Buffalo Law Review

Volume 68 | Number 3 Article 2

5-1-2020

"The Angels that Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense

Eugene M. Fahey
New York State Court of Appeals

Laura Groschadl
New York State Court of Appeals

Brianna Weaver
Cornell Law School (Student)

Buffalo Law Review

VOLUME 68 MAY 2020 NUMBER 3

"The Angels that Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense

JUDGE EUGENE M. FAHEY†

CO-AUTHORS: LAURA GROSCHADL†† & BRIANNA WEAVER†††

INTRODUCTION

Edvard Munch, painter of "The Scream," famously said, "Sickness, insanity and death were the angels that surrounded my cradle, and they have followed me throughout my life."[1] Although Munch was referring to his difficult childhood and his turbulent adult life, the quote fairly depicts the experience of those with severe mental illness who find themselves enmeshed in the criminal justice

† Associate Judge of the New York State Court of Appeals. This Article was derived from a presentation given at the Charles E. Steinberg Lecture in Psychiatry and the Law at the University of Rochester Medical Center in September 2018. I would like to thank Dr. Robert L. Weisman and Dr. J. Richard Ciccone from the University of Rochester for their assistance and feedback on that presentation. All views expressed herein are my own and not reflective of the positions or opinions of the Court or its members.

†† Senior Principal Law Clerk to the Hon. Eugene M. Fahey.

††† J.D. Candidate 2020, Cornell Law School; B.S. 2017, St. Thomas Aquinas College.

1. Edvard Munch, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Edvard_Munch (last visited April 15, 2020).

system. Some of these individuals plead not guilty by reason of insanity.[2]

During my time as an Associate Judge on New York's Court of Appeals, I visited maximum security prisons throughout the state. Frequently, I would ask what percentage of inmates in the facility were being treated for mental health disorders. Invariably, the anecdotal figures I received was that approximately fifty percent of inmates are being treated for some form of mental health problem, and that approximately ten percent have a serious mental disorder. Thus far, I have visited thirteen of New York's maximum-security prisons.

Reality vs. Perception

Charles Ewing—a professor at University at Buffalo Law School, prominent forensic psychologist, and expert on this subject—says that he tells his students, "you have to be crazy to plead insanity."[3] This is because the insanity defense is rarely used, and even more rarely successful. It may result in lifetime confinement in a secure psychiatric facility, even when it is successful.[4] Studies indicate that nationally, fewer than one percent of criminal cases involve an insanity defense, and of those cases, the defense succeeds in fewer than a quarter of them.[5] Nationally, when the insanity defense is disputed at trial, "only an estimated one-120th of [one] percent of contested felony cases" end in a successful

2. The average trial judge seldom sees an insanity case given the rarity of the defense. Trial judges more often deal with competency proceedings under Criminal Procedure Law article 730 in criminal cases. In civil cases, trial judges are likely to see proceedings for appointment of a guardian for those with incapacities under Mental Hygiene Law article 81, hospitalization of the mentally ill pursuant to Mental Hygiene Law article 9, or the civil commitment of sex offenders under Mental Hygiene Law article 10. Those proceedings are beyond the scope of this Article.

3. CHARLES PATRICK EWING, INSANITY: MURDER, MADNESS, AND THE LAW xv (2008).

4. *See generally id.* at xxii–xxiv.

5. *Id.* at xxii.

insanity defense.[6] The vast majority of insanity acquittals result from a plea agreement, where the prosecution concedes that the defendant meets the requirements for the insanity defense,[7] rather than after a trial where the defense is disputed.

In the State of New York, of approximately five thousand murder cases between 2007 and 2016, just six ended with the defendant found not responsible by reason of mental disease or defect; the state does not track how often the defense is raised.[8] Between 2013 and 2017, only eleven defendants out of 19,041 felony and misdemeanor trials conducted in the state were found not responsible by reason of mental disease or defect pursuant to Penal Law § 40.15, and 241 defendants entered an insanity plea out of 1,375,096 convictions during the same time period.[9] As of June 30, 2018, 260 insanity acquittees were receiving treatment in secure confinement and another 452 insanity acquittees "were in the community subject to orders of conditions."[10]

Despite this evidence to the contrary, the public is persistent in its belief that insanity is a loophole that sane defendants frequently fake in order to escape punishment.[11] The public overestimates how often the insanity defense is

---

6. Mac McClelland, *When "Not Guilty" Is a Life Sentence*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html.

7. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 188 (2d ed. 1997).

8. James C. McKinley Jr. & Jan Ransom, *Nanny Faces Tough Insanity Test: Did She Know Killing Was Wrong?*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/nyregion/nanny-murder-trial-insanity-defense.html; *see also* Russ Buettner, *Mentally Ill, But Insanity Plea Is Long Shot*, N.Y. TIMES (Apr. 3, 2013), https://www.nytimes.com/2013/04/04/nyregion/mental-illness-is-no-guarantee-insanity-defense-will-work-for-tarloff.html.

9. Christopher Liberati-Conant & Sheila E. Shea, *'You Have to Be Crazy to Plead Insanity': How an Acquittal Can Lead to Lifetime Confinement*, 91 N.Y. STATE B. ASS'N J. 28, 30 (2019).

10. *Id.* at 30–31.

11. EWING, *supra* note 3, at xxii.

raised and how successful it is.[12] In addition, although media reports often equate mental illness with violent behavior, individuals with mental illness are overall more likely to be victims of violence than perpetrators.[13]

The Essential New York Statutes

Penal Law § 40.15 provides New York's definition of the insanity defense, which New York formally refers to as "lack of criminal responsibility by reason of mental disease or defect." Penal Law § 40.15 states:

> 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 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.[14]

Insanity is an affirmative defense in New York, which means that the defendant bears the burden of proving that he or she was insane at the time of the crime by a preponderance of the evidence.[15] This essentially means that the evidence the defendant presents tending to establish that he or she was insane at the time of the crime must outweigh the evidence presented by the prosecution to the contrary.[16]

---

12. *See* MELTON ET AL., *supra* note 7, at 187–88; MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14-3.2 (3d ed. 2017); Natalie Jacewicz, *After Hinckley, States Tightened Use of The Insanity Plea*, NPR (July 28, 2016), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea.

13. A.B.A. DEATH PENALTY DUE PROCESS REV. PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 17–18 (2016), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

14. N.Y. PENAL LAW § 40.15 (McKinney 2019).

15. PENAL § 25.00(2).

16. *Insanity (Lack of Criminal Responsibility By Reason of Mental Disease or Defect) Penal Law § 40.15*, *in* N.Y. STATE UNIFIED COURT SYSTEM, C.J.I.2D[NY] INSTRUCTIONS OF GENERAL APPLICABILITY 2 (last updated Nov. 27, 2019),

It is a lower standard than proof beyond a reasonable doubt.

Criminal Procedure Law [hereinafter "CPL"] § 250.10 contains important procedural provisions relevant to the insanity defense. It provides that whenever the defense intends to present psychiatric evidence of a mental disease or defect in connection with *any* defense, not just the insanity defense, the defense must serve notice thirty days after entry of a not guilty plea to the indictment.[17] The Court of Appeals recently held that this notice requirement applies when the defense wishes to introduce psychiatric evidence to demonstrate that a defendant could not fully understand or waive his *Miranda* rights.[18] The trial court can permit late notice in the interest of justice for good cause shown before the close of evidence.[19] CPL § 250.10 also contains provisions regarding the psychiatric examinations the defendant must submit to at the request of the prosecutor after such notice is provided.[20]

Other relevant New York statutes include CPL § 220.15, which allows a defendant to enter a plea of not responsible by reason of mental disease or defect to the entire indictment so long as the court and the prosecutor consent.[21] CPL § 330.20 governs all post-verdict proceedings when a defendant is found not responsible by reason of mental disease or defect, including the confinement of the defendant in a psychiatric facility and the periodic review of the defendant's mental health and appropriate confinement.[22]

The *Practice Insights* by John Castellano following CPL § 250.10 in GILBERT'S CRIMINAL PRACTICE ANNUAL, 2020 contain useful observations about evaluating whether and

---

https://www.nycourts.gov/judges/cji/1-General/Defenses/CJI2d.Insanity.pdf.

17. N.Y. CRIM. PROC. LAW § 250.10(1), (2) (McKinney 2019).

18. People v. Silburn, 98 N.E.3d 696, 702–03, 707 (N.Y. 2018).

19. CRIM. PROC. § 250.10(2).

20. § 250.10(3)–(5).

21. § 220.15.

22. § 330.20.

how to pursue a psychiatric defense, including the defense of insanity. They include discussion concerning the hiring of an expert to evaluate the viability of the defense, determining the cooperativeness of the defendant and the likelihood that the court will allow the defense, and considering the consequences of a successful defense, including the possibility of the defendant's lengthy confinement in a psychiatric facility after a successful insanity defense.[23]

Overview

This Article explores the arc of development of the insanity defense in national history and in New York State. The Article begins in Part I with a national history. It discusses the various tests for insanity that have developed and the widespread impact that the *Hinckley* acquittal had on insanity law in the United States. Part II focuses on New York's insanity defense. It discusses the history of the defense in New York, the battle of the experts that typically ensues, and what happens after a successful insanity defense. The Article also reviews some famous cases arising out of Western New York involving the insanity defense. Finally, Part III contains a brief overview of just a few of the many important topics that are tangentially relevant to the insanity defense.

23. John M. Castellano, *Practice Insights: Considering Psychiatric Defense*, *in* GILBERT'S CRIM. PRAC. ANN., 2020, at CPL-389–390.

I. HISTORY OF THE INSANITY DEFENSE

A. *Theoretical Framework*

The insanity defense "touches—philosophically, culturally, and psychologically—on our ultimate social values and beliefs [and] is rooted in moral principles of excuse that are accepted in both ordinary human interaction and criminal law."[24] Justification and excuse are two broad categories of defenses to criminal behavior. Justification contemplates the moral culpability of an act itself, whereas excuse contemplates personal culpability.[25] Classic examples of justification in the law, like self-defense,[26] deal with the circumstances surrounding an act, while excuses, like involuntary intoxication and duress,[27] tend to deal with the actor's state of being.

Insanity provides an excuse, rather than a justification, for criminal behavior. When a defendant is found not guilty by reason of insanity, the fact-finder has concluded that the defendant should not be held criminally responsible for his or her behavior because the defendant cannot understand the nature or wrongfulness of the criminal conduct, or cannot conform his or her conduct to the law. In other words, the defendant has not intentionally chosen to commit a criminal act. As a society, we conclude that the defendant is not morally blameworthy because we should punish only those whose criminal behavior is the result of their own free will. Traditional goals of criminal punishment, such as retribution and deterrence, do not apply with equal force to a defendant who meets the criteria for the insanity defense.

---

24. PERLIN & CUCOLO, *supra* note 12, at § 14-1.1 (internal quotation marks omitted).

25. George P. Fletcher, *The Right and The Reasonable*, 98 HARV. L. REV. 949, 954 (1985).

26. *Id.*

27. *Id.* at 954–55.

B. *Early History*

The insanity defense predates both the professional studies of psychiatry and psychology,[28] and can be traced back to ancient civilizations such as the Talmudic, Greeks, and Romans.[29] Hebrew scriptures from the sixth century B.C. that discuss criminal offenses group children and the insane together, excusing both from fault.[30] Similarly, under Rome's sixth century Code of Justinian, the insane were not held responsible for their otherwise criminal acts.[31]

Although the concept of insanity as a defense to criminal conduct is ancient, our modern understanding of the insanity defense is the product of centuries of judicial development within case law. Judges were influenced by the work of legal scholars such as Henry Bracton. Writing in the thirteenth century, Bracton—the author of THE LAWS AND CUSTOMS OF ENGLAND—observed that the insane should be excused from criminal punishment because, much like children, they are unable to form the intent necessary to commit a crime.[32]

C. *Development Under Common Law*

One of the earliest examples of the insanity defense in case law comes from England in the case *Rex v. Arnold*, decided in 1724.[33] There the judge instructed the jury that for a defendant to be acquitted by reason of insanity he "must

28. EWING, *supra* note 3, at xxi.

29. PERLIN & CUCOLO, *supra* note 12, at § 14-1.1.

30. *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. AM. ACAD. PSYCHIATRY & L. S3, S4 (2014).

31. PERLIN & CUCOLO, *supra* note 12, at § 14-1.1.

32. *AAPL Practice Guideline*, *supra* note 30, at S4; Daniel P. Greenfield, *Criminal Responsibility from a Clinical Perspective*, 37 J. PSYCHIATRY & L. 7, 10–11 (2009). Henry Bracton is only one of many influential legal scholars whose early writings on the insanity defense impacted the development of the common law. *See generally* Kahler v. Kansas, 140 S Ct. 1021, 1030–32 (2020); *see also id.* at 1040–41 (Breyer, J., dissenting).

33. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.1.

be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, . . . a brute, or a wild beast . . . ."[34] This archaic standard for insanity seems representative of the era in which it was created; however, it would not survive into the nineteenth century due to the work of the zealous advocate, Lord Thomas Erskine.

In 1800, Erskine represented James Hadfield, a defendant charged with the attempted assassination of King George III while he was attending the theater.[35] Erskine presented evidence that Hadfield suffered a brain injury in battle, which caused a disturbed mental condition. That condition manifested in Hadfield's belief that he could save the world by taking his own life, but not wanting to kill himself, Hadfield instead chose to attempt to assassinate the king, which he knew was punishable by death.[36] Erskine won the case after advancing a standard for insanity sometimes called the "offspring of a delusion test." That test did not require "total insanity." Instead, it stated that the defendant should be acquitted if his conduct was the offspring of his disease.[37]

The verdict in the Hadfield case was notable for the subsequent enactment of The Criminal Lunatics Act of 1800. Before Hadfield's case, defendants acquitted by reason of insanity were legally entitled to release unless they could be confined civilly.[38] Four days after Hadfield's acquittal, a bill was presented that would mandate the continued confinement of defendants acquitted by reason of insanity.[39]

---

34. *Id.* (internal quotation marks omitted); *AAPL Practice Guideline*, *supra* note 30, at S4–S5 (emphasis omitted).

35. *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 L. & SOC'Y REV. 487, 492–93 (1985).

36. *Id.* at 493, 504–08.

37. *Id.* at 503; *AAPL Practice Guidelines*, *supra* note 30, at S5.

38. Moran, *supra* note 35, at 487–88.

39. *Id.* at 511.

The Act was made retroactive to apply to Hadfield. It further provided that those acquitted by reason of insanity would be kept in custody until "His Majesty's Pleasure Be Known."[40] Unsurprisingly, King George III did not express his "pleasure" for Hadfield's release, and Hadfield was confined until his death in 1841.[41]

In 1800 it may have seemed like James Hadfield would go down in history as the attempted assassin who shaped the insanity defense. Two men, however, would come to share that title with Hadfield—each unsuccessfully attempting to assassinate a world leader, each successfully raising an insanity defense, and each causing a legislative backlash more severe than the last.

D. *The M'Naghten Rule*

In 1843, Daniel M'Naghten[42] attempted to assassinate Sir Robert Peel, the British Prime Minister.[43] M'Naghten believed that Peel was conspiring with the Tory Party to persecute him. He instead killed Edward Drummond, Peel's secretary, whom he mistook for Peel.[44] At trial, a jury found M'Naghten not guilty by reason of insanity.[45] The public was outraged by the verdict. They were not alone. In response to M'Naghten's acquittal, Queen Victoria summoned the House of Lords to set a legal standard for the insanity defense.[46] The Lords presented five questions regarding the insanity defense to a panel of judges, and what we now know as the

---

40. *Id.* at 513.

41. *Id.* at 516 n.24.

42. Various spellings for M'Naghten's name exist, but "M'Naghten" is the "customary spelling." Bernard L. Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84, 84 (1964).

43. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.2; *AAPL Practice Guideline*, *supra* note 30, at S5.

44. *AAPL Practice Guideline*, *supra* note 30, at S5.

45. *Id.*

46. *Id.*

M'Naghten rule was derived from two of the judges' responses:

> [T]o establish a defense on the ground of insanity, it must be 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.[47]

The *M'Naghten* rule was widely influential in the development of American jurisprudence on the insanity defense. Several variations have developed, but in its pure form, the *M'Naghten* rule is defined by lack of cognition. For the defendant to be acquitted by reason of insanity, the *M'Naghten* rule requires that as the result of a mental illness, the defendant either did not know (1) the nature and quality of the act committed; or (2) that the act was wrong.[48] The defendant's lack of cognition is measured at the time the crime occurred. In the United States, the *M'Naghten* rule was the standard test for insanity in nearly all jurisdictions until the mid-1900s, and it remains the rule with some variation in many jurisdictions today, including in New York.[49]

E. *Alternatives to the M'Naghten Rule*

1. The Irresistible Impulse Test

A volitional standard called the irresistible impulse test can be traced back to 1840 England in the case of *Regina v. Oxford*.[50] The *Oxford* case is also notable for being one of the first in which medical expert witnesses were allowed to state

---

47. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.2; *AAPL Practice Guideline*, *supra* note 30, at S5 (internal quotation marks omitted).

48. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.2.

49. *Id.*; *see also* Kahler v. Kansas, 140 S. Ct. 1021, 1051 (2020) (Breyer, J., dissenting) (Appendix classifying seventeen states and the federal government as currently using the *M'Naghten* test for the insanity defense).

50. *See* PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.1, n.73; *AAPL Practice Guideline*, *supra* note 30, at S5.

their opinion on the sanity or insanity of the accused.[51]

The irresistible impulse test asks whether a defendant was able to conform his or her conduct to the law, regardless of whether the defendant is able to understand the nature of the offense or that it was wrong.[52] The first American case to adopt the test was *Parsons v. State*, decided by the Supreme Court of Alabama in 1887.[53] At its peak popularity, the irresistible impulse test was adopted by approximately eighteen jurisdictions.[54] The irresistible impulse test proved to be better in theory than in practice, however, because of the difficulty in distinguishing between an irresistible impulse and an impulse not resisted.[55] For example, if a schizophrenic defendant has delusions that his neighbor is conspiring against him and hears voices telling him to kill his neighbor, and then does kill his neighbor, the jury would be tasked under the irresistible impulse test with determining whether the defendant *could have* resisted the impulse to kill his neighbor. As of 1990, no United States jurisdiction uses the irresistible impulse test as its sole standard for the insanity defense.[56]

2. The Product Test

The product test was developed by New Hampshire Supreme Court Justice Charles Doe.[57] Instead of specifying

---

51. *See* Frank R. Freemon, *The Origin of the Medical Expert Witness: The Insanity of Edward Oxford*, 22 J. LEGAL MED. 349, 368–73 (2001).

52. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.3.

53. *AAPL Practice Guideline*, *supra* note 30, at S6 (citing Parsons v. State, 2 So. 854 (Ala. 1887)).

54. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.3.

55. *See* MELTON ET AL., *supra* note 7, at 191; PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.3.

56. *AAPL Practice Guideline*, *supra* note 30, at S6. Three states—Georgia, New Mexico, and Virginia—use the *M'Naghten* test but include an element of "volitional incapacity." *See* Kahler v. Kansas, 140 S. Ct. at 1052–54 (Breyer, J., dissenting).

57. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.4 (quoting State v. Pike, 49 N.H. 399, 442 (1870) (Doe, J., dissenting)).

a cognitive or volitional measure of insanity, the product test as articulated by Doe in 1870 simply states that "if [an act] was the offspring or product of mental disease in the defendant, [the defendant is] not guilty by reason of insanity."[58] Although it was praised by academics, the product test was not adopted by any other jurisdiction until the 1954 case *Durham v. United States*, decided by District of Columbia Circuit Court of Appeals in an opinion authored by Judge David Bazelon.[59] *Durham* was heavily criticized, however, and in 1972 it was overruled by *United States v. Brawner*, a decision in which Judge Bazelon concurred, and replaced by the American Law Institute's Model Penal Code test.[60] Only New Hampshire and the Virgin Islands currently use some form of the product test for insanity.[61]

F. *The American Law Institute's Test*

When the D.C. Circuit replaced the product test in *Brawner*, it joined the majority of federal courts of appeals in adopting the American Law Institute's proposal.[62] In 1950, some form of the *M'Naghten* test was being used by approximately two-thirds of states, many of which added some volitional element, such as an irresistible impulse component.[63] In 1955, the American Law Institute [hereinafter "ALI"] proposed a new test for the insanity defense as part of its Model Penal Code.[64] The ALI's proposal would eventually become as widely influential as the

---

58. *Id.*

59. *Id.* (citing Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)).

60. *See* MELTON ET AL., *supra* note 7, at 191–92; PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.4 (citing United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)).

61. *See generally* State v. Fichera, 903 A.2d 1030, 1034 (N.H. 2006); *AAPL Practice Guideline*, *supra* note 30, at S5.

62. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.5.

63. *AAPL Practice Guideline*, *supra* note 30, at S6.

64. *Id.*

M'Naghten test.[65]

The ALI's Model Penal Code states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[66] The ALI test is a combination of the *M'Naghten* test and the irresistible impulse test.[67] Unlike the *M'Naghten* test, the ALI test contains a volitional element similar to the irresistible impulse test: the defendant is not guilty even if he or she can appreciate the wrongfulness of the conduct, but cannot conform his or her conduct to the requirements of the law.[68]

Interestingly, the ALI's Model Penal Code standard prohibited "an abnormality manifested only by repeated criminal or otherwise antisocial conduct" from being used as the underlying "mental disease or defect."[69] This was widely seen as an attempt to prevent "psychopaths" or "sociopaths" from using the insanity defense to exonerate themselves.[70] Some states have excluded antisocial personality disorder, or even all personality disorders, from the "mental disease or defect" that forms the basis of the insanity defense.[71]

The ALI's Model Penal Code test was generally praised and considered at the time to be superior to the *M'Naghten*

---

65. *Id.*

66. MODEL PENAL CODE § 4.01(1) (AM. LAW INST. 2020).

67. *AAPL Practice Guideline*, *supra* note 30, at S6.

68. *See* PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.5; *AAPL Practice Guideline*, *supra* note 30, at S6.

69. MODEL PENAL CODE § 4.01(2).

70. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.5.

71. *See* MELTON ET AL., *supra* note 7, at 196; Natalie Jacewicz, *Does a Psychopath Who Kills Get To Use the Insanity Defense?*, NPR (Aug. 3, 2016), available at https://www.npr.org/sections/health-shots/2016/08/03/486669552/does-a-psychopath-who-kills-get-to-use-the-insanity-defense.

test due to its incorporation of a volitional element.[72] The ALI test was eventually adopted in some form by over half the states and all but one federal circuit.[73] The widespread popularity of the ALI test was irrevocably altered, however, with the 1982 acquittal of John Hinckley Jr., which changed the landscape of the insanity defense in the United States.[74]

Despite the differences between the *M'Naghten* test and the Model Penal Code test, it is questionable whether the differences in the tests make any difference as a practical matter. That is, there is some evidence that the particular insanity test that jurors are instructed to apply "actually makes little difference to the verdict they return."[75] Empirical research has certain limitations, but generally suggests that the type of insanity instruction received by jurors matters little to the insanity acquittal rate, and some researchers have concluded that "any differences that exist between the ALI and [the *M'Naghten*] standard may be practically meaningless."[76]

G. *The Doctrine of Diminished Capacity*

Some states that apply the *M'Naghten* rule have attempted to broaden their standards through the use of the doctrine of "diminished capacity." First developed in California,[77] the doctrine of diminished capacity does not function as an excuse like the insanity defense. Instead, diminished capacity is typically raised to challenge the mental element, or mens rea, required for criminal conviction, even if the defendant has not raised an insanity

---

72. *See* PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.5.

73. *See id.*; *AAPL Practice Guideline*, *supra* note 30, at S6.

74. *See AAPL Practice Guideline, supra* note 30, at S6.

75. Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 126 n.18 (2018).

76. *See* James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 L. & HUM. BEHAV. 509, 511–12, 526 (1991).

77. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.6.

defense.[78]

It is generally the prosecution's burden to prove that a defendant had the necessary mens rea as an element of the crime. This has caused one court to remark that the doctrine of diminished capacity is "not a defense at all but merely a rule of evidence."[79] In New York, for example, the defendant may present evidence of a mental disease or defect in an attempt to negate the intent element of the charged crime, but that does not relieve the prosecution of the burden to prove beyond a reasonable doubt that the defendant could and did have the requisite intent.[80] In some states, however, the doctrine of diminished capacity is used to convict the defendant of a lower grade of offense that does not require proof of the contested state of mind.[81] This variant is sometimes referred to as the doctrine of "diminished responsibility," and is the version that was formerly in place in California.[82]

The doctrine of diminished capacity has fallen out of favor after criticisms regarding its arbitrary application.[83] Even California, the birthplace of the doctrine, has legislatively abolished it.[84] In California today, a jury may not consider evidence of a mental disease or defect with respect to a defendant's *capacity* to form the requisite intent, but may consider a mental disease or defect with respect to whether the defendant *actually* formed the requisite intent.[85]

---

78. *See id.*

79. United States v. Pohlot, 827 F.2d 889, 897 (3d Cir. 1987), *cert. denied* 484 U.S. 1011 (1988).

80. *See, e.g.*, People v. Segal, 429 N.E.2d 107, 110 (N.Y. 1981).

81. *See* MELTON ET AL., *supra* note 7, at 205–06; Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828–30 (1977).

82. *See* MELTON ET AL., *supra* note 7, at 205–06.

83. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.6.

84. *See* CAL. PENAL CODE § 28(b) (West 2003).

85. *Id.*; *see, e.g.*, People v. Williams, 941 P.2d 752, 777 (Cal. 1997).

One explanation for the disapproval of the doctrine of diminished capacity in California is Dan White's famous use of the doctrine during his 1979 trial for killing two popular political figures: San Francisco Supervisor Harvey Milk and Mayor George Moscone.[86] At trial, White's attorneys presented the testimony of four psychiatrists and one psychologist, all of whom agreed that White was suffering from "serious depression" when he killed Moscone and Milk.[87] Three of those experts opined that as a result of his depression, White was incapable of premeditating, an element required for White to be convicted of first-degree murder.[88] White was convicted of two counts of voluntary manslaughter—a far less serious crime—and the public outrage was compounded by the relatively light sentence he received, which allowed him to be paroled after approximately five years.[89]

Although it was only briefly mentioned at trial and far from the foundation of White's defense, one of White's expert witnesses mentioned that White's indulgence in junk food like Twinkies was a sign of his depression.[90] In other words, the expert testified that White's Twinkie consumption was an effect, rather than a cause, of his depression.[91] The media nevertheless sensationalized the "Twinkie defense," and it has been used ever since as a euphemism for a fraudulent excuse for criminal behavior.[92] The California legislature abolished the diminished capacity defense two years later in 1981, and in 1985, a year after he was paroled, Dan White

86. CHARLES PATRICK EWING & JOSEPH T. MCCANN, MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY, 70–74 (2006).

87. *Id.* at 75.

88. *Id.* at 74–75.

89. *See id.* at 78.

90. *Id.* at 75–76.

91. *Id.* at 76.

92. *Id.* at 69–70, 77–79.

committed suicide.[93] The expert witness who discussed White's consumption of junk food during the trial said years later, "If I found a cure for cancer, they'd still say I was the guy who invented 'the Twinkie defense.'"[94]

H. *The Impact of the Hinckley Case*

1. *United States v. Hinckley*

John Hinckley, Jr. first became withdrawn and isolated from his peers in high school and continued to mentally deteriorate into adulthood.[95] After a few unsuccessful attempts at college, Hinckley moved to Hollywood where he developed an obsession with the movie Taxi Driver and with actress Jodie Foster.[96] In the film, the male lead plots to assassinate a presidential candidate to win the affection of a love interest.[97] Hinckley's obsession led to the stalking of Foster, and he began planning a presidential assassination of his own.[98] Hinckley first targeted Jimmy Carter, but turned his attention toward Ronald Reagan following the 1980 election.[99] In 1981, Hinckley traveled to D.C. and attacked Reagan, firing several shots that hit a police officer, a secret service agent, Reagan and his press secretary.[100] All of the victims initially survived the attack.[101] Press Secretary James Brady died from his injuries in 2014.[102]

---

93. *Id.* at 79.

94. *Id.* at 80.

95. *See id.* at 92.

96. *Id.* at 92–93.

97. *Id.* at 92.

98. *Id.* at 93.

99. *Id.*

100. *Id.* at 95.

101. *See id.*

102. *See* Peter Hermann & Michael Ruane, Medical Examiner Rules James Brady's Death a Homicide, Wash. Post (Aug. 8, 2014), https://www.washingtonpost.com/local/crime/james-bradys-death-ruled-homicide-by-dc-medical-examiner/2014/08/08/686de224-1f41-11e4-82f9-2cd6fa8da5c4_story.html?noredirect=on;

Hinckley pleaded not guilty by reason of insanity to multiple counts of attempted murder.[103] The trial took place in D.C., where the ALI's Model Penal Code test was the standard for insanity.[104] At trial, all the expert witnesses, including those who testified for the prosecution, agreed that Hinckley was mentally ill, although they disagreed on the correct diagnosis.[105] The defense experts testified that Hinckley lacked substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law, while the prosecution's experts disagreed.[106] After three days of deliberation, the jury returned a verdict of not guilty by reason of insanity.[107]

2. National Response

The verdict in the *Hinckley* case was met with bipartisan criticism and public outrage.[108] Just two years later, Congress passed the Insanity Defense Reform Act of 1984 with virtually no opposition.[109] The Act made four major changes to the federal insanity defense: (1) it removed the volitional element of the test, (2) it shifted the burden to the defense to prove insanity with clear and convincing evidence, (3) it barred expert testimony on the ultimate issue as to whether or not the defendant was insane at the time of the crime, and (4) it provided that a defendant found not guilty of a crime by reason of insanity was to be confined for the same length of time as the maximum prison sentence for that

---

Trevor Hughes, John Hinckley Jr. released from mental hospital after more than 30 years, USA Today (Sept. 10, 2016, 3:30 PM), https://www.usatoday.com/story/news/2016/09/10/would—reagan-assassin-john-hinckley-jr-released-mental-hospital/90191312/.

103. *See* EWING & MCCANN, *supra* note 86, at 95.

104. *Id.* at 96.

105. *Id.*

106. *Id.* at 97–98.

107. *Id.* at 98.

108. *Id.*

109. *Id.* at 99.

crime, subject to judicial revision if the defendant recovers from the illness.[110]

After the *Hinckley* verdict, two prominent professional organizations also changed their positions on the insanity defense. The American Psychiatric Association took the position that the insanity defense should be limited to the most severe cases of mental illness and that the insanity defense should not include a volitional element.[111] The American Medical Association took the position that the insanity defense should be abolished and that mental illness should be used only to argue that the defendant lacked the required mens rea.[112] Both the APA and the AMA would later rescind these positions in 2007 and 2005, respectively.[113]

3. State Reforms

In the wake of the *Hinckley* trial, thirty-six states in total altered their insanity defense in some form.[114] Five states—Idaho, Kansas, Montana, Utah, and Nevada—abolished the insanity defense as an affirmative defense, although Nevada's Supreme Court reinstated the insanity defense in 2001.[115] Several other states shifted the burden to prove insanity to the defendant, others modified their test for insanity, and others adopted the verdict of "guilty but mentally ill."[116]

---

110. *See* 18 U.S.C. § 17 (1986); EWING & MCCANN, *supra* note 86, at 99; *see also AAPL Practice Guideline*, *supra* note 30, at S7–S8.

111. *AAPL Practice Guideline*, *supra* note 30, at S6.

112. *Id.*

113. *Id.*

114. *Id.* at S7.

115. *Id.*; *see generally Finger v. State*, 27 P.3d 66 (Nev. 2001). Idaho, Kansas, Montana, and Utah allow a defendant to introduce evidence of mental illness to show that the defendant was incapable of forming the intent required to commit the crime, thereby negating an element of the crime—the *mens rea*—that the prosecution must prove for the defendant to be convicted. *See* Kahler v. Kansas, 140 S. Ct. at 1026 n.3.

116. EWING & MCCANN, *supra* note 86, at 99; *AAPL Practice Guideline*, *supra* note 30, at S8.

4. Guilty but Mentally Ill

A "guilty but mentally ill" verdict allows a jury to find a defendant guilty of a crime where the defendant was not legally insane at the time of the crime but suffered from some form of mental illness not rising to the level of insanity.[117] Approximately a dozen states adopted "guilty but mentally ill" as a possible verdict in the wake of the *Hinckley* trial.[118]

The "guilty but mentally ill" verdict has been criticized as a compromise verdict that jurors choose when they do not wish to find the defendant not guilty by reason of insanity.[119] Some studies conducted with mock juries have shown that jurors tend to favor guilty but mentally ill verdicts when they are available.[120]

Critics note that although those found guilty but mentally ill are supposed to receive mental health treatment in prison, this occurs at the discretion of the correctional facility.[121] Supporters of the guilty but mentally ill verdict, by contrast, have characterized it as a means of filling a gap with a verdict for defendants who deserve to be imprisoned but also are in need of treatment.[122]

5. Hinckley's Release

In 2016, at the age of sixty-one,[123] John Hinckley was released from confinement thirty-five years after he attempted to assassinate President Reagan.[124] At the time

117. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.7.

118. *See* Clark v. Arizona, 548 U.S. 735, 751–52 nn.19 & 21 (2006); Natalie Jacewicz, *'Guilty But Mentally Ill' Doesn't Protect Against Harsh Sentences*, NPR (Aug. 2, 2016, 1:22 PM), https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences.

119. Jacewicz, *supra* note 118.

120. *Id.*

121. PERLIN & CUCOLO, *supra* note 12, at § 14-1.2.7.

122. Jacewicz, *supra* note 118.

123. Hughes, *supra* note 102.

124. Jacewicz, *supra* note 118.

Hinckley was released, officials at the hospital he had been housed in said that his mental illness had been in remission for decades.[125] Hinckley is required to continue receiving outpatient treatment.[126]

125. Jacewicz, *supra* note 12.

126. Hughes, *supra* note 102.

II. NEW YORK STATE'S INSANITY DEFENSE

A. *History of New York's Insanity Defense*

1. Early Case Law

As early as 1829, New York law declared that "[n]o act done by a person in a state of insanity can be punished as an offense," but that law did not define insanity.[127] In 1845, a New York court charged a jury under the *M'Naghten* rule for the insanity defense.[128]

The case widely attributed as establishing the *M'Naghten* rule as the test for the insanity defense in New York is *Freeman v. People*.[129] In that case, the defendant, "the illiterate grandson of a former slave," had murdered a prominent family in Auburn, New York.[130] The defendant entered a plea of insanity, and he was convicted of murder and sentenced to death.[131] In 1847, the Supreme Court of Judicature, in an exercise of its appellate jurisdiction, ordered a new trial and held that the *M'Naghten* standard was the proper one to apply for the insanity defense.[132] In *Flanagan v. People*, decided in 1873, the New York Court of Appeals, created in 1847 as the highest court in New York state, reaffirmed that *M'Naghten* was the proper test and rejected a request to adopt the irresistible impulse test.[133]

---

127. N.Y. REV. STAT. pt. 4, ch. 1, tit. VII, § 2 (1829); *see also* ROBERT ALLAN CARTER, HISTORY OF THE INSANITY DEFENSE IN NEW YORK STATE 2 (1982).

128. Cynthia G. Hawkins-Leon, *Literature as Law: The History of the Insanity Plea and a Fictional Application within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 413–14 (1999) (citing People v. Kleim, 1 Edm. Sel. Cas. 13, 25–26 (1845)).

129. Freeman v. People, 4 Denio 9 (1847); *see also* Hawkins-Leon, *supra* note 128, at 415*;* CARTER, *supra* note 127, at 2–3.

130. Hawkins-Leon, *supra* note 128, at 415.

131. *See Freeman*, 4 Denio at 18; Hawkins-Leon, *supra* note 128, at 415.

132. *See Freeman*, 4 Denio at 28–29.

133. Flanagan v. People, 52 N.Y. 467, 469–70 (1873).

2. Codification and Modernization of *M'Naghten*

The *M'Naghten* rule was codified by the legislature in 1881.[134] In the 1915 case of *People v. Schmidt*, Judge Benjamin Cardozo, writing for the Court of Appeals, declined to grant a new trial to a defendant who claimed that he merely feigned insanity at his first trial in an attempt to obtain an acquittal, and Judge Cardozo opined that New York's statutory iteration of the *M'Naghten* rule would likely apply where the defendant knows that the act is legally wrong but does not appreciate that it is morally wrong.[135]

The statute remained largely unchanged until 1965. Governor Harriman became aware of the shortcomings of the *M'Naghten* rule as a result of a clemency hearing following the Court of Appeals's affirmance in the case of *People v. Horton*, decided in 1954.[136] Governor Harriman created a commission to examine possible changes to the insanity defense, whose work culminated in the 1958 "Foster Report."[137] The Foster Report noted three major objections to the *M'Naghten* rule:

> First, it was reported that a difficulty arose in the use of the word "know" in *M'Naghten* because a defendant might be able to verbalize that some act is wrong and yet have no depth of understanding as to what this means. Another defect with *M'Naghten* was said to be its emphasis on the actor's cognitive capacity. The commission noted that the *M'Naghten* test disregarded the notion that an individual might have minimal awareness of some fact and at the same time lack the ability to control his conduct in light of this. Finally, the commission stated

134. Hawkins-Leon, *supra* note 128, at 417 (citing 1881 N.Y. Laws 676, §§ 20–23).

135. *See* People v Schmidt, 216 N.Y. 324, 339–40 (1915). For a thorough account of the bizarre *Schmidt* case and Judge Cardozo's role in it, *see* RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS, 71–81 (1997).

136. People v. Adams, 257 N.E.2d 610, 611 (N.Y. 1970) (citing People v. Horton, 123 N.E.2d 609 (N.Y. 1954)); *see also* CARTER, *supra* note 127, at 9–10; *Clemency Plea for Horton Based on Insanity Claim*, ELMIRA STAR-GAZETTE, Jan. 12, 1955, at 8.

137. *Adams*, 257 N.E.2d at 611.

> that *M'Naghten* taken on its face called for a total impairment of ability to know, whereas in even the most extreme psychoses it is impossible to say that the actor was totally bereft of knowledge or control.[138]

The Foster Report recommended adoption of the ALI's Model Penal Code standard with some adaptation, and in 1963, the Temporary Commission on Revision of the Penal Law and Criminal Code issued an interim report adopting the recommendations of the Foster Report.[139] That recommendation, however, was strongly opposed, particularly by district attorneys.[140] In 1965, former Penal Law § 1120 was amended to substantially the same version of the insanity defense that exists today.[141] The revised statute provided that a defendant was not guilty by reason of insanity if, at the time of the criminal conduct, by reason of mental disease or defect, the defendant "lack[ed] substantial capacity to know or appreciate either: (a) [t]he nature and consequence of such conduct; or (b) [t]hat such conduct was wrong."[142]

The revised standard was substantially similar to the *M'Naghten* rule, but with some important differences. Lack of "substantial capacity" was considered a more realistic standard than the total incapacity required by the *M'Naghten* rule.[143] In addition, the word "appreciate" was intended to apply to a defendant with some minimal, surface awareness that an act is wrong but who nevertheless is unable to understand the "legal and moral import of the conduct involved."[144] With respect to the meaning of

---

138. *Id.*

139. *Id.*; *see also* CARTER, *supra* note 127, at 11–12; INTERIM REP. OF COMMISSION ON REVISION OF PENAL LAW AND CRIM. CODE, Leg. Doc. No. 8 at 24–25 (1963).

140. *Adams*, 257 N.E.2d at 612.

141. *Id.*

142. *Id.* (citing N.Y. PENAL LAW § 1120 (amended 1965)).

143. *Id.*

144. *Id.* (internal quotation marks omitted).

"appreciate," the Court of Appeals has stated that a jury may be instructed that mere surface knowledge, such as "the type of knowledge children have of propositions which they can state, but cannot understand," is *not* sufficient to satisfy the "appreciate" requirement.[145]

3. 1980s Changes

Other significant changes to New York's insanity defense occurred in the 1980s. In 1980, the legislature passed the Insanity Defense Reform Act, which implemented many recommendations made by the Law Revision Commission.[146] The bill contained New York's first comprehensive procedural laws for the use of the insanity defense,[147] and was, in part, a response to the case of Robert Torsney.[148]

In 1976, after responding to a call at a housing project but finding the issue already resolved, Torsney, a white NYPD officer, calmly and inexplicably shot an unarmed black teenager in the head after the youth asked about the police presence.[149] Torsney initially claimed self-defense, but at trial, he argued insanity based on the testimony of a forensic psychiatrist who opined that despite no documented history of mental illness, Torsney suffered a psychosis associated with an imperceptible epileptic seizure at the very moment of the shooting.[150] An all-white jury found Torsney not guilty by reason of insanity.[151] Torsney was committed to

145. *Id.* at 613; *see also Insanity*, *supra* note 16.

146. 1980 N.Y. Laws 1616, ch. 548; 1980 N.Y. Sess. Laws 1879–80 (McKinney) (Memorandum from Gov. Hugh Carey approving the Insanity Defense Reform Act).

147. *Compare* 1980 N.Y. Laws ch. 548, § 11 (enacting modern version of N.Y. CRIM. PROC. LAW § 330.20) *with* N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1971).

148. Hawkins-Leon, *supra* note 128, at 425–26; *see also* Dorothy Spektorov McClellan, *The New York State Insanity Defense Reform Act of 1980: A Legislative Experiment*, 17 BULL. AM. ACAD. PSYCHIATRY L. 129, 143–44 (1989).

149. EWING, *supra* note 3, at 22.

150. *Id.* at 24–28.

151. *Id.* at 29.

a psychiatric facility but spent only a year and a half there, after doctors were unable to detect any continuing mental illness besides a personality disorder and impulse control issues.[152] The legislature subsequently passed the Insanity Defense Reform Act in 1980 in part as a response to the *Torsney* case.[153]

Before the 1980 Insanity Defense Reform Act, review for discharge or release of defendants found not guilty by reason of insanity and confined in a psychiatric institution was initiated by application, filed either by the patient or by the commissioner of mental hygiene.[154] Transfers and furlough were left to administrative discretion, and no particular Office of Mental Health regulations controlled the post-verdict procedure.[155] After the 1980 Act, and under the current version of CPL § 330.20, patients found not guilty by reason of insanity are regularly reviewed for discharge or release, and all furloughs, transfers, releases, and discharges must be accomplished by court order after thorough evaluation.[156]

Although the same Law Revision Commission Report that led to the 1980 Insanity Defense Reform Act rejected proposals to reclassify insanity as an affirmative defense,[157] in 1984, in part as a response to the *Hinckley* verdict, the New York legislature made insanity an affirmative

---

152. *See In re* Torsney, 394 N.E.2d 262, 263–70 (N.Y. 1979); EWING, *supra* note 3, at 30–32.

153. *See, e.g.*, 1981 N.Y. Sess. Laws 2262 (McKinney) (1980 Report of Law Revision Commission on The Defense of Insanity in New York State, citing the *Torsney* case for the proposition that N.Y. CRIM. PROC. LAW § 330.20 "needs a complete overhaul.").

154. *See* N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1971).

155. *See id.*; *see also* McClellan, *supra* note 148, at 132–33.

156. *See* N.Y. CRIM. PROC. LAW § 330.20 (McKinney 2019); McClellan, *supra* note 148, at 133–34.

157. *See* 1981 N.Y. Sess. Laws 2256–59 (1980 Report of Law Revision Commission on The Defense of Insanity in New York State).

defense.[158] Before 1984, the prosecution had the burden to prove that the defendant was sane beyond a reasonable doubt, although the prosecution could nevertheless rely to some extent on a presumption of sanity.[159] Since the 1984 amendment, the defendant now has the burden to prove his or her insanity by a preponderance of the evidence.[160] The Court of Appeals upheld the constitutionality of that change.[161]

B. *The Battle of the Experts*

1. The Significance and Limitations of Expert Testimony

Testimony from experts in psychology or psychiatry "is a staple in virtually all insanity trials."[162] In New York courts, an expert witness *must* be permitted to state his or her opinion with respect to "the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time."[163] Such testimony on the "ultimate issue" is prohibited in the federal courts.[164]

Some of the limitations on expert testimony are illustrated by the case of Andrew Goldstein. In 1999, Goldstein pushed Kendra Webdale off of a New York City subway platform in front of an oncoming train, which hit and

158. 1984 N.Y. Sess. Laws 1973–75 (McKinney) (L 1984, ch. 668); *see also* 1984 N.Y. Sess. Laws 3399 (McKinney) (Memorandum of Legis. Rep. of N.Y.C. on L 1984, ch. 668, mentioning the *Hinckley* case as an example of recent events that have "dramatically exposed the dangers of the insanity defense as currently formulated"); *see also* Bill Jacket, L 1984, ch. 668 (containing several mentions of the *Hinckley* verdict).

159. *See* People v. Silver, 310 N.E.2d 520, 522 (N.Y. 1974).

160. *See* N.Y. PENAL LAW §§ 25.00(2), 40.15 (McKinney 2019).

161. People v. Kohl, 527 N.E.2d 1182, 1182 (N.Y. 1988).

162. EWING, *supra* note 3, at 22.

163. N.Y. CRIM. PROC. LAW § 60.55(1) (McKinney 2019).

164. FED. R. EVID. 704(b).

killed her on impact.[165] Webdale was a University at Buffalo graduate who grew up in Upstate New York.[166] Goldstein had been in and out of psychiatric hospitals over a dozen times with various diagnoses, including paranoid schizophrenia and bipolar disorder with psychotic features.[167]

Goldstein's first trial ended in a hung jury.[168] During the second trial, the prosecution's strategy was to concede that Goldstein had a "relatively mild" mental illness, but to argue that his killing of Webdale was a result of his hatred of women, not his mental illness.[169] To that end, an expert witness for the prosecution testified as to what she was told by various people from Goldstein's past about Goldstein's prior assaults and sexually inappropriate conduct with women.[170] After his second trial, Goldstein was convicted and sentenced to twenty-five years to life in prison.[171] On appeal, the Court of Appeals held that the expert's testimony regarding what others had told her was testimonial hearsay—that is, a statement made out of court by another person, offered for the truth of the matter asserted, and intended for use at trial—and therefore inadmissible.[172] The Court further held that admission of the testimonial hearsay statements through the prosecution's expert could not be considered harmless inasmuch as the People's case "drew some significant support from the improperly admitted statements."[173] After he was granted a third trial by the

165. EWING, *supra* note 3, at 116.

166. *Id.* at 114.

167. *Id.* at 114–15.

168. *Id.* at 120.

169. *Id.* at 117, 121.

170. *See* People v. Goldstein, 843 N.E.2d 727, 729–30 (N.Y. 2005); EWING, *supra* note 3, at 123–24.

171. EWING, *supra* note 3, at 124.

172. *Goldstein*, 843 N.E.2d at 732–33; EWING, *supra* note 3, at 125–26.

173. *Goldstein*, 843 N.E.2d at 734.

Court of Appeals, Goldstein pleaded guilty to manslaughter.[174]

Goldstein was recently released from prison, and it is possible that he may be subject to "Kendra's Law," a law passed in the wake of Kendra Webdale's death that allows for court-ordered assisted outpatient therapy for mentally ill individuals with a history of hospitalizations or violence.[175]

2. The Ethics of Expert Testimony

In its *Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, the American Academy of Psychiatry and the Law [hereinafter "AAPL"] discusses ethical issues faced by expert witnesses testifying in a criminal trial where the defendant has raised an insanity defense. For example, while psychiatrists generally owe a duty to their patient, the AAPL states that a forensic psychiatrist retained by the defense owes a duty to the defense attorney.[176] Additionally, while a psychiatrist usually operates under a duty of confidentiality, forensic psychiatrists retained by the prosecution must warn the defendant that evaluations are not confidential and may be used against him or her.[177] Furthermore, the AAPL states that a forensic psychiatrist has a duty to "further the interests of justice, regardless of the identity of the retaining party."[178]

---

174. EWING, *supra* note 3, at 127.

175. *See In re* K.L., 806 N.E.2d 480, 482 (N.Y. 2004); NEW YORK STATE OFFICE OF MENTAL HEALTH, KENDRA'S LAW: FINAL REPORT ON THE STATUS OF ASSISTED OUTPATIENT TREATMENT 1 (2005), https://www.omh.ny.gov/omhweb/kendra_web/finalreport/intro.htm; Ali Watkins, *A Horrific Crime on the Subway Led to Kendra's Law. Years Later, Has it Helped?*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/nyregion/kendras-law-andrew-goldstein-subway-murder.html.

176. *AAPL Practice Guideline*, *supra* note 30, at S18.

177. *See id.* at S19.

178. *Id.*

Although not true in all jurisdictions,[179] in New York, the prosecution is permitted to call a psychiatrist who has treated the defendant even if that expert is not called to testify by the defense, because by asserting an insanity defense, the defendant makes a "complete and effective waiver . . . of any claim of privilege."[180] Defense counsel may consult with a psychiatrist "in order to obtain advice concerning the efficacy of an insanity plea . . . without fear of later courtroom disclosure," but *only* facts and observations "disclosed *by the attorney*" are subject to a work product privilege.[181] The AAPL states that forensic psychiatrists should have sufficient knowledge of how the laws in their jurisdiction may affect their role in an insanity trial.[182]

Professor Ewing stated in one of his books that some mental health experts have famously offered testimony regarding the insanity defense at trial that is "clinically, legally, or factually suspect."[183] He provides the example of the expert testimony about the impeccably timed epileptic seizure suffered by Robert Torsney, discussed earlier.[184] He also cites the expert testimony offered by the prosecution in the Goldstein case, which led to a new trial, and the testimony offered by the defense in the case of Arthur Shawcross, which this Article will address shortly.[185]

3. Ethical Considerations for Attorneys

Attorneys face their own set of ethical obligations when it comes to psychiatric evaluations performed in connection with the insanity defense. When a psychiatrist retained by

179. *See id.* at S18.

180. People v. Edney, 350 N.E.2d 400, 402–03 (N.Y. 1976); *see* N.Y. CRIM. PROC. LAW § 60.55(2) (McKinney 2019).

181. *Edney*, 350 N.E.2d at 403.

182. *See AAPL Practice Guideline*, *supra* note 30, at S18–S19.

183. *See* EWING, *supra* note 3, at 162.

184. *See id.*

185. *Id.*

the prosecution in an insanity case finds that a defendant meets the legal criteria for insanity, the prosecution has a legal duty to inform the defense.[186] By contrast, when a psychiatrist retained by the defense finds that a defendant is legally sane, defense counsel has no obligation to reveal that information to the prosecution. In fact, defense counsel has an ethical duty not to do so, and may seek other, more favorable expert opinions.[187] When both prosecution and defense experts agree that a defendant is insane, the case typically does not proceed to trial unless there is some other issue presented,[188] and the court may accept a plea of not responsible by reason of mental disease or defect.[189] In most jurisdictions, if the defendant is deemed competent to stand trial, defense counsel cannot impose an insanity defense over the defendant's objection.[190] The New York Court of Appeals has not yet spoken on this precise issue.

C. *After a Successful Insanity Defense*

1. Jury Instruction

New York law provides that when a defendant has raised the affirmative defense of not responsible by reason of mental disease or defect, the court must instruct the jury as follows, "without elaboration":

> A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment

186. *Id.* at 70.

187. *Id.*

188. *See id.*

189. *See* N.Y. CRIM. PROC. LAW § 220.15 (McKinney 2019).

190. *See generally* PERLIN & CUCOLO, *supra* note 12, at § 14-1.7; *AAPL Practice Guideline*, *supra* note 30, at S19.

proceedings.[191]

That provision was added as part of New York's Insanity Defense Reform Act of 1980 in order to avoid speculation by the jury that a mentally ill defendant who is a danger to the community might be released back into the public, which may lead the jury to improperly convict a defendant who meets the requirements of the insanity defense.[192] Other jurisdictions impose different rules regarding whether the jury can or must be informed of the consequences of an insanity acquittal.[193]

2. Duration of Confinement

In most states, when a defendant raises a successful insanity defense, the defendant is confined to a psychiatric institution with no definite release date, and is released only when it is safe to do so.[194] Likewise, New York indefinitely confines forensic patients found not guilty by reason of insanity if, after an initial examination, the defendant is determined to have a dangerous mental disorder.[195] New York does, however, regularly review such cases, approximately every two years, to determine whether the defendant should be released or placed into a less secure facility.[196]

In New York, the statute that governs the confinement of defendants found not guilty by reason of insanity is CPL § 330.20, enacted as part of the Insanity Defense Reform Act

191. CRIM. PROC. § 300.10(3).

192. *See* 1980 N.Y. Laws 1619, ch. 548, § 8; 1981 N.Y. Sess. Laws 2272–73 (McKinney) (1980 Report of Law Revision Commission on The Defense of Insanity in New York State).

193. *See generally* People v. Adams, 257 N.E.2d 610, 614 (N.Y. 1970) (discussing jury instruction before 1980 statutory enactment); PERLIN & CUCOLO, *supra* note 12, at § 14-1.3.4.

194. *See* MELTON ET AL., *supra* note 7, at 189; McClelland, *supra* note 6.

195. *See* CRIM. PROC. § 330.20; McClelland, *supra* note 6.

196. CRIM. PROC. § 330.20(h)–(i); McClelland, *supra* note 6.

of 1980, discussed earlier.[197] "The postadjudication statutory scheme set forth in CPL § 330.20 provides three alternative tracks, with different treatment progressions and procedural consequences, based upon the hearing court's postacquittal determination of a defendant's mental condition."[198] Defendants who are determined to have a "dangerous mental disorder" are classified as "track one" insanity acquittees and are confined in a secure facility for treatment.[199] If the defendant is determined to be "mentally ill" but not dangerous, the defendant is classified as a "track two" insanity acquittee and may be subject to involuntary civil commitment in a nonsecure facility pursuant to the Mental Hygiene Law.[200] Finally, if the court determines that the defendant does not have a dangerous mental disorder and is not mentally ill, the defendant must be released, "either unconditionally or subject to an order of conditions."[201]

A minority of states, including California, limit the time that a defendant may be involuntarily confined in a psychiatric institution to the maximum time the defendant would have served in prison if convicted, but the California law also allows for perpetual two-year extensions.[202] In *Jones v. United States*, the United States Supreme Court held that it does not violate due process for a defendant acquitted by reason of insanity to be involuntarily confined to a psychiatric institution "until such time as he has regained his sanity or is no longer a danger to himself or society," even if the defendant is confined for much longer than the maximum sentence the defendant could have received if

197. *See In re* James Q., 120 N.E.3d 358, 360 (N.Y. 2019).

198. *Id.* (internal quotation marks omitted); *see generally In re* Jamie R. v. Consilvio, 844 N.E.2d 285, 287–88 (N.Y. 2006).

199. *See* CRIM. PROC. § 330.20(1)(c), (1)(f), (6); *In re James Q.*, 120 N.E.3d at 360.

200. *See* CRIM. PROC. § 330.20(1)(d), (7); *In re James Q.*, 120 N.E.3d at 360–61; People v. Stone, 536 N.E.2d 1137, 1139 (N.Y. 1989).

201. CRIM. PROC. § 330.20(7); *see also James Q.*, 120 N.E.3d at 361.

202. *See* McClelland, *supra* note 6.

convicted of the crime.[203]

3. New York's Forensic Psychiatric Facilities

The New York State Office of Mental Health has oversight of several facilities that serve "justice-involved" individuals.[204] Of these facilities, three treat defendants found not responsible for criminal conduct by reason of mental disease or defect: Kirby Forensic Psychiatric Center on Wards Island, Mid-Hudson Forensic Psychiatric Center in New Hampton, and the Rochester Regional Forensic Unit, located at the Rochester Psychiatric Center on Elmwood Avenue.[205]

The Rochester Regional Forensic Unit's stated goal for patients found not responsible by reason of mental disease or defect is "to evaluate and treat their dangerous mental disorder . . . [and] to prepare these patients for transfer to a civil unit or nonsecure unit as soon as it is determined that they are no longer a danger to themselves or others because of their mental illness."[206]

D. *Selection of Famous Local Cases Involving the Insanity Defense*

1. George Fitzsimmons

Professor Ewing writes in his book on the insanity defense that when he first moved to Buffalo, New York in 1983 and asked why the insanity defense was, at that time, "rarely, if ever" used in the area, local attorneys repeatedly

---

203. Jones v. United States, 463 U.S. 354, 370 (1983).

204. NEW YORK STATE OFFICE OF MENTAL HEALTH, DIVISION OF FORENSIC SERVICES, https://www.omh.ny.gov/omhweb/forensic/bfs.htm (last visited Apr. 18, 2020).

205. *Id.*

206. *Rochester Psychiatric Center, Rochester Regional Forensic Unit*, NEW YORK STATE OFFICE OF MENTAL HEALTH, https://www.omh.ny.gov/omhweb/facilities/ropc/consumers/forensic.html (last visited Apr. 18, 2020).

mentioned the name "Fitzsimmons."[207] In 1969, George Fitzsimmons "karate-chopped" his parents to death in the Buffalo suburb of Amherst.[208] At the subsequent bench trial, a judge found Fitzsimmons not responsible by reason of mental disease or defect.[209] Just three years after Fitzsimmons was acquitted and confined in a psychiatric hospital, a judge ordered Fitzsimmons released, after four psychiatrists at that hospital testified that Fitzsimmons was no longer a danger to himself or others.[210] He was to remain under the supervision of the Office of Mental Hygiene for five years, and his release was subject to him remaining not dangerous to others.[211]

Not long after being released, Fitzsimmons and his new wife moved to Pennsylvania to live with Fitsimmons's aunt and uncle.[212] While in Pennsylvania, Fitzsimmons seriously assaulted his wife, the second time he had attacked her. New York authorities believed that they were powerless to take any action.[213] While awaiting sentencing on the Pennsylvania assault, Fitzsimmons stabbed his aunt and uncle to death during an argument over a television program.[214] During the following trial, where he was represented by renowned criminal defense attorney F. Lee Bailey, Fitzsimmons again raised an insanity defense.[215] This time, a jury rejected the defense and found Fitzsimmons guilty of murder.[216] He was sentenced to life in prison.[217]

---

207. EWING, *supra* note 3, at xi.

208. *Id.*

209. *Id.* at xi–xii.

210. *Id.* at xii.

211. *Id.*

212. *Id.* at xii.

213. *See id.* at xii–xiii.

214. *Id.* at xiii.

215. *Id.* at xiii–xiv.

216. *Id.* at xiv.

217. *Id.*

Western New York's perception of the insanity defense was shaped by the Fitzsimmons case, and many believe that the Fitzsimmons case is typical of an insanity case.[218] Asked in 2000 whether the insanity defense was "dead" in Buffalo, the late criminal defense attorney John Nuchereno responded, "It's not dead, but its heart beats very weakly."[219]

2. Arthur Shawcross

In 1972, Arthur Shawcross admitted to killing two children in the Watertown, New York area.[220] Due to concerns over the admissibility of his statements and the weak evidence against him, the prosecution offered Shawcross a plea deal in which he would plead guilty to manslaughter for killing one of the children.[221] In 1987, after 14 years in prison, Shawcross was released to parole supervision.[222] His parole officer warned his superiors that he considered Shawcross to be "possibly the most dangerous individual to have been released to this community in many years."[223]

Shawcross was settled in Rochester in 1987 by parole officials.[224] Over the next two years, Shawcross raped and killed 11 women.[225] He was finally apprehended in 1990 after he returned to the scene of one of his crimes.[226] Shawcross gave a detailed confession to each murder.[227]

---

218. *Id.* at xiv–xv.

219. *Id.* at xv (quoting Gene Warner, *Insanity Plea on Life Support*, BUFFALO NEWS (Feb. 29, 2000), https://buffalonews.com/2000/02/28/insanity-plea-on-life-support/).

220. *Id.* at 64–66.

221. *Id.* at 65–66.

222. *Id.* at 66.

223. *Id.* at 67.

224. *Id.*

225. *Id.*

226. *Id.* at 68.

227. *Id.*

The defense vigorously pursued an insanity defense. Counsel retained two expert psychiatrists to evaluate Shawcross, and when both refused to testify that Shawcross was insane, the defense found one who would.[228] Using techniques such as hypnotism, the defense expert heard Shawcross's increasing unbelievable tales of childhood violence and atrocities witnessed and perpetrated during the Vietnam War, and she diagnosed him with post-traumatic stress disorder so severe that it caused him to enter a "dissociative state" during his murders.[229] On cross-examination, the expert admitted that she did not use standard procedures for the hypnosis, did not verify that the traumatic events Shawcross relayed to her ever occurred, and did not discuss each of the killings with Shawcross because they were "not distinct."[230] The prosecution expert, by contrast, pointed out that many of the events Shawcross relayed to the defense expert were "impossible," and diagnosed Shawcross with antisocial personality disorder, "the modern-day version of what was formerly called a psychopath or sociopath."[231] The jury rejected the insanity defense, and Shawcross was sentenced to a minimum term of 250 years' imprisonment.[232]

3. Gail Trait

The case of Gail Trait is another famous insanity case out of Buffalo. In 1978, Trait killed her four children in a "voodoo-style" ritual.[233] After a jury rejected her insanity defense, Trait was sentenced to twenty-five years to life in

228. *Id.* at 69–70.

229. *Id.* at 71–72.

230. *Id.* at 74–75.

231. *Id.* at 76–78.

232. *Id.* at 79.

233. Matt Gryta, *Trait, Convicted of Killing Her 4 Children, Fights New Trial*, BUFFALO NEWS (Oct. 24, 1988), https://buffalonews.com/1988/10/24/trait-convicted-of-killing-her-4-children-fights-new-trial/.

prison, where she received treatment for schizophrenia.[234] Ten years later, however, the Appellate Division overturned Trait's conviction for ineffective assistance of counsel.[235] The court held that Trait's counsel had been unprepared and that his performance had "alienated the jurors to such an extent that it may have had an adverse effect on their verdict."[236] After her second trial, Trait was found not responsible by reason of mental disease or defect and was confined to a psychiatric facility.[237]

4. John Justice

John Justice was an honor student at Kenmore West High School when he killed his family and a stranger in 1985.[238] Justice stabbed his mother, father, and thirteen-year-old brother to death and then intentionally rear-ended a car at a high speed in an alleged suicide attempt, killing the driver of the other car.[239] At trial, he was found not guilty by reason of insanity in two of the deaths, and guilty of manslaughter in the others.[240] In 2005, Justice was released from prison on parole, but within two years he returned to prison for violating the conditions of his release by threatening workers at a halfway house.[241] After serving out the remaining period of his 30-year prison sentence, Justice

234. *Id.*

235. People v. Trait, 527 N.Y.S.2d 920 (App. Div. 1988), *appeal denied*, 528 N.E.2d 908 (N.Y. 1988).

236. *Id.* at 921.

237. Matt Gryta, *Trait's First Lawyer Cites Faults of Decade Ago*, BUFFALO NEWS (June 6, 1989), https://buffalonews.com/1989/06/06/traits-first-lawyer-cites-faults-of-decade-ago/.

238. Melinda Miller, *Justice Released from Prison in 1985 Murders, but Gets Civil Confinement*, BUFFALO NEWS (Sept. 16, 2015) https://buffalonews.com/2015/09/16/justice-released-from-prison-in-1985-murders-but-gets-civil-confinement/.

239. *Id.*

240. *Id.*

241. *Id.*

was released from prison in September 2015.[242]

The state, however, successfully sought to confine Justice civilly, on the ground that he remained dangerously mentally ill.[243] The civil confinement was based upon a "recommitment order" issued pursuant to CPL § 330.20(14), which allows for recommitment of the defendant to a psychiatric facility if the court determines that the defendant has a dangerous mental disorder.[244] Interestingly, if Justice had been found guilty of all of the murders, instead of not guilty by reason of insanity with respect to two of the murders, this statutory provision would not apply.[245] The Appellate Division affirmed the recommitment order, concluding that Justice's diagnosis of antisocial personality disorder with narcissistic and paranoid features, coupled with other testimony presented by the state regarding his dangerousness, sufficiently demonstrated that Justice suffered from a dangerous mental disorder requiring commitment to a secure facility.[246]

E. *Other New York Considerations*

1. Competency under CPL Article 730

Before a defendant may raise an insanity defense at trial, the defendant must be competent to stand trial. CPL Article 730 governs competency proceedings. The defendant is incompetent to stand trial if, as a result of mental disease or defect, the defendant "lacks capacity to understand the

242. *Id.*

243. *See id.*; Casey Seiler, *Civil Confinement of Killer Upheld on Appeal*, TIMES UNION (Feb. 18, 2016), https://www.timesunion.com/local/article/Civil-confinement-of-killer-upheld-on-appeal-6841098.php.

244. N.Y. CRIM. PROC. LAW § 330.20(14) (McKinney 2019); *see also In re* John Z., 25 N.Y.S.3d 721, 722 (App. Div. 2016), *appeal denied*, 63 N.E.3d 71 (N.Y. 2016).

245. *See In re John Z.*, 25 N.Y.S.3d at 722.

246. *Id.* at 723–26.

proceedings against him or to assist in his own defense."[247] Competency is determined at the time of the criminal proceedings, not the time of the crime. If the defendant is determined to be incompetent to stand trial and has been charged with a felony, the criminal action is suspended and the defendant is committed to the custody of the Office of Mental Health until he or she is no longer incapacitated, for up to two-thirds of the maximum term of imprisonment, after which a civil commitment proceeding may be commenced.[248]

2. Extreme Emotional Disturbance

A defendant charged with murder may raise an affirmative defense that the defendant was "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[249] If the defendant is successful, the conviction is reduced to manslaughter in the first degree.[250] Like the insanity defense, the defense of extreme emotional disturbance often involves the presentation of expert psychiatric evidence, notice of which is required pursuant to CPL § 250.10.[251]

In 2015, Court of Appeals upheld the conviction of a defendant who had raised an extreme emotional disturbance defense during his trial for murdering his ex-girlfriend and her current partner.[252] Expert testimony on the defense was presented by both sides, but the jury rejected the defense after deliberating for three hours.[253] Additionally, the New

247. CRIM. PROC. § 730.10(1).

248. *See generally* CRIM. PROC. §§ 730.50, 730.60, 730.70.

249. N.Y. PENAL LAW § 125.25(1)(a); *see also* PENAL § 125.27(2)(a).

250. PENAL § 125.20(2).

251. *See* CRIM. PROC. § 250.10(1)(b).

252. People v. Pavone, 47 N.E.3d 56, 59 (N.Y. 2015).

253. *See id.* at 63.

York State Legislature recently enacted legislation abolishing the so-called "gay panic" and "trans panic" defenses in the state, which previously allowed a homicide defendant to claim extreme emotional disturbance based on discovery or disclosure of the victim's sexual orientation or gender identity.[254]

3. Negating Mens Rea

In New York, the defendant may present evidence of a mental disease or defect in an attempt to negate the intent element of the charged crime. For example, if the defendant is charged with murder, the defendant may argue that because of a mental disease or defect, the defendant was incapable of forming the intent to cause the death of the victim.[255] Unlike the insanity defense, which the defendant has the burden to prove by a preponderance of the evidence, if the defendant argues that a mental illness prevented him or her from forming the required intent, the People are not relieved of the burden to prove beyond a reasonable doubt that the defendant could and did have the requisite intent.[256] If the defendant is successful in using a mental illness to negate the mens rea, the defendant could be acquitted entirely, rather than confined in a psychiatric facility, because the requisite intent is an element of the crime that the People must prove in order to convict the defendant.[257] A defendant attempting to use psychiatric evidence of a mental disease or defect to negate the mens rea must therefore give proper notice under CPL § 250.10 and submit to the required examinations.[258]

254. *See* 2019 N.Y. Sess. Law News 760–61 (McKinney) (L 2019, ch. 45).

255. *See, e.g.*, PENAL § 125.25(1).

256. *See generally* People v. Segal, 429 N.E.2d 107, 110–11 (N.Y. 1981).

257. *See id.*

258. N.Y. CRIM. PROC. LAW § 250.10; *see also Segal*, 429 N.E.2d at 109.

4. Mental Health Courts in New York

New York's Mental Health Courts "seek to improve safety, court operations, and the well-being of justice-involved individuals living with mental illness by linking them with court-supervised, community-based treatment."[259] Eligibility criteria are based on the nature of the criminal offense and the "nature and severity of a person's mental illness."[260] There are currently twenty-nine mental health court locations, and the Buffalo and Rochester areas have several mental health courts.[261]

259. *Mental Health Courts: Overview*, NYCOURTS, http://ww2.nycourts.gov/mental-health-courts-overview-27066.

260. *Mental Health Courts: Key Principles*, NYCOURTS, http://ww2.nycourts.gov/courts/problem_solving/mh/key_principles.shtml

261. *Mental Health Courts: Court Locations*, NYCOURTS, http://ww2.nycourts.gov/courts/problem_solving/mh/courts.shtml; *see also* JOSEPHINE W. HAHN, CTR. FOR CT. INNOVATION, NEW YORK STATE MENTAL HEALTH COURTS: A POLICY STUDY 2 (2015), https://www.courtinnovation.org/sites/default/files/documents/MHC%20Policy%20Study%20Report_Final.pdf.

III. ADDITIONAL RELEVANT ISSUES

There are many additional issues that a discussion of the insanity defense touches on that are beyond the scope of this Article, but that an attorney or expert witness involved in an insanity defense should be aware of. I will discuss them briefly below, although this is by no means an exhaustive list.

A. *Is there a Constitutional Right to the Insanity Defense?*

Eric Clark had a history of paranoid schizophrenia when he shot and killed a police officer in 2000.[262] At trial, Arizona law prohibited him from presenting evidence regarding his mental illness insofar as he wished to argue that he was incapable of forming the necessary mens rea, and he was found guilty during a bench trial after the court rejected his alternative insanity defense.[263] In 2006, the Supreme Court rejected Clark's contention that any particular articulation of the insanity defense is constitutionally required by due process.[264] The Court also held that Arizona could constitutionally preclude expert testimony on a diminished capacity defense.[265] The Supreme Court expressly left open the issue whether the Constitution "mandates an insanity defense."[266]

In 2012, in *Delling v. Idaho*, the Supreme Court declined the opportunity to address whether due process requires states to allow some form of the insanity defense in criminal cases.[267] Idaho is one of four states that does not recognize insanity as an affirmative defense, although it does allow

---

262. *See* Clark v. Arizona, 548 U.S. 735, 743–45 (2006).

263. *Id.* at 744–46.

264. *Id.* at 747–56.

265. *Id.* at 770–79.

266. *Id.* at 752 n.20; *see also* EWING, *supra* note 3, at 136–40 (discussing the *Clark* case).

267. Delling v. Idaho, 568 U.S. 1038 (2012).

expert evidence "on the issue of any state of mind which is an element of the offense."[268] Over the dissent of Justices Breyer, Ginsburg, and Sotomayor, the Supreme Court denied certiorari, leaving the issue open for a future case.[269]

The Supreme Court largely resolved that issue in March 2020, with its decision in *Kahler v. Kansas*.[270] In 2009, James Kahler shot and killed his estranged wife, mother-in-law, and two daughters.[271] Kahler filed a motion challenging the constitutionality of Kansas' insanity statute.[272] Kansas does not recognize insanity as an affirmative defense but allows a defendant to claim that, as a result of mental disease or defect, the defendant "lacked the culpable mental state required as an element of the crime charged."[273] The trial court denied Kahler's motion,[274] leaving him unable to argue that his inability to know right from wrong should excuse him from criminal liability. Instead, Kahler unsuccessfully argued at trial that his severe depression prevented him from forming intent, and he was convicted of capital murder and sentenced to death.[275]

After Kahler exhausted his state court appeals, the Supreme Court granted certiorari in 2019.[276] The Court considered "whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not 'distinguish right from wrong' when committing his crime, or, otherwise put, whether that Clause requires States to adopt the moral-incapacity test from *M'Naghten*."[277] In an

268. IDAHO CODE § 18-207(1), (3) (2019).

269. *Delling*, 568 U.S. at 1038–39.

270. 140 S. Ct. 1021 (2020).

271. *Id.* at 1026–27.

272. *Id.* at 1027.

273. KAN. STAT. ANN. § 21-5209 (West 2011).

274. Kahler v. Kansas, 140 S. Ct. at 1027.

275. *Id.*

276. Kahler v. Kansas, 139 S. Ct. 1318 (2019).

277. Kahler v. Kansas, 140 S. Ct. at 1027.

opinion by Justice Kagan, the Court held that the Due Process Clause imposed no such requirement.[278]

Justice Kagan's majority opinion largely focused on the fact that the insanity defense varies among states and throughout history.[279] The Court reasoned that this variation meant that no particular version of the insanity defense could be deemed fundamental, such that it violated due process for a state to formulate its defense differently.[280] Inasmuch as the Court considered the Kansas statute an alternative version of the insanity defense as opposed to an abolition thereof,[281] the Court held that the Kansas statute was not unconstitutional.[282] The Court observed that "[d]efining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility," and that this project "should be open to revision over time."[283]

Justice Breyer authored a dissenting opinion, joined by Justices Ginsburg and Sotomayor.[284] Justice Breyer would have held that Kansas had unconstitutionally "eliminated the core of a defense that has existed for centuries: that the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy."[285] The *Kahler v. Kansas* decision is a fascinating read for any person interested in the origins and history of the insanity defense.

278. *Id.* at 1025.

279. *See id.* at 1032–37.

280. *See id.* at 1037.

281. *See id.* at 1030–32.

282. *Id.* at 1037.

283. *Id.*

284. *Id.* at 1037 (Breyer, J., dissenting).

285. *Id.* at 1038.

B. *Increasing Incarceration of Mentally Ill Individuals*

The deinstitutionalization movement that began in the 1950s was based, in part, on a benign motive: to treat mental illness in the least restrictive setting, and to provide individuals with mental illness the greatest possible amount of autonomy.[286] The abysmal conditions at many mental institutions were also an alarming call to action.[287] Policymakers at the time were also overly optimistic about new psychotropic drugs and were attempting to decrease the large cost burden that public psychiatric hospitals placed on taxpayers.[288]

One estimate states that "approximately [ninety-two] percent of the people who would have been living in public psychiatric hospitals in 1955 were not living there in 1994."[289] Many of those who were deinstitutionalized were severely mentally ill and were released into the community without ensuring that medication, community integration services, and other support those individuals needed would be available to them.[290] As a result, the nation's population of individuals in psychiatric hospitals has decreased

---

286. *See* E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS (1997), *excerpted in Deinstitutionalization: A Psychiatric "Titanic,"* PBS (May 10, 2005), https://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html.

287. *See* Richard D. Lyons, *How Release of Mental Patients Began*, N.Y. TIMES (Oct. 30, 1984), https://www.nytimes.com/1984/10/30/science/how-release-of-mental-patients-began.html; Ana Swanson, *A shocking number of mentally ill Americans end up in prison instead of treatment*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/30/a-shocking-number-of-mentally-ill-americans-end-up-in-prisons-instead-of-psychiatric-hospitals.

288. *See* Thomas L. Hafemeister et al., *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 167–69 (2012); *see also* Lyons, *supra* note 287.

289. TORREY, *supra* note 286; *see also* Hafemeister et al., *supra* note 288, at 168 (stating that in the mid-1950s, approximately 559,000 individuals were receiving care in these facilities, but by 2012, that number had dropped to 40,000).

290. TORREY, *supra* note 286; Hafemeister et al., *supra* note 288, at 168; Lyons, *supra* note 287.

exponentially, but the incarceration of mentally ill individuals has rapidly increased.[291] The population of the mentally ill in the nation's prisons and jails is difficult to quantify, and statistics vary, but the Department of Justice estimated that in 2005, "more than half of all prison and jail inmates had a mental health problem,"[292] including less severe diagnoses. Some recent estimates state that approximately fifteen percent of inmates have a "severe" mental illness.[293]

C. *Execution of Mentally Ill Persons*

Internationally, there is strong opposition to executing people with severe mental illness.[294] The United Nations, the European Union, the Council of Europe, and the Inter-American Commission on Human Rights have all taken positions accordingly.[295] Most Americans agree; approximately two-thirds of Americans polled expressed opposition to executing severely mentally ill people.[296] Exact statistics are not available, but some organizations estimate that approximately twenty percent of individuals on death row have a severe mental illness.[297] In 2006, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Health, and the American Bar Association all adopted a policy opposing the

---

291. *See* TORREY, *supra* note 286; Lisa W. Foderaro, *The Mentally Ill Overwhelm New York's Prisons*, N.Y. TIMES (Oct. 6, 1994), https://www.nytimes.com/1994/10/06/us/the-mentally-ill-overwhelm-new-york-s-prisons.html; Swanson, *supra* note 287.

292. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

293. A.B.A. DEATH PENALTY PROJ., *supra* note 13, at 15. In 2000, the American Psychiatric Association estimated that one in five prisoners were "seriously mentally ill." Hafemeister et al., *supra* note 288, at 150 n.7, 171 n.101.

294. A.B.A. DEATH PENALTY PROJ., *supra* note 13, at 4.

295. *Id.*

296. *Id.*

297. *Id.* at 16.

death penalty for defendants who suffered from severe mental illness at the time of their crime.[298] Thus far, no jurisdictions with the death penalty have adopted a categorical exclusion for the severely mentally ill.[299]

D. *Community Intervention Programs*

Community intervention programs have been developed to attempt to reduce the incarceration and recidivism of mentally ill individuals involved with the criminal justice system. One such model is the Assertive Community Treatment [hereinafter "ACT"] model.[300] ACT programs arose in the 1970s and utilize mobile treatment teams that provide services like housing assistance, addiction treatment, and employment assistance.[301] Rochester's Forensic Assertive Community Treatment, or R-FACT model, was developed at the University of Rochester. By targeting risk factors and using "legal leverage," this model has been effective in reducing jail time and increasing engagement in outpatient treatment.[302]

Another program, Transitions Clinic Network, employs former prisoners as community health workers to assist people leaving prison in dealing with medical, psychiatric, and substance abuse disorders.[303] The program is rapidly

298. *Id.* at 1.

299. *Id.* Some state legislatures, however, have considered creating such an exclusion. *See Resources on Severe Mental Illness and the Death Penalty*, AMERICANBAR.ORG (Apr. 21, 2020), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/resources0/.

300. Robert L. Weisman, J. Steven Lamberti, & J. Richard Ciccone, *Community-Based Interventions for Justice-Involved Individuals with Serious Mental Disorders*, *reprinted in* RICHARD ROSNER & CHARLES SCOTT, PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY 895 (3d ed. 2016).

301. *Id.*

302. *See id.* at 895–96

303. Patricia Leigh Brown, *They're Out of Prison. Can They Stay Out of the Hospital?*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/ex-prisoners-health-california.html.

growing, doubling in size over the past five years, and it now has twenty-five health centers in eleven states and Puerto Rico.[304] These are only two of the many community intervention programs doing similar work throughout the nation.

304. *Id.*

CONCLUSION

The madness that is insanity is found across a wide spectrum of behavior. This is why the law struggles with defining the defense. It is a noble intellectual effort to prevent punishing a person for acts that are a product of disease. The disease of mental illness, however, can be difficult to objectively measure. Its subjective nature has consistently undermined public support for the insanity defense. Cancer cannot be faked, but insanity can . . . or so the argument goes.

Reporter Mac McClelland perhaps encapsulated the influence of public perception on the insanity defense best with this quote from her 2017 New York Times article, *When "Not Guilty" Is a Life Sentence*:

> Perhaps the most cleareyed view of the compromises inherent in [not guilty by reason of insanity] commitments comes from Paul Appelbaum, professor and director of the division of law, ethics and psychiatry at Columbia University. Appelbaum acknowledges that some [defendants found not guilty by reason of insanity] are "unnecessarily detained for a longer period than what seems to be warranted by their mental disorder and its impact on their likelihood of being violent in the future." But, he says, such exaggerated concerns about public safety may be necessary to the survival of the insanity defense. "There are injustices that are imposed on individuals," Appelbaum says. "But I also see at a 30,000-foot level why the system works that way, and recognize perhaps the paradox that if it didn't work that way, we might lose the insanity defense altogether, or at the very least have an even more restrictive system that we have to deal with."[305]

The defendant in the 1847 *Freeman* case discussed above was represented by future Governor of New York and Secretary of State William Seward.[306] During his closing argument, Seward had this to say about the insanity defense:

> We labor under the further embarrassment that the plea of insanity is universally suspected. It is the last subterfuge of the guilty, and so is too often abused. But however obnoxious to

305. McClelland, *supra* note 6.

306. Hawkins-Leon, *supra* note 128, at 440.

> suspicion this defense is, there have been cases where it was true; and when true it is of all pleas the most perfect and complete defense that can be offered in any human tribunal.[307]

Many members of the public indeed view the insanity defense as the last subterfuge of the guilty. The insanity defense, however, is used far less often than many people believe, and is even less often successful.[308]

The public imagination is easily inflamed by the insanity defense. That is because the acts that lead to criminal charges are often horrific. It is an ongoing challenge for our criminal justice system to separate acts that are a consequence of disease from those that arise from criminal intent. The challenge can only be met by judging each case individually, on its own unique set of facts.

---

307. *Id.*

308. Recently, a committee of the New York State Bar Association reviewed the history of New York's insanity defense and recommended the study of potential legislative changes to the defense and to the confinement of insanity acquittees. *See* Liberati-Conant & Shea, *supra* note 9, at 28. The conclusions and recommendations made in that report are beyond the scope of this Article, but New York's insanity defense, as it has in the past, will undoubtedly be amended in the future.