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DRUG ADDICTION, INSANITY, AND COMPETENCY: HOW THE *HALIMI*  
CASE GALVANIZES A U.S.-INSPIRED REFORM OF FRANCE’S CRIMINAL  
RESPONSIBILITY SYSTEM

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*Abolir le délit, c’est abolir la loi*  
– Denis Diderot

ABSTRACT

*The Halimi case, culminating in a verdict from the Court of Cassation in April 2021, has ignited intense and contentious debates on criminal responsibility, leading to a profound erosion of public trust in the French judicial system. This Note delves into the urgency of addressing the issues presented by Halimi and emphasizes the necessity for innovative approaches within the French legislative framework. Striking a delicate balance between permitting the trial of controversial cases and upholding the age-old moral duty of excluding the mentally insane from guilty verdicts, this Note compares the intricacies of criminal responsibility in France with those in the United States. As this Note dissects the French legal framework, it sheds light on potential shortcomings and identifies areas for improvement. Moreover, it presents recommendations for reforming the French criminal legal system, with a steadfast commitment to fostering a more justice-oriented decision-making process in the courts.*

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## I. INTRODUCTION

“J’ai tué le Sheitan” (“I killed the Devil”) shouted Kobili Traoré as he murdered Dr. Sarah Halimi, a sixty-five-year-old retired doctor and teacher, by breaking into her apartment, beating her to death, and throwing her body out of a window onto the street.<sup>1</sup> This was a hateful antisemitic crime committed against a frail Jewish woman who was alone.<sup>2</sup> Yet, Traoré was never even tried.<sup>3</sup>

On April 14, 2021, the Court of Cassation, France’s highest court,<sup>4</sup> rendered a pre-trial decision determining that Traoré was

<sup>1</sup> James McAuley, *How the Murders of Two Elderly Women Shook France*, THE GUARDIAN (Nov. 27, 2018, 1:00 AM), <https://www.theguardian.com/world/2018/nov/27/how-the-murders-of-two-elderly-jewish-women-shook-france-antisemitism-mireille-knoll-sarah-halimi> [https://perma.cc/Z7MT-FSVT].

<sup>2</sup> Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 14, 2021, Bull. crim., No. 404 (Fr.).

<sup>3</sup> *Id.*

<sup>4</sup> In July 2017, the Tribunal judiciaire de Paris (Judicial Court of Paris) determined that plausible reasons existed as to Traoré’s criminal irresponsibility due to his lack of cognition, thus barring any trial from taking place until the appeal stage. In July 2019, the cour d’appel de Paris (Court of Appeals of Paris) held Traoré

criminally irresponsible due to his experiencing a “*bouffée délirante aigüe*,” (i.e., a psychotic episode) triggered by an excessive consumption of cannabis.<sup>5</sup> The Court reasoned that Traoré’s episode was ultimately triggered by daily cannabis consumption and, as such, impaired his judgment or control over his actions and, therefore, he was not competent to stand trial.<sup>6</sup> The Court relied on Article 122-1 of the French Penal Code, which read that “a person is not criminally responsible if suffering, *at the time of the event*, from psychic or neuropsychic disturbance that has eliminated all discernment or control over the acts,”<sup>7</sup> *even if*, as the court held, such mental disorder was caused “by a voluntary and regular consumption of narcotics.”<sup>8</sup> The *Halimi* decision struck much of the country as shocking and unacceptable,<sup>9</sup>

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criminally irresponsible, pursuant to Article 122-1 of the French Penal Code, in light of expert reports recommending his lack of cognition due to a drug-induced psychotic episode on the night of the homicide. ASSEMBLÉE NATIONALE, COMPTE RENDU: COMMISSION D’ENQUÊTE CHARGÉE DE RECHERCHER D’ÉVENTUELS DYSFONCTIONNEMENTS DE LA JUSTICE ET DE LA POLICE DANS L’AFFAIRE DITE SARAH HALIMI ET DE FORMULER DES PROPOSITIONS POUR ÉVITER LE CAS ÉCHÉANT LEUR RENOUVELLEMENT [REPORT OF THE COMMISSION OF INQUIRY RESPONSIBLE FOR INVESTIGATING POSSIBLE DYSFUNCTION OF JUSTICE AND THE POLICE IN THE SO-CALLED SARAH HALIMI AFFAIR AND FOR FORMULATING PROPOSALS TO AVOID THEIR RENEWAL IF NECESSARY] (2021), [https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cehalimi/115cehalimi2122037\\_compte-rendu](https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cehalimi/115cehalimi2122037_compte-rendu) [<https://perma.cc/HV2X-MYS2>].

<sup>5</sup> Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 14, 2021, Bull. crim., No. 404 (Fr.).

<sup>6</sup> *Id.* Traoré had smoked up to fifteen joints a day since the age of fourteen. Julien Mucchielli, *Affaire Sarah Halimi: cannabis, meurtre antisemite et irresponsabilité pénale*, DALLOZ (Dec. 30, 2019), <https://www.dalloz-actualite.fr/flash/affaire-sarah-halimi-cannabis-meurtre-antisemite-et-irresponsabilite-penale> [<https://perma.cc/E5LC-FK2Z>].

<sup>7</sup> *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 14, 2021, Bull. crim., No. 404, ¶ 25 (Fr.); *see also* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.). At this stage, it is important to note that the French and U.S. criminal law systems differ in their interpretations of the difference between the principles of competency to stand trial and insanity. This issue will be discussed below in Part II.B.

<sup>8</sup> Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 14, 2021, Bull. crim., No. 404, ¶ 25 (Fr.).

<sup>9</sup> *See Sarah Halimi: Thousands Protest Decision not to Try Jewish Woman’s Killer*, EURONEWS (Apr. 25, 2021, 3:58 PM), <https://www.euronews.com/2021/04/25/sarah-halimi-thousands-protest-decision-not-to-try-jewish-woman-s-killer> [<https://perma.cc/MNL4-8U6W>]; *see also* “Justice pour Sarah Halimi”: 26 000 manifestants ont défilé partout en France, FRANCEINFO,

and French Jews became even more fearful of being targets of hatred.<sup>10</sup> President Emmanuel Macron himself, while visiting Jerusalem, expressed the need for a trial in the face of such a decision.<sup>11</sup> In response to the emotion aroused by the absence of trial in the *Halimi* case, in January 2022, the French Parliament adopted an amendment to Article 122-1 of its Penal Code, codified in Article 122-1-1,<sup>12</sup> aiming to offer courts clearer guidelines for adjudicating cases involving criminal irresponsibility, particularly in light of a defendant's history of drug consumption. Nevertheless, the amendment neither altered the *Halimi* decision nor improved or solved the criminal responsibility issue as a whole.

The first Part of this Note describes the current French law regarding criminal responsibility, including its recent amendments and their inherent flaws. It then compares the French and U.S. criminal responsibility models, both substantively and procedurally. The Note concludes by reflecting on potential amendments to French criminal law, inspired by the United States' model, that would promote more justice-oriented decision-making in French courts.

## II. UNDERSTANDING THE CURRENT FRENCH CRIMINAL RESPONSIBILITY LAW AND ITS INHERENT FLAWS

### *A. The Evolution of the French Criminal Responsibility Law*

The rules of criminal procedure that prevent criminally irresponsible people from being tried have ancient roots. One such rule, the

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[https://www.francetvinfo.fr/societe/religion/plusieurs-milliers-de-manifestants-partout-en-france-pour-reclamer-justice-pour-sarah-halimi-sexagenaire-juive-tuee-en-2017\\_4385863.html](https://www.francetvinfo.fr/societe/religion/plusieurs-milliers-de-manifestants-partout-en-france-pour-reclamer-justice-pour-sarah-halimi-sexagenaire-juive-tuee-en-2017_4385863.html) [<https://perma.cc/74S4-RN2S>] (Apr. 26, 2021, 8:43 AM).

<sup>10</sup> According to a Fondapol survey published in 2020, 70% of French people of Jewish faith or culture say they have been victims of at least one antisemitic act in their lifetime, and 43% of French Jews apply strategies of avoidance and concealment. See DOMINIQUE REYNIÉ & SIMONE RODAN-BENZAQUEN, ANALYSIS OF ANTI-SEMITISM IN FRANCE 5-6 (2020), <https://www.fondapol.org/app/uploads/2020/06/radiographieantisemitisme-gb-2020-01-24-3.pdf> [<https://perma.cc/6DFU-DYV6>].

<sup>11</sup> *Discours du Président de la République à la communauté française d'Israël* [*Speech by the President of the Republic to the French Community of Israel*], ÉLYSÉE (Jan. 23, 2020), <https://www.elysee.fr/emmanuel-macron/2020/01/23/discours-du-president-de-la-republique-a-la-communaute-francaise-disrael> [<https://perma.cc/BXL5-Y6ZR>].

<sup>12</sup> See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

insanity defense, was expressed in ancient Greece and ancient Rome.<sup>13</sup> Since the Ancien Régime, France has had explicit rules excluding people deemed to be insane from courts.<sup>14</sup> The current French Penal Code expressly addresses the matter, and Article 122-1 establishes that “the person who was suffering, at the time of the events, from a mental or neuropsychic disorder which abolished his discernment or hindered the control of his actions is not criminally responsible,” and is therefore deemed incompetent to stand trial.<sup>15</sup> Avoiding criminal responsibility may also be achieved if discernment is impaired—also called “diminished capacity”—and in this regard, Article 122-1 states that “the person who was suffering, at the time of the events, from a mental or neuropsychic disorder which impaired his discernment or hindered the control of his actions remains punishable,” but could be subject to a sentence reduction.<sup>16</sup> The particular debate on criminal responsibility that was revived by the *Halimi* case focused on the question of drug addiction, the effects of which, like those of a psychic or neuropsychic disorder, are compulsive and unpredictable.<sup>17</sup>

Prior to the January 2022 amendments to the Penal Code, Article 122-1 lacked any distinction between different types of behavior leading to a mental disorder resulting in the loss of discernment.<sup>18</sup> Consequently, it was impossible to differentiate between pre-existing psychological conditions that led to the act and psychotic episodes induced by the voluntary consumption of narcotics that impaired discernment at the time of the act. In response to the Court of Appeals of Paris’s ruling in the *Halimi* case, which declared Traoré unfit to stand trial due to a lack of criminal responsibility, France’s then-Minister of Justice, Nicole Belloubet, issued a report in June 2020 addressing the

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<sup>13</sup> T.V. Asokan, *The Insanity Defense: Related Issues*, 58 INDIAN J. PSYCHIATRY 191, 191 (2016).

<sup>14</sup> A.M. Voutyras-Pierre, *L’exception d’incompétence sous l’Ancien Régime (avril 1667-août 1789): une norme hybride dans une organisation juridictionnelle complexe* [*The Exception of Incompetence Under the Ancien Regime (April 1667-August 1789): A Hybrid Norm in a Complex Jurisdictional Organization*], 74 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER [REV. HIS. DROIT] 45, 56 (1996).

<sup>15</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.).

<sup>16</sup> *Id.*

<sup>17</sup> Barry J. Everitt, *Neural and Psychological Mechanisms Underlying Compulsive Drug Seeking Habits and Drug Memories – Indications for Novel Treatments of Addiction*, 40 EUR. J. NEUROSCIENCE, 2163, 2171 (2014).

<sup>18</sup> See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.) (referring only to “psychological or neuropsychological disturbance”).

complex issue of the criminal responsibility of individuals who voluntarily consume narcotics and commit crimes (“the Belloubet report”).<sup>19</sup> Nevertheless, the report concluded that no changes to the law were necessary, noting that a defendant’s discernment and intent are distinct concepts and that evaluating the connection between the two only “belongs to the examining magistrate’s jurisdiction.”<sup>20</sup>

In this context—the Belloubet report having been publicly released a few days after the Court of Cassation’s *Halimi* decision<sup>21</sup>—Emmanuel Macron, France’s President, urged a change in the law, stating that deciding to take narcotics and then “going mad” should not remove the accused’s criminal responsibility.<sup>22</sup> Then, in May 2021, current Minister of Justice Eric Dupont-Moretti, in light of the “legal vacuum” in this area,<sup>23</sup> announced a bill on criminal responsibility which would allow courts to differentiate between normal loss of discernment and loss of discernment caused by an individual’s voluntary intake of psychoactive substances.<sup>24</sup> In December 2021, France passed the bill, reforming the system of criminal responsibility that France had known until then.<sup>25</sup>

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<sup>19</sup> Jean-Baptiste Jacquin, *Un rapport sur l’irresponsabilité pénale conclut qu’il ne faut pas toucher à la loi*, LE MONDE (Apr. 26, 2021, 6:22 PM), [https://www.lemonde.fr/societe/article/2021/04/26/irresponsabilite-penale-un-rapport-conclut-qu-il-ne-faut-pas-toucher-a-la-loi\\_6078138\\_3224.html](https://www.lemonde.fr/societe/article/2021/04/26/irresponsabilite-penale-un-rapport-conclut-qu-il-ne-faut-pas-toucher-a-la-loi_6078138_3224.html) [<https://perma.cc/2TH4-87T8>].

<sup>20</sup> NATHALIE GOULET, RAPPORT N° 602 FAIT AU NOM DE LA COMMISSION DES LOIS, PROPOSITION DE LOI TENDANT A REVOIR LES CONDITIONS D’APPLICATION DE L’ARTICLE 122-1 DU CODE PENAL SUR LA RESPONSABILITE PENALE DES AUTEURS DE CRIMES ET DELITS [REPORT NO. 602 MADE ON BEHALF OF THE LAW COMMISSION, PROPOSAL FOR A LAW TO REVIEW THE CONDITIONS OF APPLICATION OF ARTICLE 122-1 OF THE PENAL CODE ON THE CRIMINAL LIABILITY OF PERPATRATORS OF CRIMES AND MISDEMEANORS] 10 (2021), <http://www.senat.fr/rap/120-602/120-6021.pdf> [<https://perma.cc/DD7E-4KFU>].

<sup>21</sup> *Id.*

<sup>22</sup> Jean-Baptiste Jacquin, *Irresponsabilité pénale: la volonté d’Emmanuel Macron de modifier la loi fait débat*, LE MONDE, [https://www.lemonde.fr/societe/article/2021/04/20/emmanuel-macron-veut-precipiter-une-reforme-sur-l-irresponsabilite-penale\\_6077387\\_3224.html](https://www.lemonde.fr/societe/article/2021/04/20/emmanuel-macron-veut-precipiter-une-reforme-sur-l-irresponsabilite-penale_6077387_3224.html) [<https://perma.cc/HXT7-LMHQ>] (Apr. 21, 2021, 3:47 PM).

<sup>23</sup> @E\_DupondM, TWITTER (Apr. 25, 2021, 7:15 AM), [https://twitter.com/e\\_dupondm/status/1386277631197388800](https://twitter.com/e_dupondm/status/1386277631197388800) [<https://perma.cc/BL2S-7YBQ>].

<sup>24</sup> Communiqué de presse, Ministère de la Justice, Irresponsabilité pénale, <https://www.justice.gouv.fr/actualites/espace-presse/irresponsabilite-penale>, [<https://perma.cc/D9Y7-HU7G>] (Mar. 21, 2023).

<sup>25</sup> See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

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The bill introduced two amendments to Article 122-1 of the Penal Code, providing two exemptions from defenses to criminal responsibility and special rules relating to the consideration of diminished capacity in the execution of the sentence.<sup>26</sup> Article 122-1-1 reads:

[T]he first paragraph of Article 122-1 is not applicable if the temporary abolition of the discernment of the person or the control of his actions at the time of the commission of a crime or an offense results from the fact that, very close to the time of the action, the person has voluntarily consumed psychoactive substances with the intention of committing the offense or an offense of the same nature or to facilitate its commission.<sup>27</sup>

The current French law requires five conditions to be satisfied for a defendant to be deemed both fit to stand trial and sane.<sup>28</sup> First, the abolition of discernment must be temporary only. Second, the abolition must be caused by voluntary consumption of a drug. Third, the drug must be a psychoactive substance. Fourth, such a consumption must be made at a time very close to the criminal offense to, fifth, realize a criminal purpose.

Article 122-1-2 provides:

[T]he reduction in sentence provided for in the second paragraph of Article 122-1 is not applicable in the event of a temporary alteration in the discernment of the person or in the control of his acts at the time of the commission of a crime or misdemeanor when this alteration results from the voluntary, illicit or manifestly excessive consumption of psychoactive substances.<sup>29</sup>

### C. Article 122-1-1's Flaws

Due to the amendments' vagueness, they do not change the law in any meaningful way. First, Article 122-1-1 specifies that the abolition of discernment must result from the voluntary consumption of *psychoactive substances*.<sup>30</sup> This language leaves open the question of whether such consumption must be the *exclusive* cause of the abolition of discernment, rather than one cause among others. For instance,

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> The difference drawn between the notions of competency to stand trial and insanity present in the United States is absent from French criminal law. *See* discussion *infra* Part III.D.

<sup>29</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-2 (Fr.).

<sup>30</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

psychological problems and terrorism may be related to a certain degree.<sup>31</sup> Similarly, before experiencing a psychotic episode or delusion, a murderer might well have developed previous hatred against their victim or the demographic to which they belong, or may have undergone a process of radicalization.<sup>32</sup> This dilemma appears to be central in the *Halimi* case. As French Deputy Meyer Habib pointed out in his investigation commission report on the *Halimi* case, Kobili Traoré admitted to having killed Halimi after noticing the Torah book and menorah lampstand at the entrance of her apartment.<sup>33</sup> Traoré's voluntary

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<sup>31</sup> Cyrus S.H. Ho, Tian Ci Quek, Roger C.M. Ho & Carol C. Choo, *Terrorism and Mental Illness: A Pragmatic Approach for the Clinician*, 25 BJPSYCH ADVANCES 101, 103, 107 (2019).

<sup>32</sup> For instance, Jared Lee Loughner, who killed six people (including District Court Judge John Roll) and severely injured U.S. Representative Gabrielle Giffords during the 2011 Tucson shooting, started suffering schizophrenia delusions when he began abusing drugs (including cannabis) but he had already developed strong political views, expressed a longstanding dislike for Congresswoman Giffords, and often stated that women should not hold positions of power. Another example is the case of Dylann Roof, who killed nine African Americans (including state senator Clementa Pinckney) during the 2015 Charleston church shooting. Although Roof showed symptoms of a psychotic disorder and had a long history of drug abuse, he had already embraced racial hatred and white supremacy ideals, and in fact aimed at starting a "race war." See Mark Thompson, *How Jared Loughner Changed: The View from His Schools*, TIME (Jan. 11, 2011), <https://content.time.com/time/nation/article/0,8599,2041878,00.html> [<https://perma.cc/Y58M-4MG2>]; *Behind Jared Loughner's Mug-Shot Grin*, N.Y. TIMES (Jan. 15, 2011), <https://www.nytimes.com/2011/01/16/us/16loughner.html> [<https://perma.cc/YVS5-59PP>]; see also Kevin Sack, *Dylann Roof, Suspect in Charleston Shooting, Flew the Flags of White Power*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2015/06/19/us/on-facebook-dylann-roof-charleston-suspect-wears-symbols-of-white-supremacy.html> [<https://perma.cc/5QGP-Q8J5>]; Daniel Trotta, *Dylann Roof Appeals Death Sentence for Massacre at South Carolina Black Church*, REUTERS (Jan. 29, 2020, 8:34 AM), <https://www.reuters.com/article/us-south-carolina-shooting-roof/dylann-roof-appeals-death-sentence-for-massacre-at-south-carolina-black-church-idUSKBN1ZS1RL> [<https://perma.cc/8M7J-HBYH>].

<sup>33</sup> MEYER HABIB, COMPTE RENDU DE LA COMMISSION D'ENQUÊTE CHARGÉE DE RECHERCHER D'ÉVENTUELS DYSFONCTIONNEMENTS DE LA JUSTICE ET DE LA POLICE DANS L'AFFAIRE DITE SARAH HALIMI ET DE FORMULER DES PROPOSITIONS POUR ÉVITER LE CAS ÉCHÉANT LEUR RENOUVELLEMENT [REPORT OF THE COMMISSION OF INQUIRY RESPONSIBLE FOR INVESTIGATING POSSIBLE DYSFUNCTION OF JUSTICE AND THE POLICE IN THE SO-CALLED SARAH HALIMI AFFAIR AND FOR FORMULATING PROPOSALS TO AVOID THEIR RENEWAL IF NECESSARY] 5 (2021), [https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cehalimi/115ce-halimi2122037\\_compte-rendu](https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cehalimi/115ce-halimi2122037_compte-rendu) [<https://perma.cc/HV2X-MYS2>].



cannabis consumption gives rise to inquiries about whether such circumstances should be considered insignificant or, rather, regarded as contributing factors to his actions.<sup>34</sup> In essence, the Court of Cassation recognized the antisemitic nature of his crime as an aggravating factor, but it remained unclear whether it could be considered when evaluating the defendant's loss of cognitive capacity.<sup>35</sup>

Furthermore, to be applicable, 122-1-1 requires that the consumption of psychoactive substances be *voluntary*.<sup>36</sup> It therefore excludes involuntary consumption of psychoactive substances, such as accidental consumption or drug prescription errors (i.e., due to negligence). One may contemplate the fate of a defendant who has already developed an addiction to a psychoactive substance. The available evidence on the impact of prolonged and heavy cannabis use on cognitive functions and voluntary decision-making remains inconclusive, necessitating further research to establish definitive causation.<sup>37</sup> Consequently, a question arises as to whether such an individual can genuinely exercise free will in choosing to consume the substance or whether the addiction should be regarded as a pre-existing mental or neuropsychic condition, thereby invoking the application of Article 122-1.

Article 122-1-1 also stipulates that the voluntary consumption of psychoactive substances must occur in "very close" proximity to the criminal offense.<sup>38</sup> This term, however, is ambiguous and leaves significant room for interpretation. "Very close" could encompass a range of time frames, spanning from mere minutes to days. As a result, the exact meaning of "very close" would inevitably become a subject of statutory interpretation by French courts, leading to considerable uncertainty when similar cases arise in the future. Even more troubling is the consideration that not all psychotropic substances have the same physiological effects, varying based on their nature and quality, and from person to person. Furthermore, where the offender is a habitual

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<sup>34</sup> Mucchielli, *supra* note 6.

<sup>35</sup> Cour de cassation [cass.] [supreme court for judicial matters], crim., Apr. 14, 2021, Bull. crim. No. 404 (Fr.).

<sup>36</sup> See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

<sup>37</sup> See Kevin Hill & Michael Hsu, *Cognitive Effects in Midlife of Long-Term Cannabis Use*, HARV. HEALTH PUBL'G (June 14, 2022), <https://www.health.harvard.edu/blog/cognitive-effects-of-long-term-cannabis-use-in-midlife-202206142760> [<https://perma.cc/H5MD-2ZCQ>].

<sup>38</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

user, the onset of the drug's effects might take longer.<sup>39</sup> These considerations may be the reason behind the vagueness of Article 122-1-1.

It is worth noting, however, that the term “very close to the criminal offense” is also present in Article 53 of the French Code of Criminal Procedure concerning *in flagrante* arrests.<sup>40</sup> Although vague in the Code of Criminal Procedure—courts have previously defined the term as a time window of twenty-four to forty-eight hours between the commission of the crime and its discovery by the police.<sup>41</sup> Given this precedent, and to ensure consistency in legal provisions, the French legislature should have clarified whether the same time window applies to Article 122-1-1. Such clarification is crucial since the immediate effects of psychoactive substances generally do not extend beyond a few hours. This conflicts with French courts' interpretation of “very close” in Article 53 (i.e., twenty-four to forty-eight hours). For example, the psychological effects of marijuana ingestion, such as memory problems, impaired psychomotor performance, altered time judgment, appetite changes, and perception alterations, typically last for approximately one to three hours.<sup>42</sup> This again demonstrates the inherent ineffectiveness of Article 122-1-1, since it is unclear whether “very close” applies to such cases.

Finally, Article 122-1-1 does not permit the defendant to assert the statute's defense if they purposely abolish their discernment by voluntarily consuming substances “*in order to commit an offense or to facilitate its realization.*”<sup>43</sup> This criminal purpose condition was added to 122-1-1 to ensure that the defense of criminal responsibility would be refused to those individuals who have consumed substances in order to diminish their empathy or alleviate their fears, and thus give

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<sup>39</sup> Shalini S. Lynch, *Tolerance and Resistance to Drugs*, MSD MANUAL, <https://www.msmanuals.com/en-gb/home/drugs/factors-affecting-response-to-drugs/tolerance-and-resistance-to-drugs> [https://perma.cc/ZSV2-EQD2] (Sept. 2022).

<sup>40</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 53 (Fr.).

<sup>41</sup> *Question N. 70710 de M. Damien Abad* [Written Question No. 70710 from Mr. Damien Abad], ASSEMBLÉE NATIONALE, <https://questions.assemblee-nationale.fr/q14/14-70710QE.htm> [https://perma.cc/UPQ9-SM4Q] (Mar. 22, 2016).

<sup>42</sup> *Cannabis (Marijuana) Research Report: What Are Marijuana's Effects?*, NAT'L INST. ON DRUG ABUSE (July 2020), <https://nida.nih.gov/publications/research-reports/marijuana/what-are-marijuana-effects> [https://perma.cc/XE2T-VU9X].

<sup>43</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.) (emphasis added).

themselves the courage necessary to commit a criminal offense.<sup>44</sup> This fifth condition, however, constitutes Article 122-1-1's most significant flaw. Indeed, proof of criminal intent—*mens rea*<sup>45</sup>—is particularly difficult to assess in this type of case. It is extremely difficult to demonstrate whether a defendant's consumption results in or is caused by any specific intent to cause wrong. In practice, judges in French jurisdictions consider an array of material evidence as external indications of intent.<sup>46</sup> Furthermore, in analyzing premeditation, judges do not consider the defendant's psychology, but instead analyze the specific facts of the case to determine whether the crime was premeditated.<sup>47</sup> It may be difficult for a case, however, to present enough facts or evidence that are alone sufficient to find guilt, which is the only way an examining magistrate can allow a case to stand trial.<sup>48</sup> For instance, the *Halimi* case does not contain enough facts for a court to determine that Traoré consumed cannabis with the specific intent to cause wrong.<sup>49</sup> It is even more difficult to show that a defendant's specific intent to consume psychotropic substances in order to commit a crime *at one moment in time* when the defendant has consumed such substances for many years *without any intent to subsequently commit a crime*. Traoré had smoked up to fifteen joints a day since the age of fourteen.<sup>50</sup> It is quite difficult to prove that he consumed cannabis with the intent to kill Sarah Halimi *at one specific time*.

Hence, Article 122-1-1 appears highly theoretical and remarkably challenging to apply, particularly concerning assessment of criminal intent. Nevertheless, it is crucial to note that this amendment would not have been sufficient to hold Traoré criminally responsible. Even the investigative pre-trial chamber was unable to establish his intent

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<sup>44</sup> Éloi Clément, *Loi responsabilité pénale et sécurité intérieure : tu ne t'intoxiqueras point*, DALLOZ (Feb. 7, 2022), <https://www.dalloz-actualite.fr/flash/loi-responsabilite-penale-et-securite-interieure-tu-ne-t-intoxiqueras-point> [<https://perma.cc/7R6C-TPU2>].

<sup>45</sup> See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-3 (Fr.) (“There is no felony or misdemeanour in the absence of an intent to commit it.”).

<sup>46</sup> *L'intention criminelle*, CABINETACI, <https://www.cabinetaci.com/lintention-criminelle/> [<https://perma.cc/SD7J-B442>] (last visited Apr. 24, 2024).

<sup>47</sup> *Id.*

<sup>48</sup> See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 706-123 (Fr.).

<sup>49</sup> See Mucchielli, *supra* note 6.

<sup>50</sup> *Id.*

and premeditation.<sup>51</sup> Had the investigation revealed such intent, a conviction might have been possible, underscoring the limited relevance of Article 122-1-1 in this particular case. Moreover, various objective aspects of the case suggested that Traoré's mental faculties were not impaired at the time of the offense.<sup>52</sup> Aside from the aforementioned facts,<sup>53</sup> he had displayed signs of paranoia, experienced episodes of uncontrolled rage, and sought a more potent drug than cannabis shortly before the crime.<sup>54</sup> Nevertheless, he attempted to convince the courts that he was unaware of cannabis's detrimental effects on his mental state.<sup>55</sup>

In France, between 1998 and 2003 (prior to the implementation of Article 122-1-1), the percentage of cases dismissed because of the defendant's insanity/incompetency increased by 55%.<sup>56</sup> Between 2012 and 2018, the number of cases dismissed because of the defendant's insanity/incompetence doubled, reaching 13,495 dismissals in 2018.<sup>57</sup> Considering Article 122-1-1's flaws, it is likely that this number will continue to increase.

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<sup>51</sup> Barbara Lefebvre, *Meurte de Sarah Halimi: la consummation de cannabis justifie-t-elle une irresponsabilité pénale?*, LE FIGARO, <https://www.lefigaro.fr/vox/societe/irresponsabilite-penale-voulons-nous-creeer-une-jurisprudence-sarah-halimi-20191128> [<https://perma.cc/TU98-D9GL>] (Dec. 19, 2019, 4:59 PM).

<sup>52</sup> See HABIB, *supra* note 33.

<sup>53</sup> *Id.*

<sup>54</sup> DIDIER PARIS, RAPPORT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LEGISLATION ET DE L'ADMINISTRATION GENERALE DE LA REPUBLIQUE, SUR LA PROPOSITION DE RESOLUTION TENDANT A LA CREATION D'UNE COMMISSION D'ENQUETE CHARGEE DE RECHERCHER D'EVENTUELS DYSFONCTIONNEMENTS DE LA JUSTICE ET DE LA POLICE DANS L'AFFAIRE DITE SARAH HALIMI ET DE FORMULER DES PROPOSITIONS POUR EVITER LE CAS ECHEANT LEUR RENOUVELLEMENT (N° 4109) [REPORT ON BEHALF OF THE COMMITTEE ON CONSTITUTIONAL LAWS, LEGISLATION AND GENERAL ADMINISTRATION OF THE REPUBLIC, ON THE PROPOSED RESOLUTION TENDING TO CREATE A COMMISSION OF INQUIRY RESPONSIBLE FOR INVESTIGATING POSSIBLE DYSFUNCTION OF JUSTICE AND THE POLICE IN THE SO-CALLED SARAH HALIMI AFFAIR AND TO FORMULATE PROPOSALS TO AVOID THEIR RENEWALS IF NECESSARY (NO. 4109)] (2021), [https://www.assemblee-nationale.fr/dyn/15/rapports/cion\\_lois/115b4300\\_rapport-fond](https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/115b4300_rapport-fond) [<https://perma.cc/NL2H-MYLB>].

<sup>55</sup> HABIB, *supra* note 33.

<sup>56</sup> MINISTERE DE LA JUSTICE, MISSION SUR L'IRRESPONSABILITE PENALE: RAPPORT N° 017-21, at 13 (2021), [https://www.apmnews.com/documents/202104271716020.Rapport\\_irresponsabilite\\_penale.pdf](https://www.apmnews.com/documents/202104271716020.Rapport_irresponsabilite_penale.pdf) [<https://perma.cc/F63B-KB33>].

<sup>57</sup> *Id.*

The flaws of Article 122-1-1 prompt a comparison between the substantive and procedural criminal law systems of France and the United States, and their approaches to criminal responsibility in particular. Such an examination will offer insights into potential amendments to French law, aiming to orient it towards justice.

### III. A COMPARISON OF U.S. AND FRENCH CRIMINAL RESPONSIBILITY MODELS

#### *A. The Distinction Between Voluntary and Involuntary Intoxication*

A significant distinction exists between criminal law in the United States and France. Article 122-1-1 of France's Penal Code requires that the consumption of psychoactive substances be *voluntary* for its application, excluding involuntary consumption from its purview.<sup>58</sup> However, U.S. law recognizes and differentiates between voluntary and involuntary intoxication defenses.<sup>59</sup> Under U.S. criminal legal standards, involuntary intoxication can be a defense for specific intent crimes if it prevents the defendant from forming the criminal intent requisite for establishing the offense.<sup>60</sup> Similarly, involuntary intoxication can be a defense for *general* intent crimes if the defendant can establish that involuntary intoxication hindered their understanding of their actions or the ability to differentiate between right and wrong.<sup>61</sup> To differentiate, voluntary intoxication may only serve as a defense for *specific* intent crimes, where the intoxication prevents the defendant from forming the requisite criminal intent.<sup>62</sup> For instance, a defendant charged with felony murder may argue voluntary intoxication as a defense, contending that their intoxication was so severe that they were unable to form the intent to commit the underlying felony.<sup>63</sup> In practice, in federal and some state courts, the presence of voluntary

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<sup>58</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

<sup>59</sup> See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.5(g) (3d ed. 2023).

<sup>60</sup> Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 519-20 (1997) (noting that twenty-one states admit voluntary intoxication as a defense only for crimes requiring a specific intent).

<sup>61</sup> LAFAVE, *supra* note 67.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* § 9.5(a).

intoxication precludes the use of the insanity defense.<sup>64</sup> The Senate Judiciary Committee, while discussing the Insanity Defense Reform Act,<sup>65</sup> explicitly stated that, “the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity.”<sup>66</sup> U.S. courts, like Article 122-1-1 of the French Penal Code, have generally not recognized substance-induced psychotic symptoms as grounds for an insanity defense when the substance in question was taken voluntarily.<sup>67</sup>

*B. Settled Insanity and the Need to Consider the Accused's Background*

While U.S. criminal law distinguishes between voluntary and involuntary intoxication, it also addresses settled insanity, a subject not found in French criminal law. Settled insanity applies to defendants who develop an addiction to alcohol or drugs, *through voluntary consumption of such substances*, and who suffer a prolonged mental defect or disease that causes the defendant to lack the required mens rea when committing the criminal act.<sup>68</sup> In such cases, if the defendant can demonstrate that their substance use triggered or intensified psychotic symptoms, separate from acute intoxication, and that these symptoms impaired their ability to control their actions, the insanity defense may be considered valid.<sup>69</sup> Although substance-induced psychosis can lead to irrational behavior and extreme violence, warning signs of this condition may not be readily discernible.<sup>70</sup> Consequently, while the

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<sup>64</sup> Jeff Feix & Greg Wolber, *Intoxication and Settled Insanity: A Finding of Not Guilty by Reason of Insanity*, 35 J. AM. ACAD. PSYCHIATRY & L. 172, 173 (2007).

<sup>65</sup> 18 U.S.C. § 17. This Act was enacted in the wake of public outrage after John Hinckley's acquittal by reason of insanity for his attempted assassination of President Reagan. The Act codified *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) and shifted the burden of proof to the defendant, thus requiring a trial.

<sup>66</sup> S. REP. NO. 98-225, at 229 (1983).

<sup>67</sup> Compare *United States v. Garcia*, 94 F.3d 57, 61 (2d Cir. 1996), *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1978), *State v. Freitas*, 608 P.2d 408, 411 (Haw. 1980), and *Griggs v. Commonwealth*, 255 S.E.2d 475, 479 (Va. 1979), with CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

<sup>68</sup> 21 AM. JUR. 2D *Criminal Law* § 48 (2024) (citing *Morgan v. Commonwealth*, 646 S.E.2d 899 (Va. Ct. App. 2007)).

<sup>69</sup> Feix & Wolber, *supra* note 72, at 173.

<sup>70</sup> See Zawn Villines, *What to Know About Drug-Induced Schizophrenia*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/drug-induced-schizophrenia> [<https://perma.cc/8YFF-J7RE>] (Feb. 10, 2023) (noting that “[n]o test can

general rule is that a voluntary state of intoxication cannot cause the type of insanity that would exempt a defendant from criminal responsibility, most U.S. jurisdictions have accepted the settled insanity defense where the settled condition of insanity is caused by continuing substance use.<sup>71</sup>

This concept is exemplified by the case of Aldo Dunphe, an individual who had used cannabis heavily for approximately six or seven years before voluntarily seeking admission to a psychiatric ward for psychosis treatment.<sup>72</sup> Shortly after his admission, and despite not using cannabis during his hospital stay, he experienced a drug-induced psychotic episode, during which he falsely accused another patient of being his abusive biological father.<sup>73</sup> Tragically, Dunphe killed the other patient<sup>74</sup> and was convicted of first-degree murder in Massachusetts state court.<sup>75</sup> On appeal, the Massachusetts Supreme Judicial Court decided that, while voluntary intoxication alone would not enable a defendant to assert a lack of criminal responsibility defense,

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conclusively diagnose drug-induced psychosis. . . . Instead, doctors diagnose the condition based on symptoms. Then to confirm the diagnosis of drug-induced psychosis, they have a person stop using drugs. If symptoms disappear, then the psychosis is drug-induced. If they do not, a person may have schizophrenia or another psychotic disorder.”)

<sup>71</sup> At least twenty-nine states (including New York and California) and the District of Columbia have accepted the settled insanity defense, Andrew M. Levine, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drugs and Alcohol Abuse*, 78 B.U. L. REV. 75, 87 (1998), while some states, like Colorado, Connecticut, and Delaware have explicitly rejected it, Feix & Wolber, *supra* note 64, at 175.

<sup>72</sup> *Commonwealth v. Dunphe*, 153 N.E.3d 1254, 1257-58 (Mass. 2020).

<sup>73</sup> *Id.* at 1258-59.

<sup>74</sup> *Id.* at 1259.

<sup>75</sup> *Id.* at 1258, 1260-63. The defense’s forensic psychologist asserted that Dunphe believed the victim posed a threat to him and acted in self-defense due to his paranoid schizophrenia. *Id.* at 1260. Because Dunphe was unable to understand the wrongfulness of his actions or comply with the law’s requirements, he met the legal standard for insanity in Massachusetts. *Id.* at 1260-61. On the other hand, the prosecution’s psychiatrist contended that Dunphe did not have schizophrenia but experienced psychotic symptoms due to withdrawal from cannabis, which was not an acceptable basis for an insanity defense since the substance was voluntarily consumed. *Id.* at 1261. The jury ultimately found him guilty of first-degree murder. *Id.* at 1258. On appeal, Dunphe argued that the jury, under proper instructions from the judge, should have been able to consider the link between his cannabis consumption and psychosis, and that consequently, he had been barred from a proper settled insanity defense. *Id.* at 1261-62.

juries could consider the interplay between mental illness and substance use when evaluating a defendant's actions.<sup>76</sup> The Court nullified Dunphe's conviction and remanded the case for a new trial, affirming settled insanity as a viable defense in Massachusetts.<sup>77</sup>

Federal and state courts in the United States have offered differing interpretations regarding when and under what circumstances the settled insanity defense is admissible.<sup>78</sup> The California Court of Appeal established a four-pronged test to clarify the doctrine of settled insanity,<sup>79</sup> which at least one other jurisdiction subsequently adopted.<sup>80</sup> For a defendant to meet the criteria for the settled insanity defense, the mental disorder must be (1) fixed and (2) stable; (3) must persist for a reasonable duration of time; and (4) must not be solely dependent on the ingestion and duration of the drug's effects.<sup>81</sup> Evaluating the last requirement can be difficult since it involves disentangling mental illness and drug abuse.<sup>82</sup> Consequently, a defendant must show the presence of a threshold condition of mental disease that exceeds mere intoxication and also meets the jurisdiction's standard for insanity.<sup>83</sup> In determining whether insanity of a fixed or permanent character brought on by use of intoxicants may negate a defendant's responsibility for criminal acts, courts have also considered whether the substance's effect overcomes the accused's mental capacity to the extent that they no longer possess the capacity to think and plan.<sup>84</sup>

In states where the settled insanity defense is recognized, expert witnesses are tasked with determining whether the defendant exhibited mental disorder symptoms in close temporal proximity to the offense.<sup>85</sup> If such symptoms are identified, the expert must then determine whether they stem from a permanent impairment rather than temporary intoxication, regardless of the symptoms' severity.<sup>86</sup> To aid in

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<sup>76</sup> *See id.* at 1264-65.

<sup>77</sup> *Id.* at 1270.

<sup>78</sup> Feix & Wolber, *supra* note 64, at 173.

<sup>79</sup> *People v. Skinner*, 228 Cal. Rptr. 652, 660-61 (Ct. App. 1986).

<sup>80</sup> *White v. Commonwealth*, 636 S.E. 2d 353 (2006).

<sup>81</sup> *Skinner*, 228 Cal. Rptr. at 660-61; J. Reid Meloy, *Voluntary Intoxication and the Insanity Defense*, 20 J. PSYCHIATRY L. 439, 448-49 (1992).

<sup>82</sup> Feix & Wolber, *supra* note 64, at 175.

<sup>83</sup> *Id.*

<sup>84</sup> *See State v. Scales*, 221 S.E.2d 898, 901 (N.C. Ct. App. 1976) (citing *State v. Cureton*, 11 S.E.2d 469, 471 (N.C. 1940)).

<sup>85</sup> Meloy, *supra* note 81, at 443.

<sup>86</sup> Feix & Wolber, *supra* note 64, at 172.



this determination, the expert may assess whether the mental illness symptoms observed during the offense extended beyond the period of intoxication, as demonstrated in the case of *People v. Kelley*.<sup>87</sup> If the expert witness can show that the defendant suffered from a lasting mental disorder, they must further illustrate how this condition impacted the defendant's ability to comprehend the nature and consequences of their actions, recognize the wrongfulness of their behavior, or manage their actions.<sup>88</sup>

The fundamental difference between U.S. and French criminal law is that Article 122-1-1 requires the voluntary intoxication to be effectuated *with the purpose of committing or facilitating the crime*.<sup>89</sup> Proving criminal intent is particularly difficult in these cases, as previously explained.<sup>90</sup> Indeed, with the hurdles posed by Article 122-1-1, it is quite challenging for French prosecutors to show the examining judge that there is sufficient evidence to prove guilt,<sup>91</sup> which is the *only* way for an examining judge to allow the case to stand trial.<sup>92</sup>

### C. Two Distinct Procedural Systems

United States criminal law recognizes the fundamental difference between the notions of competency to stand trial and insanity. According to the U.S. Supreme Court, the U.S. Constitution's due process guarantee protects incompetent defendants from criminal liability.<sup>93</sup> Although statutes addressing competency vary from state to state, the U.S. Supreme Court set a two-pronged test for evaluating competency in *Dusky v. United States*.<sup>94</sup> According to this test, a defendant is deemed mentally competent to stand trial only if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as

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<sup>87</sup> *People v. Kelly*, 516 P.2d 875, 882 (Cal. 1973); Feix & Wolber, *supra* note 64, at 175.

<sup>88</sup> Feix & Wolber, *supra* note 64, at 179.

<sup>89</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1-1 (Fr.).

<sup>90</sup> *See supra* Part II.B.

<sup>91</sup> CODE DE PROCEDURE PENALE [C. PR. PEN.] [CODE OF CRIMINAL PROCEDURE] art. 706-123 (Fr.).

<sup>92</sup> *Id.*

<sup>93</sup> *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (citing *Bishop v. United States*, 350 U.S. 961 (1956)) (holding that it is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial).

<sup>94</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

factual understanding of the proceedings against him.”<sup>95</sup> In federal courts, competency is determined at a court hearing called a competency hearing,<sup>96</sup> before which a judge may request a psychological examination of the defendant, and during which a trial court judge will determine the defendant’s competency.<sup>97</sup> The judge must find the defendant incompetent by a “preponderance of the evidence.”<sup>98</sup> The accused’s trial can resume only if the judge rules that the defense has not met such a burden.<sup>99</sup> Then, *when the trial resumes*, the defense is free to plead not guilty by reason of insanity, which allows for criminal charges to be reduced or dismissed, depending on a *jury’s* evaluation of the accused’s mental state at *the time of the offense*.<sup>100</sup> In other words, while insanity means that the defendant lacked criminal responsibility *when they committed the crime*, they might nonetheless be competent to stand trial because competency and culpability are evaluated at different times. Although a defendant may suddenly have started suffering a *delirium continuum* prior to committing a crime, and thus plead not guilty by reason of insanity or settled insanity, such a defendant, if deemed competent, is constitutionally required to stand trial.

The principles of insanity and competency to stand trial are evaluated during a pre-trial hearing in front of an examining magistrate, without a jury.<sup>101</sup> As such, the defense can plead a lack of criminal responsibility (which does not itself differentiate between incompetency and insanity) under Article 122-1 *before* a trial takes place.<sup>102</sup> If the examining magistrate finds that Article 122-1 may be relevant to the case, they may transmit it to an examining chamber, wherein the examining judge determines whether, considering expert opinions, the accused’s abolition of discernment was voluntary.<sup>103</sup> Such a decision depends on expert analysis of the accused’s mental state *at the time of the offense*, but does not evaluate the accused’s mental state at the time

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<sup>95</sup> *Id.*

<sup>96</sup> 18 U.S.C. § 4241(c).

<sup>97</sup> *Id.* § 4241(a)-(b).

<sup>98</sup> *Id.* § 4241(d).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* §17.

<sup>101</sup> *See* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 706-120 (Fr.).

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

of the hearing.<sup>104</sup> As a result, a defendant who is competent to stand trial but lacked the requisite mens rea at the time of the offense by reason of insanity or settled insanity will not stand trial or face the jury.

In France, allowing the defense to plead a lack of criminal responsibility—the equivalent of the U.S. insanity defense—at an early, pre-trial stage prevents jury-based consideration of insanity cases. The defense may plead insanity or settled insanity as an alternative to showing that the defendant is incompetent.

#### *D. Article 122-1 in Contrast with the U.S. Insanity Defense*

##### *1. The Insanity Defense in U.S. Criminal Law*

The insanity defense, which is recognized by most states and federal courts, is controversial.<sup>105</sup> The insanity defense has been subject to varying interpretations and implementations across different states.<sup>106</sup> While some states allow insanity defenses that exempt defendants from liability based on their inability to be aware of the moral wrongfulness of their actions, the Court’s decision clarified that such a defense is constitutional but not mandated under the Constitution.<sup>107</sup> While forty-five states, the District of Columbia, and all federal jurisdictions permit defendants to plead insanity, five states—Montana, Idaho, Utah, Alaska, and Kansas—do not permit courts to, when deciding legal insanity, “consider a defendant’s appreciation of wrongfulness at the time of the crime.”<sup>108</sup> The insanity defense is seldom employed, and, when it is, it is rarely successful.<sup>109</sup> This is primarily

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<sup>104</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.); *see also* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 706-125 (Fr.).

<sup>105</sup> Asokan, *supra* note 13, at 192.

<sup>106</sup> *Id.* at 196.

<sup>107</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1027-37 (2020).

<sup>108</sup> Jacqueline S. Landess & Brian J. Holoyda, *Kahler v. Kansas and the Constitutionality of the Mens Rea Approach to Insanity*, 49 J. AM. ACAD. PSYCHIATRY L. 231, 231-32 (2021).

<sup>109</sup> *See* FRANCK SCHMALLEGGER, CRIMINAL JUSTICE: A BRIEF INTRODUCTION 106 (4th ed. 2001) (noting that “the insanity defense was used in less than 1 percent of the cases” and “only 26 percent of all insanity pleas were argued successfully”); *The Insanity Defense in Criminal Law Cases*, JUSTIA, <https://www.justia.com/criminal/defenses/insanity/> [<https://perma.cc/FSL5-YCG7>] (Oct. 2023) (noting that “various criminal studies have established that only about one percent of all felony cases

due to the daunting challenge of proving legal insanity in U.S. courts.<sup>110</sup>

In the United States, jurisdictions adopt one of four tests to ascertain whether a defendant is legally sane.<sup>111</sup> The *M'Naghten* Rule, which is adopted by a majority of states, considers a defendant insane if, at the time of the criminal act, they suffered from a mental defect that rendered them unaware of the nature and quality of their actions, or, if they knew, that they did not comprehend the wrongfulness of their conduct.<sup>112</sup> The *M'Naghten* insanity defense is *cognitive* and focuses on the defendant's awareness of the nature and quality of their actions, rather than their ability to *control* their conduct.<sup>113</sup>

The irresistible impulse insanity defense requires the defense to prove the existence of mental illness, and that such illness caused the defendant to be unable to control their actions or conform their conduct to the law.<sup>114</sup> Under this approach, even if a defendant can distinguish right from wrong during a criminal act, the defendant must have been subject to "the duress of such mental disease [that] he had . . . lost the *power* to choose between the right and wrong" and that his "free agency was at the time destroyed,"<sup>115</sup> with consideration also given to whether the alleged crime was solely the product of such mental disease.<sup>116</sup>

The test for the insanity defense proposed by the Model Penal Code has been adopted in many jurisdictions,<sup>117</sup> including in New York.<sup>118</sup> Under this test, "[a] person is not responsible for criminal

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in the United States involve use of the insanity defense [and] even when the defense is asserted, it is successful in only about 30 cases every year").

<sup>110</sup> SCHMALLEGER, *supra* note 121, at 106 ("[T]he differences between psychiatric and legal conceptualizations of insanity often lead to disagreements among expert witnesses who, in criminal court, may appear to provide conflicting testimony as to the sanity of a defendant.").

<sup>111</sup> *Id.* at 106-07.

<sup>112</sup> *Id.*

<sup>113</sup> See *M'Naghten's Case* (1843), 8 Eng. Rep. 718, 722 (laying out the two-pronged test for the insanity defense).

<sup>114</sup> See *United States v. Kunak*, 17 C.M.R. 346, 359-60 (C.M.A. 1954) (quoting jury instructions that elaborate slightly on earlier formulations of the test).

<sup>115</sup> *Parsons v. State*, 81 Ala. 577, 597 (1887).

<sup>116</sup> *Id.* This Note refers to this aspect as the "external prong" of the test.

<sup>117</sup> Christopher J. Lockey & Joseph D. Bloom, *The Evolution of the American Law Institute Test for Insanity in Oregon: Focus on Diagnosis*, 35 J. AM. ACAD. PSYCHIATRY L. 325, 325 (2007).

<sup>118</sup> See N.Y. PENAL LAW § 40.15 (Consol. 2024).

conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”<sup>119</sup> It is noteworthy that this test requires satisfaction of either the cognitive standard of the *M’Naghten* rule or the external prong of the irresistible impulse test and is not restricted to just one of them.<sup>120</sup>

Under the *Durham* (or “product”) test, a person is legally insane “if his unlawful act was a product of mental disease or defect.”<sup>121</sup> Due to its broad scope and the fact that it does not require a medical diagnosis, the *Durham* test is no longer used by federal courts.<sup>122</sup> Currently, only New Hampshire adheres to this test.<sup>123</sup>

In federal criminal proceedings, courts apply the federal statutory definition of insanity, which is a slight variation of the *M’Naghten* test. Under this approach, a person is considered legally insane if, “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.”<sup>124</sup>

## 2. *The Insanity Defense in French Criminal Law*

In the French judicial system, an examining magistrate has the authority to proceed to trial if there is sufficient evidence indicating a defendant’s criminal responsibility.<sup>125</sup> Notably, a mere 0.2% to 0.5% of all criminal cases in France culminate in the defendant being acquitted by reason of insanity.<sup>126</sup> However, French criminal procedure

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<sup>119</sup> MODEL PENAL CODE § 4.01(1) (1962).

<sup>120</sup> Judd F. Sneirson, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2269 (1995).

<sup>121</sup> *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1962), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

<sup>122</sup> Sarah Williams, *Current Application of the Insanity Defense*, FINDLAW, <https://www.findlaw.com/criminal/criminal-procedure/current-application-of-the-insanity-defense.html> [<https://perma.cc/LCR2-8UD5>] (Jan. 3, 2024).

<sup>123</sup> *Id.*

<sup>124</sup> 18 U.S.C. § 17(a) (1988).

<sup>125</sup> *See* CODE DE PROCEDURE PENALE [C. PR. PEN.] [CODE OF CRIMINAL PROCEDURE] art. 706-123 (Fr.).

<sup>126</sup> Charlotte Dubois, *Crime commis par une personne volontairement intoxiquée : quelle responsabilité pénale ?*, LE CLUB DES JURISTES (May 12, 2022, 4:19 PM), <https://blog.leclubdesjuristes.com/crime-commis-par-une-personne-volontairement-intoxiquee-quelle-responsabilite-penale/> [<https://perma.cc/T6MV-9KBV>].

permits the defense to assert a lack of criminal responsibility at any stage of the trial if they obtain new expert witness reports or evidence supporting the potential application of Article 122-1.<sup>127</sup>

Article 122-1 analyzes the accused's mental state *at the time of the offense*,<sup>128</sup> parallel to the insanity defense in U.S. criminal law. However, Article 122-1's definition of insanity is constrained to "psychological or neuropsychological disorder[s]" only.<sup>129</sup> Although such definition leaves expert witnesses free to consider any mental health or neurological disorder,<sup>130</sup> 122-1's applicability depends on the expert's testimony<sup>131</sup> regarding the existence of a "psychological or neuropsychological disorder." To determine whether such disorder is present, the examining judge will ask the expert a set of questions, which, though the amount and content of questions are discretionary, generally follow the same pattern.<sup>132</sup> Judges will likely focus on whether the psychological or neuropsychological disorder prevented or impaired the defendant's discernment or whether it prevented or impeded the

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<sup>127</sup> CODE DE PROCEDURE PÉNALE [C. PR. PÉN.] [Code of Criminal Procedure] art. 706-123 (Fr.); *see also* ASSEMBLEE NATIONALE, MISSION « FLASH » SUR L'APPLICATION DE L'ARTICLE 122-1 DU CODE PENAL: COMMUNICATION DE MME NAÏMA MOUTCOU ET M. ANTOINE SAVIGNAT ["FLASH" MISSION ON THE APPLICATION OF ARTICLE 122-1 OF THE PENAL CODE: COMMUNICATION OF MS. NAÏME MOUTCHOU AND MR. ANTOINE SAVIGNAT] 7 (2021), <https://www2.assemblee-nationale.fr/content/download/349608/3439404/version/1/> [<https://perma.cc/RNQ3-URWY>] (noting the thousands of cases that were dismissed at various procedural stages for lack of discernment).

<sup>128</sup> *See* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.).

<sup>129</sup> *Id.*

<sup>130</sup> Thomas Fovet, Florence Thibaut, Anne Parsons, Hans-Joachim Salize, Pierre Thomas & Camille Lancelevée, *Mental Health and the Criminal Justice System in France: A Narrative Review*, FORENSIC SCI. INT'L: MIND & L., Nov. 2020, at 3.

<sup>131</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 167-1 (Fr.). It is important to note that in the United States, as opposed to France, mental health professionals provide testimony and professional opinion but are not ultimately responsible for answering the magistrate's legal question. For more details, *see generally* STUART H. JAMES & JON J. NORDBY, FORENSIC SCIENCE: AN INTRODUCTION TO SCIENTIFIC AND INVESTIGATIVE TECHNIQUES 585-604 (3d ed. 2009).

<sup>132</sup> JEAN SOL & JEAN-YVES ROUX, EXPERTISE PSYCHIATRIQUE ET PSYCHOLOGIQUE EN MATIÈRE PÉNALE : MIEUX ORGANIZER POUR MIEUX JUGER, SÉNAT [PSYCHIATRIC AND PSYCHOLOGICAL EXPERTISE IN CRIMINAL MATTERS: BETTER ORGANIZE TO BETTER JUDGE, SENATE] 58 (2021), <https://www.senat.fr/rap/r20-432/r20-4321.pdf> [<https://perma.cc/26LZ-URPF>] (Senate Report No. 432, Regular Session 2020-21).

control of the defendant's actions at the time of the offense.<sup>133</sup> The judge will also likely ask about the defendant's ability to control their behavior and whether they acted under volition.<sup>134</sup> Article 122-1's test considers both the defendant's awareness (cognitive prong) and ability to control their conduct (external prong).<sup>135</sup> Therefore, Article 122-1's applicability is not limited to one prong or the other, and each factor will likely be considered, just like the approach adopted by the Model Penal Code.

However, unlike the different insanity tests in U.S. criminal law, Article 122-1 does not seem to draw a difference between *absolute* and *substantial* cognitive incapacity or inability to control conduct. In other words, Article 122-1 applies when either cognition or control over conduct is "abolished,"<sup>136</sup> but it does not specify the evidence required to demonstrate complete abolishment. One may argue that such an evidentiary standard need not be specified in the statute itself but rather be assessed by a psychological expert. But the French Penal Code's lack of specificity as to the evidentiary requirements of cognitive impairment for the defense to be successful makes it difficult for the examining judge to consistently assess "abolishment."

Furthermore, the term "discernment" has not been defined in either the French Penal Code or the Code of Penal Procedure, nor by the legislature in any other act.<sup>137</sup> In contrast, the insanity tests utilized in U.S. criminal law, which contain a cognitive prong (except for the irresistible impulse test), offer a legal definition of cognition or specify the criteria to be used by experts in assessing cognitive incapacity.<sup>138</sup> For instance, for an insanity defense to be successful, the *M'Naghten* test necessitates the inability to recognize either the nature and quality of the criminal act or the wrongfulness of the act itself, while the MPC test mandates a lack of substantial capacity to appreciate the wrongfulness of the conduct.<sup>139</sup>

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<sup>133</sup> *Id.* at 59.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The language "aboli son discernement" designates the awareness prong; "altéré le contrôle de ses actes" designates the external prong (conduct).

<sup>136</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 122-1 (Fr.).

<sup>137</sup> Groupe ISP – Droit Pénal, *Le discernement en droit pénal*, <https://www.prepa-isp.fr/wp-content/uploads/2018/09/Police-Annales-Pénal-2004.pdf> [<https://perma.cc/TPV3-DT74>] (last visited Apr. 6, 2024).

<sup>138</sup> *See* Part III.D.i.

<sup>139</sup> *Id.*

Furthermore, Article 122-1 does not clarify whether “discernment” signifies cognitive capacity to appreciate moral or legal wrong; this lack of definition can induce divergent conclusions about a defendant’s mens rea. For instance, if Kobili Traore was legally insane and did not perceive the moral wrong of his act—under theories discussed in Part II.B, such as radicalization—he might have still understood the legal wrong behind it. Indeed, while murdering Sarah Halimi, he told her she would “pay,” suggesting the possibility that he thought his act was morally right. Subsequently, he hid at Dr. Halimi’s neighbors’ home until police officers apprehended him,<sup>140</sup> suggesting that he may have been able to perceive legal wrong. Consequently, the lack of clarity within Article 122-1 complicates the task of French criminal judges when assessing a defendant’s cognitive incapacity or abolition of discernment and, consequently, its applicability.

In summary, Article 122-1-1 would not have altered the *Halimi* decision, and it failed to fill crucial lacunae in French criminal law. French criminal law does not differentiate between insanity and competency to stand trial. Moreover, allowing the defense to plead a defendant’s lack of criminal responsibility (equivalent to the U.S. insanity defense) in front of a judge at an early pre-trial stage precludes jury-based decisionmaking in insanity cases. Additionally, Article 122-1-1 overlooks the idea of involuntary consumption of psychoactive substances and, consequently, settled or fixed insanity, which may have applied in Traoré’s case. Furthermore, even in cases that proceed to trial, Article 122-1 lacks sufficient guidelines for judges and psychiatric experts to assess whether the accused has a “psychological or neuropsychological disorder” that leads to their abolition of discernment (i.e., cognition), unlike the nuanced interpretations adopted by U.S. courts and language laid out by the MPC. This Note now considers the various measures that the French legislature could adopt to increase the efficiency and justice achieved in its criminal justice system.

#### IV. PUSHING FOR MORE JUSTICE-ORIENTED DECISION-MAKING IN FRENCH COURTS

In France, the debate on criminal responsibility has been more prominent than ever since use of the insanity defense has become

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<sup>140</sup> Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 14, 2021, Bull. crim., No. 404 (Fr.).



standard practice in criminal matters.<sup>141</sup> This trend can be attributed to the fact that the defense can be raised as early as during the investigation stage, without necessitating a distinction between incompetency and insanity, and often resulting in adjudication before a trial occurs.<sup>142</sup>

An illustrative example of this situation arose in October 2022, when twelve-year-old Lola Daviet was found dead in a travel trunk in Paris's Nineteenth Arrondissement.<sup>143</sup> The accused, Dahbia B., was considered fit to cooperate with investigators, but her attorney quickly suggested her lack of criminal responsibility.<sup>144</sup> It is plausible that the defense might convince the examining judge of Dahbia B.'s lack of criminal responsibility even before a trial takes place. Such an outcome would prove highly controversial, especially given the profound emotions and grief this case stirred throughout the entire country.<sup>145</sup>

In February 2023, Pierre Palmade, a French actor and comedian was responsible for a fatal car accident that severely injured three individuals, one of whom was a six-year-old boy, and caused the death of an unborn baby.<sup>146</sup> Renowned for his ongoing struggle with drug addiction, Palmade was driving under the influence at the time of the

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<sup>141</sup> See Emmanuelle Hunzinger, *Meurte de Lola : la question de la responsabilité pénale de Dahbia B. posée*, FRANCEINFO (Oct. 18, 2022, 5:21 PM), <https://france3-regions.francetvinfo.fr/paris-ile-de-france/paris/meurtre-de-lola-la-question-de-la-responsabilite-penale-de-dahbia-b-posee-2637996.html> [https://perma.cc/G49P-N4YY]; see also Shirli Sitbon, *In France, Perpetrators of Anti-Semitic Attacks Claim Insanity to Elude Justice*, HAARETZ (Nov. 23, 2019), <https://www.haaretz.com/world-news/2019-11-23/ty-article-magazine/premium/in-france-perpetrators-of-anti-semitic-attacks-claim-insanity-to-elude-justice/0000017f-ef3d-ddba-a37f-ef7f8c0a0000> [https://perma.cc/P8ZL-ECBL].

<sup>142</sup> See CODE DE PROCEDURE PENALE [C. PR. PEN.] [CODE OF CRIMINAL PROCEDURE] art. 706-123 (Fr.).

<sup>143</sup> *Mort de Lola à Paris : ce que l'on sait du parcours de la suspecte*, LE MONDE, [https://www.lemonde.fr/societe/article/2022/10/18/mort-de-lola-a-paris-une-suspecte-au-parcours-de-vie-chaotique-et-marque-par-la-violence\\_6146358\\_3224.html](https://www.lemonde.fr/societe/article/2022/10/18/mort-de-lola-a-paris-une-suspecte-au-parcours-de-vie-chaotique-et-marque-par-la-violence_6146358_3224.html) [https://perma.cc/HE8A-KFK9] (Oct. 18, 2022, 7:08 PM).

<sup>144</sup> *Id.*

<sup>145</sup> Yunnes Abzouz, *À la marche en hommage à Lola, sa famille célèbre « la solidarité, la fraternité »*, MEDIAPART (Nov. 17, 2022, 8:08 AM), <https://www.mediapart.fr/journal/france/171122/la-marche-en-hommage-lola-sa-famille-celebre-la-solidarite-la-fraternite> [https://perma.cc/GLR4-NPJ2].

<sup>146</sup> Alexandra Fauché, *Pierre Palmade: French Comic Faces Charges over Drug-Fuelled Crash*, BBC NEWS (Feb. 15, 2023), <https://www.bbc.com/news/world-europe-64642641> [https://perma.cc/37V2-J7XD].

collision.<sup>147</sup> Foreseen by many, Palmade's legal representatives are anticipated to assert criminal irresponsibility,<sup>148</sup> evidenced by his current placement in a substance abuse center.<sup>149</sup> This legal matter again illustrates the complexities inherent in ascertaining criminal responsibility within the framework of the French legal system. The outcome of the forthcoming trial is poised to engender profound public debate and scrutiny, given the gravity of the incident and the contentious nature of the defendant's plea, especially if the defense pleads lack of criminal responsibility under Article 122-1-1.

To enhance public trust in the judicial system and, most importantly, prevent outcomes like the *Halimi* case, the French legislature must consider new approaches that permit critical cases to be tried while adhering to the longstanding legal practice of excluding the mentally insane from court proceedings. The proposed model should ensure that defendants who are accused of murder are competent to stand trial at the time of the proceeding will ultimately face a jury.

Juries are advantageous because they consist of ordinary citizens rather than judges, giving them a perspective that judges often do not possess. According to the liberation theory, juries are "liberated" from the constraints of the law and consider extralegal values when arriving at verdicts.<sup>150</sup> As Harry Kalven and Hans Zeisel argue, the judge's perspective on the case is a "baseline representing the law,"<sup>151</sup> while the close cases in which the jury come to a different conclusion constitute a "war with the law."<sup>152</sup> Others suggest that "when juries decide to acquit in cases in which judges would have convicted, they do not arrive at this decision because of sentiment, but rather do so because

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<sup>147</sup> *Id.*

<sup>148</sup> As of January 2024, Palmade's trial remains pending.

<sup>149</sup> Gwendoline Gauven, *Pierre Palmade : quelles conditions médicales rendent irresponsable pénalement?*, MEDISITE (Feb. 22, 2023), <https://www.medisite.fr/a-lhopital-pierre-palmade-queles-conditions-medicales-rendent-irresponsable-penalement.5686731.734030.html> [<https://perma.cc/77JC-ZVKU>].

<sup>150</sup> Amy Farrell & Daniel Givelber, *Liberation Reconsidered: Understanding Why Judges and Juries Disagree About Guilt*, 100 J. CRIM. L. CRIMINOLOGY 1549, 1551 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 165 (1966) (noting that Kalven and Zeisel's research, which gave rise to the liberation hypothesis, "has been cited in twenty-five different Supreme Court decisions (as well as more than 190 decisions of other courts) as support for a proposition concerning the behavior of juries") (internal footnote omitted).

<sup>151</sup> KALVEN & ZEISEL, *supra* note 150, at 499.

<sup>152</sup> Farrell & Givelber, *supra* note 150, at 1554 (quoting KALVEN & ZEISEL, *supra* note 164, at 495).

they evaluate the evidence differently than judges.”<sup>153</sup> In any case, it can be reasonably inferred from both theories that jury trials add a valuable dimension to factfinding in important criminal cases.

To allow the jury to play a part in criminal proceedings involving the insanity defense, French criminal law should first evaluate the defendant’s mental state at the time of the proceedings and second at the time of the offense. The initial assessment of the defendant’s mental state would follow a U.S.-based approach to competency to stand trial, wherein the judge would determine the defendant’s competence during the trial with the aid of psychiatric or psychological expert reports.<sup>154</sup> On the other hand, evaluation of the defendant’s mental state *at the time of the offense* would occur for the purposes of determining insanity under Article 122-1 only if the judge has already ruled on the defendant’s competency to stand trial. In this scenario, the jury would deliberate on the legal defense, and if it renders a verdict of not guilty by reason of insanity, the criminal charges against the defendant would be reduced or dismissed. This model would ensure that all criminal defendants who are competent to stand trial cannot escape trial solely because they lack criminal intent *at the time of the offense*. This model would also guarantee that a defendant found incompetent to stand trial and subsequently ordered to undergo treatment would face trial once rehabilitated.<sup>155</sup> In the *Halimi* case, this model would have guaranteed Traoré’s trial, especially considering his upcoming discharge from the psychiatric hospital.<sup>156</sup>

The legislature should consider other revisions to Article 122-1 that will offer more clarity to French courts and enable them to make more justice-oriented decisions. First, the legislature should consider amending Article 122-1 to incorporate the defense of settled insanity. Doing so would provide judges and experts with a better understanding of the threshold required by law to establish discernment, as required by Article 122-1. It would also alleviate the difficulty of assessing a defendant’s specific intent to consume substances in order to commit a crime *at one moment in time* when they have consumed drugs for many years *without any intent to subsequently commit a crime*. In the *Halimi* case, the issue of settled insanity under Article 122-1’s purview led to divergent assessments by psychiatric

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<sup>153</sup> *Id.* at 1585.

<sup>154</sup> See 18 U.S.C. § 4241(d)-(e) for the U.S. application of this principle.

<sup>155</sup> See *id.* § 4241(d) for the U.S. application of this principle.

<sup>156</sup> HABIB, *supra* note 33, at 7.

experts.<sup>157</sup> If the concept of “discernment” (i.e., cognition) in the context of Article 122-1 had included settled insanity, the examining judge might have referred Traoré to a jury. The French legislature could adopt one of the existing settled insanity tests used in the United States.<sup>158</sup> This would require significant effort, however, as the French Penal Code would need to define specific terms to establish applicable standards. For instance, adopting a *Skinner*-like test for settled insanity should include clear and recognized definitions of “insanity,” a “fixed and stable” mental disorder, and a “reasonable duration of time,”<sup>159</sup> all of which could be extensively discussed in the legislature and passed through a simple majority in the Parliament.<sup>160</sup> This adjustment would contribute to a more comprehensive and equitable assessment of criminal responsibility in cases involving issues of mental capacity and drug-induced psychosis.

The Parliament may encounter several challenges in recognizing the settled insanity defense. First, reaching a consensus on a specific test to establish a prima facie case of settled insanity and agreeing on definitions for the elements of such a test could be a lengthy process. Additionally, law enforcement may advocate against the settled insanity defense because it may seek to discourage voluntary drug consumption and use of the defense by individuals with self-induced drug-related mental illness. If they do, an insanity defense can still be established under Article 122-1, as one may be simultaneously intoxicated and insane notwithstanding a claim of settled insanity.

Article 122-1-1 is inherently deficient because it excludes involuntary intoxication from its scope.<sup>161</sup> Therefore, if the French Parliament chooses not to adopt the settled insanity defense because it aims to deter people from voluntarily ingesting drugs or to prevent those

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<sup>157</sup> For example, Daniel Zagury, a renowned court expert, testified that Traore’s cognition was not “abolished” but rather “altered” because of a “conscious and voluntary” consumption, which had become even more frequent before his atrocious act. *Id.* at 2. On the other hand, other experts explained that Traore’s state of *delirium* as being a direct consequence of chronic mental illness. *Id.* at 8.

<sup>158</sup> *See supra* Part II.B.

<sup>159</sup> Meloy, *supra* note 81, at 448.

<sup>160</sup> *La majorité simple, suffi sante pour faire passer des lois ?*, PUBLIC SENAT (June 22, 2022, 12:11 PM), <https://www.publicsenat.fr/article/politique/la-majorite-simple-suffisante-pour-faire-passer-des-lois-214382> [https://perma.cc/7J4C-KWZC].

<sup>161</sup> Note that Article 122-1-1 also does not consider the issue of intoxication resulting from either an accident, drug prescription errors (i.e., due to negligence), or the existence of a pre-existing pathology.

suffering from drug abuse-induced mental illness from being excused for their crime, amendments must differentiate between voluntary and involuntary intoxication. Neglecting to do so would incentivize defendants who voluntarily consumed drugs, and who would otherwise be unable to access the defense in 122-1-1, to plead not guilty by reason of insanity by claiming involuntary consumption of the drugs in question. Ultimately, this would render Article 122-1-1 improperly and excessively cited, as may already be the case.

In order to prevent the aforementioned consequences, the French Parliament must clarify Article 122-1-1. First, the Penal Code should provide explicit guidance on what constitutes “discernment” from a legal standpoint. This could be achieved through the cognitive prongs in the insanity defenses defined by U.S. jurisdictions or by setting out criteria for assessing cognitive incapacity.<sup>162</sup> This clarification would help French courts properly adjudicate cases where a defendant may not have perceived the moral wrong of their crime but understood its legal wrong. Second, the legislature should specify the threshold required to attain complete abolishment of “discernment,” or draw a line between absolute and substantial cognitive incapacity or inability to control conduct, much like the approach in U.S. criminal law. Third, the meaning of “very close” in Article 122-1-1 should be defined to include a narrow and specific time window between the initial drug ingestion and the commission of the crime. This would likely require considering the long- and short-term psychological effects of various psychoactive substances, or at least the ones that are among the most likely to be consumed in France, including cocaine, ecstasy, and heroin.<sup>163</sup> Lastly, providing guidance on external factors contributing to a defendant’s lack of cognition, such as their history of radicalization and prolonged use of substances, could be an innovative step.

## V. CONCLUSION

The issue of criminal responsibility has become a prominent subject of debate in France due to the widespread use of the insanity defense in criminal cases.<sup>164</sup> To restore public confidence in the judicial

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<sup>162</sup> See Part III.D.1.

<sup>163</sup> *Share of People Aged 16 to 30 Using Psychoactive Substances Regularly in France in 2022, by Gender*, STATISTA (Mar. 11, 2024), <https://www.statista.com/statistics/947198/illicit-drugs-users-by-gender-by-type-france/> [<https://perma.cc/K4T7-522Z>].

<sup>164</sup> See Hunzinger, *supra* note 141; Sitbon, *supra* note 141.

system, the French legislature must amend its criminal laws to allow insanity cases to be tried, while still upholding the moral duty of excluding the mentally insane from the courts. The legislature would need to first remedy Article 122-1-1's most significant flaw, the difficulty to prove whether a defendant's drug consumption resulted in any specific intent to commit a crime, especially when the defendant has long consumed drugs with no such intent. In that regard, Article 122-1 should be amended to include the defense of settled insanity, which would allow judges and experts to better comprehend the threshold required by 122-1 to attain discernment (i.e., cognitive capacity). The law should also be amended to contrast between two distinct steps of criminal procedure: evaluating the defendant's mental state *first* at the time of the proceedings (as the equivalent of the principle of competency to stand trial) and *then* at the time of the offense (as the equivalent of the insanity defense). Drawing such a distinction would allow a jury to deliberate on the defendant's potential insanity and ensure that all criminal defendants who are competent to stand trial do not escape it on the grounds that they lacked criminal intent at the time of the offense.

Moreover, the legislature should recognize that even without settled insanity, an insanity defense can still be asserted under Article 122-1. To prevent improper reliance on Article 122-1-1, additional amendments are necessary. These include: (1) distinguishing voluntary from involuntary intoxication, and, more specifically, identifying whether involuntary intoxication could ever constitute a defense; (2) defining the term "very close" to encompass a specified time period between the initial drug ingestion and commission of the crime; and (3) taking inspiration from the various approaches to the insanity defense in the United States. In following the approaches implemented in the United States, the French legislature should (a) provide guidance as to what constitutes "discernment" (cognition) from a legal standpoint; (b) clarify whether "discernment" signifies cognitive incapacity to appreciate moral or legal wrong; and (c) specify the threshold required by law to attain complete abolishment of discernment, which may be done by differentiating between absolute and substantial cognitive incapacity/inability to control conduct, thereby recognizing gradations of mental impairment. Such proposals would enable judges in French criminal courts to more easily assess a defendant's cognitive incapacity and determine Article 122-1's applicability. As a result, these clarifications and amendments will prevent Article 122-1-1 from being both improperly and excessively cited, which would ultimately

increase public confidence in the French judicial system and prevent outcomes like the *Halimi* case.