrong, believed that he had no choice but to commit the act in question.⁷⁶

CONCLUSION

U.S. law on insanity in part has its roots in the soil of English jurisprudence from the 17th century through the late 19th century. The bulk of the developed law has been derived from the writings of early English scholars and a handful of well-known, frequently referenced cases. Virtually every U.S. jurisdiction that permits the defense requires insanity claims to comport with the jurisdiction's general test for criminal responsibility. The M'Naghten Rules remained the dominant test until the second half of the 20th century. After publication of the *Model Penal Code*, every state that seriously considered insanity defense reform adopted the MPC test legislatively or judicially. *The Insanity Defense Reform Act of 1983* required the defendant to prove a 'severe' mental disease and eliminated the 'volitional' or 'control' aspect of the insanity defense. According to 18 U. S. C. §17, a federal defendant has had to prove that the 'severe' mental disease made him "unable to appreciate the nature and quality or the wrongfulness of his acts".

To successfully establish a defense of temporary insanity, it must be shown that the defendant was suffering from a mental defect at the time the criminal act occurred and that this defect affected the defendant's ability to differentiate between right and wrong. Like regular insanity claims, virtually every jurisdiction that permits the defense requires temporary insanity claims to comport with the jurisdiction's general test for criminal responsibility. The temporary insanity defense is a recognized, viable defense in some forty-four states. Four states - Idaho, Kansas, Montana and Utah - do not recognize insanity as a defense at all. It follows, *a fortiori*, that these states also do not recognize temporary insanity as a defense.

American courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Under the reasoning of the *California Supreme Court*, a defendant may be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.

Until March 2020, state supreme courts disagreed on the constitutionality of abolishing the insanity defense. Several states had abolished or attempted to abolish the traditional, affirmative insanity defense and replace it with a *mens*

⁷⁶ Insanity defense not available to defendant who knew he acted wrong but believed he had no choice (Court of Appeal), [https://uk.practicallaw.thomsonreuters.com/w-034-8938?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-034-8938?transitionType=Default&contextData=(sc.Default)&firstPage=true), (accessed 2 April 2023).

rea approach. The purpose of the traditional insanity defense is to ensure that criminal culpability is only imposed upon those individuals who have the mental capacity to comply with the law. The purpose of the *mens rea* approach, however, only allows a criminal defendant to introduce evidence showing the existence of mental disease in order to negate intent. On 23 March 2020, the Court ruled that the Due Process Clause of the Fourteenth Amendment does not require the states to adopt an insanity defense based on a defendant's ability to understand that his crime was morally wrong.

The analyzed judicial practice focuses on the defendants with a history of mental health problems and drug addiction, who believed that their actions were being externally controlled. In *R v Keal* case, the M'Naghten's test was used, which is geared to the defense of error of law rather than to that of mental deviation. In *People v. DeFeo*, the *Model Penal Code* test incorporated a "free will" formula. Lack of "substantial capacity to conform one's conduct to the requirements of law" means, in the last analysis, that he "could not, substantially, have acted otherwise than he did act". It is one thing to assume a philosophical position of 'free will' as justifying punitive state intervention in principle and an entirely different thing to attempt 'proving' by legal methods that a given individual did or did not possess 'free will'.

REFERENCES

- Barkow R. *et. al.*, *Casenote Legal Briefs for Criminal Law, Keyed to Dressler and Garvey*, Aspen Publishing, 2022
- Brants C., Jackson A. & Koenraad F., "Culpability compared: Mental capacity, criminal offences and the role of the expert in common law and civil law jurisdictions", *Journal of International and Comparative Law*, Vol. 3, No. 2, 2016
- Bulgakov M., *Master and Margarita*, Penguin Classics, London, 2001
- Byrn R., *Homicide Under the Proposed New York Penal Law*, *Fordham Law Review*, Vol. 33, No. 2, 1964
- Covey R., "Temporary Insanity: The Strange Life and Times of the Perfect Defense". *Boston University Law Review*, Vol. 91, No. 5, 2011
- Davoudian S., "California Homicide Law: The Basics", *Loyola of Los Angeles Law Review*, Vol. 36, No. 4, 2003
- Dubber M., *An introduction to the Model Penal Code*, Oxford University Press, Oxford, 2015
- Flowers R., *The Amityville Massacre: The DeFeo Family's Nightmare (A True Crime Short)*, CreateSpace, Scotts Valley, 2017
- Grainger, M., "Insanity and command delusions", *The Cambridge Law Journal*, Vol. 81, No. 3, 2022
- Hall J., *General principles of criminal law*, Lawbook Exchange, New York, 1960

- Hans V., Slater D., "John Hinckley, Jr. and the Insanity Defense: The Public's Verdict", *The Public Opinion Quarterly*, 1983, Vol. 47, No. 2
- Joseph J., "Deliberation and Premeditation in First Degree Murder - Cummings v. State", *Maryland Law Review*, Vol. 21, No. 4, 1961
- Douglas L., "The Trial of John W. Hinckley, Jr.", *Popular Media*, Vol. 55, 2007
- Lilienthal G., Nehaluddin A., "Deconstructing the Criminal Defence of Insanity", *International Journal for the Semiotics of Law*, Vol. 30, No. 1, 2017
- Levine H., "The New York Penal Law: A Prosecutor's Evaluation", *Buffalo Law Review*, Vol. 18, No. 2, 1968
- Moriarty J., *The Role of Mental Illness in Criminal Trials*, Routledge, New York, 2001, p. XI
- Morse S., "Before and after Hinckley", (in:) R. Mackay (ed.) *The Insanity Defence: International and Comparative Perspectives*, Oxford University Press, Oxford, 2022
- Myers T., "Halcion Made Me Do It: New Liability and a New Defense - Fear and Loathing in the Halcion Paper Chase", *University of Cincinnati Law Review*, Vol. 62, No. 2, 1993
- Pleck E., "Criminal Approaches to Family Violence, 1640-1980", *Crime and Justice*, 1989, Vol. 11
- Silvestro M., "Kahler v. Kansas: The Supreme Court Case to Decide the Constitutionality of Abolishing the Traditional Insanity Defense and Reconcile the Split Among the Circuits", *UIC Law Review*, Vol. 53, No. 3, 2021
- Webster N., *Webster's Third New International Dictionary of the English Language*, Merriam-Webster, Springfield, 1981
- Wendzel B., "Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense", *American Criminal Law Review*, Vol. 57, No. 2, 2020