Insanity Denied: Abolition of the Insanity Defense in Kansas

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I. Introduction

The legal test for insanity, designed to identify the scope of the insanity defense, has changed over the years.[1] For thousands of years, society, however, has recognized a fundamental belief that it is unfair to hold insane persons responsible for their criminal behavior regardless of the crime.[2] Despite its extensive history and firm entrenchment in common law, the insanity defense engenders a national mood of skepticism. In order to soothe public concerns and gain popularity, the Kansas Legislature, in 1995, enacted Kan. Stat. Ann. § 22-3220 which states:

> It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense. The provisions of this section shall be in force and take effect on and after January 1, 1996.

Thus, the insanity defense in Kansas, which has been in existence since 1884,[3] is no longer a viable affirmative defense. Defendants can no longer be exonerated, as they could under the traditional defense, for not knowing the nature and quality of their actions or for not knowing right from wrong with respect to their actions. Even if the defendant was insane, but had the requisite mental state required for the crime he or she is charged with, he or she cannot plead insanity as a defense.

This article does not join the debate with regard to how insanity should be substantively defined by the courts. Instead, the article focuses exclusively on the issue of abolishment of the insanity defense, particularly in the state of Kansas. First, abolition of the insanity defense in Kansas was unwarranted. The Kansas Legislature abolished the defense because the public wanted it abolished. It made good political sense. After all, as elected representatives of the state, the Kansas Legislators adequately represented their constituents by giving them what they wanted. Yet the public was, and still is, remarkably uninformed about the actual use of the insanity defense. The public's call for abolition was based on several misperceptions that were either empirically untrue or unjustified. Instead of educating the public on the actual use of the insanity defense, the Kansas Legislature catered to the public's misperceptions by abolishing the defense. Second, Kansas's new "*mens rea* approach" is too narrow. Proclaimed as a balance between the rights of mentally ill defendants and the public's outcry for reform, the new *mens rea* approach is unfair when compared to the former insanity defense. This is evidenced by the fact that some of the most debilitating mental

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illnesses would fail to meet the strict requirements of the new approach.

While the majority of this article is a piecemeal representation of some of the major works on the insanity defense, its conclusion is unique. No other work has attributed the abolition of the insanity defense solely to political cynicism. Admittedly, this is a bold assertion given the lack of legislative history with respect to Kan. Stat. Ann. § 22-3220. While this paper cannot prove that political cynicism played a major role in abolishing the insanity defense in Kansas, it will show that given the timing and circumstances surrounding the defense's abolition, political cynicism was the motivational factor

II. The Insanity Defense in Kansas

A. The Old Approach

Before abolishing the defense, Kansas adhered to the M'Naghten test for over one hundred years.[4] Under M'Naghten, the defendant should be found criminally insane only if the accused did not know the nature and quality of the act; or, if the accused did know it, where the accused did not know right from wrong with respect to the act.[5] Admittedly, the test's application is not straight forward because its component terms: "know," "nature and quality," and "right from wrong" are themselves far from straightforward. Although the M'Naghten test draws much criticism for being too outdated, the majority of states that retain the insanity defense, recognize the M'Naghten test in various forms. It continues to apply in Kansas to crimes alleged to have been committed prior to January 1, 1996.

Procedurally, Kansas was in the minority regarding which side had the burden of proof in insanity cases. Two-thirds of the states place the burden of proof on the defense. In Kansas, however, the defense had the burden of production, but the state had the burden of proof. In other words, the defense had to overcome a presumption of sanity by introducing evidence indicating the possibility of insanity.[6] Once introduced, the prosecution had the burden of proving that the defendant was not insane beyond a reasonable doubt.[7]

B. The New Approach

With the adoption of Kan. Stat. Ann. § 22-3220, Kansas followed Montana,[8] Idaho,[9] and Utah[10] to become the fourth state to legislatively abolish the insanity defense. In order to understand Kansas's new approach to insanity, one must understand the concept of *mens rea*. All crimes, except for those imposing strict liability, require the defendant to possess the illegal state of mind (*mens rea*).[11] *Mens rea* refers to a defendant's moral culpability or "evil mind."[12] More specifically, *mens rea* refers to criminal intent, or the specific mental element contained in the applicable criminal statute.[13] Kansas provides that criminal intent may be established by proof that the conduct of the accused person was intentional or reckless.[14] Proof of intentional conduct is required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a reckless manner.[15] The terms "knowing," "willful," "purposeful," and "on purpose" are included within the term "intentional."[16]

Since a defendant's capacity to form intent or *mens rea* is often an indispensable element of every crime (with the exception of strict lia-

bility), Kansas could not have entirely eliminated evidence with regard to mental disease or defect relevant to the defendant's requisite state of mind. To do so would have been unconstitutional.[17] Kansas courts have yet to decide the constitutionality of abolishing the affirmative defense of insanity and replacing it with a *mens rea* approach. Nonetheless, it is safe to say that the *mens rea* approach is constitutional. Although the U.S. Supreme Court has not directly addressed the issue, three current justices of the Court have expressed in dicta that a separate affirmative defense of insanity is not constitutionally required.[18] Moreover, the highest courts of Montana, Idaho, and Utah have upheld the constitutionality of their respective *mens rea* statutes,[19] and the U.S. Supreme Court recently denied *certiorari* on the issue in a case arising under Montana's *mens rea* statute.[20]

Consequently, in place of the affirmative defense of insanity, Kansas enacted the "*mens rea* approach." This approach permits a defendant to introduce expert psychiatric witnesses or evidence to litigate the intent elements of a crime. If the evidence negates the requisite intent, the defendant is entitled to an acquittal. However, there is one major limitation on the defendant's ability to introduce evidence corroborating or showing the existence of a mental disease or defect. Such evidence is only admissible as it specifically relates to the requisite *mens rea* of the offense. Therefore, the defense cannot introduce evidence as to the existence of a mental disease or defect to litigate the defendant's mental condition in general. The evidence must relate specifically to the defendant's ability to possess the requisite *mens rea* of the offense.

III. Why Did Kansas Change?

We have all heard the old adage, "If it's not broke, don't fix it." Apparently, the Kansas Legislature thought that the criminal justice system was broken with regard to the insanity defense. From this, many questions come to mind, but this article is only concerned with two: (1) why was the Kansas Legislature insistent upon changing Kansas law with regard to the insanity defense? and (2) why abolish the defense and change to the *mens rea* approach?

A. Reason One: The Public

The public's negative perception of the insanity defense is a major reason why the Kansas Legislature abolished the defense. Unfortunately, most people, including prominent politicians, believe that defendants misuse, abuse, and manipulate the criminal justice system by utilizing the insanity defense. Dissatisfaction with the defense peaked with the "not guilty by reason of insanity" acquittal of John Hinckley following his attempted assassination of President Ronald Reagan. At the time, 83% of respondents to an ABC overnight poll thought that justice was not done, and 75% of those questioned in another poll stated that they did not favor exculpation for criminal acts based on insanity.[21] Other polls placed the percentage of the public favoring abolition as high as 90%.[22] However, dissatisfaction with the defense pre-dated Hinckley. For instance, in a series of pre-Hinckley surveys, large segments of community residents (90%), college students (94%), legislators (87%), police officers (91%), state hospital aides (94%), state hospital professionals (54%), and mental health center professionals

(49%) agreed with the statement: "Too many people escape responsibility for crimes by pleading insanity."[23] The Hinckley acquittal just added fuel to the fire.

After the Hinckley acquittal, members of Congress, responding quickly to the public's outrage, introduced several pieces of legislation created to limit, modify, or abolish the insanity defense. During congressional debates, legislators and politicians presented various arguments opposing the insanity defense. Their arguments are worth noting because they reflect some of the public's basic concerns regarding the defense. For instance, Senator Strom Thurmond criticized the insanity defense for "exonerat[ing] a defendant who obviously planned and knew exactly what he was doing."[24] Former Attorney General Edwin Meese argued that eliminating the insanity defense would "rid...the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes."[25] Then Senator Dan Quayle supported constituents' views that the insanity defense was "decadent," and it "pampered criminals" by giving them the right to kill "with impunity."[26] Even more striking, Senator Steven Symms argued that the insanity defense reflected a criminal justice system "no longer representative of the interests of a civilized society."[27] Congressman John Myers contended that the defense provided a "'safe harbor' for criminals who bamboozle a jury" into thinking they should not be held responsible.[28] Congressman James Sensenbrenner characterized the insanity trial as "protracted testimonial extravaganzas pitting high-priced prosecution experts against equally high-priced defense experts."[29] According to former Attorney General William French Smith, "There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage and then have the door opened for them to return to the society they victimized."[30]

Since those statements were made, times have not changed. Over a decade later, the defense's unpopularity has remained a constant. A recent poll showed that 87% of the respondents believe that the insanity defense "allows too many guilty people to go free."[31] This is made evident whenever there is a high-profile case in which a defendant utilizes the insanity defense. Recent cases include: John Salvi, who walked into a Massachusetts abortion clinic and shot two receptionists; John Du Pont, accused of murdering an Olympic wrestler on the family estate; and in Maine, Mark Bechard, a mental patient charged with murdering two nuns. At least in Massachusetts, Salvi's mere plea of insanity has spurned legislation that would eliminate the insanity defense as it now exists in the state.[32] Reminiscent of Congressional post-Hinckley arguments, Massachusetts Governor William Weld has called for reform of the defense because "[t]hese people [criminal defendants] are not not guilty by reason of insanity; they're guilty. They performed the murder. They executed the person, and we think they should be punished."[33] To further bolster his argument in favor of abolition, Weld rhetorically asked, "Do you want people who commit these terrible murders to be out in a year, two, three, walking streets again?"[34]

Unlike the Hinckley and Salvi trials, no specific case is celebrated as the catalyst for Kansas's abolition. Yet, even without the aid of a high-profile insanity case to ignite the aboli-

tion spark, the Kansas Legislature has been attempting to reform the defense in each of the several years prior to the enactment of Kan. Stat. Ann. §22-3220 in 1995. Proposals, ultimately rejected, included adopting the alternative verdict of "Guilty But Mentally Ill," shifting the burden of proof on the issue of insanity to the defense, and providing that a not guilty by reason of insanity (NGRI) acquittee, once committed to a hospital, could not be released except upon a judicial finding that the individual "would never again be dangerous."[35] From these proposals, it was clear that the Legislature was seeking to be responsive to the public's concern regarding the defense.[36]

B. Reason Two: The Mens Rea Approach

The attractiveness of the *mens rea* approach is another, albeit secondary, reason why Kansas abolished the insanity defense. Although the Minnesota Legislature first introduced the defense in 1979, the literature contains very little discussion, for or against, the approach. Academics are virtually silent on the issue. However, when it comes to defending the *mens rea* approach over the traditional insanity defense, the work of Washburn University Law School Professor Raymond L. Spring is of the utmost importance.[37] Professor Spring, presented considerable material on the issue to the Kansas Legislature when the *mens rea* proposal was first introduced, and he apparently had an impact.

Spring is an ardent supporter of the *mens rea* approach for a variety of reasons. First, constitutionality is not a problem because the approach, as noted above, had already passed constitutional muster in three other states. Second, the *mens rea* approach addresses public concern and anxiety by eliminating the insanity defense while maintaining the fundamental requirement that a crime involves a coupling of act and criminal intent. Third, the *mens rea* approach, being simple and easy to understand, eliminates or at least substantially reduces jury confusion associated with the insanity defense.

This third argument needs some elaboration. When Kansas recognized the insanity defense, the jury was given the choice of finding the defendant guilty of the crime charged, not guilty based on reasonable doubt of the defendant's guilt for reasons other than insanity, or not guilty by reason of insanity. Additionally, the judge gave them one definition of the mental state required for the crime, another with respect to insanity, and perhaps a third with respect to diminished capacity.[38] Consequently, the jury instructions were extremely complex; and to make matters worse, the jury did not have the benefit of knowing the applicable tests during the presentation of the evidence, i.e., expert testimony and lay discussion. As a result, it is unlikely that juries knew what to focus on when the evidence was being presented.[39]

Although the judge still gives the jury instructions at the end of the trial, jurors under the *mens rea* approach will no longer be given complex instructions with regard to the requisite mental state, insanity, and diminished capacity.[40] Rather, the judge will provide the instruction defining the crime and its mental state component. The judge will then tell the jurors that they may find the defendant not-guilty if they believe that a mental disease or

defect rendered the defendant incapable of criminal intent.

IV. Kansas Should Not Have Abolished the Defense

A. The Public's Concern and Anxiety is Unfounded

The public is outraged over the insanity defense. Given conventional wisdom surrounding the defense, the public's anger is understandable. Ever since the Hinckley acquittal, the predominant view has been that the insanity defense is a legal loophole that allows criminals to escape punishment. Many people believe that defendants frequently utilize the defense when charged with murder and are often successful. Win or lose, pleading insanity is risk-free. When successful, defendants, at worst, are quickly released after serving light sentences in a loosely supervised hospital setting. If the defense fails, defendants suffer no additional harm for their unsuccessful attempt. With regard to mental illness, people believe that psychiatric testimony is unreliable given that defendants can and do pretend to have a mental disease or defect. Psychiatric testimony is further undermined by the inevitable disagreement among the various experts at trial. Finally, the defense unfairly favors wealthy defendants because insanity acquittals often hinge upon the testimony of high-priced expert witnesses that indigent defendants cannot afford.

The conventional wisdom, for the most part, is wrong. Few defendant's who utilize the insanity defense use it as a legal loophole to avoid punishment. Yet, the public, inundated with the media's bizarre distortions and inaccuracies in portraying mentally ill individuals, believe that the defense allows large numbers of criminals to avoid conviction and punishment.[41] According to one expert, the general public has the impression that the defense is used in 20% to 50% of all criminal cases.[42] Prominent politicians and legislators have the same concerns. Based on the empirical data, however, the public and the legislative calls for abolition have "dramatically" and "grossly" exaggerated both the frequency and the success rate of the insanity defense.[43] For instance, research in the area shows that the defense is used in only about 1% of all felony cases. Of those felons who plead insanity, only about one-quarter are successful.[44] Consequently, for every thousand defendants charged with a felony, only two or three are found not guilty by reason of insanity. This success rate is hardly an incentive to plead insanity.

In fact, it is essentially a defense of last resort because of the risks associated with an unsuccessful insanity plea. Defendants who assert the insanity defense at trial, and who are ultimately found guilty of their charges, serve significantly longer sentences than defendants tried on similar charges who do not assert the insanity defense.[45] For instance, in one study unsuccessful NGRI pleaders were incarcerated for a 22% longer term than individuals who never raised the defense.[46] This increase is due to the fact that unlike many criminal defendants, defendant's who actually go to trial and assert the insanity defense do not plea-bargain to reduce their prison terms before the verdict is announced.[47] Consequently, in the vast majority of cases, defendants that want to "beat the rap," or receive shorter sentences do not do so by pleading insane.

Another common fear is that the NGRI acquittees are quickly released from custody to

prey once again on society. This is simply not true. In Kansas, as in most states, defendants acquitted by reason of insanity are involuntary confined for an indefinite time.[48] Prosecutors have even been known to allege the insanity of the accused in order to assure that the defendant would be confined under such a provision.[49] In one study, those found NGRI spent almost double the amount of time that defendants convicted of similar charges spent in prison, and they often faced a lifetime of post-release judicial oversight.[50] Another comprehensive study in California showed that only 1% of insanity acquittees were released following their NGRI verdict, 4% were placed on conditional release, and the remaining 95% were hospitalized for a relatively long period of time.[51] In that same study, defendants found NGRI for violent crimes other than murder were confined twice as long as those found guilty on the same charges, and those found NGRI of nonviolent crimes were confined nearly ten times as long.[52] Given this wide disparity, it appears that defendants suffering from an alleged mental disease or defect would be better off by pleading guilty instead of NGRI, especially if charged with nonviolent offenses.

Another common misconception is that only violent and dangerous defendants charged with murder utilize the insanity defense. Although the types of offenses most often associated with the insanity defense vary from state to state, some not guilty by reason of insanity acquittees are charged with relatively minor offenses such as assault, drug possession, shoplifting, and various property offenses.[53] In one jurisdiction where the data had been closely studied for eight years, less than one third of the successful insanity pleas involved murder.[54] Among those, other underlying charges were writing false checks, drug use, and carrying an unloaded starter's pistol.[55]

One of the oldest public misconceptions is that defendants who plead insanity are usually faking. Although such incidents are few and far between. NGRI acquittees usually have significant histories of treatment for mental illness.[56] For instance, in Connecticut, only five of the 176 insanity acquittees did not have a major psychosis.[57] As one expert noted, "They're bad actors. They're also, by and large, mentally ill, usually seriously mentally ill."[58] Of the 141 defendants found NGRI in one jurisdiction over an eight-year period, there was no dispute that 115 were genuinely mentally ill, and the diagnostician was unwilling or unable to specify the nature of the patient's mental illness in only three cases.[59]

Second, studies show that mental illness diagnoses, like diagnoses of other medical illnesses, are about 80% accurate.[60] This does not mean that 20% of the people diagnosed are faking. Rather, it means that experts are wrong 20% of time in identifying the correct illness. Even more compelling, doctors are accurate ninety-two to ninety-five percent of the time when it comes to determining whether someone is faking or not faking a mental illness.[61]

In any case, the fact that some defendant's may fake insanity to win acquittal should not justify abolishing the insanity defense. In fact, a survey of the case law reveals only a handful of cases in which a defendant tricked a court or jury into a NGRI acquittal.[62] In these cases, the defendants admitted to faking insanity after being acquitted.

Moreover, many critics contend that insanity trials feature a "battle of the experts." This,

the critics say, proves that psychiatric testimony is unreliable given that experts rarely agree at trial. The empirical, however, evidence shows the vast majority of insanity cases do not feature a "battle of the experts." A study done almost thirty-five years ago in Washington D.C. found that between 66% and 75% of all insanity defense acquittals were uncontested.[63] In a more recent survey, medical examiners agreed in 92% of the insanity cases.[64] Another found that prosecutors agreed to insanity in 92% of all the cases in which it was raised.[65] In the small percentage of cases that experts do disagree, the difference of opinion usually centers on whether the defendant meets the legal test for insanity, not on the medical diagnosis.[66]

People also claim that only the wealthy can afford to plead insane because acquittal often depends on the credibility of the testifying psychiatrists. Admittedly, insanity trials can be expensive. The psychiatrist's manner of presentation, his personality, and his credentials have a significant influence upon the jury, and good psychiatrists, like good lawyers, cost money. Yet, this is not a good reason to abolish the insanity defense. First, wealthier defendants have an advantage over indigent defendants in all types of criminal trials, not just insanity trials. They have the money to retain the best attorneys and experts. Second, abolishing the insanity defense will not abolish the financial inequities of the criminal justice system. Unfortunately, those inequities are here to stay, unless more drastic systematic measures are taken to ensure equality. In any case, as noted above, few defendants of any economic status succeed by pleading insanity.

B. The *Mens Rea* Approach Is Too Narrow

Procedurally, the new approach is very similar to the old. If the defendant decides to rely on evidence allegedly showing a mental disease or defect, he or she must notify the prosecution not more than 30 days following entry of a not guilty plea.[67] As mentioned above, evidence of the defendant's mental state at the time of the alleged crime admissible, except that the focus must be solely on the issue of the specified criminal intent. Although the court no longer gives the jury an instruction on insanity, it does advise the jury that evidence of the defendant's mental condition is to be considered in determining whether the defendant possessed the requisite criminal intent.[68] If the defendant is found not guilty solely because of lack of criminal intent due to mental disease or defect, a special verdict triggers automatic hospitalization, as it did under a not guilty by reason of insanity verdict.[69]

While Kansas's former insanity defense and current *mens rea* approach are procedurally similar, they are substantively different. Before the enactment of Kan. Stat. Ann. § 22-3220, Kansas's insanity defense operated as an affirmative defense.[70] "When a defendant asserts an affirmative defense to a charge, it is assumed that facts alleged in the charging instrument are true, and if the affirmative defense is found to be factually true by the jury, the defendant should be found not guilty."[71] Therefore, even if the prosecution proved all the charges against a defendant beyond a reasonable doubt, or if the defendant admittedly committed the charges, insanity would operate as a defense warranting a not guilty verdict. To take a classic example, suppose A admits to the

intentional killing of B, but A was under the delusion that voices were commanding him to kill B. Regardless of A's clear intent to kill B, a jury could conceivably acquit A under the M'Naghten test because intent is irrelevant with respect to insanity.

Under the current *mens rea* approach, however, intent is relevant. As mentioned above, under this approach, evidence of a mental disease or a defect is admissible only to the extent that it directly relates to *mens rea.* It no longer matters whether the defendant is insane; i.e., whether the defendant is unable to know the nature and quality of his actions or know the difference between right and wrong with respect to his actions. Consequently, in the example above, the voices that A heard before killing B would be irrelevant given the fact that A admittedly acted with intent. Even if A had not admitted to intentionally killing B, evidence of mental disease or defect would still be of no help since the hearing of voices has nothing to do with whether A acted with intent, purposefully or knowingly.

In order for a mentally ill offender to be excused under the *mens rea* approach, she must establish mental incapacity which prevents her from formulating the *mens rea* of the crime. The classic example is the defendant who, because of his mental disease, believed that he was squeezing a lemon when in fact he was strangling his victim.[72] In such a case, the prosecution has the duty of proving intent. However, the prosecution would fail under the *mens rea* approach because evidence of a mental disease or defect would show that the defendant truly believed that he was squeezing a lemon and not strangling a human being. Thus, no intent to kill. To take a real case, in Utah, a diagnosed schizophrenic who said he believed his wife was a mannequin when he fired two bullets into her head was not held responsible for her murder under the *mens rea* approach.[73]

While these cases do arise, defendants rarely lack *mens rea* because they believe that they are squeezing a lemon or shooting a mannequin rather than killing a person. As a factual matter, even the most debilitating mental illness rarely negates the appropriate mental state. To be sure, the *mens rea* approach does not exclude situations where a person lacks free will because he or she is driven by mental illness. However, evidence of mental disease or defect does not necessarily preclude the defendant from possessing the requisite intent. A defendant can be both insane and capable of having the requisite intent; the two concepts are not mutually exclusive. As one scholar noted,

> Disordered persons are not automations. Unlike sleepwalkers or persons acting reflexively who lack the actus reus for the crime, disordered persons' acts are willed even if they are a result of crazy reasons or compulsion. Moreover, virtually all people know, in the strictest sense, what they are doing and intend to do it. A person who kills another because of a delusional belief is aware of killing a human being and does so intentionally. If such a person is to be acquitted, it must be because of an excuse, not because the state has no prima facie case.[74]

The following five insanity cases illustrate the point.[75] In case one, the defendant believed

that the devil was in his daughter. After stabbing her over one hundred and fifty times with a pair of scissors, he proceeded to gouge out her eyes. In case two, the defendant extracted all of her three year old daughter's teeth because she believed that the devil was inside of them. In case three, the defendant threw his baby from a first floor window in order to save him from being attacked by some assailants who did not exist. The defendant in case four cut off the tip of his young son's penis while suffering delusions relating to "black magic." Finally, the defendant in case five attempted to kill his parents because he believed that they were going to be tortured, and he wanted to kill them first to insure that that they would die in a humane way.

Needless to say, each of the defendants in the above cases suffered from mental illness. Ultimately, all of them were found not guilty by reason of insanity because they either did not know the nature and quality of their actions, or if they did, they did not know what they were doing was wrong. However, if tried in Kansas, they all would have been found guilty. Evidence of mental disease or defect would have been useless because they all intended their actions.

IV. Conclusion

From the above discussion, it is obvious that the Kansas Legislature abolished the defense largely based on unfounded public misperceptions. There are only two explanations for such action. One possible explanation is that the legislature, like the public, was equally uninformed about the actual use of the insanity defense. That is, it reacted to the public sentiment without a full understanding of what actually occurs when defendant's plead insanity. Given the lack of legislative history, it is uncertain what the legislature knew at the time. Still, this explanation is highly unlikely. By the time Kan. Stat. Ann. § 22-3220 was approved in 1995, Dr. Henry Steadman and Michael Perlin had already published data that directly addressed and disproved the conventional wisdom surrounding the insanity defense.[76] The legislature should have consulted the data on the issue before summarily abolishing a defense that has been in existence for hundreds of years.

A second and more likely explanation is that the legislature wanted to keep the voters happy. Put simply, the voters wanted it abolished, and the legislators wanted votes. The legislature jumped on the public abolition "bandwagon" and was not concerned with whether the public's concerns were grounded in fact.

Moreover, Kansas's *mens rea* approach is not a satisfactory alternative to the former insanity defense. Even though the approach is relatively simple and straightforward when compared to M'Naghten, it is too narrow in its application. It unfairly punishes people who are completely unable to understand the nature and consequences of their actions. Our criminal justice system has been premised on the belief that only people who are responsible for their actions should be punished. The Kansas Legislature should adhere to this principle and repeal Kan. Stat. Ann. 22-3220.

Notes

1. *See* MICHAEL L. PERLIN, JURISPRUDENCE OF THE INSANITY DEFENSE, 74 (1994) ("The substantive insanity defense went through three significant stages: the 'good

and evil' test, the 'wild beast' test, and the 'right and wrong' test.").

2. *See generally* DONALD H. J. HERMANN, THE INSANITY DEFENSE 22 (1983) (Stating insanity was used as an excuse in time of Henry II (1216-1272)); *see also* NIGEL WALKER, CRIME AND INSANITY IN ENGLAND, 219 (1968)(stating laws promulgated in ninth century England provided that "if a man be born dumb or deaf, so that he cannot acknowledge or confess his offense," his father must pay for his forfeitures.)

3. *See* State v. Nixon, 4 P. 159 (Kan. 1884).

4. *See* State v. Baker, 877 P.2d 946, 953 (Kan. 1994)(citing State v. Nixon, 4 P. 159 (Kan. 1884).

5. *Id.*

6. *See* State v. Linn, 840 P.2d 1133, 1141 (Kan. 1992).

7. *Id.*

8. *See* MONT. CODE ANN. § 46-14-102 (1979).

9. *See* IDAHO CODE ANN. § 18-207 (1982).

10. *See* UTAH CODE ANN. § 76-2-305 (1990).

11. *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, 217 (5th ed. 1989).

12. *See, e.g.*, United States v. Bishop, 412 U.S. 346, 359-60 (1973).

13. KADISH & SCHULHOFER, *supra* note 11, at 217.

14. *See* KAN. STAT. ANN. § 21-3201(a).

15. *Id.*

16. *See* KAN. STAT. ANN. § 21-3201(b)

17. *See* State v. Strasburg, 110 P. 1020 (Wash. 1910); *see also* State v. Lange, 123 So. 639 (La. 1921); *see also* Sinclair v. State, 132 So. 581 (Miss. 1931).

18. *See* State v. Korell, 690 P.2d 992 (Mont. 1984); *see also* State v. Searcy, 798 P.2d 914 (Idaho 1990); *see also* State v. Herrera, 895 P.2d 359 (Utah 1995).

19. *See* Foucha v. Louisana, 504 U.S. 71 (1992)(Kennedy, J., dissenting; O'Conner, J., concurring); *see also* Ake v. Oklahoma, 470 U.S. 68 (1985)(Rehnquist, C.J., dissenting).

20. *See* Montana v. Cowen, 861 P.2d 884 (Mont. 1993), *cert. denied* 511 U.S. 1005 (1994).

21. *See* 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989) § 15.36 at 390 (1989).

22. *See* RAY FARABEE & JAMES L. SPEARLY, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release*, 24 S. TEX. L.J. 671, 671 (1983).

23. Richard A. Pasewark et al., *Opinions About the Insanity Plea*, 8 J. FORENSIC PSYCHOL. 63, 67 (1981).

24. STEVEN J. ROBERTS, *High U.S. Officials Express Outrage, Asking for New Laws on Insanity Plea*, N.Y. TIMES, June 23, 1982, at B6. *See also* PERLIN, *supra* note 1 at 17-20.

25. *Reagan Adivsor Edwin Meese Enunciates Administration's Crime Control Goals*, 12 CRIM. JUST. NEWSLETTER 4 (1981). *See also* PERLIN, *supra* note 1 at 17-20.

26. *The Insanity Defense: Hearings Before the Comm. on the Judiciary, United States Senate*, 97th Cong., 2d Sess. 18-19 (1982) (prepared statement of Senator Dan Quayle). *See also* PERLIN, *supra* note 1 at 17-20.

27. *Id.* at 25 (statement of Senator Steven D. Symms).

28. *The Insanity Defense in Federal Courts, Hearings before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, House of Representatives*, 97th Cong., 2d Sess. 19 (1982) (statement of Representative John T. Myers). *See also* PERLIN, *supra* note 1 at 17-20.

29. *Id.* at 143 (testimony of Representative James Sensenbrenner, Jr.).

30. ROBERTS, *supra* note 24.

31. RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY, 179 (1995).

32. *See The Insanity Defense*, MASS. LAW. WKLY., May 12, 1997, § A. See also Eric T. Berkman, *Effort to Ban Defense of Insanity is Opposed*, MASS. LAW. WKLY., April 28, 1997, § A.

33. *Today* (NBC News television broadcast, March 8, 1996 (quoting Massachusetts Governor William Weld), *available in* 1996 WL 3699781.

34. *Id.*

35. *See* Raymond L. Spring, *Farewell to Insanity*, J. KAN. B.ASS'N. May 1997 at 38, 44-45.

36. *See id.*

37. *See generally* Spring, *supra* note 35; *see also* RAYMOND L. SPRING, THE END OF INSANITY 96 (1983).

38. *See* Spring, *supra* note 35.

39. *See* RAYMOND L. SPRING, THE END OF INSANITY 96 (1983).

40. *See* Spring, *supra* note 35.

41. *See* Joseph H. Rodriguez, et al, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401 (1983).

42. *See* Mary Frain, *Professor Says Insanity Defense Seldom Works*, TELEGRAM & GAZETTE, Jan. 19, 1996, at B1, *available in* 1996 WL 2377559 .

43. *See* Rodriguez, *supra* note 41, at 401.

44. *See* Lisa A. Callahan, et al, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991).
45. *See* Rodriguez, *supra* note 41 at 401-02.
46. *See id.*
47. *See* Henry J. Steadman, *Empirical Research on the Insanity Defense*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 63-66 (1985) (stating that plea bargaining should be taken into consideration when comparing sentencing of convicted criminal charges with NGRI offense charges).
48. *See* Kan. STAT. ANN. § 22-3428 *et seq.*
49. *See* Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 523 (1968) (statement of Lord Denning) ("The old notion that only the defense can raise a defense of insanity is now gone. The prosecution are [sic] entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large.").
50. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of the Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 651 (1990).
51. *See* H. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY, 58 (1993).
52. *See id.* at 59.
53. *See* Callahan, *supra* note 44, at 336.
54. *See* Rodriguez, *supra* note 41 at 402.
55. *See id.*
56. *See e.g.*, Michael R. Hawkins & Richard A. Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOL. REP. 191, 194 (1983); *see also* STEADMAN, *supra* note 51 at 56.
57. *See* Kathryn Kranhold, *Insanity Plea Leads to Longer Term; Escapee Can't Shake Treatment After Insanity Plea*, HARTFORD COURANT, Dec. 13, 1992 at B1.
58. Frain, *supra* note 42 (quoting Paul S. Appelbaum, M.D.).
59. *See* Rodriguez, *supra* note 41, at 404.
60. American Psychiatry Association, *Public Information: The Insanity Defense* (visited Sep. 13, 1997) <http://www.psych.org/public_info/INSAN~1.HTM>.
61. Schretlen & Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75 (1990).
62. PERLIN, supra note 1, 238 n. 40 (citing cases).
63. *See* David C. Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580, 589 (1963).
64. Kenneth K. Fukunaga et al., *Insanity Plea: Interexaminer Agreement in Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW. & HUM. BEHAV. 325, 326 (1981).
65. *Id.*
66. American Psychiatry Association, *supra* note 60.
67. *See* KAN. STAT. ANN. § 22-3219.
68. *See* Pattern Instructions Kansas, Criminal 3d 54.10.
69. *See* KAN. STAT. ANN. § 22-3428 *et seq.*
70. *See* State v. Holloman, 837 P.2d 826, 834 (Kan. Ct. App. 1992) ("Alibi is not an affirmative defense, as is entrapment or insanity.")
71. State v. McIver, 902 P.2d 982, 988 (Kan. 1995).
72. MODEL PENAL CODE § 4.01 cmt. 156 (Tent. Draft No. 4, 1955).
73. *See* West's Legal News Staff, Criminal Justice: Insanity, WLN, Oct. 23, 1996, *available in* 1996 WL 602046.
74. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 801-02 (1985).
75. *See* R.D. Mackay, *Fact and Fiction About the Insanity Defence*, 1990 CRIM. L. REV. 247, 250 (the source of the following list of cases).
76. *See* STEADMAN, *supra* note 51; PERLIN, *supra* note 1.