

Re-designing Afghanistan's Approach to
Mental Illness Evaluations for Criminal
Defendants: Toward Reliable Procedures and
Predictable Outcomes

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ARTICLE

RE-DESIGNING AFGHANISTAN'S APPROACH TO MENTAL ILLNESS EVALUATIONS FOR CRIMINAL DEFENDANTS:

TOWARD RELIABLE PROCEDURES AND PREDICTABLE OUTCOMES

*Habiburrahman Rizapoor**

ABSTRACT

Afghanistan's penal code prohibits courts from convicting and punishing mentally ill or insane people who have committed serious crimes. However, there is no specific article in the penal code or in the rules of criminal procedure to clarify the process for handling cases in which a defendant claims to be insane. Furthermore, there are no clear evidentiary standards for what kinds of evaluations or evidence can prove lack of mental capacity due to mental illness. With an absence of standards and requirements around this process, judges are left to their own discretion to make determinations on a case-by-case basis; as such, there is little accountability or predictability in how courts handle mental capacity issues.

This Article argues that Afghanistan should consider adopting more specific mental capacity rules modeled after the kinds of rules and standards found in the United States, such as those in

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Washington State and in the federal system. It begins by discussing how Afghan laws and courts now handle cases in which defendants plead insanity or a lack of mental capacity, describing the existing law and presenting observations about practice. Next, it describes how mental capacity is evaluated in the US legal system, including court procedures and evidentiary rules in both US federal and Washington state courts, and it identifies aspects of these systems that could be useful if adapted to the Afghan context. Finally, it offers some model language for these reforms and potential obstacles.

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I. INTRODUCTION

Similar to the law in the US legal system, Afghan law provides protections to certain mentally ill defendants, preventing criminal liability where defendants are found incapable of forming the requisite criminal intent at the time of the crime. These protections stem from a combination of Sharia law, the Afghan Constitution, and statutory law. For example, Article 3 of the Afghan Constitution mandates that no law in Afghanistan can be contrary to the Sharia law,¹ and Sharia law provides broad protection for the mentally ill in criminal cases. Specifically, sources of Sharia law, such as the Sunni Hadith, report that the Prophet Mohammad directed judges to lift the pen, or to refrain from punishing the sleepers until they wake up, the children until they reach maturity age, and the insane until they become healthy.² The language of the Afghan Penal Code reflects this foundation by confirming in Article 67 that a mentally ill person is not criminally liable.³

However, unlike in the United States, where state and federal legislatures have provided clear guidance, definitions, and standards for determining and proving the requisite level of mental illness for establishing the affirmative defense of insanity, including rules about the standards for testifying as an expert witness and the evidence that can be offered to prove insanity, the Afghan legislature has not provided any standards for these determinations. Rather, the legislature has left this assessment to judges—including determinations of whether an expert evaluation is needed at all or what kinds of evidence will suffice as proof.

Indeed, Afghanistan has many laws that ostensibly protect the mentally ill—but without standardized procedures for determining what qualifies as “mentally ill” within the criminal law context, there is a lack of reliability and predictability in the system. Because Afghanistan is a country that continues to suffer from high levels of corruption and political instability,⁴ without systems that create more

1. QĀNOON-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] 1382 [2004], art. 3.

2. Mohammad Turmizi, Sunani Turmizi, Hadith No. 1423.

3. QANOON E JAZAE AFGHANISTAN [PENAL CODE OF AFGHANISTAN] Kabul 1355 [1976], art. 67.

4. Paul D. Shinkman, *U.S. Caused Afghan Corruption, Instability*, U.S. NEWS (Sept. 14, 2016), <https://www.usnews.com/news/articles/2016-09-14/report-corruption-instability-in-afghanistan-due-to-us-mismanagement-of-billions>.

reliable outcomes, courts are left vulnerable to outside influence, influence that can affect whether a defendant is found sufficiently mentally ill in order to meet the standard for the affirmative defense of insanity. For example, in Afghanistan, courts continue to be influenced by powerful local warlords, who are known to put pressure on judges or prosecutors to punish or not punish defendants depending on the outcome the warlords want to see.⁵

In addition to outside influences, there is also just the reality that some judges simply are not equipped to determine the kind of mental illness that may not be obvious on the surface—cases where a significantly mentally ill person does not appear to be mentally ill.⁶ In fact, Afghan judges are not only untrained and unequipped to determine mental illness, many also lack training and education, in general. According to the United Nations Human Development Report of 2007, more than half of the judges in Afghanistan have the relevant formal higher education and have completed the one-year period of judicial training.⁷ The remaining judges are either graduates of madrassas or other faculties. This report also indicates that twenty percent of them do not have university education at all. Furthermore, thirty-six percent of judges have no access to statutes, fifty-four percent of them have no access to legal textbooks, and eighty-two percent have no access to previous decisions of the Supreme Court. In those cases, judges, being left to their own discretion, may choose to convict or not based on a superficial, uninformed assessment of mental illness.⁸ This approach can result in unjust convictions and punishment.

Therefore, to promote justice and rule of law, this Article argues that Afghanistan needs to design and implement a standardized approach to defining and proving the kind of mental illness sufficient to avoid criminal liability and establish the affirmative defense of

5. Kara Jensen, *Obstacles to Accessing The State Justice System In Rural Afghanistan*, 18 *IND. J. OF GLOBAL LEGAL STUD.* 929, 929-34 (2011).

6. Andrew Wood, *Afghanistan: weak criminal justice system needs support*, *JURIST* (May 17, 2008), <http://www.jurist.org/hotline/2008/05/afghanistan-weak-criminal-justice.php> [<https://perma.cc/5VXR-KZ8R>] (archived Jan. 5, 2018).

7. *Id.*

8. UNODC, *Afghanistan: Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation*, 19-22, May 2008, Tomris Atabay and Paul English (Independent Consultants), https://www.unodc.org/pdf/criminal_justice/Afghanistan_Implementing_Alternatives_to_Imprisonment.pdf [<https://perma.cc/E4RM-BN89>] (archived Jan. 5, 2018).

insanity. The Afghan government and Afghan legislators should develop the Afghan mental illness system by amending the Afghan Penal Code. When doing so, they should consider all the international standards for mental illness proceedings to assess whether they are appropriate to the Afghan context. There is no single model that Afghanistan can import for its mental illness justice system; however, the US system can serve as a strong model for procedures and standards that could suit the needs of Afghan parties.

Both U.S. federal and state laws offer very clear legal definitions and evidentiary standards for identifying and evaluating mentally ill persons. For example, in general these laws state that to establish an affirmative defense of insanity, it must be shown that a defendant was not able to distinguish right from wrong at the time of the crime, that the defendant was not able to distinguish the nature and quality of his actions, and that this inability can be proven by strong and reliable evidence.⁹ Under Washington state law, a defendant must be evaluated by at least two qualified experts to prove the defense.¹⁰ Those experts must give their written opinion, which accounts for the current mental state of the defendant, his mental state at the time of committing the crime, and if the defendant is mentally ill, whether the defendant should be involuntarily committed when they are found to be so mentally ill that they continue to pose a danger to themselves and society.¹¹

This Article recommends that Afghanistan adopt clear standards for establishing the insanity defense, including evidentiary standards and procedures for proving the defense as well as procedures for determining what to do with defendants who continue to suffer from severe mental illness and pose a danger to the public. Afghan legislators can model new laws and regulations, in particular, after those in the US federal or Washington state mental illness systems. Most importantly, the Afghan legislature needs to develop standards that assess mental illness, such as determining whether the defendant was able to distinguish right from wrong and knew the quality and nature of the crime at the time that the crime was committed. This Article also suggests that Afghanistan needs to develop its expert testimony system by requiring that there be at least two expert witnesses to ensure that both experts come to the same conclusion and

9. 18 U.S.C.A. § 17 (West 2017); Wash. Rev. Code Ann. § 10.77.060 (West 2017).

10. Wash. Rev. Code § 10.77.060 (West 2017).

11. *State v. Maish*, 29 Wash. 2d 52, 55 (1947).

are not influenced or bribed to falsely testify. The Afghan law also needs to detail what kind of information the expert opinions should include. Finally, as in the United States, the Afghan law should require a determination of what the defendant's mental state was at the time of the crime and at the present, and it should offer recommendations on whether involuntary commitment or another measure is needed to protect the defendant and the public going forward.

This Article begins by discussing the laws, standards, and procedures governing mental illness determinations in criminal cases in Afghanistan, revealing why Afghanistan needs to redesign its system of mental illness evaluation and its procedural and evidentiary laws governing the insanity defense. From there it describes the related US federal mental illness laws, rules, standards, and procedures. It compares these federal laws with the same laws from Washington State, demonstrating the manner in which Washington State offers some additional protections for defendants through expert testimony requirements (including the number of expert witnesses able to testify and the content included in the testimony). Finally, this Article identifies ways that these US laws could inform legal reforms in Afghanistan. In particular, it uses lessons from these models to recommend specific legislative reforms for redesigning the Afghan insanity defense and mental illness evaluation system. These changes would ultimately ensure increased consistency and predictability in the legal system, and thereby promote the rule of law and justice in the country.

II. CURRENT STATE OF MENTAL ILLNESS AND INSANITY DETERMINATIONS IN AFGHANISTAN

Article 66 of the Afghan Penal Code, states that "Obstacle to Penal responsibility comes into existence from the realization of any sensual indisposition or one of the instances of lack of will."¹² Under the chapter of obstacles to penal responsibility, the Afghan Penal Code discusses all the ways that a person may not be fit for prosecution, including mental insanity or mental illness. However the code does not mention any standards for evaluation of mental illness and does not define the "lack of will" mentioned in the code; as such, the Afghan mental illness system suffers from a lack of predictability

12. PENAL CODE OF AFGHANISTAN, *supra* note 3, art. 66.

The insanity defense in the Afghan judicial system can be invoked when “a person who, while committing a crime lacks his senses and intelligence due to insanity or other mental diseases, has no penal responsibility and shall not be punished.”¹³ In addition, the Afghan Penal Code states that if a person, at the time of committing a felony or misdemeanor, has a defect in his senses and intelligence, the court will consider him excused.¹⁴ It also says that obscenity committed by such persons shall not be considered a crime either.¹⁵ However, the legislature did not lay out how to determine the requisite insanity, the type and quantity of expert witnesses, and what kind of evidence would suffice as proof.

A. An Absence of Procedures and Standards

While the Afghan Criminal Procedure does not offer clear rules about which experts may evaluate defendants for mental illness, it does discuss experts generally, and it specifies some conditions for admitting the testimony or statements of experts—conditions that are invoked in cases involving mentally ill defendants as well. Under Article 44 of the Afghan Criminal Procedure, courts, attorneys, parties, or judicial record officers can move the court for expert testimony or statements.¹⁶ Under this provision, attorneys, courts, and judicial record officers can ask an expert for an opinion about information relevant to his or her expertise and the facts of the case.¹⁷ In general, an Afghan court can request any expert—regardless of whether they are officially registered with the court; if the court thinks the experts have relevant knowledge and expertise and their expertise will be useful in the case, then their testimony may be admitted.¹⁸ When the opinion of an expert is unclear, ambiguous, or unsatisfactory to the prosecutor or judge, the either can request another expert’s opinion.¹⁹ Furthermore, neither the Afghan Penal Code nor the Afghan Criminal Procedure Code state how many experts are needed in any given case. The wide and poorly defined

13. *Id.* art. 67(1).

14. *Id.* art. 67(2).

15. *Id.* art. 67(3).

16. QANOONI EJRAAT E JAZAI AFGHANISTAN [AFGHANISTAN CRIMINAL PROCEDURE CODE] Kabul 1392 [2014], art. 44(1).

17. *Id.* art. 44(2).

18. *Id.* art. 44(3).

19. *Id.* art. 45.

discretion given to judges and prosecutors about who will qualify as an expert combined with the lack of certainty about how many experts will be required leads to unpredictable—and at times—unjust outcomes. There are simply too few safeguards to prevent injustice due to corruption or due to incompetent determinations about the sufficiency of the evidence.

Notably, under the current law of Afghan Criminal Procedure, the Attorney general is required to prepare a list of experts who can be used for testifying in court on different kinds of cases and different areas of the law.²⁰ These experts are supposed to be chosen according to the highest criteria of each field.²¹ Any time courts need an expert to testify or give an evaluation, they are supposed to choose from this list.²² A copy of the expert's testimony is then supposed to be made available to both parties, and the parties have the right to ask questions to the experts about topics related to their expertise and to the case.²³ Similarly, the parties can give their own opinions regarding the evaluations and opinion of the experts.²⁴

If an expert gives an opinion to the court that appears to be unprofessional or contradicts the results of the evaluation, he or she may be fined up to ten thousand Afghanis (about US\$200). An expert also faces similar fines if he or she refuses to take the stand. In addition, if an expert intentionally gives a false opinion, he or she will be criminally prosecuted for perjury.²⁵ While these provisions appear to protect defendants from injustice, Article 52 of the Criminal Procedure Code falls short because it does not provide any procedures for evaluating or securing the quality of expert testimony. In theory a prosecutor or judge could find an expert to be corrupt; however, without proper standards in place, these determinations are dangerously speculative.

20. *Id.* art. 47(1).

21. *Id.*

22. *Id.*

23. *Id.* art. 51.

24. *Id.*

25. *Id.* art 52.

B. Judicial Discretion and Case-By-Case Determinations Result in a Lack of Predictability

As touched on above, in Afghanistan, the lack of procedures and standards for evaluating mentally ill or insane defendants has given judges too much discretion in determining whether a defendant's mental illness affords him or her the right to an insanity defense. As such, there is little accountability or predictability in how courts handle mental capacity issues, and in an environment in which corruption is common, this can lead to wrongful convictions, an abuse of the process and corrupt practices, or a general perception that there is a lack of fairness or reliability. Judges can and do come under the influence of governmental authorities and local leaders when deciding whether to punish an offender who is mentally ill. At the same time, however, judges may be influenced in the opposite direction—shielding a powerful offender from prosecution. This influence and corruption may be especially strong in the rural areas where the government simply does not have as much power or influence as community elders, warlords, or other influential people who are accustomed to having the final word on guilt or innocence of offenders.²⁶ There are few legal safeguards against this kind of influence on the court.

The lack of standards in mental illness determinations gained international attention with a case involving an Afghan named Abdul Rahman. Abdul Rahman converted to Christianity in 2006, an act that constituted the crime of apostasy. Accordingly, the prosecutor asked for the death penalty, a punishment consistent with Islamic law.²⁷ One of Abdul Rahman's colleagues raised the question of his mental capacity, claiming that he became a Christian because of mental illness. From the available records and reports about this case, it appears that there was never any mental illness test or evaluation done;²⁸ nevertheless the court sentenced him to death. Ultimately, because of international pressure on the Afghan government, Abdul Rahman was released and left the country.²⁹

26. Jensen, *supra* note 5, at 929-934.

27. Abdul Waheed Wafa, *Kabul Judge Rejects Calls to End Trial of Christian Convert*, N.Y. TIMES (March 24, 2006), <http://www.nytimes.com/2006/03/24/world/asia/kabul-judge-rejects-calls-to-end-trial-of-christian-convert.html?module=ArrowsNav&contentCollection=Asia%20Pacific&action=keypress®ion=FixedLeft&pgtype=article>.

28. *Id.*

29. *Id.*

*III. US APPROACHES TO MENTAL ILLNESS AND INSANITY
DETERMINATIONS AND DEFENSES*

Both US federal and state laws and regulations governing how mental health evidence and the insanity defense are handled in the courts can serve as useful models for reform in Afghanistan. Among the various US laws, there are similarities at the federal and state levels, such as how courts determine whether a person can distinguish right from wrong and whether he or she had a mental illness or defect at the time of committing a crime. Notably, the US Congress toughened the standard for the application of the insanity defense in federal cases with the Insanity Defense Reform Act of 1984,³⁰ a law that was intended to respond to public pressure that mounted after John Hinckley's attempted assassination of Ronald Reagan.³¹

Both state and federal systems use similar evidentiary standards reflective of the M'Naghten test, a test discussed in more detail below.³² This Article focuses primarily on Washington State law because of its explicit and detailed provisions concerning the contents of an expert opinion.³³ Washington law requires significant detail about an insane defendant's situation. More specifically, Washington law suggests that a defendant should be detained if it is determined that he or she is a risk to public safety.³⁴

Not all states approach insanity determinations in the exact same way. Some states require psychiatrists to testify as experts,³⁵ and some states allow anyone with mental illness training to testify as an expert. For example, Illinois State law suggests that a clinical psychologist can testify as an expert.³⁶ One study showed that twenty percent of states required an expert witness to be a licensed psychiatrist or psychologist in "not guilty by reason of insanity"

30. 18 U.S.C.A. § 17 (West 2017); Wash. Rev. Code Ann. § 10.77.060 (West 2017).

31. Jay M. Zitter, Annotation, *Construction and Application of 18 U.S.C.A. § 17, Providing For Insanity Defense In Federal Criminal Prosecutions*, 118 A.L.R. Fed. 265 (1994).

32. Compare Fed. R. Crim. P. 12.2. with Wash. Rev. Code § 10.77.060 (West 2017). It is important to note that the law codifies the M'Naghten test, but does not specifically call it by name.

33. Compare Wash ER 702 (West 2017) with 18 U.S.C.A. § 17 (West 2017).

34. Wash. Rev. Code § 10.77.060 (West 2017).

35. Ind. Code Ann. § 35-36-2-2 (West 2017).

36. 30 Ill. Comp. Stat. Ann. 5/5-2-5; *People v. Lewis*, 75 Ill.App.3d 560, 562 (1979).

determinations; less than twenty percent required an additional expert; and only twelve percent required a test to be done.³⁷

Again, because they both offer good models, this Article limits its discussion of the US law to the federal system and the system in Washington State. By discussing the Washington State and US federal mental illness systems, this Article hopes to identify the best aspects of both systems and adapt them to a program that would work well in the Afghan context. This Article does not suggest that the guidance provided by one model alone (either the Federal model or the Washington State model) will rectify the situation in Afghanistan, but instead suggests that authorities in Afghanistan look to both models for ideas about how to best ameliorate the current system in Afghanistan.

A. The Meaning of "Insanity" in Criminal Proceedings

The text of the federal law that establishes the insanity defense at 18 USCA Section 17 is as follows:

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.³⁸

Importantly, the insanity defense differs from other defenses because it does not result in an acquittal and standard release of the accused. Instead, it results in a special verdict or finding of *not guilty by reason of insanity*, “which is usually followed by commitment of the defendant to a mental institution. Thus, its purpose is usually said to be that of separating from the criminal justice system those who should only be subjected to a medical-custodial disposition.”³⁹

37. Kenneth B. Chiacchia, *Insanity Defense - Insanity Defense Statistics, Problems With NGRI, Guilty But Mentally Ill*, PSYCHOLOGY ENCYCLOPEDIA, <http://psychology.jrank.org/pages/336/Insanity-Defense.html> [https://perma.cc/MB8M-6JBB] (last visited Jan. 5, 2018).

38. 18 U.S.C.A. § 17 (West).

39. WAYNE R. LAFAYE, § 7.1 THEORY AND PURPOSE, 1 SUBST. CRIM. L. § 7.1 (3d ed. Oct. 2017 Update).

Definitions of insanity relevant to the insanity defense in criminal prosecutions should not be confused with definitions of “diminished capacity,” which allows a defendant to avoid criminal liability by claiming and proving that his or her mental capability was so diminished that he was not able to have had the intent to commit the crime that he or she is charged with.⁴⁰ While it appears similar to the insanity defense, diminished capacity permits the defendant to try to prove that, because of a mental damage, he lacked the required intent to commit the crime. In contrast, the goal of the insanity defense is not to disprove intent.⁴¹ Instead, the insanity defense is used to show that a defendant does not have the basic capability to avoid engaging in morally or legally reprehensible behavior because he was not able to understand right from wrong or he was unable to control his actions.⁴² There are strong arguments that the diminished capacity doctrine improves defects in a jurisdiction’s insanity test criteria because it allows the jury to avoid applying the death penalty to a mentally ill defendant who is criminally liable and it allows a jury to make more correct, and modified culpability judgments.⁴³

The US federal system allows *not guilty by reason of insanity* as a defense for people who suffer from a mental disease at the time of the commission of a crime, and the culprit must have been not able to ascertain the difference between right and wrong and the quality and nature of their acts.⁴⁴ Courts generally maintain that “a defendant’s ability to appreciate right and wrong has consistently been determined by reference to societal, not personal, standards of morality.”⁴⁵ For example, in *United States v. Ewing*,⁴⁶ the court gave the following instruction to the jury (a particularly clear explanation of the standard):

The term “wrongfulness,” as used in these instructions, means moral wrongfulness as well as criminal wrongfulness. In other words, if you find that the defendant as a

40. *Diminished Capacity*, LAW SHELF EDUCATIONAL MEDIA, https://nationalparalegal.edu/public_documents/courseware_asp_files/criminalLaw/defenses/DiminishedCapacity.asp [https://perma.cc/U8YH-B6XX] (last visited Jan. 5, 2018).

41. *Id.*

42. *Id.*

43. Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of A Doomed Marriage*, 77 COLUM. L. REV. 827, 853 (1977).

44. 18 U.S.C.A. § 17 (West 2017).

45. *United States v. Ewing*, 494 F.3d 607, 610 (7th Cir. 2007).

46. *Id.*

result of a severe mental disease or defect, was unable to appreciate the moral wrongfulness of his acts, even if he appreciated his acts to be criminal but commits them because of a delusion that he was morally justified, then your verdict must be not guilty only by reason of insanity.⁴⁷

In *Ewing*, the defendant was convicted of arson and the use of a damaging device during a crime of violence. The Court of Appeals held that “‘wrongfulness’, as used in insanity defense statute, is defined by reference to objective societal or public standards of moral wrongfulness; jury instruction on meaning of ‘wrongfulness’ was warranted.”⁴⁸

The court in *Ewing* clarified that this wrongfulness is not a subjective standard. In that case, the defendant requested the district court to instruct the jury that the term “wrongfulness” means “moral as well as criminal wrongfulness,”⁴⁹ and morally wrong means the “defendant’s subjective beliefs about morality or moral justification.”⁵⁰ The district court rejected this definition, clarifying that wrongfulness means “contrary to public morality, as well as contrary to the law.”⁵¹ Further, a *legal wrong* means that the action is contrary to law.⁵² In contrast, *morally wrong* means an action is against the public morality, which is determined by referring to standards of society and its general condemnation of an act.⁵³

In addition to not being able to distinguish right from wrong because of mental illness, having a mental illness must be proved by strong and reliable evidence.⁵⁴ Strong and reliable evidence requires expert testimony. As a basic example of how this works at trial, in *United States v. Sanchez-Ramirez*, the defendant was charged with felony ownership of a weapon and making a wrong statement related to the attempted possession of a weapon.⁵⁵ The defendant did not bring any expert testimony and simply claimed that he was suffering from mental illness at the time of the crime and was, therefore,

47. *Id.* at 611–12.

48. *Id.* at 609.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 616.

53. *Id.*

54. 18 U.S.C.A. § 17 (West 2017).

55. *United States v. Sanchez-Ramirez*, 432 F. Supp. 2d 145, 145-46 (D. Me. 2006).

eligible for the insanity defense.⁵⁶ The government responded that the defendant was not eligible without providing an expert opinion.⁵⁷ The court granted the government's request and rejected the question of the availability of the insanity defense.⁵⁸

Under Federal Rules of Evidence ("FRE") 702, an expert who testifies in the form of an opinion or otherwise must have the "knowledge, skill, experience, training, or education" such that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.⁵⁹

Expert testimony is also governed by FRE 703, Bases of an Expert's Opinion Testimony,⁶⁰ and FRE 704, Opinion on an Ultimate Issue. Of particular importance to expert testimony with respect to cases in which the insanity defense is brought, FRE 704(a) establishes that, "An opinion is not objectionable just because it embraces an ultimate issue;" however, FRE 704(b) provides this exception: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."⁶¹

FRE 704(b), therefore, does not allow the expert to testify about whether a defendant has the requisite *mens rea* for the necessary criminal intent, a determination that must be made by the jury based

56. *Id.* at 146.

57. *Id.* at 147.

58. *Id.* at 148.

59. Fed. R. Evid. 702.

60. Fed. R. Evid. 703 states the following:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

61. Fed. R. Evid. 704.

on the facts in evidence. That said, as explained by the court in *United States v. Cameron*, evidence as to mental condition that pertains to the defendant's intent remains admissible.⁶² The Cameron court emphasized, that with the Insanity Defense Reform Act, "Congress meant to eliminate any form of legal excuse based upon one's lack of volitional control. This includes a diminished ability or failure to reflect adequately upon the consequences or nature of one's actions."⁶³

The *Cameron* court also observed that with this reform, "Congress chose to eliminate any form of legal excuse based upon psychological impairment that does not come within the carefully tailored definition of insanity in section 17(a)."⁶⁴ Further, "[p]sychiatric evidence of impaired volitional control or inability to reflect on the ultimate consequences of one's conduct is inadmissible whether offered to support an insanity defense or for any other purpose."⁶⁵ In addition, the court explained that Congress "intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other *affirmative defense*, such as that the defendant had a 'diminished responsibility' or some similarly asserted state of mind which would serve to *excuse* the offense."⁶⁶

The *Cameron* court also warned against "the danger that expert psychiatric testimony regarding inherently malleable psychological concepts can be misused at trial to mislead or confuse the jury."⁶⁷ Ultimately, *Cameron* held that "while Congress clearly meant to circumscribe carefully the use of psychiatric evidence both as it relates to legal excuse *and* to legal guilt or innocence, Congress did not bar the use of psychiatric evidence to negate specific intent when such is an element of the offense charged."⁶⁸

62. See *United States v. Schneider*, 111 F.3d 197, 200-01 (1st Cir. 1997) (discussing *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990)).

63. 907 F.2d at 1061.

64. *Id.* at 1061.

65. *Id.* at 1061.

66. *Id.* at 1061-62 (citing S.Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), *Reprinted in* 1984 U.S. Code Cong. & Ad. News, 3182, 3411 (emphasis added)).

67. *Id.* at 1062.

68. *Id.* at 1060.

B. Most Common Tests for Insanity Under US Law

The insanity defense has long been a subject of disagreement and controversy among psychiatrists, legal scholars, and the public, and there have been various tests that have arisen over the years.⁶⁹ This Section discusses the most popular tests and some of the controversy surrounding them. This controversy stems not just from the standards themselves, but also from the legal proceedings.

In general, there are four different tests that US state and federal courts have used to evaluate legal insanity: the M’Naghten test (a cognitive-based standard that is currently used for insanity determinations in nearly half of the US states);⁷⁰ the “irresistible impulse test”;⁷¹ the *Durham* Rule (otherwise known as the “Product” Test—which is currently used only in New Hampshire);⁷² and the Model Penal Code approach, which is a bit more progressive and uses some elements from the other tests.⁷³

The M’Naghten test came from British law.⁷⁴ In 1843, M’Naghten tried to assassinate the prime minister of England. While the prime minister survived, his secretary was killed.⁷⁵ The lawyer of the M’Naghten said that according to the examination done by a pioneer in the field of psychiatry, the defendant was suffering from mental illness at the time of committing the crime.⁷⁶ The court granted the defendant the insanity defense, and it was the first time a court used or consulted this kind of scientific evidence.⁷⁷ This case eventually gave rise to what is now known as the “M’Naghten Rule,” the rule that a defendant is legally irresponsible if he or she either

69. See generally Henry T. Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337 (1985).

70. Pronounced “mik-naw’tēn.” (the proper pronunciation of the test is “M’Naght-en test \mæk-’nāt-ə-n-“ as it is pronounced in <https://www.merriam-webster.com/legal/M’Naghten%20test>).

71. *United States v. Freeman*, 357 F.2d 615 and 620 (2d Cir. 1966).

72. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) abrogated by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

73. The American Law Institute’s Model Penal Code Test: US Legal, <https://criminallaw.uslegal.com/defense-of-insanity/the-american-law-institutes-model-penal-code-test/> [<https://perma.cc/GRW4-NYXT>] (archived Mar. 13, 2018).

74. Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 944 (1987); *R V M’Naghten* (1843) 8 E.R. 718 (1843).

75. Fernand N. Dutile, *What Now for the Insanity Defense?*, 58 NOTRE DAME L. REV. 1104, 1105 (1983).

76. Mickenberg, *supra* note 74, at 944–45.

77. *Id.*

does not know the nature and quality of his or her conduct or does not distinguish whether his or her action is right or wrong.⁷⁸

The “irresistible impulse” test is permitted in certain jurisdictions when a defendant had been found to be uncontrollably obliged to commit the crime.⁷⁹ The defense would arise in situations where the defendant was aware of the wrongfulness of the act, but he or she was unable to control his or her impulse to commit the crime.⁸⁰ The test raises questions, however, about a person’s capability to prove whether an impulse was in fact irresistible.⁸¹ In a classic old case where the defense was considered, *People v. Hubert*, the defendant was charged with first degree murder and argued that he had an irresistible impulse, and as such should not be liable for the crime under the insanity defense. In that case, the defendant shot his wife, whom he had long accused of trying to poison him.⁸² The court concluded that the defendant was not in fact insane; even if he were partly insane, the crime was not due to the insanity itself, but rather the natural passions of the defendant.⁸³

The third standard is called the “Durham rule,” which was first articulated by the Courts of Appeals for the District of Columbia Circuit in 1954.⁸⁴ In *Durham*, the defendant was charged with housebreaking.⁸⁵ This test departed from the previous insanity defense which is commonly associated with homicide cases, and the Durham test could include other crimes as well.⁸⁶ For example, in *United States v. Currens*, the defendant was charged with the violation of the Dyer Act and automobile theft, and he was given the right of having the insanity defense because the defendant lacked substantial capacity to conform his conduct to the requirements of the law he allegedly violated.⁸⁷

Under the Durham test, a defendant is not legally responsible if his act was the product of mental disease or defect.⁸⁸ The court

78. *Id.*

79. 2 WHARTON'S CRIMINAL LAW § 102 (15th ed.), Westlaw (database updated Sept. 2017).

80. 1 Witkin Cal. Crim. Law 4th Defenses § 21 (2012).

81. Dutile, *supra* note 75 at page 1104, 1105.

82. *People v. Hubert*, 119 Cal. 216, 220, 222-23 (1897).

83. *Id.*

84. *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954).

85. *Id.*

86. Dutile, *supra* note 75, at 1106.

87. *United States v. Currens*, 290 F.2d 751, 774-75 (3d Cir. 1961).

88. 214 F.2d at 874-75.

reasoned that there was a need for a new rule because the M’Naghten rule (or the “right” and “wrong” standard) was mistakenly premised on a notion of the human as directed merely by brainpower.⁸⁹ Unlike the M’Naghten rule, this test stated, “The science of psychiatry now recognizes that a man is an integrated personality, and that reason, which is only one element in that personality, is not the sole determinant of his conduct.”⁹⁰ This rule stirred significant controversy and it never gained wide acceptance.⁹¹

The fourth common test is the “Model Penal Code” standard, which was proposed by the American Law Institute in 1950.⁹² This standard sets forth that a defendant will be legally irresponsible if, “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 the law” when he was doing the action he was charged with.⁹³ It also insists that the term “mental disease or defect” does not contain an “abnormality manifested only by repeated criminal or otherwise antisocial conduct.”⁹⁴

This test reflects a combination of the M’Naghten test and the irresistible impulse test, although it makes some useful distinctions.⁹⁵ For example, the concept of “substantial capacity” permits a degreed evaluation and the word “appreciate” permits more standardization for the test.⁹⁶ For example, if someone believes that murder is an equivalent crime to jaywalking and that the two crimes should have the same punishment, this person probably does not appreciate the criminality of his conduct.⁹⁷ The Model Penal Code test differs from the M’Naghten test through its use of the word “appreciate,” whereas

89. Dutile, *supra* note 75, at 1106.

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

91. Dutile, *supra* note 75, at 1106.

92. Stephen Coleman, *Mentally Ill Criminals and The Insanity Defense*, CENTER FOR APPLIED RESEARCH AND POLICY ANALYSIS SCHOOL OF LAW ENFORCEMENT OF CRIMINAL JUSTICE AND PUBLIC SAFETY, METROPOLITAN STATE UNIVERSITY 9 (1999), <https://www.leg.state.mn.us/docs/2012/mandated/120701.pdf> [<https://perma.cc/XP5H-49TR>] (last visited Jan. 5, 2018).

93. Dutile *supra* note 75, at 1106 (quoting the Model Penal Code § 4.01(1) (Official Draft 1962)).

94. *Id.* at 1107.

95. *Id.* at 1105-07.

96. *Id.* at 1107.

97. *Id.*

the M'Naghten test uses the word "know" in regard to the right or wrongfulness of the conduct.⁹⁸

There has been significant controversy over the existence of the insanity defense and the efficacy of these tests primarily due to myths about insanity and mental illness including public misconceptions about the diseases and mental conditions that qualify.⁹⁹ Some have called for abolishing the insanity defense, claiming *mens rea* determinations or other principles of the criminal law are sufficient.¹⁰⁰ These calls for change are sparked by the concerns people have toward the insanity defense implementation and its general concept, expressing concern that it is used improperly to evade punishment for serious crimes.¹⁰¹

Similarly, some criticize the use of the defense for heinous or capital crimes.¹⁰² Others express concern that people who are found not guilty by reason of insanity go free and can then be a danger to the community.¹⁰³ Statistics and studies overcome most of these commonly held beliefs and misconceptions.¹⁰⁴

C. Pleading Insanity Under the Federal Rules of Criminal Procedure

Under the Federal Rules of Criminal Procedure ("FRCP"), a defendant who requests the insanity defense must inform the government attorney in a written notice within the time provided for filing a pretrial motion, or at the time the court sets for the defendant to file the defense.¹⁰⁵ Similarly, the defendant must file a copy of the notification with the court clerk.¹⁰⁶ Notice to the court and opposing council is described under FRCP 12.2, which states the following:

If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the

98. *Id.* at 1105-06

99. RANDY BORUM & SOLOMON M. FULERO, EMPIRICAL RESEARCH ON THE INSANITY DEFENSE AND ATTEMPTED REFORMS: EVIDENCE TOWARD INFORMED POLICY, L. AND HUM. BEHAV. 378 (1999).

100. *Id.* at 385.

101. John P. Martin, *The Insanity Defense: A Closer Look*, WASH. POST (1998), <https://www.washingtonpost.com/wpsrv/local/longterm/aron/qa227.htm>.

102. BORUM & FULERO, *supra* note 99, at 378.

103. *Id.*

104. *Id.*

105. Fed. R. Crim. P. 12.2.

106. *Id.*

defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.¹⁰⁷

Once a defendant provides notice that he will use the expert's examination to assess his mental illness at the time of the commission of the crime, the court will order the defendant to be examined by an expert.¹⁰⁸ Furthermore, the law sets forth the disclosure requirements of the defendant's examinations:

The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.¹⁰⁹

If the defendant intends to introduce his or her own expert's evidence and evaluation of mental illness, under Rule 12.2 (c)(2), the defendant must disclose the results and reports of the evaluation to the government.¹¹⁰

In addition, the court can exclude any expert evidence in connection with the defendant regarding the mental disease, mental defect, or any other mental condition. The law explains that "if defendant fails to (A) give notice under Rule 12.2(b); or (B) submit to an examination when ordered under Rule 12.2(c),"¹¹¹ the court can exclude the evidence.

D. Evidentiary Standards Under the Federal Rules of Evidence

According to the Federal Rules of Evidence, a defendant can assert the insanity defense if he or she suffers from a severe mental

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

illness or defect at the time of committing the crime or was unable to recognize the nature and quality or the wrongfulness of his action.¹¹² The defendant has the burden of proving the defense of insanity by clear and convincing evidence.¹¹³ Clear and convincing evidence means enough evidence to convince a jury that the defendant's insanity assertion is greatly credible.¹¹⁴ Once a defendant asserts the insanity defense, the court by its motion or by the motion of the defendant can assign experts to evaluate the defendant for the mental illness.¹¹⁵ Also, as explained earlier, the court can require the defendant to submit expert testimony about his mental illness or insanity as defined by the statute.¹¹⁶

IV. INSANITY DEFENSE IN WASHINGTON STATE

Like the US federal law, Washington law follows the M^oNaghten test. However, the Washington law is more detailed and offers more protections to defendants.¹¹⁷ Specifically, Washington law is particularly detailed about expert qualifications, what an expert's opinion must include, the mental status of the defendant while he or she was committing the crime, the current status of the defendant, and what should be done with the defendant if found to satisfy the defense, including transferring the defendant to a safe facility for treatment.¹¹⁸ Notably, each year about twenty-two people are found not guilty by reason of insanity in Washington State.¹¹⁹

112. 1 FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:18 (4th ed.), Westlaw (database updated Dec. 2017).

113. *Id.*

114. *Id.*

115. Fed. R. Crim. P. 12.2.

116. *Id.*

117. *Compare* Wash. Rev. Code Ann. § 9a.12.010 (West, Westlaw through 2016 Reg. & First Spec. Legis. Sess.), *with* 18 U.S.C.A. § 4242 (West 2017) (regarding the determination of insanity defense).

118. *Compare* Wash. Rev. Code § 10.77.060, *with* 38 C.F.R. § 3.354 (regarding the expert's evaluation). The State law is more detailed but the federal is not. *Compare* Wash. Rev. Code § 10.77.110 (West 2017), *with* Fed. R. Crim. P. 12.2.

119. Ross Reynolds & Andy Hurst, *Why the Insanity Defense Is Rarely Effective*, KUOW NPR (Jan. 20, 2015), <http://kuow.org/post/why-insanity-defense-rarely-effective> [<https://perma.cc/99D4-7MJG>] (last visited Jan. 5, 2018). Across the United States, there is a connection between serious mental illness and a successful insanity defense. Coleman, *supra* note 92. If a defendant is really mentally ill, he would liable for the insanity defense and if he is making excuse for skipping from the punishment, by using these standards which Washington state laws developed there is less chance for them to be libel. For example, a study of eight state's cases shows that about 2600 criminal defendants are not found guilty because

A. The Statutory Scheme in Washington State

Washington State, like the federal courts and the courts of many other states, applies the M’Naghten test in insanity cases.¹²⁰ Washington legislators have codified M’Naghten, at RCW Section 9A.12.010 to govern the assessment of the sanity of a person who committed a crime and is claiming that he was insane when he or she committed the crime. Under RCWA Section 9A.12.01:

To establish the defense of insanity, it must be shown that:

At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that: (a) he or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) he or she was unable to tell right from wrong with reference to the particular act charged. (2) The defense of insanity must be established by a preponderance of the evidence.¹²¹

According to this test the defendant must show by a preponderance of the evidence that committing the crime was a result of mental illness.¹²² Accordingly, his or her mind was affected in such a manner that he or she was unable to recognize the nature and quality of the act.¹²³ In addition, the defendant must show that he or she was not able to tell right from wrong.¹²⁴

Under Washington law, the term “legally wrong” means that the present law of the state prohibits the action.¹²⁵ The court in *State v. Crenshaw* reinforced this rule stating that “legally wrong” means an

of the insanity defense. From those defendants 68% percent of them had schizophrenia and 16% had a severe mood disorder - a total of 84% were with a severe mental illness. *Id.* The remaining 5% of them were mentally retarded or had other kinds of mental illness. Similarly, 3.5% of them had personality disorder. *Id.* In addition, 157 of them were charged with murder, 38% of them were charged with physical assault, 12% of them were charged with other violent crimes, 7% of them were charged with robbery, 18% of them were charged with property crimes, 10% of them were charged with other minor crimes. *Id.*

120. *State v. Crenshaw*, 98 Wash. 2d 789, 791 (1983); WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 1003 (3d ed.)

121. Wash. Rev. Code § 9a.12.010 (West 2017)

122. *Id.*

123. *Id.*

124. *Id.*; 98 Wash. 2d at 793; WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 1003 (3d ed.).

125. 98 Wash. 2d at 795.

action is contrary to the law.¹²⁶ In contrast, “morally wrong” means that an action is wrong according to public morality, not according to the defendant’s subjective opinion of morality.¹²⁷ In *State v. Crenshaw*,¹²⁸ the court clarified this difference in the following discussion of the standard:

[I]n discussing the term “moral” wrong, it is important to note that it is society’s morals, and not the individual’s morals, that are the standard for judging moral wrong under *M’Naghten*. If wrong meant moral wrong judged by the individual’s own conscience, this would seriously undermine the criminal law, for it would allow one who violated the law to be excused from criminal responsibility solely because, in his own conscience, his act was not morally wrong.¹²⁹

The concept of insanity has two meanings: the legal and the medical.¹³⁰ The legal meaning differs from the medical meaning because it requires that the culprit be unable to distinguish between right and wrong and also requires that he or she was not able to know the nature of his or her actions.¹³¹ For example in *State v. Crenshaw*,¹³² the court clarified that “legal insanity has a different meaning and a different purpose than the concept of medical insanity.”¹³³ In that case, the court explained that because a “verdict of not guilty by reason of insanity completely absolves a defendant of any criminal responsibility, the defense is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.”¹³⁴

By way of illustration, in the gruesome *Crenshaw* case, the defendant doubted his wife’s faithfulness.¹³⁵ He took her to a motel, and after stabbing her twenty-four times and killing her with an ax, he

126. *Id.*

127. *Id.* at 797.

128. *See generally id.*

129. *Id.* at 797.

130. John F. W. Meagher, Crime and Insanity the Legal as Opposed to the Medical View and the Most Commonly Asserted Pleas, *Journal of Criminal Law and Criminology*, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com.af/&httpsredir=1&article=1886&context=jclc>.

131. *Id.*

132. *See generally* 98 Wash. 2d 789.

133. *Id.* at 793.

134. *Id.*

135. *Id.*

took her body twenty-five miles away.¹³⁶ He then hid her body in two parts and went to the Hoquiam area about 200 miles from the motel.¹³⁷ He told two hitchhikers about this crime, and he asked them to help him dispose of his wife's car.¹³⁸

At trial, the defendant claimed that he believes in the Moscovite religion and according to that religion, when a wife commits adultery, she should be killed.¹³⁹ He also had a history of mental illness.¹⁴⁰ The jury rejected his request for the insanity defense and found him guilty.¹⁴¹ The Washington Supreme Court reasoned that he was not eligible for the insanity defense because even though he had a history of mental illness, at the time of the crime, he knew that it is was legally wrong to kill his wife, illustrated by his choice to take his wife's body twenty-five miles away to hide it.¹⁴²

B. Evidence and Procedural Rules Related to Pleading Insanity in Washington State

Washington offers a strong model for clear rules and procedures for pleading and proving insanity in a criminal case. First, as to expert testimony, Washington Evidence Rule 702 clarifies that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”¹⁴³

The bases for expert opinions are provided in Washington Evidence Rule 703, which states the following:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in

136. *Id.* at 792.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 795–96.

143. Fed. R. Evid. 702.

forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.¹⁴⁴

In *State v. Swan*, the court clarified that a witness presenting testimony as an “expert” must demonstrate that he or she is (1) qualified, (2) that the facts he or she presents are scientific, technical, or other specialized knowledge, and (3) that the testimony will assist the jury in understanding the evidence or to determine a fact in issue.¹⁴⁵

As for defendants that plead *not guilty by reason of insanity*, or when there is reason to doubt the defendant’s competency to stand trial, under RCW § 10.77.060(1), the court on its own motion or on the motion of any party will order an independent mental examination of the accused by at least two qualified experts. Together these experts are known as the “sanity commission.”¹⁴⁶ Under this provision, the court may order that the defendant be committed for up to fifteen days in order for the commission to complete its examination. The language of this statute reads as follows:

Whenever a defendant has pleaded not guilty by reason of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed as a result of mental disease or defect, the court on its own motion or on the motion of any party shall appoint, or shall request the secretary to designate, at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitable facility for a period of time necessary to complete the examination, but not to exceed fifteen days.¹⁴⁷

Washington is explicitly protective of the rights of defendants to have an attorney present during these court ordered evaluations. RCW Section 10.77.060 clarifies that the defendant has the right to have expert testimony, and during the examination of the expert, defendant has the right to counsel and cannot be deprived of his or her right to counsel in any situation.¹⁴⁸ However, if and when the court orders an

144. Fed. R. Evid. 703.

145. *See State v. Swan*, 114 Wash. 2d 613, 655 (1990); *see also Reese v. Stroh*, 128 Wash. 2d 300 (1995).

146. § 1007.Appointment of sanity commission, 12 Wash. Prac., Criminal Practice & Procedure § 1007 (3d ed.).

147. Wash. Rev. Code § 10.77.060.

148. *Id. See also State v. Ellis*, 136 Wash. 2d 498, 523 (1998).

evaluation, the defendant must answer questions and participate in the evaluation, or the court will exclude the evidence and don't consider it while deciding.¹⁴⁹ The legislature included this restriction to close the door on corruption by experts, and also to prevent defendants from rejecting a court's assigned experts and bring their own potentially biased experts who may or may not be credible. Notably, under Washington law, the defendant then has access to all information obtained by the court's evaluation. In addition, the court is required to help an indigent defendant prepare reports and obtain the expert opinions.¹⁵⁰ Under RCW § 10.77.060(3), a report prepared by experts regarding the sanity of a defendant must include the following:

- (a) A description of the nature of the evaluation;
- (b) A diagnosis or description of the current mental status of the defendant;
- (c) If the defendant suffers from a mental disease or defect, or has a developmental disability, an opinion as to competency;
- (d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, and an evaluation and report by an expert or professional person has been provided concluding that the defendant was criminally insane at the time of the alleged offense, an opinion as to the defendant's sanity at the time of the act, and an opinion as to whether the defendant presents a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, provided that no opinion shall be rendered under this subsection (3)(d) unless the evaluator or court determines that the defendant is competent to stand trial;
- (e) When directed by the court, if an evaluation and report by an expert or professional person has been provided concluding that the defendant lacked the capacity at the time of the offense to form the mental state necessary to commit the charged offense, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;

149. Wash. Rev. Code § 10.77.060.

150. Wash. Rev. Code § 10.77.060.

(f) An opinion as to whether the defendant should be evaluated by a designated mental health professional under chapter 71.05 RCW.¹⁵¹

If the report finds that the defendant was insane at the time of the event,¹⁵² the report should also offer an opinion about whether the defendant's release would pose a substantial danger to other persons.¹⁵³ If the defendant is found to be a danger to public safety, he will not be released from commitment until he recovers from his insanity and there is no danger to public safety.¹⁵⁴ Under this rule, the defendant would be sent to a mental hospital or an equivalent facility to treat the condition and keep the defendant from posing a danger to himself or others.¹⁵⁵ If the defendant does not pose a danger to public safety, but still needs control, he will be released subject to observation and supervision.¹⁵⁶ If the defendant disappears from a detention center or facility, the manager or the officials of those centers must tell law enforcement agencies about the unauthorized leave of absence or any escapes.¹⁵⁷

V. *EFFECTIVENESS AND OUTCOMES*

According to surveys done in the United States, insanity plea figures show that about seventy percent of not guilty by reason of insanity cases (or NGRI cases) withdrew their requests when state-selected experts determined that the defendant was legally sane.¹⁵⁸ they also reveals that on average, less than one defendant in 100 (0.85%) raises the NGRI defense.¹⁵⁹ This suggests that there are few

151. Wash. Rev. Code § 10.77.060

152. Although, there is no clear and comprehensive case describing the kind of mental diseases that a person should have, mental defects like psychosis, neurosis, organic brain illness, or inherited intellectual deficiency, which can lead to the situations which described in the statute may count as mental illness or insanity and that such persons will likely establish the insanity defense. 1 Subst. Crim. L. § 7.2 (2d ed.).

153. Wash. Rev. Code § 10.77.060; *See Legal effect of finding of insanity*, WASH. PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 1015 (3d ed.).

154. Wash. Rev. Code § 10.77.110.

155. *Id.*

156. *Id.*

157. *Id.*

158. Kenneth B. Chiacchia, *Insanity Defense - Insanity defense statistics, Problems with NGRI, Guilty but mentally ill*, PSYCHOLOGY ENCYCLOPEDIA, <http://psychology.jrank.org/pages/336/Insanity-Defense.html> [https://perma.cc/Q9G4-FD9P] (last visited Jan. 5, 2018).

159. *Id.*

instances where a defendant asks for the insanity defense. Likewise, less than twenty percent require some kind of additional certification, and just twelve percent require a test (such as M,Naghten test or Model Penal Code) to establish legal sanity.¹⁶⁰ The statistics show that sixty percent of the laws in the United States require that a sanity case must be determined by a psychologist or a psychiatrist.¹⁶¹ So not only are these cases more rare than people may believe, but there is also great variation across states when it comes to approaches to testing for insanity and designation and qualification of expert witnesses.

VI. CONTROVERSIAL ISSUES IN THE US MENTAL ILLNESS SYSTEM

The United States has a relatively strong mental illness system. With its developed statutory standards and procedures for the evaluation of insanity in criminal cases, it offers developing or post-conflict nations, like Afghanistan, a good starting place from which to tailor an appropriate, context-specific approach.¹⁶² In addition, with its rich tradition in Anglo-American jurisprudence and common law, the U.S. approach to insanity determinations provides substantial guidance and illustrations of the kinds of cases that could justify the defense and how the standards should be applied by the courts.¹⁶³ Despite these clear strengths, however, the issue of the insanity defense has always been and continues to be controversial in the United States; learning from those controversies and weaknesses will be essential to evaluating approaches to adapt as models for reform.

Recent adoptions of the *mens rea* approach illustrate some of this controversy. Since 1979, four states including, Montana, Idaho, Utah, and Kansas, have repealed the insanity defense and replaced it with the *mens rea* approach.¹⁶⁴ The *mens rea* approach differs from fundamental Anglo-American criminal-law principles and common-law traditions that have historically preferred treating over

160. *Id.*

161. Brandon Gaille, *20 Gripping Insanity Plea Statistics*, BRANDON[GAILLE] (May 22, 2017), <http://brandongaille.com/20-insanity-plea-statistics/> [<https://perma.cc/B9CZ-485G>] (last visited Jan. 5, 2018).

162. Stephen M. LeBlanc, *Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense*, 56 AM. U. L. REV. 1281, 1286 (2007).

163. *Id.* at 1286

164. *Id.* at 1283-84.

punishing the insane, and which have relied on legal mechanisms to differentiate “blameworthy from non-blameworthy offenders.”¹⁶⁵ Instead, the *mens rea* approach depends on the introduction of mental-disability evidence to negate the *mens rea* element of the offense charged. Specifically, it relies on a defendant’s ability to introduce evidence of mental illness to disprove the prosecution’s case by proving that the defendant, because of mental illness or defect, was not able to form the requisite mental state or intent for conviction.¹⁶⁶ In other words, with the *mens rea* approach, the defendant must disprove each element of the prosecution’s case.¹⁶⁷ This differs greatly from the insanity defense, which serves to pardon a mentally ill person from the conviction and punishment as an affirmative defense, excusing the offender even when all elements of the prosecution’s case are proved beyond a reasonable doubt—including intent.¹⁶⁸

Other scholars and some public figures argue for abolition of the insanity defense because they fear it is used too frequently.¹⁶⁹ These scholars and public figures are concerned that the defense is misused or abused by defendants to evade punishment.¹⁷⁰ On the contrary, as previously mentioned, the insanity defense is actually used infrequently, and there is no evidence that defendants abuse it.

VII. ADAPTING USEFUL ASPECTS OF THE US LAW FOR THE AFGHAN CONTEXT

There are many positive aspects in both US federal and state law that could be adapted for the Afghan context. Using similar, appropriately adapted standards and procedures in Afghanistan’s criminal justice system would increase justice and improve the rule of law as the identification of a mentally ill person would no longer be left to the discretion of a judge. Modeling legislation after the approaches described in this Article, including creating both an affirmative defense and the requisite evidentiary standards and

165. *Id.*

166. *Id.* at 1289–90.

167. *Id.*

168. *Id.*

169. Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1561-62 (2002).

170. *Id.*

procedures, Afghan defendants could raise the issue of mental illness or insanity at the time of committing the crime, and in turn, precipitate evaluation by an expert commission. With these changes, the Afghan legislature would pave the way for judicial accountability and begin to close the doors on corruption in insanity defense cases.

A. Standards & Procedures for Mental Illness and Insanity Determinations

Afghan legislators need to clarify standards and procedures related to the insanity defense. The elements necessary to establish the insanity defense should be explicit in the Afghan Penal Code. It should no longer be up to the discretion of judges to decide who is mentally ill and who is not. As for which laws should inform Afghan reform efforts, just incorporating a clear definition of the insanity defense—similar to the definitions found in the US federal and Washington State laws—would solve many problems that judges in Afghanistan face when trying to distinguish between criminal insanity and other mental defects.¹⁷¹

These standards must be included in the Afghan mental illness system. First, the defendant must be mentally ill at the time of commission of a crime, and because of such mental illness, the defendant was therefore not able to distinguish between right and wrong and was unable to know the nature and quality of his or her action. The other important standard is that all of these should be proven by strong and reliable evidence. By having these standards, the Afghan mental illness system will be aligning with the acceptable norms of the international community and human right standards. Further, it will ensure the rule of law in the country.

B. Evidentiary Rules

In addition, Afghanistan would benefit from amending its evidence rules to mirror the Washington State law on expert testimony in cases involving the insanity defense, including the number of experts required, the court's ability to call for an expert panel or commission, and what testimony should be included. Even though the Afghan Criminal Procedure Code establishes that the court may ask for an expert's opinion when a defendant needs to be

171. See 18 U.S.C.A. § 17 (West 2017).

evaluated for mental illness, the Afghan criminal procedure and other laws do not say how many experts should testify or what the experts should include in their opinion when they testify.

US laws explain that there should be at least the testimony of two experts, and a defendant also has the right to choose his own expert. Afghanistan could benefit from adopting a law similar to Washington State law and using some aspects of the federal law that clarifies when a defendant can be evaluated for the insanity defense and the procedures for how a defendant should give notice to the prosecutor and the court.

The M'Naughten insanity test could also be useful in the Afghan context.¹⁷² Afghanistan could apply this test strictly, as is done in Washington State, to ensure that the defense is only available to people who were truly mentally ill at the time of the crime, cutting down on the chances that the defense will be abused.¹⁷³ Moreover, Afghanistan would benefit from changes inspired the Washington State approach that allows the insanity defense in a wide range of criminal cases, including murder, assault, burglary, attempted rape, theft, and forgery.¹⁷⁴ It can be raised for cases related to kidnapping and can be raised for other crimes as well.¹⁷⁵

The other useful aspect of US law concerns the qualifications of expert witnesses. Both state and federal laws emphasizes that experts must be chosen according to their knowledge, training, skills, and for their expertise. Likewise, Washington State law specifies the number of experts and asserts that there should at least two expert witnesses. However, Afghan law does not specify qualifications of experts in insanity cases. The Afghan criminal procedure also explains that experts generally should be selected according to their knowledge, experience and their expertise,¹⁷⁶ which can be applied to the insanity cases as well.

The law should specify that a defendant who claims to be a mentally ill or looks like a mentally ill person should be evaluated by an expert who is qualified and is not biased. It must identify qualifications for experts who evaluate a mentally ill person. For

172. For a discussion of M'Naughten, see WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 1003 (3d ed.).

173. *Id.*

174. See Washington Practice: Criminal Law § 3105 (2016-2017 ed.).

175. *Id.*

176. Afghanistan Criminal Procedure Code, *supra* note 16, art. 44 (1).

example, the expert must have training, education, experiences, and the expert should not be corrupt, should have a good working history, and must have license from an official organization such as the Ministry of Public Health. Moreover, the law must decide the number of experts for evaluation of experts. The minimum number that can ensure justice and prevent corruption is at least two experts. By having these qualifications there will less chance for corruption.

Likewise, the Afghan law also needs to clearly explain who is responsible for hiring an expert for evaluation in criminal cases and when the government would pay for the indigent defendants. Similarly, the law should state what the opinion of an expert should include and how it should be explained. Just knowing the state of mind of a defendant at the time of committing the crime is not enough, it is also important to know what should be done with the defendant if he was suffering from mental illness.

In addition, the Afghan law should say when a defendant with mental illness or defect should be released and when he or she should be kept in a detention center or hospital for treatment. For example, if the defendant is found mentally ill and the experts found that releasing him will endanger the public safety, the defendant must be kept in the hospital. If a defendant does not need treatment, but still poses a danger to the public, then he or she should be kept in a detention center to keep the people safe.

C. Barriers to Overcome and Looking Ahead to the Future

There are many barriers that the Afghan government and the Afghan legislature need to overcome with respect to addressing the redesign of the mental illness system in Afghanistan. One of the complications surrounding the issue of expert qualifications in Afghanistan is the continued corruption in the Ministry of Public Health. Currently there is a lack of oversight to determine whether doctors are obeying the ethical rules of medical service providers. Further, doctors may be under the pressure and influence of local elders, powerful people and can manipulate the conclusion of the expert testimony for their own benefit. Similarly, rich defendants in Afghanistan may continue to exert pressure and influence over doctors, outside of the court context, and may continue to influence evaluations regardless of what changes are made to the existing law. Thus, Afghanistan needs to be very careful in how it redesigns this system.

In the Afghan context, it might be more advisable to allow a defendant to provide his or her own expert testimony if the expert were on a vetted list of professionals used by the court. These professionals would be under the control and observation of courts; therefore, there would be less of a chance of corruption or giving false reports. Because some of the Afghan provinces do not have many experts that are qualified to evaluate these cases, this may be challenging. However, the government can still refer them to the nearest available centers.

In addition, Afghanistan continues to suffer security concerns posed by terrorist groups such as Taliban and ISIS, groups that continue to inflict horrible attacks on civilians, hospitals, schools and other public places. These attacks have destroyed hospitals, health facilities, and detention centers, not just in Kabul, but in all parts of the country. There are many people in the country who are suffering from the mental illness and they need treatment. Therefore, there is a need for improved infrastructure in the country and services for the mentally ill. At this time, Afghanistan has only one hospital that handles mentally ill patients.

Ironically, these conditions brought on by the effects of war also represent one of the reasons that people in Afghanistan may need the insanity defense in the first place: the effects of war have caused to develop mental illnesses—such as post-traumatic stress disorder. I recommend that the legislature initiate the creation of at least one mental illness hospital and one safe facility in each zone of the country (e.g. North Zone, West, East, etc.) to deal with these mentally ill defendants who have been proven not guilty due to mental illness. These hospitals can treat mentally ill criminals and other citizens who are suffering from mental illness, and they can be a center for housing mentally ill criminals who are the potential threat to public safety.

The Afghan government also needs to build a university or a facility to train experts who can deal with the insanity and mental illness cases. Today, there is lack of experts who are qualified to evaluate mentally ill defendants. For example, in the Badakhshan province alone, there is just one doctor who knows about mental illness. In addition, hospitals or clinics to treat mentally ill people do not exist. If there is a defendant in the court who claims the insanity defense, there is not an expert to evaluate him and no hospital or safe facility to accommodate the defendant for the evaluation and treatment.

The other barrier that the Afghan government needs to overcome regarding the mental illness system is making a law that can answer all the challenges that Afghanistan has in dealing with mental illness cases. This law should be organized and developed in a way that is culturally acceptable to all citizens. For example, the legislature will need to determine whether the evaluation fee comes under the free access to health, which is a constitutional right of all Afghans, or whether it should be the responsibility of each citizen to pay for his evaluation in a criminal case.

Moreover, the Afghan government needs to spread awareness about the evaluation of mentally ill defendants and how it is important for the rule of law and criminal justice. It needs to hold workshops and seminars for judges, attorneys and defense lawyers about this importance and what is their responsibility to work towards this goal. As of now judges, attorneys, and prosecutors do not really pay attention to mental illness evaluation. If the case is very obvious they will refer it to an expert evaluation and if it is not obvious, then they think that the defendant is making an excuse to avoid punishment. Therefore, it is vital that judges, attorneys and prosecutors who are dealing with criminal cases should be trained in dealing with mentally ill defendants.

VIII. CONCLUSION

Afghanistan's penal code and criminal procedure code establish that a person will not be convicted when he commits a crime while he was suffering mental illness. However, this law does not provide a clear definition of mental illness, nor does it have specific standards for evaluating a mentally ill person. There is no clear direction to courts about how to determine whether a person was sufficiently "insane" to merit the affirmative defense, and there are no guidelines on the qualifications of experts and what the opinion of an expert must include when he testifies in front of a court.

This Article recommends changes to the Afghan codes and rules that address this issue. These suggested reforms are modeled after and inspired by laws and procedures found in US federal and state law. Both The US federal law and Washington State law on the affirmative defense of *not guilty on the basis of insanity* have developed clear definitions of the defense, standards for evaluating a mentally ill person, qualifications and expectations for expert testimony, and procedures for when a person is deemed to have satisfied the defense.

To successfully implement reform on this issue, Afghanistan will have to address other related problems such as corruption in the Ministry of Public Health, lack of security and infrastructure, lack of mental health facilities, and lack of capacity for expert mental health evaluations. Nonetheless, this Article hopes to point the way toward improved justice for mentally ill defendants in Afghan criminal cases.

