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# The Status and Legitimacy of M’Naghten’s Insane Delusion Rule

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*This Article investigates jurisdictions’ compliance with M’Naghten’s directive for how to treat delusions in insanity cases and assesses the validity and reasonableness of courts’ application of the law. Most U.S. jurisdictions employ an insanity test roughly modeled on the rule articulated in the 1843 M’Naghten’s Case. This test focuses on a defendant’s inability to know, because of a mental disease, the nature of her act or its wrongfulness. But the M’Naghten judges also issued a second rule — particular to delusions — that has received much less attention. This rule holds that, when the defendant labors under a “partial delusion only,” her culpability must be assessed as if the factual content of her delusion were true. Thus, if a person with delusions killed as she believed in self-defense, she should be acquitted. But if she killed anticipating future harm, she would be convicted of intentional murder. Commentators have long dismissed the delusion rule as obsolete, and the last examination of states’ use of the rule was sixty years ago.*

*This Article excavates the insane delusion rule and assesses its current force. Its review reveals the rule maintains its vibrancy, continues to evolve, and in some places is growing in influence. Nine jurisdictions — California,*

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Florida, Georgia, Nevada, Oklahoma, Tennessee, Texas, and the federal and military systems — give special significance to delusions. These jurisdictions vary in their understanding of how the rule relates to general insanity; whether the rule functions only to establish (not defeat) insanity; and whether it operates as a background principle or manifests in jury instructions. The status of the rule is currently in flux, so understanding its permutations may inspire movement in the law.

Next, the Article subjects the insane delusion rule and its current variants to the crucible of modern science. The justness of the rule turns on whether a defendant with delusions likely possessed — and could have fairly been expected to exercise — adequate reasoning abilities while in the throes of psychosis. To examine this question, the Article applies insights from the cognitive sciences on how delusions are formed, are maintained, and may affect moral decision-making. Research in psychology and cognitive neuroscience suggests that the cognitive biases and emotional impairments that contribute to the origin and maintenance of delusions impair the capacity for moral decision-making in delusional individuals, at least in the context of decisions connected to those delusions. The scientific findings demonstrate the inseparability of cognition, emotion, and volition and thus hold implications for the insane delusion rule, insanity more generally, and the broader legal treatment of individuals with psychosis.

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#### INTRODUCTION

Robert Loredo was diagnosed with paranoid schizophrenia when he was twenty-two years old.<sup>1</sup> At age twenty-seven, he shot and killed two men — one was his father.<sup>2</sup> Having been off his antipsychotic medication for four months, Loredo became convinced that a Mexican drug cartel had infiltrated his family's business, an auto repair shop, and transformed it into a drug distribution system. He believed that the cartel planned to kill him because he would not cooperate in transporting drugs and that his father was in on the scheme. He understood that members of the cartel were tracking his movements and listening to his conversations.

Loredo's mental illness, schizophrenia, produced a delusion that inspired the killings.<sup>3</sup> How will this delusion factor into Loredo's insanity defense for the murder charges? Does it matter whether the circumstances of the delusion, if true, would have justified the killings? The answer to these questions depends on the jurisdiction in which the crimes occurred. In some jurisdictions, whether the delusion squares with a legal justification will largely determine the success or failure of a defendant's insanity defense.

The possibility of differential treatment arises because of an oft-neglected rule in *M'Naghten's Case*, the 1843 English case which provides the prevailing standard for insanity in the United States.<sup>4</sup> The

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<sup>1</sup> "Paranoid schizophrenia" is currently an informal diagnosis used by clinicians, as this subtype of schizophrenia does not appear in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders.

<sup>2</sup> The facts in this hypothetical were inspired by those in *People v. Leeds*, 192 Cal. Rptr. 3d 906, 909-10 (Ct. App. 2015), *as modified on denial of reh'g*.

<sup>3</sup> "Delusions are fixed beliefs that are not amenable to change in light of conflicting evidence." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87 (5th ed. 2013).

<sup>4</sup> *See infra* Part I.

*M'Naghten* judges declared that “in all cases” a defendant may establish her insanity if she proves that, at the time of committing the act and because of a mental disease or defect, she either did not know the nature and quality of her act, or did not know what she was doing was wrong.<sup>5</sup> Elements of this standard persist in the insanity standards of most states and the federal government.<sup>6</sup>

But the *M'Naghten* judges issued a second rule as well, this one particular to delusions. This rule (the insane delusion rule) holds that, when the defendant “labours under . . . [a] partial delusion only, and is not in other respects insane, . . . [she] must be considered in the same situation as to responsibility if the facts with respect to which the delusion exists were real.”<sup>7</sup> Thus, if a person killed a man because she believed (in her delusional state) that he posed an imminent and deadly threat, then she would be acquitted on grounds of insanity because, had the facts been as she perceived, her deadly act would have been justified in self-defense. On the other hand, if the perceived facts suggested the man only posed a non-deadly or non-imminent threat, she would be convicted of intentional murder. Commentators have long believed the delusion rule to be “obsolete” and in “desuetude,”<sup>8</sup> and the last examination of states’ treatment of delusions within their insanity standards took place more than half a century ago.<sup>9</sup>

This Article evaluates the current status of the insane delusion rule in *M'Naghten* jurisdictions and analyzes courts’ application of the law

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<sup>5</sup> *M'Naghten's Case* (1843) 8 Eng. Rep. 718; 10 Cl. & Fin. 200, 210 (HL).

<sup>6</sup> See *infra* note 38. Important topics unaddressed by this Article include possible rationales for the insanity defense, how these rationales fit within defensible theories of punishment and excuse, and how well the *M'Naghten* test satisfies any justification for the insanity defense. For a collection of critiques of *M'Naghten* and its right-and-wrong test, see HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 63-68 (1954).

<sup>7</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 211. Scholars also call this rule the partial insanity rule, the partial delusion rule, the specific delusion rule, the mistake of fact rule, the counterfactual rule, and the delusional limb of *M'Naghten*.

<sup>8</sup> GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* §§ 145, 160 (2d ed. 1961); see also H. Barnes, *A Century of the McNaghten Rules*, 8 *CAMBRIDGE L.J.* 300, 305 (1944) (arguing that the delusion test “is no longer accepted anywhere”). Others note the rule but are dismissive of its impact. See 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 7.2(b)(5) (3d ed. 2020). While the American Bar Foundation mentioned the rule in its 1971 edition of *The Mentally Disabled and the Law*, the most recent edition of this book does not address it. See AM. BAR FOUND., *THE MENTALLY DISABLED AND THE LAW* 380 (Samuel J. Brakel & Ronald S. Rock eds., rev. ed. 1971). State treatises on insanity law — in states that follow the rule — neglect the topic or sometimes omit it altogether. See *infra* notes 104, 135 and accompanying text (offering examples of treatises and handbooks that omit or neglect the insane delusion rule in Texas and Florida, respectively).

<sup>9</sup> See WEIHOFEN, *supra* note 6, at 104, 108.

given the relationship of delusions to moral reasoning. In so doing, it makes two primary contributions. First, it excavates the insane delusion rule and assesses its current force. Notably, a comprehensive review of the insanity statutes and case law in United States jurisdictions reveals that the insane delusion rule maintains its vibrancy, continues to evolve, and in some places is growing in influence.<sup>10</sup> The rule is employed in nine jurisdictions that, combined, account for roughly half of the current prison population.<sup>11</sup> These jurisdictions vary in their understanding of the relationship of the delusion rule to general insanity, with some considering the rule a quintessential example of the general test,<sup>12</sup> and others finding it applicable only when the general test is unavailing.<sup>13</sup> They also differ in their operationalization of the rule, including whether they use the rule solely to benefit the defendant, or whether its use may deprive the defendant of an insanity acquittal.<sup>14</sup> Additionally, the rule may operate as a background legal principle or manifest in instructions to the jury, given at the defendant's request or possibly over her objection. The status of the rule in multiple jurisdictions is currently in flux,<sup>15</sup> so understanding its various permutations and their effects may inspire movement in the law.

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> See U.S. DEP'T OF JUSTICE, NCJ 252156, PRISONERS IN 2017, at 4 tbl.2, 28 tbl.18 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/63NR-AD2U>] (showing these nine jurisdictions made up approximately 47% of the prison population in 2017); *infra* Part II (discussing delusions' significance in insanity jurisprudence in California, Florida, Georgia, Nevada, Oklahoma, Tennessee, Texas, federal courts, and military courts).

<sup>12</sup> See *infra* Part II.B.2 (discussing the use of the delusion rule by Tennessee, Oklahoma, the military, and federal justice systems).

<sup>13</sup> See *infra* Part II.B.1 (discussing Georgia's current use of the rule and Florida's previous use of the rule).

<sup>14</sup> See *infra* Part II. The information on state practices presented in this Article derives from appellate decisions, jury instructions, treatises, and state practice materials. These resources almost certainly paint an incomplete and imperfect picture of trial practice. Surveys of trial judges or defense attorneys, or a review of trial transcripts (where available), could provide a useful supplement to this material.

<sup>15</sup> For example, in California, the insane delusion rule appears in nonofficial but not official jury instructions. Compare CAL. JURY INSTR. – CRIM. 4.06 (2020) (instructing on insane delusion as a defense), with JUD. COUNCIL OF CAL. JURY INSTR. – CRIM. 3450 (2020), [https://www.courts.ca.gov/partners/documents/CALCRIM\\_2020.pdf](https://www.courts.ca.gov/partners/documents/CALCRIM_2020.pdf) [<https://perma.cc/L9SD-AKD2>]. Florida's law on the treatment of insanity claims based on a perceived, but delusional, justification is muddled and in need of clarification. See *infra* Part II.B.1.b. Although Texas has long followed the insane delusion rule, one 2009 unpublished case found the state legislature eliminated this common law defense when it enacted a new penal code in 1974. See *infra* note 105. In addition, some of the most important decisions on insane delusions have been issued in the last decade. See, e.g., *United States v. Mott*, 72 M.J. 319

This Article's second contribution is to subject the insane delusion rule and its current variants to the crucible of modern science. Each variation relies on critical assumptions about the type of disordered thinking that should relieve responsibility and the relationship of delusions to moral reasoning. The rule rejects the notion that a genuine mistake of fact derived from mental disorder should always excuse. Instead, the rule holds that delusional mistakes without justifying or excusing content will not excuse, presumably because of the culpability inherent in the defendant's decision to act in a way (had circumstances been as she believed) prohibited by law. The justness of holding an individual to account in these circumstances turns on whether the delusional defendant likely possessed — and could have fairly been expected to exercise — adequate reasoning abilities while in the throes of psychosis.<sup>16</sup> Therefore, critical to the soundness and humanity of the insane delusion rule is whether delusions do or may signal impairments destructive of sound decision-making within the context of decisions involving those delusions.

Most scholars who have remarked upon the insane delusion rule over the last 150 years have declared it unjust, often on scientific grounds. They have argued that the rule ignores the reality that delusions are not “partial” but rather affect the whole mind,<sup>17</sup> unreasonably expects a person with delusions to reason like a person without a mental disorder,<sup>18</sup> and distinguishes between delusions of equivalent psychological composition.<sup>19</sup> This Article supplements and deepens those arguments by applying insights from the cognitive sciences on

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(C.A.A.F. 2013) (applying an objective interpretation of “wrongful” when the defendant suffers from an insane delusion); *People v. Leeds*, 192 Cal. Rptr. 3d 906 (Ct. App. 2015), as modified on denial of reh'g (holding that, in cases involving delusional justified force, a trial court should provide instructions on the legal standard for self-defense to allow the jury to assess a defendant's understanding of the wrongfulness of her acts); *Martin v. State*, 110 So. 3d 936, 938 (Fla. Dist. Ct. App. 2013) (holding that the defendant was entitled to a self-defense instruction due to his delusions at the time of the charged event).

<sup>16</sup> Psychosis carries several possible meanings. See Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik*, 9 CRIM. L. & PHIL. 645, 655-57 (2015). The fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* lists a number of psychotic disorders, including schizophrenia and delusional disorder. AM. PSYCHIATRIC ASS'N, *supra* note 3. In addition, Michael Moore articulates a “more substantive” medical definition that focuses on gross impairment of reality-testing and severe abnormalities of behavior. See Moore, *supra*, at 656. In this latter sense, observes Moore, the psychoses roughly correspond with the “non-medical, common sense view of madness.” *Id.* at 657.

<sup>17</sup> See *infra* notes 75–77, 222.

<sup>18</sup> See *infra* note 46.

<sup>19</sup> See *infra* note 223.

how delusions are formed, are maintained, and may affect moral decision-making.<sup>20</sup>

These scientific literatures reveal that the series of cognitive and emotional impairments that contribute to the formation and maintenance of delusions holds significant consequences for moral decision-making related to those delusions.<sup>21</sup> Research in the fields of psychology and cognitive neuroscience has established a framework by which to understand moral reasoning in healthy individuals. Separately, researchers in the cognitive sciences have been investigating the relationship of delusions to cognitive and emotional impairments corrosive of sound decision-making. This Article combines and assesses these literatures to find that the significant cognitive and emotional impairments associated with delusions could impair moral decision-making, especially in the context of decisions colored by delusional content.<sup>22</sup> These findings should inform usage of the insane delusion rule and the general right-and-wrong test more broadly.

The Article proceeds in five parts. Part I reviews the origin of the insane delusion rule and its relationship to the general right-and-wrong test in *M'Naghten*. Part II provides a detailed exposition of jurisdictions' current use of the rule. It identifies primary variations and explores how each works in practice. Crucially, while modern commentators find the affirmative aspect of the insane delusion rule unobjectionable,<sup>23</sup> experience suggests its use may weaken a defendant's general insanity defense.

Part III constitutes the scientific contribution of the Article. It first presents the leading psychological frameworks of decision-making and moral reasoning. It then plumbs the cognitive sciences literatures to detail the cognitive impairments that support delusions. Next, it

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> See, e.g., Lea Ludwig, Dirk Werner & Tania M. Lincoln, *The Relevance of Cognitive Emotion Regulation to Psychotic Symptoms – A Systematic Review and Meta-Analysis*, 72 *CLINICAL PSYCHOL. REV.* 1, 1-2, 8-13 (2019) (explaining that “difficulties in [emotion regulation] are closely linked to psychotic symptoms”); Thomas Ward & Philippa A. Garety, *Fast and Slow Thinking in Distressing Delusions: A Review of the Literature and Implications for Targeted Therapy*, 203 *SCHIZOPHRENIA RSCH.* 80, 80-83 (2019) (discussing cognitive predispositions of people who suffer from delusions, including the tendency to jump to conclusions); Lisong Zhang, Zhongquan Li, Xiaoyuan Wu & Ziyuan Zhang, *Why People with More Emotion Regulation Difficulties Made a More Deontological Judgment: The Role of Deontological Inclinations*, *FRONTIERS PSYCHOL.*, Nov. 2017, at 5 (finding that “individuals with more emotional regulation difficulties” preferred more deontological actions).

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* note 341.

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analyzes dysfunctions in emotion regulation associated with psychosis, emotions' contribution to the existence of delusions, and the effect of stress on persecutory delusions. It concludes by assessing the possible effect of these impairments on moral reasoning.

Part IV uses the lessons derived from Parts II and III to propose legal reforms. It endorses the affirmative aspect of the insane delusion rule and suggests a form of the rule for possible adoption. This rule would permit delusional beliefs to satisfy the insanity defense in two circumstances: (a) when, had they been true, the beliefs would have provided a justification or excuse for the criminal act, and (b) when the mental disorder that caused the delusional beliefs (of any content) substantially impaired the individual's capacity for moral reasoning. Finally, Part V briefly surveys the broader lessons that the science of delusions offers for the law of insanity and the legal treatment of individuals with psychosis, including rethinking the artificial distinction between cognition, emotion, and volition and considering the creation of a generic partial excuse. These topics will be explored in future work.<sup>24</sup>

#### I. M'NAGHTEN'S INSANE DELUSION RULE

The existence of, and ambiguities in, the insane delusion rule stem from two English cases in the early nineteenth century. In 1843, Daniel M'Naghten shot and killed Edward Drummond, private secretary to Prime Minister Sir Robert Peel, believing him to be Sir Robert.<sup>25</sup> The defendant allegedly suffered from the paranoid delusion that the Tories, which included Sir Robert, were harassing him.<sup>26</sup> He attempted to kill

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<sup>24</sup> See E. Lea Johnston, *Delusions and Moral Incapacity*, 97 IND. L.J. (forthcoming 2022) [hereinafter *Delusions and Moral Incapacity*] (on file with authors); E. Lea Johnston & Vincent T. Leahey, *Delusions and Partial Responsibility* (Mar. 25, 2021) (unpublished manuscript) (on file with authors).

<sup>25</sup> For a book-length treatment of *M'Naghten's Case*, see generally RICHARD MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN* (1981). Controversy surrounds the spelling of Daniel M'Naghten's name. As Richard Moran recounts, M'Naghten's surname has been spelled at least twelve different ways. *Id.* at xi-xiii. This Article uses "M'Naghten," as his name was spelled in his English legal case.

<sup>26</sup> Daniel M'Naghten, in his single public statement concerning his motive, explained:

[The Tories] follow, persecute me wherever I go, and have entirely destroyed my peace of mind. . . . I cannot sleep nor get no rest from them in consequence of the course they pursue towards me. . . . They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact, they wish to murder me.

Sir Robert to terminate the persecution. M'Naghten advanced a "partial insanity" defense at trial.<sup>27</sup> His chief counsel argued that "any act committed as the result of a delusion was by definition an act of insanity" — a test at odds with the prevailing common law doctrine that irresponsibility depended upon total inability to distinguish right from wrong.<sup>28</sup> The medical evidence established that M'Naghten was afflicted with a "morbid delusion" that "left him no such perception [of right and wrong] and . . . he was not capable of exercising any control over acts which had a connection with his delusions."<sup>29</sup> When the solicitor general chose not to contest that evidence, Chief Justice Nicholas Tindal stopped the trial.<sup>30</sup> The jury found M'Naghten "Not guilty, on the ground of insanity."<sup>31</sup>

The public and the Queen were outraged by the verdict.<sup>32</sup> In response, the House of Lords issued four questions to the fifteen judges of England in an attempt to understand "the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort."<sup>33</sup> Reflecting the undisputed factual setting of *M'Naghten's Case*, the Lords framed their questions within the context of "insane delusions."<sup>34</sup> Questions II and III concerned jury instructions.<sup>35</sup> Responding on behalf of fourteen judges,<sup>36</sup> Chief Justice Tindal pronounced this standard for insanity, which has come to be known as the general test:

[I]n all cases . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know

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*Id.* at 10.

<sup>27</sup> Richard Moran, *The Modern Foundation for the Insanity Defense: The Cases of James Hadfield (1800) and Daniel McNaughtan (1843)*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 31, 38 (1985) [hereinafter *The Modern Foundation*].

<sup>28</sup> *Id.* For an illuminating yet pithy account of the historical development of the right and wrong test, see WEIHOFEN, *supra* note 6, at 52-59.

<sup>29</sup> M'Naghten's Case (1843) 8 Eng. Rep. 718; 10 Cl. & Fin. 200, 201 (HL).

<sup>30</sup> Moran, *The Modern Foundation*, *supra* note 27, at 31, 38-39.

<sup>31</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 202.

<sup>32</sup> See Moran, *The Modern Foundation*, *supra* note 27, at 31, 39-40.

<sup>33</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 202-03.

<sup>34</sup> See *id.* at 203 (including "insane delusion" in Questions I, II, and IV). A fifth question concerned expert testimony and is not relevant to this discussion.

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 208. Mr. Justice Maule delivered a separate opinion. *Id.* at 204.

the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>37</sup>

Today, twenty-seven states, plus the federal and military systems of justice, use insanity standards that include at least the latter part of the *M'Naghten* test, which this Article refers to as the general right-and-wrong test for insanity.<sup>38</sup>

Chief Justice Tindal articulated a second rule which applies solely to insane delusions. To Question IV — “If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?” — the Chief Justice answered:

[T]he answer must of course depend on the nature of the delusion: but, . . . [assuming] that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.<sup>39</sup>

The judges' answers left unclear whether the insane delusion rule merely provides an example of the general right-and-wrong test, or whether it creates a distinct test for irresponsibility that could supplement the general insanity standard or even detract from it.<sup>40</sup> Commentators' conclusions on this point have diverged.<sup>41</sup> The

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<sup>37</sup> *Id.* at 210.

<sup>38</sup> As defined in this Article, jurisdictions whose wrongfulness prong is modeled on the *M'Naghten* standard declare insane a person who, because of her mental disease, *did not* — or *was unable* to — know or appreciate the wrongfulness of her action (as opposed to one who merely lacked a *substantial capacity* to appreciate wrongfulness). We include states that assess the ability to appreciate, not merely to know, in this grouping because courts generally construe these terms consistently. *See generally infra* notes 61–71 and accompanying text (discussing how “knowledge” has been interpreted in light of the *M'Naghten* test). These states include Alabama, Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. *See Kahler v. Kansas*, 140 S. Ct. 1021, 1051–55 (2020) (reciting the insanity test of each state). Fundamental fairness does not compel a state to offer either prong of the *M'Naghten* insanity defense, or, indeed, any affirmative defense of insanity at all. *See id.* at 1037.

<sup>39</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 211; *see also id.* at 209 (providing a similar and consistent answer to Question I).

<sup>40</sup> *See WEIHOFEN, supra* note 6, at 105, 107; Barnes, *supra* note 8, at 304; Dennis R. Klinck, “*Specific Delusions*” in *the Insanity Defence*, 25 CRIM. L.Q. 458, 464–70 (1983).

<sup>41</sup> *Compare WEIHOFEN, supra* note 6, at 107–08 (“And since the judges were not professing to reform or modify the law, but merely to state the law of England as it then was, it seems that this mistake of fact test was not intended by the judges as a distinct test, but as entirely consistent with the right and wrong test they had just set forth.”),

difficulty has been that the judges' task was merely to explain current law — and they professed to do nothing more<sup>42</sup> — yet the insane delusion rule appeared to introduce a novelty.<sup>43</sup> Prior to *M'Naghten*, no court or textbook had articulated an insanity rule specific to delusions, certainly not one that subjected the delusion to an objective standard of justification or excuse.<sup>44</sup>

*M'Naghten*'s insane delusion rule operates in a manner similar to the mistake-of-fact doctrine, with delusion substituting for the reasonableness of the mistake.<sup>45</sup> A chief criticism has been that the rule

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with ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 966 n.89 (3d ed. 1982) (“No doubt what the judges meant is that if a man, who is not insane within the right-wrong rule, has a delusion he will be treated as if the imaginary facts were real.”), and Klinck, *supra* note 40, at 466-70 (considering and rejecting the view that the insane delusion rule is a separate test from the general rule), and Philip Lyons, *Responsibility Without Individual Responsibility?: The Controversy over Defining Legal Insanity*, 45 U. COLO. L. REV. 391, 402-03 (1974) (suggesting that the answers to Questions I and IV apply when one's reason is not so overcome that she cannot know the wrongfulness of her act).

<sup>42</sup> See *M'Naghten's Case*, 10 Cl. & Fin. at 208.

<sup>43</sup> See HEINRICH OPPENHEIMER, *THE CRIMINAL RESPONSIBILITY OF LUNATICS* 23 (1909); DOUGLAS AIKENHEAD STROUD, *MENS REA OR IMPUTABILITY UNDER THE LAW OF ENGLAND* 77 (1914) (arguing that the delusion rule had no basis in English law).

<sup>44</sup> WEIHOFEN, *supra* note 6, at 107-08; Barnes, *supra* note 8, at 300, 305; see LAFAVE, *supra* note 8, at § 7.2(b)(5). A likely precursor to the insane delusion rule was the *Hadfield* case of 1800, where the famed barrister Thomas Erskine eloquently argued that insanity should extend beyond “total deprivation of memory and understanding” to reach actions emanating from a circumscribed delusion. *Trial of James Hadfield* (1800) 27 How. St. Tr. 1281, 1312-13 (KB); see also Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 LAW & SOC'Y REV. 487, 499-500, 503 (1985). The jury ultimately found Hadfield not guilty by reason of insanity, but, because the presiding judge had not instructed the jury on a specific test of legal responsibility, the case held no precedential value. See *id.* at 508. It appears that the majority of judges in *M'Naghten* had wanted to resolve a perceived lack of clarity that remained after *Hadfield* and to reject, once and for all, the idea that a mere causal link between a defendant's delusion and her criminal act sufficed for an insanity acquittal. See DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 173 (1996); Klinck, *supra* note 40, at 473, 476; Henry Weihofen, *Psychiatry and the Law of Criminal Insanity*, 6 SW. L.J. 47, 62-63 (1952).

<sup>45</sup> PERKINS & BOYCE, *supra* note 41, at 965 (“One not suffering from an insane delusion would not be excused for such a killing unless the mistake was a reasonable one under the circumstances, but the delusion will take the place of reasonable grounds for the belief in the mistake of fact defense.”); see OPPENHEIMER, *supra* note 43, at 218. The insane delusion rule also strongly resembles Christopher Slobogin's “integrationist” alternative to an affirmative test for insanity. See *infra* note 323.

It is worth noting that, in exculpating on the basis of a perceived need for defensive force, the rule resembles the doctrine of imperfect self-defense. That doctrine holds that, when the defendant killed another person under a genuine but unreasonable mistake of fact, the defendant acted without malice, and thus murder is reduced to manslaughter. See *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994); *State v. Smullen*, 844 A.2d 429,

subjects people with delusions to the standards of reasoning demanded of sane people.<sup>46</sup> It is certainly the case that the insane delusion rule, in excusing acts stemming from delusional beliefs that align with a legal defense, privileges sane reasoning. However, the force of this complaint depends upon whether those who fail the insane delusion test may appeal to the general right-and-wrong insanity test. If they may, then disordered reasoning may still excuse, but insanity must be proven through lack of capacity to distinguish right from wrong, not through the specific content of a delusion.

The import of the insane delusion rule — and the extent to which the rule is distinct from the general right-and-wrong test, is engulfed by it, or detracts from it — depends in part on the meaning of three terms: “wrong,” to “know,” and “partial delusion.”<sup>47</sup> “In all cases” a defendant’s responsibility turns on her ability to know, at the time of the act, that what she was doing was wrong.<sup>48</sup> The English judges in *M’Naghten* employed differing usages of the term “wrong” in their

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440 (Md. 2004); *Commonwealth v. Tilley*, 595 A.2d 575, 582 (Pa. 1991). However, imperfect self-defense generally is not available when one is acting under delusions. See *People v. Elmore*, 325 P.3d 951, 955 (Cal. 2014) (“No state, it appears, recognizes ‘delusional self-defense’ as a theory of manslaughter. We have noted that unreasonable self-defense involves a mistake of *fact*.” (citing *In re Christian S.*, 872 P.2d at 580 n.3)). A claim of impartial self-defense based only on delusions would be a claim of insanity under *M’Naghten*. *Id.* at 962.

<sup>46</sup> See S. SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 249-53 (1927); HENRY MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* 216 (1883) (arguing the absurdity of assuming a delusion “which itself exists only in violation of all reason should conform in its action to laws which govern the action of, and are therefore appreciable by, a sound intelligence”); I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 47 (Boston, Little, Brown & Co. 4th ed. 1860) (“This is virtually saying to a man, ‘You are allowed to be insane; . . . but have a care how you manifest your insanity; there must be method in your madness.’”); Jau Don Ball & A. M. Kidd, *The Relation of Law and Medicine in Mental Disease*, 9 CALIF. L. REV. 1, 4 (1920); Carl Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 U. MIAMI L. REV. 30, 39-40 (1959); Klinck, *supra* note 40, at 463; see also *Parsons v. State*, 2 So. 854, 866 (Ala. 1887) (“If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law.”); *State v. Jones*, 50 N.H. 369, 387-88 (1871) (“[The insane delusion rule] practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health.”).

<sup>47</sup> *M’Naghten’s Case*, 10 Cl. & Fin. at 210-11.

<sup>48</sup> *Id.* at 210. She may also be excused if, because of a mental disease, she did not know the nature and quality of her act. *Id.* In *Clark v. Arizona*, the U.S. Supreme Court held that inability to understand the nature or quality of one’s act would necessarily be encompassed by the broader standard of inability to distinguish wrongfulness. 548 U.S. 735, 753-54 (2006).

answers to the House of Lords<sup>49</sup>: two answers confined “wrong” to illegality,<sup>50</sup> while two others defined “wrong” in reference to a moral wrong that is also illegal.<sup>51</sup> Scholars have wrestled with this contradiction and its import for the insane delusion rule.<sup>52</sup> A number have viewed the insane delusion rule as redundant with the general right-and-wrong test.<sup>53</sup> In essence, a defendant cannot have known an act was wrong if she believed it was legally justified.<sup>54</sup>

Many state courts define “wrong” for their jurisdiction. Currently, a majority of states conceptualize wrongfulness as contrary to public or societal standards of morality,<sup>55</sup> but a minority limit it to illegality.<sup>56</sup>

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<sup>49</sup> The judges' varying usage is understandable; most crimes were *mala in se* at the time *M'Naghten* was decided, so the distinction between legal and moral wrongfulness was of little salience. The authors are grateful to Michael Mannheimer for sharing this observation.

<sup>50</sup> See *M'Naghten's Case*, 10 Cl. & Fin. at 209 (declaring the defendant is “punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land”); *supra* note 39 and accompanying text.

<sup>51</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 210 (“If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable . . .”).

<sup>52</sup> See RAY, *supra* note 46, § 29 (reasoning that the right-and-wrong test conflicts with the first answer in *M'Naghten* because a person may believe she is doing the right thing by breaking the law); accord J.J. Child & G.R. Sullivan, *When Does the Insanity Defence Apply? Some Recent Cases*, 2014 CRIM. L. REV. 787, 799-800 (illustrating that a person may satisfy the delusion test but fail the knowledge of wrong test when she kills a victim, believing the victim to be a demon, but knowing that the law would condemn the killing); *infra* notes 53–55.

<sup>53</sup> See LAFAVE, *supra* note 8; WILLIAMS, *supra* note 8, §§ 156, 160; Norval Morris, *Daniel M'Naughten and the Death Penalty*, 6 RES JUDICATAE 304, 323 (1953); Orvill C. Snyder, *Who Is Wrong About the M'Naghten Rule and Who Cares?*, 23 BROOK. L. REV. 1, 3 (1956); see also John S. Strahorn, Jr., *Criminology and the Law of Guilt*, 84 U. PA. L. REV. 600, 619 (1936) (noting that the insane delusion test is a “substantial expression of the right and wrong test”). Stanley Yeo concludes that Commonwealth nations, such as Canada and New Zealand, eliminated the insane delusion rule because they found the rule redundant under the right and wrong test. Stanley Yeo, *The Insanity Defence in the Criminal Laws of the Commonwealth of Nations*, 2008 SING. J. LEGAL STUD. 241, 253.

<sup>54</sup> WILLIAMS, *supra* note 8, § 160. Oppenheimer agrees that the insane delusion rule is just a special application of the general wrongfulness rule. OPPENHEIMER, *supra* note 43, at 36. In most cases, the general test would excuse those cases also excused under the insane delusion rule. *Id.* at 219. Oppenheimer argues that in some cases, the insane delusion rule would excuse in cases that the general rule would not. *Id.* But rather than supporting the rule, these cases show its potential absurdity. *Id.* at 219-20.

<sup>55</sup> *United States v. Ewing*, 494 F.3d 607, 621 (7th Cir. 2007).

<sup>56</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1035 & n.10 (2020) (listing sixteen states).

Because insanity cases typically involve serious crimes,<sup>57</sup> public morality usually equates to legality.<sup>58</sup> Societal standards of morality may extend beyond legality, however, especially in cases involving delusions of a deity commanding the act in question.<sup>59</sup> Even when wrongfulness reduces to illegality, a defendant cannot establish her ignorance of the wrongfulness of her act by simply demonstrating her ignorance of the law.<sup>60</sup> As in criminal law generally, ignorance of the law is no defense.

The language of *M'Naghten's* general insanity test makes clear that "knowledge" is a product of, and is dependent upon, the holder's ability to reason.<sup>61</sup> First, the opinion conditions criminal responsibility on sufficiency of reason.<sup>62</sup> Second, the opinion dictates that, to qualify for insanity, a defendant must prove that a "disease of the mind" produced "such a defect of reason" that she did not "know" the act's wrongfulness.<sup>63</sup> Thus, an examination of a defendant's reasoning deficits (broadly conceived) is necessary to determine if her ascertainment of "knowledge" was intolerably improbable to warrant an

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<sup>57</sup> ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 52 (1967); see Eric Silver, Carmen Cirincione & Henry J. Steadman, *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 *LAW & HUM. BEHAV.* 63, 66-67 (1994) (finding that, in a study of 8,953 defendants in eight states who entered an insanity plea between 1976 and 1985, 14.3% of defendants pleading insanity had been charged with murder, 54.1% had been charged with other violent offenses, and 31.6% had been charged with nonviolent offenses).

<sup>58</sup> GOLDSTEIN, *supra* note 57, at 52.

<sup>59</sup> *State v. Worlock*, 569 A.2d 1314, 1321 (N.J. 1990).

<sup>60</sup> See *M'Naghten's Case* (1843) 8 Eng. Rep. 718; 10 Cl. & Fin. 200, 210 (HL) (observing that "the law is administered upon the principle that every[]one must be taken conclusively to know it, without proof that he does know it").

<sup>61</sup> See HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 198 (1972) ("The defect-of-reason clause tells us that 'know the nature and quality of the act' and 'know that is wrong' must be taken to apply with reference to the person's reason, his capacity for rational conduct.").

<sup>62</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 210 (instructing "every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved").

<sup>63</sup> See *id.* at 210-11.

excuse.<sup>64</sup> This is ultimately a moral and legal judgment for the trier of fact.<sup>65</sup>

Courts and scholars have recognized that, to guide a person's action, "knowledge" of wrongfulness must extend beyond mere intellectual awareness.<sup>66</sup> Although many states do not define the operative term

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<sup>64</sup> This focus on reasoning is consonant with scholars' views that practical reasoning and rationality are crucial for moral and legal responsibility. See, e.g., HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 218 (1979) (arguing that "capacity for rational conduct . . . has actually been at the center of the practical intuition that mental disability negates responsibility"); MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 245 (1985) (recognizing an excuse when the accused is "so irrational as to be nonresponsible"); ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY* 215-16 (1991) (advocating for an insanity defense that identifies "substantial impairment in the defendant's capacity for practical reasoning regarding the offense" as the excusing condition and "gross disturbance of cognitive processes such as concept formation or reasoning" as the disability); Robin Anthony Duff, *Who is Responsible, for What, to Whom?*, 2 OHIO ST. J. CRIM. L. 441, 444-45 (2005) ("The responsible person is 'responsible' (i.e., capable of responding appropriately) to reasons: she is capable of recognizing, deliberating about and being guided (or guiding herself) by reasons."); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 294 (2003) [hereinafter *Diminished Rationality*] ("A reasonable capacity for rationality is the fundamental criterion for responsibility."); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1415 (1986) ("Irrationality is a vital aspect of the exculpatory nature of insanity because rationality is an essential attribute of intelligible conduct, of behavior an observer, such as a jury, can interpret."). While these scholars generally agree that insanity involves irrationality, their theories of irrationality differ in important ways. See Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 142-43 (2018).

<sup>65</sup> See *infra* note 229.

<sup>66</sup> See *infra* notes 67-68. A number of scholars have advocated for a broad conception of knowledge. See, e.g., JAMES FITZJAMES STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 163 (1883) (arguing that anyone "who was deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he mean to do" cannot "know" its wrongfulness); Walter Bromberg & Hervey M. Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 729, 737 (1952) ("When no longer dismembered and falsified in one-dimensional aspect, but considered in all that we sometimes imply by 'appreciation,' 'realization,' 'normal evaluation,' 'adequate feeling,' 'significant and appropriate experiencing,' etc., the term 'knowing' does not restrict us solely to a discussion of the patient's reasoning abilities in the abstract."); Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 780-81 (1956) (observing that "giv[ing] the word 'know' in the M'Naghten Rules a wide meaning . . . would meet the principal current criticism of the Rules"); cf. FINGARETTE, *supra* note 61, at 239 (accepting the M'Naghten standard as "a formula which in its core ('defect of reason from disease of the mind') is correct and entirely general" and arguing it "can stand as an adequate test if properly interpreted, retained in full, and rendered somewhat more flexible in certain respects").

“know” for the jury, those that do or explore its meaning in case law typically hold that knowledge requires “insight” or an ability to “understand” or “appreciate” the character and consequences of one’s act.<sup>67</sup> Courts have also recognized that knowledge requires rationality and a sufficient capacity to reason.<sup>68</sup> Contemporary forensic

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<sup>67</sup> GOLDSTEIN, *supra* note 57, at 49-50; SCHOPP, *supra* note 64, at 35; Moore, *supra* note 16, at 680 (“Many jurisdictions give ‘know’ a different meaning specific to the *M’Naghten* test. To know . . . it is commonly said in this context, is to *emotionally appreciate* the things that are worthy of such appreciation. Knowledge it is said, must be knowledge that is *emotionally driven home* to the one whose knowledge it purportedly is.”). According to Abraham Goldstein, trial courts in eleven states instruct juries that knowledge means understanding that enables a person to judge “the nature, character, and consequences of the act charged against him” or the “capacity to appreciate the character and to comprehend the probable or possible consequences of his act.” GOLDSTEIN, *supra* note 57, at 49-50; *see, e.g.*, *People v. Skinner*, 704 P.2d 752, 761 (Cal. 1985) (holding that “‘knowing’ in the sense of being able to verbalize the concepts of right and wrong was insufficient to establish legal sanity[;] [r]ather, the defendant must ‘know’ in a broader sense — he must appreciate or understand these concepts”); *Johnson v. State*, 76 So. 2d 841, 844 (Miss. 1955) (“[T]he test of criminal responsibility is the ability of the accused, at the time he committed the act, to realize and appreciate the nature and quality thereof — his ability to distinguish right and wrong.”); *State v. Esser*, 115 N.W.2d 505, 521-22 (Wis. 1962) (recognizing that “real insight” is necessary to “be able to make a normal moral judgement” and “appreciate and evaluate” an act at the time committed).

<sup>68</sup> *See, e.g.*, *State v. Davies*, 148 A.2d 251, 255 (Conn. 1959) (affirming this charge: “To be the subject of punishment, an individual must have mind and capacity, reason and understanding enough to enable him to judge of the nature, character and consequence of the act charged against him, that the act is wrong and criminal, and that the commission of it will justly and properly expose him to penalty”); *Camp v. State*, 149 So. 2d 367, 370 (Fla. Dist. Ct. App. 1963) (“The only issue presented under the defense of legal insanity is whether the accused, at the time of the unlawful act alleged to have been committed by him, had a sufficient degree of reason to know that he was doing an act that was wrong.”); *Roberts v. State*, 3 Ga. 310, 330 (1847) (“A person, therefore, in order to be punishable by law . . . must have sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong in regard to the particular act about to be done; to know and understand that it will be wrong, and that he will deserve punishment by committing it.”); *State v. Rawland*, 199 N.W.2d 774, 785 (Minn. 1972) (“The defendant will be excused if at the time of the criminal act he had a mental disease or defect which included among its symptoms or consequences an impairment in one or more of the psychological functions requisite for reasoning (*i.e.*, cognitive ego functions (perceiving, remembering, classifying, judging, etc.)) which, in turn, reduced the strength of his disposition to token ‘this is wrong’ to a negligibly low value . . . .” (quoting Joseph M. Livermore & Paul E. Meehl, *The Virtues of M’Naghten*, 51 MINN. L. REV. 789, 808 (1966))); *Davis v. State*, 28 S.W.2d 993, 996 (Tenn. 1930) (“The general rule is that if a defendant has capacity and reason to enable him to distinguish the difference between right and wrong as to the particular act he is then doing, he is criminally responsible for such act.”). Indeed, the examples provided in *M’Naghten* — when differentiating between motivations that would inculpate and those that would exculpate under the insane delusion rule — demonstrate

psychologists have identified functional abilities relevant to insanity evaluations as including: (1) the possession of knowledge that an act is prohibited by law or contrary to society's moral views, (2) an ability to retrieve that knowledge, (3) a "capacity to understand how that knowledge may apply — and its implications — in relation to one's own situation or a given set of facts," and (4) the ability to "rationally evaluate the potential risks and consequences" of doing the relevant action.<sup>69</sup> A common critique of the *M'Naghten* standard is that it embodies a cognitive test that ignores the affective and volitional aspects of human behavior.<sup>70</sup> However, *M'Naghten's* focus on reason need not have such restricted meaning.<sup>71</sup>

Regardless, if these understandings of "knowledge" as involving appreciation and a capacity to reason are correct, then the insane delusion rule merely sets forth a narrow, easy case for insanity: it establishes that intellectual ignorance of the factual predicate necessary for wrongfulness (due to delusions from a mental disease) belies knowledge of wrongfulness. In addition, awareness of the factual predicate necessary for wrongfulness — in an absence of other evidence of general insanity — does not establish irresponsibility.

However, these conclusions only hold true if the phrase "partial delusion only, and is not in other respects insane,"<sup>72</sup> signifies that the accused's reasoning powers (outside the delusion itself) were intact at the time of the criminal act. Otherwise, the negative component of the insane delusion rule — the defendant "would be liable to punishment" if the perceived facts would not have justified or excused her act<sup>73</sup> — would withhold the general insanity test from any person whose delusion happened not to conform to a legally recognized defense,

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the importance of intact reasoning abilities. See *M'Naghten's Case*, 10 Cl. & Fin. at 211 (distinguishing between killing for self-defense and for revenge).

<sup>69</sup> Randy Borum, *Not Guilty by Reason of Insanity*, in *EVALUATING COMPETENCIES* 193-204 (Thomas Grisso ed., 2d ed. 2003). Scholars have offered compilations of relevant functional abilities as well. See, e.g., Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 253, 255 (2000) [hereinafter *Rationality and Responsibility*] (arguing that legally responsible agents "must be capable of rational practical reasoning" and defining "rationality" as, at a minimum, including "the ability to perceive accurately, to get the facts right, to form justifiable beliefs, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering" — "it is the ability to act for good reasons").

<sup>70</sup> See, e.g., Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 18-19 (2007).

<sup>71</sup> See *infra* notes 367-78 and accompanying text.

<sup>72</sup> *M'Naghten's Case*, 10 Cl. & Fin. at 211.

<sup>73</sup> *Id.*

assuming she was able to form the necessary level of intent.<sup>74</sup> The English judges likely conceptualized “partial delusion” as a form of disorder limited to the delusion itself. Criminologist Sheldon Glueck has noted, along with a number of legal scholars, the judges probably were influenced by the discredited ideas of phrenology and monomania when drafting the insane delusion rule.<sup>75</sup> These theories conceptualized the brain as consisting of separate parts, whereby one area could be diseased while the others remained wholly unaffected.<sup>76</sup> Although a common critique is that the rule’s application is limited to people who do not exist,<sup>77</sup> a “delusional disorder” resembles the condition described in the rule.<sup>78</sup> Regardless, modern cases typically ignore the “partial delusion” language and apply the rule in cases where other aspects of mental disorder are clearly evident, as with schizophrenia.<sup>79</sup> The next

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<sup>74</sup> Wayne R. LaFave observed the *M’Naghten* insane delusion rule can be read to have an “affirmative part” and a “negative part.” LAFAVE, *supra* note 8, § 7.2(b)(5) “[T]he affirmative part” declares insane “a person suffering from delusions [who] imagines facts which, if true, would justify his acts.” *Id.* “[T]he negative part . . . bars[] an insanity defense if the facts regarding which the delusion exists would not constitute a defense if true . . .” *Id.*

<sup>75</sup> See GLUECK, *supra* note 46, at 169 n.1, 170; G.W. KEETON, GUILTY BUT INSANE 193 (1961); OPPENHEIMER, *supra* note 43, at 215; Weihofen, *supra* note 44, at 63-64. *But cf.* Morris, *supra* note 53, at 322 (arguing the *M’Naghten* rules have outlasted monomania and phrenology because the judges based the rules on legal and social responsibility, not psychological categories).

<sup>76</sup> See WEIHOFEN, *supra* note 6, at 110 (describing “monomania” as “essentially a state of mind characterized by the predominance of one insane idea, while the rest of the mind was normal” and “phrenology” as the “theory that the brain was a bundle of some twenty-seven different organs presiding over the different traits of the individual”).

<sup>77</sup> See, e.g., CHARLES MERCIER, CRIMINAL RESPONSIBILITY 198, 200 (1926) (“There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane.”); WEIHOFEN, *supra* note 6, at 109 (“The rule applies, they said, only in cases where the person is ‘labouring under such partial delusion only, and is not in other respects insane.’ A person ‘not in other respects insane’ could, of course, quite rightly be expected to reason about the subject of his own delusion as well as a sane man. The difficulty is that no such person exists.”); Morris, *supra* note 53, at 323 (“When the best psychological knowledge of the time included this idea of monomania the judge could not be blamed for making room for it. Nevertheless, the difficulty is that no such person as envisaged in this part of the *M’Naghten* Rules exists.”).

<sup>78</sup> See AM. PSYCHIATRIC ASS’N, *supra* note 3, at 90-91 (defining a delusional disorder as the presence of one or more delusions for a month or longer in a person who, except for the delusions and their behavioral ramifications, does not appear odd and is not functionally impaired). Dennis Klinck made this observation about monosymptomatic psychosis. Klinck, *supra* note 40, at 463.

<sup>79</sup> See GA. CODE ANN. § 16-3-3 (2020); *Diestel v. Hines*, 506 F.3d 1249, 1271-74 (10th Cir. 2007); *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001). On the other hand,

Part discusses jurisdictions' current use of the insane delusion rule, their procedural variants, and their impact on a residual general insanity defense.

## II. JURISDICTIONS' USE OF THE INSANE DELUSION RULE

An examination of current case law finds that most *M'Naghten* jurisdictions simply analyze a defendant's alleged delusions within the context of the general right-and-wrong test.<sup>80</sup> However, nine jurisdictions — California, Florida, Georgia, Nevada, Oklahoma, Tennessee, Texas, federal courts, and military courts — give special significance to a defendant's delusions.<sup>81</sup> Of these, only Nevada expressly precludes an insanity defense for a person whose delusion, if true, would not justify or excuse her act.<sup>82</sup> Although some of the case law is quite murky, the remaining eight jurisdictions appear to allow a person afflicted with delusions to establish her insanity either through operation of the insane delusion rule or satisfaction of the general insanity test.<sup>83</sup> Yet, as subpart B below demonstrates, the rule in these jurisdictions may operate in a way that impedes a defendant's general insanity claim.<sup>84</sup>

### A. *Negative Aspect: Not Insane if Fail to Satisfy Rule*

Only delusional defendants in conformity with the insane delusion rule are irresponsible in Nevada. A Nevada statute provides:

[T]he burden of proof is upon the defendant to establish by a preponderance of the evidence that:

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Tennessee appears to limit the rule to defendants with intact reasoning capabilities. See *Overton v. State*, 56 S.W.2d 740, 741 (Tenn. 1933).

<sup>80</sup> See *Dixon v. State*, 668 So. 2d 65, 67, 72 (Ala. Crim. App. 1994); *State v. Roberts*, 876 N.W.2d 863, 867-71 (Minn. 2016); *State v. Petrie*, 69 N.E.3d 150, 152-57 (Ohio Ct. App. 2016).

<sup>81</sup> See § 16-3-3; *United States v. Ewing*, 494 F.3d 607, 612-13 (7th Cir. 2007); *United States v. Mott*, 72 M.J. 319, 324-26 (C.A.A.F. 2013); *People v. Leeds*, 192 Cal. Rptr. 3d 906, 912 (Ct. App. 2015), as modified on denial of reh'g; *Martin v. State*, 110 So. 3d 936, 938 (Fla. Dist. Ct. App. 2013); *Finger*, 27 P.3d at 84-85; *Dukes v. State*, 499 P.2d 471, 476 (Okla. Crim. App. 1972); *Davis v. State*, 28 S.W.2d 993, 994 (Tenn. 1930); *Miller v. State*, 940 S.W.2d 810, 812 (Tex. Ct. App. 1997).

<sup>82</sup> See *infra* Part II.A.

<sup>83</sup> See *infra* Part II.A.

<sup>84</sup> See *infra* Part II.B.

- (a) Due to a disease or defect of the mind, the defendant was in a delusional state at the time of the alleged offense; and
- (b) Due to the delusional state, the defendant either did not:
  - (1) Know or understand the nature and capacity of his or her act; or
  - (2) Appreciate that his or her conduct was wrong, meaning not authorized by law.<sup>85</sup>

Nevada apparently does not offer other ways to demonstrate an inability to appreciate the wrongfulness of one's act, such as a lack of cognitive abilities to process information, retain information, reason, or understand.<sup>86</sup> In essence, the state supreme court reduced the wrongfulness prong of the insanity standard to a strict application of the insane delusion rule.

Dissatisfaction with the general right-and-wrong test inspired this narrow interpretation of *M'Naghten*.<sup>87</sup> Between 1889 and 1995, Nevada recognized the general right-and-wrong test as well as the positive and negative aspects of the insane delusion rule.<sup>88</sup> In 1964, the state supreme court clarified that delusional insanity was merely a species of general insanity.<sup>89</sup> Nevada trial courts apparently interpreted the *M'Naghten* test broadly and, over time, dissatisfaction with the insanity standard grew.<sup>90</sup> The Legislature was concerned that courts "had simply improperly analyzed [cases involving insanity] by not considering the relationship of delusions to wrongfulness and criminal intent as

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<sup>85</sup> NEV. REV. STAT. § 174.035(6) (2020).

<sup>86</sup> See *Brown v. State*, No. 77962, 2020 WL 3474157, at \*1 (Nev. June 24, 2020) ("The insanity defense is 'very narrow,' and a defendant is entitled to jury instructions on it only if he presents evidence that he acted under a delusion and his 'delusion, if true, would justify the commission of the criminal act.'). Little case law exists on the issue, but the Nevada Supreme Court has rejected arguments that cognitive impairments other than delusions are cognizable under its insanity standard. See *Gray v. State*, No. 61987, 2014 WL 4922871, at \*4 (Nev. Sept. 29, 2014) (characterizing expert testimony that the defendant's posttraumatic stress disorder "caused 'his thoughts and actions [to be] adversely affected and/or slowed'" as irrelevant to insanity because "no evidence was proffered to show that [his] PTSD caused him to be delusional . . . [nor] prevented him from understanding the nature of his conduct or appreciating its wrongfulness").

<sup>87</sup> *Finger v. State*, 27 P.3d 66, 76-77 (Nev. 2001).

<sup>88</sup> See *State v. Lewis*, 22 P. 241, 247-48, 252 (Nev. 1889), *overruled in part on other grounds by Kuk v. State*, 392 P.2d 630 (Nev. 1964); see also *Sollars v. State*, 316 P.2d 917, 919 (Nev. 1957) (choosing to retain these insanity tests).

<sup>89</sup> See *Kuk*, 392 P.2d at 633-34.

<sup>90</sup> *Finger*, 27 P.3d at 76-77.

required by [the Nevada Supreme Court].<sup>91</sup> In response, the Nevada Legislature abolished the insanity defense in 1995 and created a new “guilty but mentally ill” plea.<sup>92</sup>

In *Finger v. State*, the Nevada Supreme Court found the Legislature’s elimination of the insanity defense violated due process.<sup>93</sup> However, the Court — likely to make the defense more palatable to prosecutors and the Legislature — limited the defense to delusional states that demonstrated the cognitive impairments listed in *M'Naghten* as limited by the insane delusion rule.<sup>94</sup> The state supreme court emphasized that juries and experts must understand that “[t]he ability to understand right from wrong under *M'Naghten* is directly linked to the nature of the defendant’s delusional state. Delusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act.”<sup>95</sup> In fact, “[u]nless a defendant presents evidence that complies with this standard, he or she is not entitled to have the jury instructed on the issue of insanity.”<sup>96</sup>

To illustrate how the Nevada rule operates in practice, consider the hypothetical posed in the Introduction<sup>97</sup> and assume the following additional facts. On the day of the shooting, Loredo saw his father, Edward Loredo, give a high-five to Nick Baughman, an employee, and understood this as a reaction to a successful drug shipment. An hour later, Loredo believed he overheard Baughman and his father on the business’s walkie-talkies detailing how they planned to kill him later that day. Fearing for his life, Loredo removed a gun from his desk drawer and cut the power to the office in order to disable the surveillance cameras and eliminate noise from the fans. Edward Loredo walked to the office to determine why the electricity was out. Unable to open the door, he kicked it open. Loredo believed his father was holding

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<sup>91</sup> *Id.* at 77.

<sup>92</sup> *Id.* at 77-78.

<sup>93</sup> *Id.* at 84.

<sup>94</sup> *Id.* at 84-85 (“To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law. So, if a jury believes he was suffering from a delusional state, and if the facts as he believed them to be in his delusional state would justify his actions, he is insane and entitled to acquittal. If, however, the delusional facts would not amount to a legal defense, then he is not insane.”). The Nevada Legislature codified the *Finger* articulation of the *M'Naghten* standard in 2007. See NEV. REV. STAT. § 174.035(6) (2020).

<sup>95</sup> *Finger*, 27 P.3d at 85.

<sup>96</sup> *Id.*

<sup>97</sup> See *supra* INTRODUCTION and notes 1-3.

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a gun, and he shot and killed him. When Loredo ran out of the office, he asked a nearby customer to “take care of my dad.” He then tracked down and killed Baughman, who Loredo was convinced would torture and kill him to avenge the death of his father. Loredo was charged with two counts of first degree murder and pleaded not guilty by reason of insanity.

In Nevada, Loredo would receive a jury instruction on insanity for the killing of his father because he would be able to adduce evidence that, “[d]ue to a disease or defect of the mind, [he] was in a delusional state at the time of the alleged offense[,] and [d]ue to the delusional state, [he] did not . . . [a]ppreciate that his . . . conduct was wrong, meaning not authorized by law.”<sup>98</sup> The instruction would include the elements of Nevada’s insanity test as well as elements of self-defense. However, a court would likely deny Loredo’s request for an insanity instruction as to the murder of Baughman. This would appear to be the case even if expert testimony established, for example, that at the time of the killing Loredo was experiencing significant cognitive impairments associated with schizophrenia, such as an impaired ability to absorb and interpret information, an impaired ability to make decisions based on that information, or problems with his working memory.

#### B. *Affirmative Aspect: Insane if Satisfy Rule*

All nine jurisdictions that follow the insane delusion rule allow a delusion’s satisfaction of a legal defense (when that delusion stemmed from a mental disease or defect and motivated the criminal act) to establish a defendant’s insanity without further inquiry.<sup>99</sup> Eight of these jurisdictions (all but Nevada) at least theoretically permit a defendant to appeal to the general right-and-wrong standard if she fails to satisfy the insane delusion test.<sup>100</sup> Legal scholars tend to assume the affirmative aspect of the insane delusion rule benefits the defendant by clarifying how to, or possibly by providing an additional way to, establish

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<sup>98</sup> § 174.035(6).

<sup>99</sup> See *supra* note 81 and cases cited therein.

<sup>100</sup> See *United States v. Ewing*, 494 F.3d 607, 612-13 (7th Cir. 2007); *United States v. Mott*, 72 M.J. 319, 324-26 (C.A.A.F. 2013); *People v. Leeds*, 192 Cal. Rptr. 3d 906, 912-13 (Ct. App. 2015), *as modified on denial of reh’g*; *Martin v. State*, 110 So. 3d 936, 938 (Fla. Dist. Ct. App. 2013); *Dukes v. State*, 499 P.2d 471, 474 (Okla. Crim. App. 1972); *Davis v. State*, 28 S.W.2d 993, 994-95 (Tenn. 1930); *Miller v. State*, 940 S.W.2d 810, 812 (Tex. Ct. App. 1997); see also GA. CODE ANN. § 16-3-3 (2020).

insanity.<sup>101</sup> An analysis of case law reveals that the rule functions this way in some jurisdictions, especially when the defendant holds the option of informing (or not informing) the jury of the rule.<sup>102</sup> In other jurisdictions, however, the insane delusion rule may impair the defense by allowing the prosecution to draw the jury's attention to a defendant's failure to satisfy the rule and by inspiring forensic mental health professionals to effectively withdraw a defendant's delusions from consideration in the general right-and-wrong test.

### 1. Insane Delusion Instruction if Sufficient Evidence

Several states — Texas, Georgia, and to a lesser extent Florida — employ the insane delusion rule as a species of insanity that, provided a sufficient evidentiary basis exists, goes to the jury with a specific instruction.<sup>103</sup> The practical effect of this version of the rule is to confine it to its affirmative aspect: a jury's attention is only drawn to the legal content of a delusion when the jury could conceivably acquit on that ground.

#### a. Texas

Although omitted from state treatises and attorney handbooks,<sup>104</sup> Texas has a long history of applying the insane delusion rule.<sup>105</sup> Case

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<sup>101</sup> See, e.g., PERKINS & BOYCE, *supra* note 41, at 967 (arguing “the delusion rule when properly understood and applied can never work to the disadvantage of the defendant”); WEIHOFEN, *supra* note 6, at 111 (“If the mistake of fact test is merely an *additional* test, or merely one specific application of the right and wrong test, it is not objectionable.”).

<sup>102</sup> See *supra* Part II.A.

<sup>103</sup> See *Shaw v. State*, 798 S.E.2d 344, 355 (Ga. Ct. App. 2017); *Martin*, 110 So. 3d at 939; *Conaway v. State*, 663 S.W.2d 53, 55 (Tex. Ct. App. 1983); *Coffee v. State*, 184 S.W.2d 278, 280 (Tex. Crim. App. 1944) (per curiam); GA. SUGGESTED PATTERN JURY INSTR. – CRIM. 3.80.30 (4th ed. 2020).

<sup>104</sup> See TEXAS CRIMINAL LAWYER'S HANDBOOK § 15:105.1.1-.2 (2020) (discussing the insanity defense); 21 TEXAS JURISPRUDENCE, THIRD CRIMINAL LAW: DEFENSES §§ 76-87 (3d ed. 2020) (discussing the same). *But see* TEXAS CRIMINAL JURY CHARGES § 3:1210 (20th ed. 2019) (observing that “more recent cases have held that it is ok to identify the specific kind of insanity relied upon by the accused” and citing two cases finding the submission of both a general insanity charge and an insane delusion charge to be proper).

<sup>105</sup> See *Miller*, 940 S.W.2d at 812; *Coffee*, 184 S.W.2d at 280; *Merritt v. State*, 50 S.W. 384, 387-88 (Tex. Crim. App. 1899).

One unpublished case found the Texas Legislature eliminated the common law defense of insane delusion when it enacted a new penal code in 1974. See *Brown v. State*, No. 05-08-00016-CR, 2009 WL 866207, at \*6-7 (Tex. Ct. App. Apr. 2, 2009). However, the court observed that “[s]ince the enactment of the penal code, at least three of our sister courts have apparently and implicitly presumed, without expressly

law establishes that, when evidence suggests the defendant held an insane delusion at the time of the crime, the court should submit two instructions to the jury: a general charge on insanity,<sup>106</sup> and an additional instruction on insane delusion “if the facts as perceived by the defendant were true and would constitute a defense to the crime charged.”<sup>107</sup> Cases stress that, before a trial court issues the latter instruction, evidence must have been admitted capable of supporting each element of a recognized defense, such as self-defense or necessity.<sup>108</sup> Without direct evidence on each element of the perceived defense, providing an insane delusion charge that includes that defense could amount to “an improper comment on the evidence that could . . . nudge[] the jury to find what no witness had testified about” and erroneously encourage the jury to make a particular inference.<sup>109</sup> A valid instruction will include the exact elements of the underlying defense — including, oddly, elements pertaining to a “reasonable person” standard<sup>110</sup> — and apply the law to the facts of the case.<sup>111</sup> Texas courts have applied the insane delusion rule in the context of delusional self-defense, necessity, and justified force to resist arrest.<sup>112</sup> Crucially, even if the trier of fact finds the delusion does not conform to a legal defense,

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deciding, that the insane-delusion defense is still viable despite the enactment of the penal code.” *Id.* (citing *Miller*, 940 S.W.2d at 811-15; *Zwack v. State*, 757 S.W.2d 66, 69-71 (Tex. Ct. App. 1988); *Conaway*, 663 S.W.2d at 55-56).

<sup>106</sup> TEXAS CRIMINAL JURY CHARGES, *supra* note 104, § 3:1220 (“It is an affirmative defense to prosecution of a criminal action that, at the time of the conduct charged against a person, as a result of severe mental disease or defect, he did not know that his conduct was wrong.”); see TEX. PENAL CODE ANN. § 8.01 (2019). Texas has defined “wrong” in this context to mean “illegal.” *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008). The defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. TEX. PENAL CODE ANN. § 2.04(d) (2020).

<sup>107</sup> *Conaway*, 663 S.W.2d at 55; see *Coffee*, 184 S.W.2d at 280.

<sup>108</sup> See *Miller*, 940 S.W.2d at 815.

<sup>109</sup> *Id.* at 814.

<sup>110</sup> See *id.* at 812 (expressing that an insane delusion charge should include the elements of the relevant delusional justification (apparently verbatim), including “while in circumstances from which a reasonable person in the accused’s position would not have retreated” and “while reasonably believing that deadly force was immediately necessary”); *Zwack*, 757 S.W.2d at 70-71.

<sup>111</sup> See *Miller*, 940 S.W.2d at 813; *Merritt v. State*, 50 S.W. 384, 387-88 (Tex. Crim. App. 1899).

<sup>112</sup> See, e.g., *Miller*, 940 S.W.2d 810 (applying the rule in the context of self-defense, apparent danger, and necessity); *Zwack*, 757 S.W.2d at 66 (applying the rule in the context of justified force to resist arrest and deadly force to do the same).

it should consider a defendant's delusion as evidence of general insanity.<sup>113</sup>

*b. Florida*

Florida's law is less clear on the subject, but it appears that a defendant pleading the affirmative defense of insanity based on a delusional belief that her act was justified or excused is entitled to an instruction on the perceived defense. From 1902 until 2000, Florida followed *M'Naghten's* insane delusion rule in addition to the general right-and wrong test.<sup>114</sup> In 1991, the Supreme Court of Florida approved a separate instruction on insanity by reason of hallucinations or delusions,<sup>115</sup> which was incorporated into the *Standard Jury Instructions in Criminal Cases* in 1997.<sup>116</sup> As the Fifth District Court of Appeal explained in 2015, this separate instruction on insanity was "often, although not always, accompanied by an instruction on the law of self-defense" because the instruction on insanity "require[d] the jury to find that the 'act of the person would have been lawful had the hallucinations or delusions been the actual facts' for the defendant to be not guilty by reason of insanity."<sup>117</sup>

The Florida Legislature codified the *M'Naghten* general test for insanity in 2000.<sup>118</sup> In *Rodriguez v. State*, the Fifth District Court of Appeal held this codification enshrined the general insanity test as the sole test for insanity and thus rejected the *M'Naghten* rule for the special

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<sup>113</sup> See *Miller*, 940 S.W.2d at 814 ("Here, Appellant's claim of insane delusion was that Mr. Allen and others had stolen or were conspiring to steal his property. Neither a previous theft of Appellant's property nor a present conspiracy to steal his property would justify Appellant seeking out and killing a person he believed to be responsible. . . . The 'insane delusion' evidence went to the issue of whether Appellant knew right from wrong, not whether in reasonable probability his delusion was that he should or would kill Mr. Allen in 'self-defense.'").

<sup>114</sup> See *Cruse v. State*, 588 So. 2d 983, 989 (Fla. 1991); *Blocker v. State*, 110 So. 547, 552 (Fla. 1926); *Davis v. State*, 32 So. 822, 826-28 (Fla. 1902); *Wallace v. State*, 766 So. 2d 364, 368 (Fla. Dist. Ct. App. 2000).

<sup>115</sup> *Cruse*, 588 So. 2d at 989.

<sup>116</sup> *Wallace*, 766 So. 2d at 368; FLA. STANDARD JURY INSTR. – CRIM. 3.6(b) (1997) ("A person is considered to be insane when: (1) The person had a mental infirmity, disease, or defect. (2) Because of this condition, the person had hallucinations or delusions which caused the person to honestly believe to be facts things that are not true or real. The guilt or innocence of a person suffering from such hallucinations or delusions is to be determined just as though the hallucinations or delusions were actual facts. If the act of the person would have been lawful had the hallucinations or delusions been the actual facts, the person is not guilty of the crime.").

<sup>117</sup> *Rodriguez v. State*, 172 So. 3d 540, 544 (Fla. Dist. Ct. App. 2015).

<sup>118</sup> FLA. STAT. § 775.027 (2020); *Rodriguez*, 172 So. 3d at 543.

treatment of delusions.<sup>119</sup> As a result, the instruction on the defense of “insanity by reason of hallucinations or delusions” applied only to offenses dated prior to 2000.<sup>120</sup> *Rodriguez* held that giving the delusions instruction *over the objection of the defendant* — even if the trial court stresses the jury should only apply the instruction if it finds the defendant sane under the general insanity test — is error because it could suggest the insane delusion rule supplies the only means to establish insanity.<sup>121</sup> Instead, a jury may consider a defendant’s delusions “as evidence” to decide whether the defendant had “a mental infirmity, disease, or defect, . . . [and] whether this condition caused [the defendant] at the time of the offenses to not know what he was doing or the consequences of his actions, or whether he knew that what he was doing was wrong.”<sup>122</sup>

However, a Florida defendant pleading insanity based on a delusional perceived justification appears still to be entitled to jury instructions both on general insanity and on the underlying delusional defense — although likely not to an insane delusion instruction. In *Martin v. State*, the defendant, charged with aggravated assault on a law enforcement officer, pleaded not guilty by reason of insanity and argued he discharged a firearm because his paranoid delirium made him feel as though “people were sneaking up on him” and his life was threatened.<sup>123</sup> The trial court, however, excluded mental health testimony pertaining to self-defense and refused to instruct the jury on that defense.<sup>124</sup>

On appeal, the First District Court of Appeal found both the trial court’s exclusion of the evidence and refusal to instruct the jury on self-defense were erroneous.<sup>125</sup> The court reasoned that “[a] defendant has a fundamental right to present witnesses and offer evidence relevant to his defense”<sup>126</sup> and that “[e]vidence that Appellant’s delirium arguably caused him to believe his life was in danger, which would have explained why he discharged his firearm, unquestionably tended to create a reasonable doubt regarding the motivation for his actions.”<sup>127</sup> In support of its holding that self-defense evidence can be relevant to

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<sup>119</sup> *Rodriguez*, 172 So. 3d at 543.

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* at 544-47.

<sup>122</sup> *Id.* at 545.

<sup>123</sup> *Martin v. State*, 110 So. 3d 936, 938 (Fla. Dist. Ct. App. 2013).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 939-40.

<sup>126</sup> *Id.* at 938.

<sup>127</sup> *Id.* at 939.

an insanity claim, the court quoted the state supreme court in *Blocker v. State*, a 1926 case that expressly applied the insane delusion rule.<sup>128</sup> The appellate court in *Martin* reasoned: “Just as the supreme court observed in *Blocker*, the evidence tending to show Appellant felt threatened by the deputies at the time of the incident, due to his delirium, would support the theory that he acted in self-defense.”<sup>129</sup> Consequently, the trial court erred in excluding “evidence regarding whether Appellant’s mental condition caused him to fear for his life.”<sup>130</sup> The trial court also erred in failing to instruct the jury on self-defense because “there was sufficient evidence in the record indicating his condition may have caused him to believe his life was in danger . . . [so] the instruction on self-defense was ‘necessary to allow the jury to properly resolve all issues in the case.’”<sup>131</sup>

Ultimately, Florida law is murky on how delusions of justification meld with the general right-and-wrong test for insanity. *Martin* neither discussed the insane delusion rule nor the relationship of delusions to general insanity, and language in the opinion appears to treat self-defense as a defense distinct from that of insanity.<sup>132</sup> Yet, this case cannot be about self-defense *per se* because, as the trial judge held, the defendant in *Martin* produced no evidence to support the “reasonably believes” element of self-defense.<sup>133</sup> Subsequent cases have characterized *Martin* as involving a request for a self-defense instruction to support the defense of insanity under an insane delusion theory.<sup>134</sup> Florida treatises do not resolve the question, as they avoid discussing *Martin* and the current status of delusions within Florida’s insanity law.<sup>135</sup>

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<sup>128</sup> *Blocker v. State*, 110 So. 547, 552-53 (Fla. 1926).

<sup>129</sup> *Martin*, 110 So. 3d at 939.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 940 (quoting *Langston v. State*, 789 So. 2d 1024, 1026 (Fla. Dist. Ct. App. 2001)).

<sup>132</sup> See, e.g., *id.* at 940 (“[T]he State does not cite any authority for the proposition that improperly rejecting a valid defense is harmless if the defendant has another defense to offer.”).

<sup>133</sup> See FLA. STAT. § 776.012(2) (2020).

<sup>134</sup> See, e.g., *Rodriguez v. State*, 172 So. 3d 540, 545 (Fla. Dist. Ct. App. 2015) (stressing that *Martin* requested the self-defense instruction after presenting testimony “that his state of delirium could have caused him to act to protect himself because he believed his life was in danger” and distinguishing *Martin* from the instant case, where the defendant “objected to the State’s request that the court give the jury a self-defense instruction, reiterating that he was not claiming self-defense, even if his hallucinations and delusions were taken as true”).

<sup>135</sup> See 4 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 21.3 (2020) (speculating that applying the general test for responsibility is “probably the proper approach to [insane

c. *Georgia*

Georgia employs the insane delusion rule in a unique manner: the rule serves as a component of the defense of delusional compulsion, which constitutes an express exception to the general right-and-wrong test for insanity. In Georgia, a person can establish her insanity<sup>136</sup> by satisfying the general right-and-wrong test<sup>137</sup> or by meeting the requirements of the delusional compulsion statute.<sup>138</sup> The Georgia statute for delusional compulsion provides:

A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.<sup>139</sup>

Committee notes on earlier versions of these statutory sections<sup>140</sup> explain the statutes were meant to codify the standard set forth in the 1847 case of *Roberts v. State*.<sup>141</sup>

Although neither *Roberts* nor the delusional compulsion statute specifies that a qualifying delusion must satisfy the elements of a legal defense, the Georgia Supreme Court in 1898 explicitly adopted such a requirement.<sup>142</sup> As the court explained,

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delusions], rather than to apply the mistake of fact doctrine to the delusions”); 16 FLORIDA JURISPRUDENCE 2D CRIMINAL LAW — SUBSTANTIVE PRINCIPLES/OFFENSES § 68 (2020) (merely including a quotation from *Blocker v. State*, 110 So. 547 (Fla. 1926)).

<sup>136</sup> Georgia courts use “insanity” as an umbrella term that includes both the statutory definitions of insanity as well as delusional compulsion. See *Lawrence v. State*, 454 S.E.2d 446, 449-50 (Ga. 1995) (quoting GA. CODE ANN. § 16-3-3 (2020)).

<sup>137</sup> GA. CODE ANN. § 16-3-2 (2020).

<sup>138</sup> See *Lawrence*, 454 S.E.2d at 449-50.

<sup>139</sup> GA. CODE ANN. § 16-3-3 (2020).

<sup>140</sup> Section 16-3-2 was formerly codified as GA. CODE § 26-702 (1933), and section 16-3-3 was formerly codified as GA. CODE § 26-703 (1933). The language of the former versions of each section are nearly identical to the current versions.

<sup>141</sup> *Roberts v. State*, 3 Ga. 310, 328, 330-31 (1847) (recognizing an exception to the wrongfulness test when “the delusion under which [the defendant] laboured had so shattered his intellect, as to control his will, and impel him resistlessly to the commission of the act, and *therefore* there was no criminal motive, no wicked or mischievous intent, and if these were wanting, he was irresponsible”).

<sup>142</sup> See *Lawrence*, 454 S.E.2d at 449 (noting that Georgia case law has included a justification component in the delusional compulsion insanity defense since 1898); *Taylor v. State*, 31 S.E. 764, 777 (Ga. 1898) (suggesting that the plaintiff-in-error would be relieved from criminal responsibility if “the act [was] connected with the delusion, so that it would not be unlawful if the facts about which he were deluded were true”).

It is only in those instances where an individual, who is able to distinguish right from wrong, commits a criminal act while suffering under a delusional compulsion which leads him to believe his action is *right*, i.e., "justified," that Georgia law accepts insanity as a defense. Hence, "if the delusion is as to a fact which would not excuse the act with which the prisoner is charged, the delusion does not authorize an acquittal of the defendant."<sup>143</sup>

Thus, when determining whether a delusional compulsion excuses a defendant's act, a Georgia court will assess whether the defendant suffered from a delusion at the time of the crime, whether the delusion was connected to the crime, and whether, if the facts of the delusion had been true, the defendant would have been justified or excused in her actions.<sup>144</sup> This defense operates independently of the right-and-wrong test.<sup>145</sup>

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Returning to the hypothetical developed above, a trial court in Texas, Georgia, or Florida would permit Robert Loredo to adduce evidence of his genuine (but delusional) belief that the killings were immediately necessary to preserve his life. In addition, Loredo would be entitled to instructions both on a general insanity defense and on self-defense, so long as he adduced evidence capable of supporting those defenses. However, Loredo would likely not be able to support a self-defense instruction for the killing of Baughman because he could not satisfy the imminence requirement.

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<sup>143</sup> *Lawrence*, 454 S.E.2d at 450 (quoting *Mars v. State*, 135 S.E. 410 (Ga. 1926)).

<sup>144</sup> *Shaw v. State*, 798 S.E.2d 344, 355 (Ga. Ct. App. 2017) (quoting *Appling v. State*, 474 S.E.2d 237 (Ga. Ct. App. 1996)).

<sup>145</sup> Georgia case law demonstrates the insane delusion rule may provide for acquittal even when the wrongfulness prong of the general insanity defense would not. See *Stevens v. State*, 350 S.E.2d 21, 22-23 (Ga. 1986) (reversing a murder conviction where overwhelming evidence showed that "at the time the defendant killed his wife he was operating under the delusion that she was possessed by satan and that he, the defendant, was defending himself against satan's physical attacks and attempts to trap and destroy him, as well as putting an end to the evil and destruction in the world caused by satan," and thus the "evidence demanded a finding that the defendant met the justification criterion for a defense of delusional compulsion," even though evidence suggesting knowledge of wrongfulness — namely the defendant had cleaned his wife's blood from his vehicle's windows, hidden his bloody clothes, and asked about Georgia's death penalty — supported the trial court's rejection of the general insanity defense); *Brown v. State*, 184 S.E.2d 655, 658 (Ga. 1971) (holding the defendant was entitled to a delusional compulsion instruction, even if she could distinguish right from wrong at the time of the killing).

In Texas, so long as direct evidence in the record supported the defense, Loredo would be entitled to an insane delusion instruction.<sup>146</sup> The instruction pertaining to the charge of murdering his father would likely look like this:

Jurors must find the defendant not guilty of the first degree murder of Edward Loredo if they believe, by a preponderance of the evidence, that, as a result of a mental disease or defect, the defendant was suffering from an insane delusion as to the facts then existing, which caused the defendant to believe that Edward Loredo was participating in a conspiracy to traffic drugs, that Edward Loredo had voiced his intent to kill the defendant on the day of the killing, and that Edward Loredo was brandishing a gun at the moment of the killing, and thus that the defendant reasonably believed the deadly force was immediately necessary to protect himself against Edward Loredo's immediate use or attempted use of unlawful deadly force.<sup>147</sup>

In this way, the jury's attention would be focused on the legal requirements of self-defense and the factual findings that must be made for the defendant's delusion to conform to that defense.

On the other hand, in Georgia, Loredo would receive a delusional compulsion instruction after receiving an instruction on the general right-and-wrong test.<sup>148</sup> The instruction would inform the jury that, should it find the defendant could distinguish between right and wrong, it still must find him irresponsible if a mental delusion overpowered his will such that he lacked the intent to commit the crime.<sup>149</sup> The instruction would clarify that, to acquit on these grounds, the jury must find the defendant was actually laboring under the delusion at the time of the act and believed facts that, if true, would have justified the action.<sup>150</sup> The jury also would receive an instruction on self-defense.<sup>151</sup>

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<sup>146</sup> *Conaway v. State*, 663 S.W.2d 53, 55 (Tex. Ct. App. 1983); *see Coffee v. State*, 184 S.W.2d 278, 280 (Tex. Crim. App. 1944) (per curiam).

<sup>147</sup> *See* TEX. PENAL CODE ANN. §§ 9.31, 9.32 (2007) (self-defense); *Miller v. State*, 940 S.W.2d 810, 813-14 (Tex. Ct. App. 1997) (describing proper and improper jury instructions in insane delusion cases).

<sup>148</sup> *See* GA. JURY INSTR., *supra* note 103, at 3.80.30.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 3.10.10; *see also Woods v. State*, 733 S.E.2d 730, 736 (Ga. 2012) (holding that, to evaluate a delusional compulsion defense, the jury must be given an instruction as to what conduct would constitute justification).

A Texas or Georgia court would not issue a similar instruction as to the killing of Baughman; the only defense relevant to that murder charge would be general insanity. In Florida, current case law indicates the defendant would be entitled to a general insanity instruction as well as a self-defense instruction, but not to an instruction pertaining specifically to insane delusion.

## 2. Evidence that “Wrong” Reduces to “Illegal”

In other jurisdictions — military courts, federal courts, Tennessee, and Oklahoma — the insane delusion rule functions as a background principle of law used to inform the definition of “wrongfulness” in the general right-and-wrong test.<sup>152</sup> In essence, the rule’s directive to subject delusions to the strict parameters of legal defenses buttresses the conclusion that wrongfulness is an objective concept that should mean contrary to societal standards of morality.<sup>153</sup> Public or societal standards of morality typically reduce to illegality, except perhaps in cases of delusions involving a deific decree.<sup>154</sup> When a defendant believed her act was justified because of an insane delusion — and, indeed, had the facts been as she believed, her act would have been justified — then, by definition, she would have been unable to appreciate her act was wrongful.<sup>155</sup> On the other hand, when a defendant’s insanity defense rests on the perceived justification of her act, a delusion that fails to conform to a legal defense will not, without more, establish her insanity. In all of these jurisdictions, however, a defendant whose delusion fails the insane delusion test can still argue that she satisfies the general test in that she lacked the cognitive abilities necessary to appreciate the wrongfulness of her act.<sup>156</sup>

*United States v. Mott*, a case before the Court of Appeals for the Armed Forces, provides a good example of how the insane delusion rule may

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<sup>152</sup> See *United States v. Ewing*, 494 F.3d 607, 612-13 (7th Cir. 2007); *United States v. Mott*, 72 M.J. 319, 324-26 (C.A.A.F. 2013); *Dukes v. State*, 499 P.2d 471, 476 (Okla. Crim. App. 1972) (quoting *Kenamer v. State*, 57 P.2d 646 (Okla. Crim. App. 1936)); *Davis v. State*, 28 S.W.2d 993, 996 (Tenn. 1930).

<sup>153</sup> See *Ewing*, 494 F.3d at 619-20 (observing that the English judges’ answer concerning the relationship of insane delusions to responsibility illustrates “that the right-versus-wrong test asked not whether *the defendant* believed he was justified based on his delusional view of reality, but whether *society* would judge his actions an appropriate response to his delusions”); *Mott*, 72 M.J. at 325-26.

<sup>154</sup> See *State v. Worlock*, 569 A.2d 1314, 1321 (N.J. 1990).

<sup>155</sup> *People v. Skinner*, 704 P.2d 752, 762 n.13 (Cal. 1985) (discussing the insane delusion rule and observing that the delusion that the defendant is defending himself “results in an inability to appreciate that the act is wrong”); see *supra* notes 53–54.

<sup>156</sup> See *M'Naghten's Case* (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL).

inform the definition of wrongfulness and rebut an insanity defense premised on a perceived justification.<sup>157</sup> Richard R. Mott slashed the throat of Seaman Recruit JG — while “shouting ‘you raped me’ or ‘he raped me’” — after believing he heard JG tell another crew member on the previous day that he planned to kill Mott and his family.<sup>158</sup> Diagnosed with severe paranoid schizophrenia, Mott delusionally believed that a large gang of men, including JG, had raped him several years earlier.<sup>159</sup> “The examining psychiatrist concluded that, at the time of the offense,” Mott “believed that ‘he was acting in self-defense,’ that ‘the only way to stop [JG from killing him] was to attack [JG],’ and that his actions were ‘justified and not wrong.’”<sup>160</sup> Mott was charged with attempted premeditated murder and was convicted by a general court-martial.<sup>161</sup>

On appeal, Mott argued the military judge erred in providing “a purely objective standard for wrongfulness.”<sup>162</sup> The appellate court rejected that contention and concluded that wrongfulness means the same thing in Article 50a of the Uniform Code of Military Justice “as in *M’Naghten’s Case* and its accompanying common law.”<sup>163</sup> After exploring *M’Naghten’s* understanding of wrongfulness and quoting the insane delusion rule, the court held that “wrongfulness” should be determined using an objective standard.<sup>164</sup> It reasoned that “[s]ociety formally expresses its determinations of ‘right and wrong’ and ‘public morality’ through law[,]” and “[r]arely would an allegedly illegal act not also be wrongful morally.”<sup>165</sup> The court continued:

Thus, “appreciating wrongfulness” is the accused’s ability to understand and grasp that his conduct violates society’s essential rules, and is supported by an accused’s understanding that his conduct violated the law, and is contradicted by

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<sup>157</sup> *Mott*, 72 M.J. at 324-25. See generally Defense of Lack of Mental Responsibility, 10 U.S.C. § 850a(a) (2018) (providing the affirmative defense of lack of mental responsibility).

<sup>158</sup> *Mott*, 72 M.J. at 321-22.

<sup>159</sup> *Id.* at 322.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 321.

<sup>162</sup> *Id.* at 323.

<sup>163</sup> *Id.* at 324.

<sup>164</sup> *Id.* at 326.

<sup>165</sup> *Id.* (quoting *State v. Worlock*, 569 A.2d 1314, 1321 (N.J. 1990)).

evidence that — if the facts of the accused's delusions were true — then his conduct would not violate the law.<sup>166</sup>

The court noted it “need not ultimately define the distinction, if any, between legal and moral wrong, as in this case Appellant argued that he acted in perceived self-defense, and that Appellant's mental illness prevented him from appreciating that the attempted killing was wrongful in any sense.”<sup>167</sup> Subsequent military cases have emphasized that a delusion's failure to conform to a legal defense contradicts the accused's argument that, because of that delusion, she believed her act was legal and cohered with society's moral values.<sup>168</sup>

However, a delusion that does not strictly conform to a justification or excuse may support a general insanity defense by helping to demonstrate an inability to appreciate wrongfulness. The appellate court in *Mott* noted in a footnote that, “while wrongfulness is determined objectively, the determination of the accused's ability to ‘appreciate’ that wrongfulness is necessarily specific to that accused.”<sup>169</sup> This passage signals the court's understanding that a delusion, regardless of content, may help to establish (along with other symptoms of mental disorder) that the accused lacked the cognitive abilities necessary for appreciation and sound moral reasoning. The court illustrated the interplay of those defensive theories in the case at bar:

Under the defense theory, Appellant's schizophrenia not only made him think that JG was the gang leader who previously raped and tried to kill him and now was back to kill him, but also that he faced imminent death and had no option but to kill JG. Even if a rational person would have understood that he could report JG to the authorities or run away, Appellant asserted that he was unable to process these options like a rational person, and therefore was unable to appreciate that he was not acting in self-defense by attacking JG — that is, Appellant was unable to appreciate that attacking JG was wrongful.<sup>170</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 326 n.5.

<sup>168</sup> *See, e.g.,* United States v. Miller, ARMY 20160422, 2018 WL 2760056, at \*2-3 (A. Ct. Crim. App. May 31, 2018) (affirming verdict of guilty because “Appellant acted on the impulse to the voice, not because he was under an illusion that he was in imminent danger, perceived a threat, or felt justified in his actions” and, “[w]hile revenge is a motive, it is not a legal justification or excuse”).

<sup>169</sup> *Mott*, 72 M.J. at 326 n.6.

<sup>170</sup> *Id.* at 333.

As this passage suggests, the tendency of a court (or trier of fact or expert witness) to find that a delusion advances a general insanity claim may depend in part on how closely the defendant's delusional belief resembles a legal justification or excuse.<sup>171</sup>

Other jurisdictions have also used the insane delusion test to construe the bounds of "wrongfulness" for purposes of general insanity. In *United States v. Ewing*, the U.S. Court of Appeals for the Seventh Circuit used the rule to affirm a conviction where the defendant's perceived justification involved delusions of a mind-reading conspiracy and illegal deprivation of property — situations that would certainly not justify arson or the use of a destructive device.<sup>172</sup> Other federal courts have affirmed the rule expressed in *Ewing*.<sup>173</sup> In *Davis v. State*, the Supreme Court of Tennessee endorsed the notion that "a homicide committed under an insane delusion is excusable, if the notion embodied in the delusion and believed to be a fact, if a fact indeed, would have excused the defendant."<sup>174</sup> Thus, if a defendant's delusion had led her to believe she was acting in legal self-defense, she would be excused,<sup>175</sup> but a delusion's failure to conform to a legal defense would effectively counter the accused's argument that, because of that delusion, she believed her act was justified.<sup>176</sup> Oklahoma's relationship to the insane delusion rule is less clear: the Oklahoma Court of Criminal Appeals affirmed its

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<sup>171</sup> See *infra* text accompanying note 394. But see *infra* note 353 (observing that bizarre beliefs may also qualify for insanity).

<sup>172</sup> See *United States v. Ewing*, 494 F.3d 607, 612-13, 621 (7th Cir. 2007).

<sup>173</sup> See *United States v. Cuebas*, 415 F. App'x 390, 397-98 (3d Cir. 2011); *United States v. Polizzi*, 545 F. Supp. 2d 270, 280 (E.D.N.Y. 2008) (quoting key language favorably in distinguishing the case).

<sup>174</sup> *Davis v. State*, 28 S.W.2d 993, 996 (Tenn. 1930); accord *State v. Shelton*, 854 S.W.2d 116, 122 (Tenn. Crim. App. 1992) ("If the mental disease or defect produced a delusion and the notion embodied in the delusion and believed to be a fact would have excused the defendant's conduct if the notion were indeed a fact, then the conduct committed under such a delusion is, likewise, excusable.").

<sup>175</sup> See *Overton v. State*, 56 S.W.2d 740, 741 (Tenn. 1933); *Davis*, 28 S.W.2d at 996. Other cases applying the rule include *Drye v. State*, 184 S.W.2d 10, 12 (Tenn. 1944), and *Long v. State*, 304 S.W.2d 492, 496 (Tenn. 1957).

<sup>176</sup> See *Overton*, 56 S.W.2d at 741 ("If in truth Overton's delusion had led him to believe that Scott was making an attack upon him (Overton) at the time of this difficulty, and if Overton had believed himself acting in self-defense at that time, he might be excused. But the record shows no such state of facts."). Tennessee's insanity defense underwent a number of legislative changes before returning to the *M'Naghten* test in 1995, but at least one unreported case indicates that previous interpretations of "wrong" in Tennessee, based on the *M'Naghten* standard in place before 1977, should apply to the current statute. See *State v. Arriola*, No. M2007-00428-CCA-R3-CD, 2009 WL 2733746, at \*7 (Tenn. Crim. App. Aug. 26, 2009). Interestingly, Tennessee has applied the insane delusion rule almost exclusively in the context of delusional provocation.

allegiance to the rule in a case syllabus in 1973,<sup>177</sup> but the only case applying it has been a 2007 federal habeas case that used the rule to hold an insanity acquittal would be unavailable to a defendant who killed because of a delusion that the victim “had committed numerous rapes and arsons” in the past.<sup>178</sup>

Using the insane delusion rule to reach the conclusion that “wrong” generally means “illegal” dictates the way perceived justifications are received by court actors — and this receipt appears to differ from that in jurisdictions that define “wrong” more broadly (or not at all). Jurisdictions that do not define “wrong” for the jury<sup>179</sup> often permit a broader, more general understanding of legal defenses — particularly self-defense or necessity — to permeate insanity cases. In these jurisdictions, the defendant’s subjective sense of justification may factor into the general right-wrong calculus without subjecting that justification to the strict requirements of the law.<sup>180</sup> In essence, subjectively feeling justified — when the facts, as believed, were generally consistent with the basic thrust or gist of the justification (even if, admittedly, quite warped) — will militate in support of the defendant’s general insanity claim. One practical advantage of such an approach is it avoids probing the complexities of a delusion and the

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<sup>177</sup> See *Dukes v. State*, 499 P.2d 471, 476 (Okla. Crim. App. 1972) (quoting *Kennamer v. State*, 57 P.2d 646 (Okla. Crim. App. 1936)); see also *Kennamer v. State*, 57 P.2d 646, 648 (Okla. Crim. App. 1936) (syllabus by the court).

<sup>178</sup> *Diestel v. Hines*, 506 F.3d 1249, 1274 (10th Cir. 2007).

<sup>179</sup> See, e.g., *Ivery v. State*, 686 So. 2d 495, 500-01 (Ala. Crim. App. 1996); *State v. Abercrombie*, 375 So. 2d 1170, 1178-79 (La. 1979); *State v. Crenshaw*, 659 P.2d 488, 497 (Wash. 1983).

<sup>180</sup> See, e.g., *Dixon v. State*, 668 So. 2d 65, 72 (Ala. Crim. App. 1994) (reversing a conviction for attempted murder of a police officer in part because of “evidence that the appellant was suffering from a delusion that the assault was necessary to ensure the appellant’s safety”); *Moler v. State*, 782 N.E.2d 454, 458-59 (Ind. Ct. App. 2003) (reluctantly affirming conviction but emphasizing the near certain “conclusion” that the defendant held a “‘firmly sustained’ belief that [the victim] was a witch from which he needed to protect himself” without mentioning that the perceived facts, if true, would not have permitted deadly force); *State v. Roy*, 395 So. 2d 664, 668 (La. 1981) (reversing a conviction where the defendant was “markedly preoccupied with blacks and their ‘evil’ nature” and felt that “he was going to war for his country” and was “executing God’s will”); *State v. Dangerfield*, 214 So. 3d 1001, 1018-19 (La. Ct. App. 2017) (finding that Louisiana courts, to reverse a conviction on grounds of insanity, typically require a showing that the defendant “articulated to a degree [her] belief that there was some justification” for her alleged criminal act and briefly discussing relevant cases); *State v. Chanthabouly*, 262 P.3d 144, 162 (Wash. Ct. App. 2011) (approving the trial court’s decision to permit the defendant to introduce evidence and argument that he acted under a delusional belief of self-defense without reference to the elements of that defense).

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imagination of the delusional defendant to determine if all the preconditions of a legal defense would have been satisfied had the delusion been real.<sup>181</sup> Therefore, in tethering the trier of fact's understanding of a delusional, perceived justification to the strict contours of the legal defense, this use of the insane delusion rule may serve to narrow the scope of the insanity defense as compared to those jurisdictions that do not use the rule in this manner — but, again, this is a result of strictly defining “wrongfulness” as “legal wrong” in such cases.

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If Robert Loredó's case were tried in a military court, federal court, Tennessee, or Oklahoma, the court would provide a general instruction on insanity that includes the right-and-wrong test.<sup>182</sup> The court may also instruct the jury that wrongfulness means contrary to societal or public morality and that knowledge of criminality is relevant but not dispositive to that inquiry.<sup>183</sup> The jury would not receive an instruction pertaining specifically to Loredó's delusion.

Before the court provided those general insanity instructions, defense counsel would likely argue in her closing that Loredó could not have appreciated the wrongfulness of his acts because he had schizophrenia and was actively psychotic at the time. He was untethered from reality: in the throes of his schizophrenia-fueled delusion, Loredó genuinely feared that his father and Baughman, part of a drug cartel, were going to kill him. He was plagued by hallucinations at the moment of the fatal acts: he believed he heard his father detail how he planned to kill Loredó later that day, and he thought his father was brandishing a gun when his father kicked down the door. Driven by delusions and hallucinations, Loredó lacked the ability to accurately perceive the external world and his relationship to it — in essence, he lacked the capacity for rational thought. Because he genuinely believed his acts were justified, the defense could conclude, Loredó could not have known his acts were wrong, and the jury must find him not guilty by reason of insanity. Loredó's counsel would support its defense by highlighting any additional impairments that could have contributed to his irrationality.

The prosecution's route would look quite different. As to the killing of Loredó's father, the prosecution would highlight evidence suggesting

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<sup>181</sup> See WILLIAMS, *supra* note 8, at 502 (“Only an exceptionally clear-headed lunatic would be able to furnish all these details of his delusion.”).

<sup>182</sup> See 10TH CIR. PATTERN JURY INSTR. – CRIM. 1.34 (2d ed. 2011).

<sup>183</sup> See *United States v. Ewing*, 494 F.3d 607, 619-20 (7th Cir. 2007).

awareness of wrongdoing, such as Loredo's cutting the power to the office in order to turn off the surveillance cameras and his flight from the scene. As for Baughman, the prosecutor would argue that — even in Loredo's delusion-filled mind — Loredo did not believe he needed to kill Baughman in self-defense; at most Loredo believed that Baughman was participating in a drug distribution scheme and planned to kill Loredo at some point in the future. Baughman did not pose an imminent deadly threat because Loredo had to track him down to kill him. The prosecution may argue that, because Loredo's defense is that he perceived his act to be justified as self-defense, wrongfulness should be assessed by the law of self-defense. Had the facts been as Loredo believed, the prosecution would conclude, he would not have a valid self-defense claim, and Loredo's insanity defense should fail.

A judge usually communicates to the lawyers which instructions she intends to provide to the jury before closing arguments begin. Because Loredo's insanity defense involves his perceived need for defensive force, the prosecution might have requested an instruction on self-defense as a means to counter the theory of defense. The judge would be unlikely to grant this request, however, since the defendant has not asserted the justification of self-defense. Thus, such an instruction (without provision of an insane delusion instruction) would likely confuse the jury. However, if the jury ultimately convicted Loredo of Baughman's murder, an appellate court could sustain the conviction by relying on evidence that Loredo's delusion, if true, would not have provided a legal justification for the killing.

### 3. Insane Delusion Instruction over Defendant's Objection

California's form of the insane delusion rule has a greater capacity to disable a defendant's general insanity defense than the background rule just considered.<sup>184</sup> California courts will preemptively issue an insane delusion instruction to the jury — even over the defendant's objection — when an insanity defense involves a perceived justification or excuse.

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<sup>184</sup> State treatises provide little guidance on the use of the insane delusion rule. See 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 86.01A (2020) (standard for insanity) (“An insane delusion that the conduct was morally correct under some other set of moral precepts would satisfy this part of the *M'Naghten* test of legal insanity.”); 19 CALIFORNIA JURISPRUDENCE 3D CRIMINAL LAW: DEFENSES § 78 (“One who commits an allegedly criminal act as the result of an insane delusion must be judged as if the facts with respect to which the delusion exists were real.”); 1 WITKIN, CALIFORNIA CRIMINAL LAW 4TH DEFENSES § 12 (2020) (insane delusion) (“Cases in which the defense has been upheld appear to be rare.”); see also 5 WITKIN, CALIFORNIA CRIMINAL LAW 4TH CRIM. TRIAL § 799 (2020) (instruction to jury) (summarizing *People v. Leeds* in supplement).

Therefore, the jury will be obligated to consider and reach a determination on the legal significance of a defendant's delusion. Language of California appellate decisions, paired with related guidance from California forensic mental health experts,<sup>185</sup> suggest that a delusion's failure to conform to a legal defense is often dispositive to the failure of the insanity defense as a whole.

California has long subscribed to *M'Naghten's* insane delusion rule.<sup>186</sup> California applies the general test of insanity<sup>187</sup> and defines "wrongfulness" as including moral and legal wrongfulness.<sup>188</sup> Interestingly, the force of the insane delusion rule may depend on whether the court believes the defendant is alleging an inability to understand the legal or the moral wrongfulness of her act.<sup>189</sup>

When an insanity case involves a claim of delusional, perceived justification or excuse — and does not involve a moral component<sup>190</sup> — the success or failure of the defendant's plea will largely turn on whether the delusion satisfies the strict elements of the legal defense.<sup>191</sup> *People v.*

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<sup>185</sup> See Brandon A. Yakush & Melinda Wolbransky, *Insanity and the Definition of Wrongfulness in California*, 13 J. FORENSIC PSYCHOL. PRAC. 355, 355 (2013); *infra* notes 348–53.

<sup>186</sup> See, e.g., *People v. Skinner*, 704 P.2d 752, 762 n.13 (Cal. 1985); *People v. Rittger*, 355 P.2d 645, 653 (Cal. 1960); *People v. Hubert*, 51 P. 329, 330-31 (Cal. 1897); *People v. Leeds*, 192 Cal. Rptr. 3d 906, 912 (Ct. App. 2015), as modified on denial of reh'g.

<sup>187</sup> CAL. PENAL CODE § 25(b) (2020); see also *Skinner*, 704 P.2d at 758-59 (clarifying that, despite the insanity statute's use of "and" rather than "or," the test is disjunctive). The crime charged must also be the product of insanity "and not the result of sane reasoning and natural motives." *People v. Griffith*, 80 P. 68, 71 (Cal. 1905).

<sup>188</sup> See *Skinner*, 704 P.2d at 760-64. In *People v. Coddington*, the California Supreme Court explained that, while morality "need not reflect the principles of a recognized religion and does not demand belief in a God or other supreme being, it does require a sincerely held belief grounded in generally accepted ethical or moral principles derived from an external source." 2 P.3d 1081, 1144 (Cal. 2000), as modified on denial of reh'g, overruled on other grounds by *Price v. Super. Ct.*, 25 P.3d 618 (Cal. 2001) (internal citations omitted). *Coddington* indicates that even deific decrees must comply with this definition of morality in order to establish moral insanity. See *id.* at 1445 n.37.

<sup>189</sup> See *infra* notes 203–08 and accompanying text.

<sup>190</sup> Identifying when a case involves "only" a delusional legal justification requires distinguishing moral from legal wrongfulness. California cases suggest, but have not held, that morality may differ from legality only in cases involving delusions of a deity or supernatural force. See *Leeds*, 192 Cal. Rptr. 3d at 914 (quoting *Skinner*, 704 P.2d at 783-84 (footnote omitted) (citation omitted)); *People v. Torres*, 26 Cal. Rptr. 3d 518, 526 (Ct. App. 2005) (involving implied deific authorization). When a defendant attempts to defend her actions as comporting with "moral" standards not involving a deity or supernatural force, she typically fails. See *Rittger*, 355 P.2d at 653 (rejecting a defendant's attempt to justify a prison murder by his own "personal, prison-influenced standards").

<sup>191</sup> See *Leeds*, 192 Cal. Rptr. 3d at 912.

*Leeds* demonstrates the nearly dispositive role that the insane delusion test plays in such cases.<sup>192</sup> Diagnosed with paranoid schizophrenia, Leeds — similar to Loredó in our hypothetical — killed his father and three other individuals under the delusional belief that they were involved with a Mexican drug cartel and planned to kill him.<sup>193</sup> The trial court issued the standard jury instruction on insanity<sup>194</sup> and, over defense counsel's objections, instructed the jury on the elements of self-defense because "the jury needs some basis of making a determination of what morally and legally wrong is."<sup>195</sup> The trial court limited the jury's consideration of self-defense: "You may consider any evidence defining self-defense *only* to assist you in determining what may be society's generally accepted moral and legal standards. You should not specifically apply the law of self-defense to the conduct of the defendant."<sup>196</sup>

A California appellate court disagreed. It found that moral wrongfulness was not at issue because the defendant's "conduct was based on the legal doctrine of self-defense."<sup>197</sup> Thus, the jury should have focused only on the defendant's knowledge of the legal wrongfulness of his act. The court explained:

The jury was instructed on self-defense but erroneously prohibited from applying it. Without applying the facts as Leeds perceived them to the law of self-defense, the jury would have no way of evaluating whether his paranoid schizophrenia rendered him incapable of appreciating the wrongfulness of his actions.<sup>198</sup>

The appellate court framed its decision as the natural application of *M'Naghten's* insane delusion rule.<sup>199</sup>

Thus, in cases involving delusional justified force, a California trial court should provide instructions on the legal standard for self-defense to allow the jury to assess a defendant's understanding of the

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<sup>192</sup> *See id.* at 914.

<sup>193</sup> *Id.* at 909-12.

<sup>194</sup> *Id.* at 913 ("[T]he defendant was legally insane if: 1. When he committed the crimes, he had a mental disease or defect; [and] 2. Because of that disease or defect, he was incapable of knowing or understanding the nature and quality of his act or was incapable of knowing or understanding that his act was morally or legally wrong.").

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 913-14.

<sup>197</sup> *Id.* at 914. Moral wrongfulness typically equates to legal wrongfulness. *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See id.* at 912.

wrongfulness of her acts.<sup>200</sup> However, given the threat is illusory and sourced in a mental disorder, the appellate court directed that those instructions should be modified to remove any “reasonableness” component.<sup>201</sup>

The insane delusion rule may carry significant, negative collateral consequences. Although a defendant who fails the insane delusion test may still argue insanity under the general right-and-wrong test, the prosecution and the court will have drawn the jury’s attention to the illegality of the defendant’s act had the facts been as she believed, thus suggesting her wickedness. In addition, some evidence suggests that forensic mental health practitioners in California largely discount delusions when applying the general test.<sup>202</sup>

Whether the insane delusion rule plays as strong a role in the context of moral wrongfulness is less clear. On one hand, California case law suggests that, when a defendant alleges moral insanity, the insane delusion rule should operate only in an affirmative manner, meaning that a delusion’s strict conformance to a legal justification will establish an inability to understand wrongfulness, but a failure to conform may not be fatal to her claim. As the California Supreme Court explained in *People v. Skinner*, then reaffirmed in *People v. Elmore*, when the defendant’s delusion would have justified the act, the person would not have appreciated that her conduct was inherently wrong.<sup>203</sup> However,

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<sup>200</sup> See *id.* In accordance with *Leeds*, the unofficial jury instructions for California instruct: “If an insane delusion purports to give rise to the law of self-defense, or defense of others, jury instructions must be given as if the perceived facts had been real. If some other theory of innocence is involved in the delusion, appropriate instructions will be required.” CAL. JURY INSTR., *supra* note 15, at 4.06. However, at least one subsequent unpublished case has interpreted *Leeds* as not dictating that a trial judge must sua sponte issue a self-defense instruction or that counsel must request a pinpoint instruction in a case involving delusional self-defense. *People v. Harris*, No. F071077, 2017 WL 3141174, at \*3 (Cal. Ct. App. July 25, 2017).

<sup>201</sup> *Leeds*, 192 Cal. Rptr. 3d at 914. The court suggested this modified wording for the context in *Leeds*: the defendant qualifies as insane “if, because of a mental disease or defect that he had when he committed the crimes, he actually believed that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force was necessary to defend against the danger.” *Id.* at 914. This approach is contrary to that taken in Texas, where “reasonableness” elements are retained in insane delusion instructions. See *supra* note 110 and accompanying text.

<sup>202</sup> See Yakush & Wolbransky, *supra* note 185, at 365; see also *infra* notes 348–53 and accompanying text.

<sup>203</sup> *People v. Elmore*, 325 P.3d 951, 962 (Cal. 2014) (“A claim of unreasonable self-defense based solely on delusion is quintessentially a claim of insanity under the *M’Naghten* standard of inability to distinguish right from wrong. Its rationale is that mental illness caused the defendant to perceive an illusory threat, form an actual belief

when the perceived facts would not have provided a defense, a mental disease may still support a finding of moral insanity so long as the defendant adduces additional evidence of (a) actual belief that her actions were morally justified according to her perception of generally accepted ethical or moral principles derived from an external source,<sup>204</sup> or (b) an inability (i.e., a lack of the cognitive abilities necessary) to understand the wrongfulness of her act.<sup>205</sup> Case law suggests that how near the delusion comes to meeting the elements of the perceived defense may contribute to the evaluation of whether she actually believed her act to be morally right.<sup>206</sup> Notably, forensic mental health professionals have opined that the narrow definition of morality in California basically eliminates the distinction between moral and legal wrongfulness.<sup>207</sup> If they are correct, a finding that a defendant's perceived justification does not square with a legal defense may be as damaging to her insanity defense in cases alleging moral wrongfulness as in those alleging legal wrongfulness.<sup>208</sup>

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Returning to our hypothetical involving Loredo, a trial court in a jurisdiction such as California would likely instruct the jury — as to both the killing of Loredo's father as well as the killing of Baughman — in this way:

A defendant who commits an act that would otherwise be criminal is not guilty by reason of insanity if the defendant was suffering from an insane delusion, and the facts perceived as real as a product of the delusion would have caused the act to

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in the need to kill in self-defense, and act on that belief without wrongful intent.”); *People v. Skinner*, 704 P.2d 752, 762 n.13 (Cal. 1985).

<sup>204</sup> See *People v. Coddington*, 2 P.3d 1081, 1113 n.5 (Cal. 2000); *supra* note 188 and accompanying text.

<sup>205</sup> Cf. *Skinner*, 704 P.2d at 762 n.13 (observing that the second delusion mentioned in *M'Naghten* — “that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury” — “*without more*, does not suggest that the defendant believes his act is lawful or morally justified” (emphasis added)).

<sup>206</sup> See *People v. Dennis*, No. B236745, 2013 WL 3853178, at \*16 (Cal. Ct. App. July 24, 2013) (“Whether appellant acted in revenge or to prevent further harm or death was a factor relevant to whether appellant knew that what she did was morally wrong, whether or not that factor was also relevant to whether she knew that what she did was legally wrong.” (emphasis omitted)).

<sup>207</sup> Yakush & Wolbransky, *supra* note 185, at 362; see *supra* note 190 and sources therein (discussing the difference between morality and legality in California).

<sup>208</sup> See Yakush & Wolbransky, *supra* note 185, at 366.

be lawful. In the case of [first degree] murder, . . . if the facts the defendant perceived as a product of the delusion would have justified the exercise of self-defense, . . . the defendant would be not guilty by reason of insanity, if the defendant's acts would have been justified had the perceived facts been real.<sup>209</sup>

Here, the defendant

was legally insane if, because of a mental disease or defect that he had when he committed the crimes, he actually believed that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force was necessary to defend against the danger.<sup>210</sup>

These instructions would be necessary because only by “applying the facts as [Loredo] perceived them to the law of self-defense [would] the jury [have a] way of evaluating whether his paranoid schizophrenia rendered him incapable of appreciating the wrongfulness of his actions.”<sup>211</sup> As discussed before, the evidence appears to permit the trier of fact to find that Loredo — while in the throes of an insane delusion stemming from his schizophrenia — believed that his father posed an imminent, deadly threat at the time of the killing, thus justifying an acquittal by reason of insanity on that charge.<sup>212</sup> However, the evidence appears not to show that Loredo feared that Baughman posed an imminent, deadly threat. Under *Leeds*, Loredo's insanity defense would fail as to this count unless he could adduce additional evidence that he lacked the capacity to reason through the illegality of this act.

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In conclusion, delusions hold special significance in nine jurisdictions in the United States.<sup>213</sup> One state — Nevada — limits the wrongfulness prong of the insanity standard to the strict application of the insane delusion rule.<sup>214</sup> Nevadans who fail to satisfy the insane delusion rule have no other means to establish their irresponsibility.<sup>215</sup> Three states — Texas, Georgia, and to a lesser extent Florida — employ

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<sup>209</sup> See CAL. JURY INSTR., *supra* note 15, at 4.06.

<sup>210</sup> *People v. Leeds*, 192 Cal. Rptr. 3d 906, 914 (Ct. App. 2015), *as modified on denial of reh'g*; see CAL. PENAL CODE § 197(3) (2020) (addressing justifiable homicide).

<sup>211</sup> *Leeds*, 192 Cal. Rptr. 3d at 914.

<sup>212</sup> See *supra* note 147 and sources therein.

<sup>213</sup> See *supra* note 81 and sources therein; *supra* Part II.

<sup>214</sup> See *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001).

<sup>215</sup> See *id.* (“Unless a defendant presents evidence that complies with this standard, he or she is not entitled to have the jury instructed on the issue of insanity.”).

the insane delusion rule as a species of insanity that, provided a sufficient evidentiary basis exists, goes to the jury with a specific instruction.<sup>216</sup> Thus, a jury's attention is only drawn to the legal content of a delusion when the jury could conceivably acquit on this basis. Four jurisdictions — the military system, the federal system, Tennessee, and Oklahoma — use the insane delusion rule as a background principle to support construing “wrongfulness” as “illegality.”<sup>217</sup> California does this as well but also transmits an insane delusion instruction to the jury — even over the defendant's objection — whenever an insanity defense involves a perceived justification or excuse.<sup>218</sup> In such cases, California juries must consider and reach a determination on the legal significance of a defendant's delusion.<sup>219</sup>

Given *M'Naghten's* focus on reasoning,<sup>220</sup> the soundness of any permutation of the insane delusion rule depends on a deluded individual's ability to exercise rational, moral reasoning about choices concerning her delusions. The next Part explores the relationship between delusions and moral reasoning.

### III. SCIENCE OF DELUSIONS

Medical and legal scholars have long criticized the insane delusion rule on scientific grounds. In addition to arguments already raised,<sup>221</sup> commentators have argued that delusions may indicate a larger diseased mind that produces erroneous reasoning and conclusions,<sup>222</sup> and that

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<sup>216</sup> See *supra* note 103 and sources therein.

<sup>217</sup> See *supra* note 152 and sources therein.

<sup>218</sup> See *People v. Leeds*, 192 Cal. Rptr. 3d 906, 912-14 (Ct. App. 2015), as modified on denial of reh'g.

<sup>219</sup> *Id.* at 914.

<sup>220</sup> See *supra* notes 62–69 and sources therein.

<sup>221</sup> See *supra* note 46 and sources therein (requiring those with mental disorder to exert sane reasoning); *supra* notes 75–77 and sources therein (premised on discredited scientific theories).

<sup>222</sup> See STEPHEN, *supra* note 66, at 160-62 (“A delusion which, considered as a mere mistake, has no importance at all, may as a matter of evidence be of the highest importance, because though trifling in itself it may indicate profound disturbance of every faculty of the mind.”); Cohen, *supra* note 46, at 39-40 (“Persons suffering from delusions of persecution, say as a result of advanced paranoia, are frequently not able to reason about them. The delusions are themselves the effects of a disordered mind — a mind over which the subject has little or no control.”). But see Lisa Bortolotti, Matthew R. Broome & Matteo Mameli, *Delusions and Responsibility for Action: Insights from the Breivik Case*, 7 *NEUROETHICS* 377, 381 (2014) (“[T]he role of delusional beliefs does not seem to be different from the role of non-delusional beliefs, unless we assume that the presence of delusions also signals the presence of a cognitive deficit that impacts on the

the rule treats psychologically similar delusions differently.<sup>223</sup> Recent discoveries in the cognitive sciences add another dimension to these arguments: delusions themselves may signal a disordered process of rational thinking, beyond the mere disordered content of thought, particularly for decisions related to those delusions.<sup>224</sup>

Despite the vast amount of research involving psychotic populations and the relatively large literature discussing moral decision-making, few modern studies probe the capacity for moral decision-making in populations with psychosis, and those that do fail to address decisions connected to or emanating from delusions.<sup>225</sup> This focus is crucial: to establish insanity, a defendant who alleges her act was the product of a delusion must establish: (a) the existence of a mental disease, (b) the existence of a genuinely held delusion emanating from that mental

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decision to commit the crime in question (and at present it would be difficult to find empirical support for such a hypothesis).”).

<sup>223</sup> See LANCELOT FEILDING EVEREST, *THE DEFENCE OF INSANITY IN CRIMINAL CASES* 47 (1887); GLUECK, *supra* note 46, at 171 (arguing that the delusion test makes the outcome of insanity cases random); RICHARD HARRIS, *BEFORE TRIAL* 261 (2d ed. 1887); ALAN NORRIE, *CRIME, REASON AND HISTORY* 181 (3d ed. 2014); MARC E. SCHIFFER, *MENTAL DISORDER AND THE CRIMINAL TRIAL PROCESS* 137-38 (1978); WILLIAMS, *supra* note 8, § 161; Klinck, *supra* note 40, at 463-64; *cf.* SCHOPP, *supra* note 64, at 181 (noting that the primary significance of delusions is that they reflect disordered thinking); Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1128-29 (2007) (arguing that, if someone is being motivated by psychotic reasons, she should be excused whether or not she had delusional beliefs that if true would be a defense).

<sup>224</sup> See LAFAVE, *supra* note 8, § 7.2(b)(5); Edwin Roulette Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 87-88 (1908).

<sup>225</sup> One modern strain of research addressing moral decision-making in schizophrenia patients concluded that the capacity for moral decision-making is preserved in schizophrenia. Jonathan McGuire, Martin Brüne & Robyn Langdon, *Judgment of Moral and Social Transgression in Schizophrenia*, 76 COMPREHENSIVE PSYCHIATRY 160, 161 (2017) [hereinafter *Social Transgression*]; Jonathan McGuire, Martin Brüne & Robyn Langdon, *Outcome-Focused Judgments of Moral Dilemmas in Schizophrenia*, 52 CONSCIOUSNESS & COGNITION 21, 21 (2017) [hereinafter *Outcome-Focused Judgments*]. However, these studies were designed to evaluate whether “capacities for moral judgment are compromised in schizophrenia . . . independent of delusions or other characteristic positive symptoms . . . .” *Social Transgression, supra*, at 161. Consequently, the experimental population included schizophrenia patients exhibiting mild symptoms. *Social Transgression, supra*, at 163; *Outcome-Focused Judgments, supra*, at 25. Thus, the conclusion that a “diagnosis of schizophrenia, per se, ought not to be considered exculpatory when capacity for moral reasoning is evaluated in a legal context” should not be interpreted as foreclosing the possibility that moral reasoning may be compromised within the context of an acute delusion. Jonathan McGuire, Linda Barbanel, Martin Brüne & Robyn Langdon, *Re-examining Kohlberg’s Conception of Morality in Schizophrenia*, 20 COGNITIVE NEUROPSYCHIATRY 377, 380 (2015).

disease, and (c) a causal link between the act and that delusion.<sup>226</sup> Notably, a growing body of psychological and cognitive neuroscience literature indicates that delusions are both generated and maintained by a constellation of reasoning impairments that impinge on the capacity for sound moral decision-making.<sup>227</sup> This literature suggests that a deluded individual's capacity for rationality may be particularly warped *within the context of her delusions*.<sup>228</sup> Therefore, when evaluating the responsibility and blameworthiness of such a defendant, the trier of fact must be permitted to evaluate whether the cognitive biases and emotional impairments associated with her delusions — considered with any other aspects of mental disorder — establish an inability to appreciate wrongfulness, regardless of those delusions' content.<sup>229</sup>

#### A. *Moral Decision-Making and the Dual-Process Model*

Comprehending the relationship of delusions to reasoning requires familiarity with the leading frameworks of decision-making and moral reasoning. In his book, *Thinking, Fast and Slow*, psychologist Daniel Kahneman conceptualized a two-part model to understand decision-making in humans.<sup>230</sup> The culmination of decades of research, Kahneman's dual-process model posits an interplay of "System 1"<sup>231</sup> processing — which "operates automatically and quickly, with little or no effort and no sense of voluntary control" — and "System 2"

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<sup>226</sup> See M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL).

<sup>227</sup> Ward & Garety, *supra* note 21, at 80-83.

<sup>228</sup> See *id.* at 82-83.

<sup>229</sup> See LAFAVE, *supra* note 8, § 7.2(b)(5); Keedy, *supra* note 224, at 87-88. Whether a particular impairment — or constellation of impairments — undermines rationality sufficiently to warrant an excuse is ultimately a moral and legal judgment left to the trier of fact. See Dean Mobbs, Hakwan C. Lau, Owen D. Jones & Christopher D. Frith, *Law, Responsibility, and the Brain*, in UNDERSTANDING COMPLEX SYSTEMS: DOWNWARD CAUSATION AND THE NEUROBIOLOGY OF FREE WILL 243, 249 (Nancey Murphy, George F.R. Ellis & Timothy O'Connor eds., 2009) (cautioning that, in light of the view that "criminal responsibility is a normative legal conclusion, . . . even the best neuroscientific study can only afford factual evidence to be weighed alongside other behavioral evidence and normative considerations, rather than actually resolve the legal questions as to which factual evidence is relevant"); Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 542, 547 (1996) [hereinafter *Brain and Blame*].

<sup>230</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 19-30 (2011).

<sup>231</sup> Literature employing Kahneman's dual-process model uses inconsistent terminology to refer to each of the processes in the model. For consistency and clarity, this Article will refer to the processes exclusively using the word "System."

processing — which reflects conscious, thoughtful decision-making.<sup>232</sup> Kahneman’s dual-process framework is sometimes referred to as having a “default-interventionalist” structure, which refers to the relationship by which System 1 produces intuition-based responses and System 2 reviews and, if necessary, modifies those responses.<sup>233</sup> In this way, System 1 is responsible for a large majority of everyday behaviors, and System 2 has the option to effortlessly endorse those behaviors; alternatively, System 2 can intervene when it does not endorse a behavior or when System 1 is unable to provide an adequate suggestion for action.<sup>234</sup>

In the field of cognitive neuroscience, Joshua Greene and colleagues have applied Kahneman’s dual-process model to explain how humans engage in moral decision-making.<sup>235</sup> Greene posits that moral decision-making stems from the competition of a “socio-emotional” pathway and a “cognitive” pathway.<sup>236</sup> In Greene’s model, the socio-emotional pathway parallels System 1, while the cognitive pathway parallels System 2.<sup>237</sup> Cognitive scientists have tested Greene’s dual-process model through use of moral probes, which typically require a person to decide between avoiding the commission of a harmful act or saving multiple lives.<sup>238</sup> Moral probes serve as a useful illustration of Greene’s model since committing a harmful act generates an intuitively negative emotional response — a System 1 process — which can be overcome by focusing on the goal of maximizing the number of lives saved — a System 2 process.<sup>239</sup>

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<sup>232</sup> KAHNEMAN, *supra* note 230, at 20-21 (“[System 2] allocates attention to the effortful mental activities that demand it, including complex computations . . . [and is] often associated with the subjective experience of agency, choice, and concentration.”).

<sup>233</sup> Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSPS. ON PSYCHOL. SCI. 223, 227 (2013).

<sup>234</sup> See KAHNEMAN, *supra* note 230, at 39-49.

<sup>235</sup> See Joshua D. Greene, Leigh E. Nystrom, Andrew D. Engell, John M. Darley & Johnathan D. Cohen, *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 389 (2004).

<sup>236</sup> See *id.* at 389-90.

<sup>237</sup> See Fiery Cushman, *Action, Outcome, and Value: A Dual-System Framework for Morality*, 17 PERSONALITY & SOC. PSYCHOL. REV. 273, 285 (2013).

<sup>238</sup> The paradigmatic moral dilemma is the “trolley” dilemma, where an out-of-control train is rapidly approaching five people standing on the tracks in its path. Participants must decide whether to push a large man in front of the train, thus killing the man but saving the five people on the track, or refrain from taking any action, which dooms the five people in the train’s path but saves the large man. See Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 519 (2002).

<sup>239</sup> See *id.*

### B. *Skewed System Processing Within Delusions*

Psychology and psychiatry researchers have demonstrated the exaggeration of several cognitive biases in populations with delusions beyond the incidence of cognitive biases in the general population. Taken together, the cognitive biases in populations with delusions indicate an impaired — but not completely abolished — capacity for moral reasoning. Section 1 of this subpart will discuss each of the cognitive biases commonly exaggerated in psychotic populations with delusions and will highlight the effect each bias has on the dual-process framework. Section 2 will then explain how the cognitive biases may collectively contribute to delusion formation, which reflects a potentially reversible deviation from healthy moral decision-making for individuals with psychosis.

#### 1. Exaggerated Cognitive Biases

Several cognitive biases are notably elevated in populations with delusions compared to healthy populations. Each cognitive bias reflects either a shift towards an overreliance on System 1 (intuitive/emotional) processing or an impaired engagement of System 2 (reflective/cognitive) processing. Collectively, the shift away from use of System 2 towards overuse of System 1 is indicative of a deluded individual's impaired ability to reflect upon — and thus to appreciate the wrongfulness — of her acts.<sup>240</sup>

Cognitive biases prevalent in populations with psychosis that reflect overreliance on System 1 processing include the jumping-to-conclusions (“JTC”) bias,<sup>241</sup> liberal acceptance,<sup>242</sup> and hostile attribution bias.<sup>243</sup> First, JTC bias refers to “a tendency to make decisions with certainty based on insufficient information.”<sup>244</sup> This data-gathering bias leads actors to quickly gauge ambiguous or anomalous information and reach a false (or even delusional)

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<sup>240</sup> See Ward & Garety, *supra* note 21, at 82-83.

<sup>241</sup> See *id.* at 80-81.

<sup>242</sup> See Steffen Moritz, Todd S. Woodward & Martin Lambert, *Under What Circumstances Do Patients with Schizophrenia Jump to Conclusions? A Liberal Acceptance Account*, 46 BRIT. J. CLINICAL PSYCHOL. 127, 128-29 (2007).

<sup>243</sup> See Raymond W. Novaco, *Cognitive-Behavioral Factors and Anger in the Occurrence of Aggression and Violence*, in THE WILEY HANDBOOK OF VIOLENCE AND AGGRESSION 329, 333-34 (Peter Sturmey ed., 2017).

<sup>244</sup> Suzanne Ho-wai So, Nicolson Yat-fan Siu, Hau-lam Wong, Wai Chan & Philippa Anne Garety, *'Jumping to Conclusions' Data-Gathering Bias in Psychosis and Other Psychiatric Disorders – Two Meta-Analyses of Comparisons Between Patients and Healthy Individuals*, 46 CLINICAL PSYCHOL. REV. 151, 152 (2016).

conclusion without thoroughly evaluating the evidence or considering alternatives.<sup>245</sup> Recent meta-analyses and systematic reviews have “definitively established” the positive correlation between psychosis and JTC bias.<sup>246</sup> Importantly, JTC bias is not limited to any particular mental illness but rather appears elevated in delusional groups across various psychiatric diagnoses.<sup>247</sup> The specificity of JTC to delusions has prompted some scholars to propose that JTC is integral in delusion formation.<sup>248</sup> JTC bias represents overuse of a System 1 process since it reflects reaching a conclusion without gathering and reflecting upon sufficient evidence.<sup>249</sup>

Next, the reasoning bias termed liberal acceptance also fosters premature and incorrect decisions by assigning meaning and momentum to weakly supported evidence.<sup>250</sup> Essentially, the liberal acceptance account posits that deluded individuals more easily (and therefore more quickly) accept a hypothesis compared to healthy individuals as a result of the lowering of their “subjective threshold of significance.”<sup>251</sup> A lowered decision threshold results in a deluded individual requiring less evidence to adopt a hypothesis, which results in premature decisions and an increased rate of error.<sup>252</sup> Importantly, research shows a positive association between the prevalence of liberal acceptance and delusional severity.<sup>253</sup> Thus, much like JTC bias, liberal

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<sup>245</sup> See Ward & Garety, *supra* note 21, at 80.

<sup>246</sup> See *id.* at 80-81.

<sup>247</sup> See Benjamin F. McLean, Julie K. Mattiske & Ryan P. Balzan, *Association of the Jumping to Conclusions and Evidence Integration Biases with Delusions in Psychosis: A Detailed Meta-Analysis*, 43 SCHIZOPHRENIA BULL. 344, 351-52 (2017) (concluding that delusional status is a good predictor of JTC bias, whereas a diagnosis of mental illness, such as schizophrenia, is not).

<sup>248</sup> See Ward & Garety, *supra* note 21, at 81. *But see* Robert Dudley, Peter Taylor, Sophie Wickham & Paul Hutton, *Psychosis, Delusions and the “Jumping to Conclusions” Reasoning Bias: A Systematic Review and Meta-Analysis*, 42 SCHIZOPHRENIA BULL. 652, 656 (2016) (arguing that JTC bias is “neither a sufficient or necessary cause of psychosis or delusions”).

<sup>249</sup> See Ward & Garety, *supra* note 21, at 82 (“It is apparent that JTC may reflect the operation of [System] 1 fast processes . . .”).

<sup>250</sup> See Steffen Moritz, Gerit Pfuhl, Thies Lüdtkke, Mahesh Menon, Ryan P. Balzan & Christina Andreou, *A Two-Stage Cognitive Theory of the Positive Symptoms of Psychosis. Highlighting the Role of Lowered Decision Thresholds*, 56 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 12, 13-14 (2017).

<sup>251</sup> Steffen Moritz, Florian Scheu, Christina Andreou, Ute Pfueller, Matthias Weisbrod & Daniela Roesch-Ely, *Reasoning in Psychosis: Risky but Not Necessarily Hasty*, 21 COGNITIVE NEUROPSYCHIATRY 91, 93 (2016).

<sup>252</sup> *Id.* at 100.

<sup>253</sup> See McLean et al., *supra* note 247, at 350.

acceptance represents overuse of System 1 processing and supplements the explanation of JTC bias in individuals with delusions.

In addition to JTC bias and liberal acceptance, populations with psychosis — especially those with persecutory delusions — also demonstrate a hostile attribution bias.<sup>254</sup> Hostile attribution bias refers generally to responding in a hostile manner to ambiguous cues,<sup>255</sup> often resulting in anger.<sup>256</sup> Further, individuals with persecutory delusions tend to focus selectively on negative information and preferentially recall negative memories.<sup>257</sup> Experimental data show that patients with schizophrenia who are exhibiting positive symptoms — including persecutory delusions — may have difficulties processing negative information,<sup>258</sup> which may cause misinterpretation of what others mean to communicate.<sup>259</sup> In sum, a hostile attribution bias reflects overuse of a System 1 process since it causes an individual to reach a premature conclusion about an ambiguous cue.

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<sup>254</sup> See Erin B. Tone & Jennifer S. Davis, *Paranoid Thinking, Suspicion, and Risk for Aggression: A Neurodevelopmental Perspective*, 24 DEV. & PSYCHOPATHOLOGY 1031, 1039 (2012).

<sup>255</sup> See *id.* See generally Thomas Suslow, Christian Lindner, Udo Dannlowski, Kirsten Walhöfer, Maïke Rödiger, Birgit Maisch, Jochen Bauer, Patricia Ohrmann, Rebekka Lencer, Pienie Zwitserlood, Anette Kersting, Walter Heindel, Volker Arolt & Harald Kugel, *Automatic Amygdala Response to Facial Expression in Schizophrenia: Initial Hyperresponsivity Followed by Hyporesponsivity*, BMC NEUROSCIENCE, Nov. 2013, at 1, 4 (conducting a study that found that schizophrenia “patients showed an initial bilateral amygdala hyperresponsivity to masked neutral faces compared to healthy controls”).

<sup>256</sup> See Novaco, *supra* note 243, at 333. Notably, psychiatry researchers have consistently demonstrated that angry affect mediates a strong association between threat-based delusions and risk of committing serious violence. See Jeremy W. Coid, Simone Ullrich, Constantinos Kallis, Robert Keers, Dave Barker, Fiona Cowden & Rebekah Stamps, *The Relationship Between Delusions and Violence: Findings from the East London First Episode Psychosis Study*, 70 JAMA PSYCHIATRY 465, 467-70 (2013); Simone Ullrich, Robert Keers & Jeremy W. Coid, *Delusions, Anger, and Serious Violence: New Findings from the MacArthur Violence Risk Assessment Study*, 40 SCHIZOPHRENIA BULL. 1174, 1176-80 (2014).

<sup>257</sup> Fumiaki Ito, Kazunori Matsumoto, Tetsuo Miyakoshi, Noriyuki Ohmuro, Tomohiro Uchida & Hiroo Matsuoka, *Emotional Processing During Speech Communication and Positive Symptoms in Schizophrenia*, 67 PSYCHIATRY & CLINICAL NEUROSCIENCES 526, 527 (2013).

<sup>258</sup> See *id.* at 528-30; Norichika Iwashiro, Yosuke Takano, Tatsunobu Natsubori, Yuta Aoki, Noriaki Yahata, Wataru Gonoï, Akira Kunimatsu, Osamu Abe, Kiyoto Kasai & Hidenori Yamasue, *Aberrant Attentive and Inattentive Brain Activity to Auditory Negative Words, and Its Relation to Persecutory Delusion in Patients with Schizophrenia*, 15 NEUROPSYCHIATRIC DISEASE & TREATMENT 491, 496-98 (2019).

<sup>259</sup> Ito et al., *supra* note 257, at 529.

While the cognitive biases reviewed above reflect an overreliance on System 1 processing, populations with psychosis also demonstrate impaired engagement of System 2 processing. Whereas healthy individuals exhibit belief flexibility — defined as a “higher order reasoning ability that involves ‘reflecting on one’s own beliefs, changing them in light of reflection and evidence, and generating and considering alternatives’” — populations with delusions instead exhibit belief inflexibility.<sup>260</sup> Belief inflexibility relates to impairments in (a) accepting the possibility of being mistaken, (b) generating an alternative explanation, and (c) changing conviction in response to contradictory evidence.<sup>261</sup> The first review of the subject, a 2018 meta-analysis, found a robust association between belief inflexibility and global severity of delusions, with a particularly strong association for delusional conviction.<sup>262</sup>

Researchers most commonly measure inflexibility in beliefs unrelated to an individual’s delusions by assessing her bias against disconfirmatory evidence (“BADE”), which refers to the individual’s willingness to modify her hypothesis in light of contradictory evidence.<sup>263</sup> A 2016 meta-analysis of BADE shows an association with delusions regardless of psychiatric diagnosis.<sup>264</sup> Further, a BADE tends to increase with delusional severity,<sup>265</sup> may be implicated prior to the

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<sup>260</sup> Chen Zhu, Xiaoqi Sun & Suzanne Ho-wai So, *Associations Between Belief Inflexibility and Dimensions of Delusions: A Meta-Analytic Review of Two Approaches to Assessing Belief Flexibility*, 57 BRIT. J. CLINICAL PSYCHOL. 59, 60 (2017) (quoting Philippa A. Garety et al., *Reasoning, Emotions, and Delusional Conviction in Psychosis*, 114 J. ABNORMAL PSYCHOL. 373, 374 (2005)).

<sup>261</sup> See Ward & Garety, *supra* note 21, at 81.

<sup>262</sup> Zhu et al., *supra* note 260, at 59, 75 (analyzing sixteen studies, with a total sample of 1,065, and finding all dimensions of delusions — conviction, distress, and preoccupation — were significantly associated with belief inflexibility).

<sup>263</sup> See Nicole Sanford, Ruth Veckenstedt, Steffen Moritz, Ryan P. Balzan & Todd S. Woodward, *Impaired Integration of Disambiguating Evidence in Delusional Schizophrenia Patients*, 44 PSYCHOL. MED. 2729, 2730 fig.1 (2014) (illustrating a typical task to measure BADE). In addition to measuring an individual’s ability (or lack thereof) to integrate disconfirmatory evidence, a BADE task can also be used to measure an individual’s bias against confirmatory evidence, or BACE. See McLean et al., *supra* note 247, at 345 (describing a BACE as the “fail[ure] to adequately up-rate the plausibility of the true interpretation despite additional supporting evidence”). Research demonstrates that trends in BACE closely mirror those of BADE. See *id.* at 350 (showing that BACE is exaggerated as delusional severity increases and diminishes as delusions abate).

<sup>264</sup> See McLean et al., *supra* note 247, at 349 (noting that BADE is less prevalent in groups with other psychiatric illnesses not experiencing delusions).

<sup>265</sup> *Id.* at 350 (noting that a BADE appears “elevated during times of worse delusions, and appear[s] lower . . . as delusions abate”).

first onset of psychosis,<sup>266</sup> and is likely a risk factor for delusion genesis.<sup>267</sup> Taken together, belief inflexibility demonstrates an individual's inability to integrate inconsistent information in order to self-correct behavior, and thus represents impairment of a System 2 process.<sup>268</sup>

Importantly, a phenomenon called hypersaliency of evidence-hypothesis matches ("EVH") demonstrates both overuse of System 1 coupled with underutilization of System 2 processes. EVH refers to the phenomenon by which individuals with delusions give "inordinately high weight" to "encountered evidence [that] matches a hypothesis currently held in mind," even in the face of contradictory evidence.<sup>269</sup> To illustrate EVH, consider that individuals with delusions frequently engage in "safety[-seeking] behaviors," which are "actions designed to prevent [a] feared catastrophe from occurring."<sup>270</sup> The non-occurrence of a catastrophe following use of a safety-seeking behavior leads the individual to incorrectly conclude that she avoided the catastrophe as a result of taking preventative action, which leads to endorsement of the behavior.<sup>271</sup>

For example, imagine an individual with psychosis has a delusional idea that she is being spied upon by people who intend to harm her (hypothesis).<sup>272</sup> While on a crowded bus, she interprets eye contact with other riders as evidence that she is being watched, which supports her

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<sup>266</sup> See Sarah Eisenacher & Mathias Zink, *Holding on to False Beliefs: The Bias Against Disconfirmatory Evidence over the Course of Psychosis*, 56 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 79, 85 (2017).

<sup>267</sup> *Id.* at 87 (holding that a BADE "can be regarded as a cognitive marker of the emerging psychotic state").

<sup>268</sup> See Ward & Garety, *supra* note 21, at 82 ("[B]elief flexibility (i.e. an ability to step back, consider the possibility of being mistaken and reflect on alternative explanations) overlaps substantially with the construct of analytic, controlled '[System] 2' reasoning.").

<sup>269</sup> See William J. Speechley, Elton T.C. Ngan, Steffen Moritz & Todd S. Woodward, *Impaired Evidence Integration and Delusions in Schizophrenia*, 3 J. EXPERIMENTAL PSYCHOPATHOLOGY 688, 696 (2012).

<sup>270</sup> Daniel Freeman, Philippa A. Garety, Elizabeth Kuipers, David Fowler, Paul E. Bebbington & Graham Dunn, *Acting on Persecutory Delusions: The Importance of Safety Seeking*, 45 BEHAV. RSCH. & THERAPY 89, 90, 93, 94 tbl.2 (2007) [hereinafter *Acting on Persecutory Delusions*] (finding that 96 out of 100 participants with persecutory delusions indicated they had carried out at least one safety-seeking behavior during the prior month).

<sup>271</sup> See *id.* at 90.

<sup>272</sup> See, e.g., Speechley et al., *supra* note 269, at 696 (providing an example of EVH in which an individual believes the CIA is spying on him or her).

hypothesis (evidence-hypothesis matches).<sup>273</sup> This belief may be maintained even in spite of contradictory evidence, such as some riders exiting the bus.<sup>274</sup> Feeling threatened, the individual believes she must exit the bus and return home (a safety-seeking behavior) in order to avoid being harmed.<sup>275</sup> Once home, the individual feels safe and concludes that removing herself from the bus allowed her to escape catastrophe (evidence-hypothesis matches).

Thus, EVH dovetails neatly with JTC bias and a BADE, whereby hypersalience could underlie JTC bias to form a delusion, and a BADE prevents the evaluation of disconfirmatory evidence to maintain the delusion.<sup>276</sup> Further, research indicates that EVH undergirds the cognitive biases in psychosis.<sup>277</sup> Importantly, EVH may not align with a specific psychotic illness but rather may be associated with delusions across diagnoses.<sup>278</sup>

In order to illustrate how these cognitive biases might operate together, consider again the Loredó example. Recall that on the day of the killings, Loredó witnessed a high-five between his father and Baughman, which Loredó interpreted as a celebration of a successful drug shipment. Since Loredó had not witnessed any events leading up to the high-five, he exhibited JTC bias by relying on insufficient information to conclude that his father and Baughman were celebrating a successful drug shipment. Further, liberal acceptance helps to explain Loredó's misinterpretation of the high-five. Loredó already believed that a Mexican cartel had infiltrated the family business, which lowered his subjective threshold of significance for evidence in support of this belief. Thus, although a high-five itself is very weak evidence of a successful drug shipment, it still exceeded Loredó's subjective threshold of significance, which led to the delusional conclusion. Moreover,

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<sup>273</sup> See, e.g., *id.* (providing an example of evidence confirming a delusional idea "at the expense of disconfirming evidence").

<sup>274</sup> See, e.g., *id.* (providing an example of EVH by showing the inability of contradictory evidence disconfirming a delusional idea).

<sup>275</sup> See Freeman et al., *Acting on Persecutory Delusions*, *supra* note 270, at 93 (finding that avoidance was the most common safety-seeking behavior used by individuals with psychosis in response to situations perceived as threatening in a clinical study).

<sup>276</sup> See Speechley et al., *supra* note 269, at 696.

<sup>277</sup> See generally Ryan Balzan, Paul Delfabbro, Cherrie Galletly & Todd Woodward, *Confirmation Biases Across the Psychosis Continuum: The Contribution of Hypersalient Evidence-Hypothesis Matches*, 52 BRIT. J. CLINICAL PSYCHOL. 53, 58-67 (2013) (discussing the findings of a study that investigated whether hypersalience of evidence-hypotheses matches is linked to delusion ideation or cognitive biases).

<sup>278</sup> See *id.* at 60 ("[T]he bias reported may not be driven by a diagnosis of schizophrenia per se, but rather by the *delusional symptomology* of schizophrenia.").

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Loredo demonstrated hostile attribution bias since he reacted negatively (and later, violently) after witnessing the high-five, which itself was an ambiguous cue.

Imagine that immediately after witnessing the high-five, Loredo heard his father and Baughman excitedly discussing the previous night's football game. Seemingly, a reasonable person would conclude that the high-five related to the discussion of the game. However, as a result of his psychosis, Loredo exhibited belief inflexibility by failing to integrate evidence of the football discussion to modify his conclusion that the high-five represented a celebration of a successful drug shipment. Considered within the context of EVH, Loredo's belief that a Mexican cartel had infiltrated the family business (hypothesis) led him to conclude the high-five reflected his father's relationship with the cartel (evidence-hypothesis matches). Thus, for an individual with psychosis, just a brief interaction can implicate a constellation of cognitive biases that serve to perpetuate a delusional belief.

## 2. Impaired Capacity for Moral Reasoning

Recent advances in psychosis research have inspired a novel theory explicitly integrating delusion formation with Kahneman's dual-process theory of decision-making.<sup>279</sup> The theory, developed by Thomas Ward and Philippa A. Garety, posits that delusions develop as a result of overreliance on System 1 processing, including the JTC bias, and that delusions are maintained by a significantly impaired ability to engage in System 2 reflective thinking, as demonstrated by belief inflexibility.<sup>280</sup> Since moral decision-making involves the interplay of Systems 1 and 2, the impairment of System 2 in delusional individuals implies that psychotic populations with active delusions have an impaired capacity for moral decision-making, especially as to decisions connected to those delusions.

Although individuals with delusions tend to suffer from impaired reflective processing, engagement of System 2 can be improved through cognitive therapies, suggesting that the impairment is not absolute. For example, clinicians have successfully used cognitive-based therapy

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<sup>279</sup> Ward & Garety, *supra* note 21, at 83.

<sup>280</sup> *Id.* (“[A]n over-reliance on fast [System] 1 reasoning processes together with a reduced likelihood of the activation of override by slow [System] 2 processes, provides the context within which the distressing [delusional] beliefs are maintained and even strengthened over time . . .”).

(“CBT”)<sup>281</sup> to encourage individuals with persecutory delusions to consciously avoid use of safety-seeking behaviors in a feared environment.<sup>282</sup> CBT relies on the forced engagement of System 2, and results have demonstrated a drastic reduction in delusional conviction.<sup>283</sup> In addition to targeting safety-seeking behaviors, researchers have successfully used CBT to target other delusion maintenance factors to mitigate delusional conviction.<sup>284</sup> Thus, while engagement of System 2 may be impaired within the context of a delusion, it is not completely abolished.<sup>285</sup>

### C. Emotional Dysfunctions in Individuals with Psychosis

Emotional irregularities in populations with psychosis provide additional evidence of the compromised ability for moral decision-making within the context of a delusion. Difficulties in emotion regulation skills in psychotic individuals demonstrate a shift from System 2 (reflective/cognitive) processing towards System 1

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<sup>281</sup> See Tania M. Lincoln & Emmanuelle Peters, *A Systematic Review and Discussion of Symptom Specific Cognitive Behavioural Approaches to Delusions and Hallucinations*, 203 SCHIZOPHRENIA RSCH. 66, 66 (2019) (“The main instrument of change in [CBT] involves reframing appraisals and modifying behavior related to psychotic symptoms, to reduce distress and improve functioning and well-being.”).

<sup>282</sup> See generally Daniel Freeman, Jonathan Bradley, Angus Antley, Emilie Bourke, Natalie DeWeever, Nicole Evans, Emma Fernis, Bryony Sheaves, Felicity Waite, Graham Dunn, Mel Slater & David M. Clark, *Virtual Reality in the Treatment of Persecutory Delusions: Randomised Controlled Experimental Study Testing How to Reduce Delusional Conviction*, 209 BRIT. J. PSYCHIATRY 62 (2016) (conducting a study that tested whether virtual reality cognitive therapy that discouraged the use of safety-seeking behaviors could be effective in treating delusions).

<sup>283</sup> See *id.* at 64-66.

<sup>284</sup> See Daniel Freeman & Philippa Garety, *Advances in Understanding and Treating Persecutory Delusions: A Review*, 49 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1179, 1180-84 (2014); Lincoln & Peters, *supra* note 281, at 75-76.

<sup>285</sup> Another similar type of therapy — termed metacognitive training (“MCT”) — targets inhibition of System 1 processing and engagement of System 2 reflective thinking. MCT has also been shown as effective in reducing the incidence of delusions, adding further support that System 2 is not completely abolished in psychotic individuals. For a meta-analysis of the MCT data, see Carolin Eichner & Fabrice Berna, *Acceptance and Efficacy of Metacognitive Training (MCT) on Positive Symptoms and Delusions in Patients with Schizophrenia: A Meta-Analysis Taking into Account Important Moderators*, 42 SCHIZOPHRENIA BULL. 952, 955-60 (2016); see also Steffen Moritz, Christina Andreou, Brooke C. Schneider, Charlotte E. Wittekind, Mahesh Menon, Ryan P. Balzan & Todd S. Woodward, *Sowing the Seeds of Doubt: A Narrative Review on Metacognitive Training in Schizophrenia*, 34 CLINICAL PSYCHOL. REV. 358, 363-64 (2014) (showing preliminary evidence for the effectiveness of MCT “over and above the effect of antipsychotic medication[s]”).

(intuitive/emotional) processing that parallels the trend resulting from exaggerated cognitive biases.<sup>286</sup> Taken together, evidence of emotional impairments associated with delusions suggest a psychotic individual may have a diminished ability to appreciate the wrongfulness of an act when that act emanates from a delusion.

### 1. Dysfunctional Emotion Regulation Skills

Deficient emotion regulation skills in populations with psychosis cause an overreliance on System 1 processing and impair the use of System 2 processing. Emotion regulation is broadly defined as “*goal directed processes* functioning to influence the *intensity, duration* and *type of emotion* experienced.”<sup>287</sup> Populations with psychosis demonstrate difficulties regulating negative emotions, which may result from impaired use of adaptive strategies, such as cognitive reappraisal,<sup>288</sup> coupled with overuse of maladaptive strategies, such as rumination and suppression.<sup>289</sup> In the context of moral reasoning, the impaired ability to appropriately control emotions leads to emotionally charged decisions with little self-reflection.

A 2019 systematic review and meta-analysis concluded that emotion regulation is “markedly impaired in patients with psychotic disorders.”<sup>290</sup> The most prominent findings from the study reveal that populations with psychosis habitually use more maladaptive and fewer adaptive emotion regulation strategies compared to healthy controls.<sup>291</sup> Further, correlative data indicated a positive association between

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<sup>286</sup> See Zhang et al., *supra* note 21, at 5.

<sup>287</sup> Anett Gyurak, James J. Gross & Amit Etkin, *Explicit and Implicit Emotion Regulation: A Dual-Process Framework*, 25 *COGNITION & EMOTION* 400, 401 (2011); see also Clara Marie Nittel, Tania Marie Lincoln, Fabian Lamster, Dirk Leube, Winfried Rief, Tilo Kircher & Stephanie Mehl, *Expressive Suppression Is Associated with State Paranoia in Psychosis: An Experience Sampling Study on the Association Between Adaptive and Maladaptive Emotion Regulation Strategies and Paranoia*, 57 *BRIT. J. CLINICAL PSYCHOL.* 291, 294-95 tbl.1 (2018) (defining and explaining seven of the most prominently used emotion regulation strategies). Adaptive strategies are those associated with better mental health outcomes, and maladaptive strategies are associated with poorer mental health outcomes. *Id.* at 293, 296.

<sup>288</sup> See Nittel et al., *supra* note 287, at 292, 294 (defining cognitive reappraisal as “cognitive change that involves changing the subjective interpretation of an emotion-eliciting event in a way that alters its emotional impact”).

<sup>289</sup> See *id.* at 292, 295 (defining rumination as “passive and repetitive focus on negative emotions or symptoms of distress,” and suppression as “conscious inhibition of expressive or behavioral components of an emotion”).

<sup>290</sup> Ludwig et al., *supra* note 21, at 1.

<sup>291</sup> *Id.* at 3.

maladaptive emotion regulation strategies and positive symptoms of psychosis such as delusions.<sup>292</sup>

Other studies demonstrate that engaging in adaptive emotion regulation during moral dilemma tasks results in more reason-based judgments,<sup>293</sup> which represent engagement of System 2.<sup>294</sup> Moreover, studies using a “process-dissociation”<sup>295</sup> approach consistently find that engagement of cognitive reappraisal<sup>296</sup> — a System 2 process — selectively increases reason-based judgments but leaves emotion-based judgments unaffected. In other words, using cognitive reappraisal does not reduce the intensity of negative emotions evoked by moral dilemmas, but rather reappraising the negative feelings leads to judgment dominated by reflective reasoning. This finding is consistent with Greene’s dual-process theory, whereby intuitively generated emotions can be overcome by deliberative self-reflection.<sup>297</sup>

Since use of adaptive emotion regulation on moral probes helps to overcome intuitively generated emotions to reach a more deliberate judgment, it logically follows that individuals with psychosis with diminished engagement of adaptive emotion regulation tend to reach less reasoned judgments in scenarios involving intense negative emotion. Indeed, a 2017 study shows that deficient emotion regulation caused a shift towards emotion-based responses on moral probes.<sup>298</sup> In

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<sup>292</sup> *Id.* at 7-8.

<sup>293</sup> See Matthew Feinberg, Robb Willer, Olga Antonenko & Oliver P. John, *Liberating Reason from the Passions: Overriding Intuitionist Moral Judgments Through Emotional Reappraisal*, 23 *PSYCHOL. SCI.* 788, 790-93 (2012); Zhongquan Li, Shiyu Xia, Xiaoyuan Wu & Zhaoyu Chen, *Analytical Thinking Style Leads to More Utilitarian Moral Judgments: An Exploration with a Process-Dissociation Approach*, 131 *PERSONALITY & INDIVIDUAL DIFFERENCES* 180, 183 (2018); Raluca D. Szekeley & Andrei C. Miu, *Incidental Emotions in Moral Dilemmas: The Influence of Emotion Regulation*, 29 *COGNITION & EMOTION* 64, 71 (2015).

<sup>294</sup> See Li et al., *supra* note 293, at 180 (“In the dual process model of moral judgment, utilitarian judgment is associated with the reasoning process, and deontological judgment with the intuitive process.” (internal citation omitted)).

<sup>295</sup> The process-dissociation approach presents congruent and incongruent versions of moral dilemmas in order to isolate whether cognitive reappraisal selectively increases reason-based judgments, selectively decreases emotion-based judgment, or a combination of both. For further discussion and examples of process-dissociation moral dilemma tasks, see *id.* at 181.

<sup>296</sup> See *supra* note 288 (defining cognitive reappraisal).

<sup>297</sup> See Li et al., *supra* note 293, at 183.

<sup>298</sup> Zhang et al., *supra* note 21, at 4-5 (utilizing the process-dissociation approach and finding that “deontological inclination was significantly higher for the participants with high emotion regulation difficulties . . . [but] utilitarian inclinations did not differ significantly between participants with high emotion regulation difficulties . . . and those with low emotion regulation difficulties”).

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sum, exposure to an emotionally evocative scenario increases the likelihood that an individual with psychosis will exhibit intuitive decision-making dominated by System 1 with little System 2 deliberative reflection.

## 2. Emotions' Contribution to Existence of Delusions

Emotions may contribute to the formation and maintenance of delusions. Persecutory delusions appear to be of particular significance in insanity cases,<sup>299</sup> and research suggests these delusions are most consistently associated with violent outcomes in populations with psychosis.<sup>300</sup> Therefore, this section will focus primarily on that delusion subtype. Understanding the factors that contribute to delusion genesis helps to explain why the presence of a delusion indicates a disordered thought process which bears directly on an individual's capacity for moral reasoning in connection with that delusion.

### a. *Emotion Regulation Dysfunctions and the Genesis and Maintenance of Persecutory Delusions*

First, to continue the discussion of emotion regulation, psychologists have suggested that difficulties in regulating emotions may contribute to the formation and maintenance of persecutory delusions.<sup>301</sup> Research suggests that negative affect precedes paranoid ideation, which in turn leads to presentation of psychotic symptoms, including delusions.<sup>302</sup>

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<sup>299</sup> See, e.g., George F. Parker, *Outcomes of Assertive Community Treatment in an NGRI Conditional Release Program*, 32 J. AM. ACAD. PSYCHIATRY & L. 291, 295 tbl.1 (2004) (examining eighty-three NGRI acquirtees and finding that fifty-nine (71%) had a diagnosis of schizophrenia and fifty-four (65%) had paranoid schizophrenia specifically).

<sup>300</sup> See, e.g., Coid et al., *supra* note 256, at 466-70 (finding a significant association between serious violence and delusions of being surveilled, persecution, and conspiracy).

<sup>301</sup> See Stefan Westermann & Tania M. Lincoln, *Emotion Regulation Difficulties are Relevant to Persecutory Ideation*, 84 PSYCHOL. & PSYCHOTHERAPY 273, 281-83 (2011). Cognitive biases may exacerbate emotion regulation impairments. See *id.* at 282 ("[T]he usually functional emotion regulation strategy of reappraising emotional evocative situations in a neutral or non-threatening manner could be corrupted by hasty decisions due to jumping-to-conclusions . . . ." (internal citation omitted)).

<sup>302</sup> See Ingrid Kramer, Claudia J.P. Simons, T.W. Wigman, Dina Collip, Nele Jacobs, Catherine Derom, Evert Thiery, Jim van Os, Inez Myin-Germeys & Marieke Wichers, *Time-Lagged Moment-to-Moment Interplay Between Negative Affect and Paranoia: New Insights in the Affective Pathway to Psychosis*, 40 SCHIZOPHRENIA BULL. 278, 284 (2013) (using time-lagged analysis to show that negative affect preceded everyday paranoia which — when aggregated — caused psychotic symptoms).

Further, psychology researchers have suggested that paranoid ideation could be a maladaptive emotion regulation strategy, whereby persecutory delusions form as a “dysfunctional strategy that leads to a (short-term) relief” from distressing paranoid thoughts.<sup>303</sup>

*b. Role of Stress*

Populations with psychosis demonstrate an aberrant response to stress compared to healthy controls, which may contribute to the formation and maintenance of persecutory delusions.<sup>304</sup> Experimentally, populations with psychosis demonstrate a stronger reaction — both objectively and subjectively — to stressors compared to healthy controls.<sup>305</sup> Importantly, the capacity for effective emotion acceptance and regulation predicts both the strength of the physiological response to stress as well as the change in level of paranoia.<sup>306</sup> Thus, Tania Lincoln and colleagues have suggested that “having more pronounced [emotion regulation] skills seems to help everybody remain calmer in the face of stressors but also helps people with psychosis not to respond to stress symptomatically.”<sup>307</sup>

Psychology and cognitive neuroscience studies document that stress affects moral decision-making, as is theorized by the “stress induced deliberation-to-intuition” (“SIDI”) model developed by Rongjun Yu.<sup>308</sup> The SIDI model revolves around the observation that individuals make more intuitive responses when under stress, and thus the model suggests that, under stressful conditions, “intuitive responses may bypass the examination of reasoning and reach the threshold to become

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<sup>303</sup> Westermann & Lincoln, *supra* note 301, at 282 (observing a “positive association between paranoid ideation and a greater acceptance of negative emotions” and suggesting that development of a persecutory delusion may temporarily help an individual to cope with distressing paranoid thoughts and regain a sense of control).

<sup>304</sup> See Tania M. Lincoln, Maike Hartmann, Ulf Köther & Steffen Moritz, *Dealing with Feeling: Specific Emotion Regulation Skills Predict Responses to Stress in Psychosis*, 228 PSYCHIATRY RSCH. 216, 219-21 (2015).

<sup>305</sup> *Id.* (using noise stressors to show that individuals with psychotic illnesses — specifically schizophrenia and schizoaffective disorder — demonstrated more reactivity to stress both through self-report (i.e., subjective) and physiological (i.e., objective) measures).

<sup>306</sup> *Id.* at 219-20.

<sup>307</sup> *Id.*; see also Inez Myin-Germeys & Jim van Os, *Stress-Reactivity in Psychosis: Evidence for an Affective Pathway to Psychosis*, 27 CLINICAL PSYCHOL. REV. 409, 416 (2007) (suggesting that while difficulties in dealing with stress are present across many psychiatric illnesses, the negative effects of stress are particularly pronounced in individuals with psychosis).

<sup>308</sup> See Rongjun Yu, *Stress Potentiates Decision Biases: A Stress Induced Deliberation-to-Intuition (SIDI) Model*, 3 NEUROBIOLOGY STRESS 83, 84 (2016).

final decisions.”<sup>309</sup> Notably, the SIDI model is a dual-process account utilizing the distinction between System 1 intuitive processes and System 2 cognitive processes.<sup>310</sup> The SIDI model is supported by studies showing that cognitive control is adversely affected under stressful conditions, which leads to weakened emotion regulation, causing a drive towards emotionally habitual responses.<sup>311</sup> In sum, aberrant responses to stressors in populations with psychosis provide strong support of overreliance on System 1 and failed engagement of System 2, suggesting that an individual with psychosis may have an impaired capacity for rational self-reflection within the context of a delusion.

*D. Summary: Moral Decision-Making in Psychosis*

The weight of the evidence discussed above suggests that individuals with psychotic disorders may have a significantly impaired capacity for moral decision-making in the context of a delusion. Cognitive biases associated with delusions implicate an overreliance on System 1 intuitive/emotional processes (e.g., JTC, liberal acceptance, hostile attribution) coupled with impaired engagement of System 2 reflective/cognitive override processes (e.g., BADE).<sup>312</sup> Stress exhibited by populations with persecutory delusions also suggests a shift towards overuse of System 1 processes.<sup>313</sup> Further, the association of delusions with significant impairment in emotion regulation intimates that individuals with delusions may be less able to mitigate intuitively generated emotions to arrive at reasoned decisions than those without delusions.<sup>314</sup> In sum, the evidence suggests that — especially within the context of a delusion and under stress — psychotic individuals are prone to act intuitively with a diminished capacity for meaningful

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<sup>309</sup> *Id.* (“[S]tressed individuals may fall back more on intuition and involve less amounts of conscious reasoning.”); see Farid F. Youssef, Karine Dookeeram, Vasant Basdeo, Emmanuel Francis, Mekael Doman, Danielle Mamed, Stefan Maloo, Joel Degannes, Linda Dobo, Phatsimo Ditshotlo & George Legall, *Stress Alters Personal Moral Decision Making*, 37 *PSYCHONEUROENDOCRINOLOGY* 491, 494-95 (2012) (demonstrating a moderate negative correlation between stress and utilitarian decisions during moral dilemma tasks and noting that the results are in line with Greene’s dual-process model).

<sup>310</sup> See Yu, *supra* note 308, at 92 (noting that the SIDI model closely resembles a “default-interventionalist” model, which is where the “intuition system supplies rapid default responses (intuition proposes) and [the] deliberation system may approve or intervene upon (deliberation decides)”).

<sup>311</sup> *Id.* at 88-89.

<sup>312</sup> See *supra* Part III.B.1.

<sup>313</sup> See *supra* Part III.B.1.

<sup>314</sup> See *supra* Part III.C.1.

cognitive reflection. A judge should permit the trier of fact to consider this evidence, along with other evidence of mental disorder, when evaluating a defendant's capacity to distinguish the wrongfulness of her act.<sup>315</sup>

The next Part evaluates various legal reforms motivated by this science and the lessons learned from jurisdictions' experience with the insane delusion rule. Part V considers broader implications for the insanity defense.

#### IV. PROPOSALS FOR LEGAL REFORM

The weight of the scientific evidence suggests that delusions signal the presence of significant cognitive and emotional impairments that may impact decision-making related to those delusions.<sup>316</sup> If that understanding is correct, then a rule premised upon the exercise of rational, moral reasoning by deluded individuals about their delusions is fundamentally flawed. Certainly, no jurisdiction should deprive an individual of an insanity defense because the perceived facts of her delusion fail to meet the four corners of a recognized justification or excuse.<sup>317</sup> Therefore, Nevada should reform its insanity statute<sup>318</sup> — both by eliminating the negative aspect of the insane delusion rule and by expanding its list of cognizable mental conditions beyond the mere symptom of delusion.<sup>319</sup>

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<sup>315</sup> See *supra* note 229.

<sup>316</sup> See *supra* Part III.

<sup>317</sup> Historically, legal scholars have been nearly unified in denouncing the negative use of the insane delusion rule. See, e.g., 1 JOEL PRENTISS BISHOP, A TREATISE ON CRIMINAL LAW § 393 (John M. Zane & Carl Zollmann eds., 9th ed. 1923); LAFAVE, *supra* note 8; PERKINS & BOYCE, *supra* note 41, at 966-68; WEIHOFEN, *supra* note 6, at 111-12; Keedy, *supra* note 229, at 87-88.

<sup>318</sup> NEV. REV. STAT. § 174.035(6) (2020); see also *Finger v. State*, 27 P.3d 66, 85 (Nev. 2001).

<sup>319</sup> Individuals with psychosis often will have significant cognitive dysfunctions in addition to delusions that impede decision-making. For example, a 2000 literature review concluded that up to 75% of patients with schizophrenia suffer “significant cognitive impairment,” including impaired function in “memory, attention, motor skills, executive function [including such cognitive abilities as attentional control, cognitive inhibition, inhibitory control, working memory, and cognitive flexibility], and intelligence.” Ronan O’Carroll, *Cognitive Impairment in Schizophrenia*, 6 ADVANCES PSYCHIATRIC TREATMENT 161, 162 (2000); see also SCHOPP, *supra* note 64, at 185-87 (describing the effects of psychopathology on practical reasoning abilities). Equally as important, conditions besides psychosis — such as organic brain disorder, congenital intellectual deficiency, senility, paranoia, and neurosis — can satisfy the functional requirements of the right-and-wrong prong of the insanity standard. See LAFAVE, *supra* note 8, § 7.2(b)(1).

A more difficult question is whether, on this basis, jurisdictions should also jettison the affirmative aspect of the insane delusion rule. This Part considers this issue and offers proposals for reform and further conversation. It starts by evaluating the benefits that may attend the rule and whether those benefits may justify its retention.

A. *Potential Benefits of the Insane Delusion Rule*

For reasons already discussed,<sup>320</sup> some scholars have argued that the insane delusion rule should be discarded in its entirety.<sup>321</sup> However, compelling reasons support retaining its affirmative aspect and allowing satisfaction of the rule to establish insanity. First and perhaps most fundamentally, the insane delusion rule helps a trier of fact realize that no person who meets the criteria of the rule could have appreciated the wrongfulness of her act.<sup>322</sup> Even though an insane delusion *should* result in a finding of irresponsibility, a trier of fact might not acquit on that basis because of complicated, conflicting, and ambiguous testimony regarding the defendant's capacity to evaluate and reach moral decisions. As Christopher Slobogin has observed when advocating for a similar test of exculpation,<sup>323</sup> application of the rule could remove the need to answer the "intractable question of whether those who did not control, think, or feel at the time of the crime had the capacity to do otherwise and just did not exercise it, or instead lacked the capacity to do so."<sup>324</sup>

Relatedly, the rule could function as an effective counter to juries' tendency to overvalue ambiguous behavioral evidence. Juries may

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<sup>320</sup> See *supra* notes 46 (pointing out the problem with requiring that the defendant exercise sane reasoning), 52–54 (debating the relationship of the insane delusion test to other rules of *M'Naghten*), 75–77 and accompanying text (noting the bad science upon which the insane delusion rule is based).

<sup>321</sup> See, e.g., GLUECK, *supra* note 46; OPPENHEIMER, *supra* note 43, at 215-19; RAY, *supra* note 46; STEPHEN, *supra* note 66, at 161, 168, 174-75; WILLIAMS, *supra* note 8, § 161.

<sup>322</sup> See *infra* note 338 and accompanying text.

<sup>323</sup> See Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH. L. REV. 523, 541 n.123 (2009) [hereinafter *Integrationist Test*] (noting that *M'Naghten*'s insane delusion test is "very similar" to the Integrationist Test he proposes); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1238-39 (2000) [hereinafter *An End to Insanity*] (proposing, in lieu of an affirmative insanity defense, that "[m]ental disorder should have exculpatory effect when, and only when, its effects lead to a lack of the required mens rea or to reasons for committing the crime that sound in justification or duress").

<sup>324</sup> Slobogin, *Integrationist Test*, *supra* note 323, at 540-41.

disregard strong — even uncontested — medical opinion of insanity on the basis of lay testimony regarding behavioral evidence such as normal demeanor, flight, denial, expression of remorse, or planning.<sup>325</sup> This evidence is within jurors' body of experience and common understanding. However, such evidence is often ambiguous, misleading, and of limited probative value. For instance, flight may be consistent with a defendant's persecutory delusions. Flight could also reflect the rational judgment that it is best to avoid unnecessary interactions with law enforcement, who disproportionately commit acts of violence against individuals experiencing psychosis or other acute symptoms of mental illness.<sup>326</sup> Indeed, the Supreme Judicial Court of Massachusetts recently recognized that "flight is not necessarily probative of a suspect's state of mind or consciousness of guilt" when the class to which the defendant belongs regularly suffers "the recurring indignity" of hostile interactions with law enforcement.<sup>327</sup> Similarly, a person with mental illness may deny her involvement in an event due to the reasonable fear that law enforcement would not believe her account.<sup>328</sup> Lay testimony of normal demeanor is of particularly questionable probative value when the defendant has a documented

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<sup>325</sup> See, e.g., *Moler v. State*, 782 N.E.2d 454, 457-59 (Ind. Ct. App. 2003); *State v. Claibon*, 395 So. 2d 770, 772-74 (La. 1981). The U.S. Supreme Court has found this practice constitutional. *Moore v. Duckworth*, 443 U.S. 713, 714 (1979).

<sup>326</sup> See Michael T. Rossler & William Terrill, *Mental Illness, Police Use of Force, and Citizen Injury*, 20 POLICE Q. 189, 199, 204 (2017) (finding that persons with mental illness were "significantly more likely to experience higher levels of police force" than persons without mental illness in an analysis of 4,000 police use-of-force incidents); Amam Z. Saleh, Paul S. Appelbaum, Xiaoyu Liu, T. Scott Stroup & Melanie Wall, *Deaths of People with Mental Illness During Interactions with Law Enforcement*, 58 INT'L J.L. & PSYCHIATRY 110, 114 (2018) (finding, in a study of 1,099 civilians killed in the United States during interactions with police in 2015, that those with signs of mental illness were seven times more likely than others to be killed). *But see* Richard R. Johnson, *Suspect Mental Disorder and Police Use of Force*, 38 CRIM. JUST. & BEHAV. 127, 134, 140-41 (2011) (noting that his study of 619 police-suspect encounters found, after controlling for factors such as a suspect's physical resistance and possession of a weapon, that police did not treat those with mental illness more harshly).

<sup>327</sup> *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

<sup>328</sup> See Amy C. Watson, Patrick W. Corrigan & Victor Ottati, *Police Responses to Persons with Mental Illness: Does the Label Matter?*, 32 J. AM. ACAD. PSYCHIATRY & L. 378, 379 (2004) ("People with mental illness are often viewed as untrustworthy and lacking integrity. Conversely, they may be viewed as incompetent and unable to provide reliable information, as suggested in police training texts."); cf. S.A. Koskela, B. Pettitt & V.M. Drennan, *The Experiences of People with Mental Health Problems Who Are Victims of Crime with the Police in England: A Qualitative Study*, 56 BRIT. J. CRIMINOLOGY 1014, 1019-20 (2016) (explaining that many people with mental illness who participated in a study hesitated to report crime because they had not been believed in the past or because they feared being blamed for the crime).

history of a psychotic disorder.<sup>329</sup> The Court of Appeals of Indiana has declared:

The proposition that a jury may infer that a person's actions before and after a crime are "indicative of his actual mental health at the time of the" crime is logical when dealing with a defendant who is not prone to delusional or hallucinogenic episodes. However, when a defendant has a serious and well-documented mental disorder, such as schizophrenia, one that causes him to see, hear, and believe realities that do not exist, such logic collapses.<sup>330</sup>

Deep and widespread sanism,<sup>331</sup> skepticism toward the insanity defense, ignorance of the consequences of acquittal on grounds of insanity, and the dynamics of the defense (whereby the defendant often admits doing heinous and violent acts) combine to propel juries to use such ambiguous evidence to convict, despite strong mental health evidence of lack of capacity.<sup>332</sup>

Second, the insane delusion rule correctly recognizes that people with serious mental illness, even psychotic disorders, exhibit rational decision-making much of the time.<sup>333</sup> One modern strain of research has concluded that patients with schizophrenia retain the capacity for

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<sup>329</sup> See *Moler*, 782 N.E.2d at 458 ("While the jury is the ultimate finder of fact, we fail to see how evidence of a defendant's demeanor before and after a crime can have much probative value when a schizophrenic defendant is involved.").

<sup>330</sup> *Id.* at 459.

<sup>331</sup> Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 374 (1992) (defining sanism as "an irrational prejudice . . . of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry that have been reflected both in our legal system and in the ways that lawyers represent clients").

<sup>332</sup> See, e.g., *Bass v. State*, 585 So. 2d 225, 235 (Ala. Crim. App. 1991), *overruled by* *Trawick v. State*, 698 So. 2d 151 (Ala. Crim. App. 1995) (affirming conviction where defendant's "statements acknowledging responsibility for the shootings and his request for an attorney" suggested sanity, despite "substantial evidence that the appellant was psychotic at the time"); *Sistrunk v. State*, 455 So. 2d 287, 289-90 (Ala. Crim. App. 1984) (affirming conviction where defendant "displayed a consciousness of guilt when he fled from the house after stabbing his niece" and took the stand in his own defense — thus supplying "his demeanor and manner of testifying" as evidence for the jury to consider — despite the unanimous testimony of four expert witnesses that the defendant showed signs of paranoid schizophrenia after the murder); cases cited *supra* note 325.

<sup>333</sup> See LISA BORTOLOTTI, *IRRATIONALITY* 61 (2015); J.H. BALFOUR BROWNE, *THE MEDICAL JURISPRUDENCE OF INSANITY* § 16 (2d ed. 1875); Sidney Gendin, *Insanity and Criminal Responsibility*, 10 AM. PHIL. Q. 99, 100, 104 (1973); Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 567, 573, 576 (1978); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 790 (1985).

moral decision-making, at least in regard to decisions independent of delusions or other characteristic positive symptoms.<sup>334</sup> The rule recognizes this capacity and accounts for a defendant's motivation. Offenders with mental illnesses, like nondisordered offenders, commit crimes for various reasons.<sup>335</sup> While a small fraction of the crimes of offenders with mental illnesses are the direct result of their symptomology, research suggests that the vast majority of crimes are either indirectly related to their illnesses or unrelated.<sup>336</sup> Thus, the crimes of those with mental disorder — like the crimes of those without — may reflect anger, frustration, lust, jealousy, greed, or revenge.<sup>337</sup> They may also reflect justified fear. When a person, with or without mental illness, perceived reality in a way that renders her acts blameless “as defined by the moral compass we all share,” she should be excused.<sup>338</sup>

By recognizing the rational decision-making of the defendant, the affirmative aspect of the rule sends a powerful expressive message. It conveys: we understand what you did because — had we been in your shoes, with your mental health condition — we would have done the same thing. This message emphasizes the similarity of those with mental illness to those without, thereby enhancing the dignity of criminal defendants. In essence, the rule (at least partially) transforms the excuse of insanity into an excusing condition that, under modern trends to subjectivize defenses, increasingly applies to those without mental illness: a mistaken belief that conditions amounted to a legal justification or excuse.<sup>339</sup> In affirming that the same standards for conduct apply to those with serious mental illness as for those without, this standard also may enhance society's respect for — and feelings of kinship with — individuals with mental illness.

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<sup>334</sup> See *supra* note 225 (discussing this research).

<sup>335</sup> E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 558-59 (2012) [hereinafter *Theorizing Mental Health Courts*].

<sup>336</sup> E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 533-35 (2019). Instead, the crimes of offenders with mental disorder are driven by the same criminogenic factors that drive offenders without mental illness, including antisocial attitudes, thoughts, or personality features; substance abuse; poor employment prospects; and family problems. *Id.* at 536.

<sup>337</sup> Johnston, *Theorizing Mental Health Courts*, *supra* note 335, at 558-59; Slobogin, *Integrationist Test*, *supra* note 323, at 538.

<sup>338</sup> Slobogin, *Integrationist Test*, *supra* note 323, at 534; see also GLEASON L. ARCHER, CRIMINAL LAW 58 (1923) (“The law recognizes the right to take life in self defense in the case of a sane man. It is very proper therefore that the insane man's delusion, as real to him as facts to a sane person, should exempt him from liability.”).

<sup>339</sup> Slobogin, *An End to Insanity*, *supra* note 323, at 1202.

Thus, it is not inherently irrational or unjust to excuse a defendant when the delusion that motivated her act would satisfy a legal defense, and doing so may enhance the dignity of the defendant and clarify complicated issues for the jury. However, different procedural manifestations of the rule realize these goals to a varying degree, and some carry negative consequences for the general insanity evaluation.<sup>340</sup>

### B. *Disadvantages of the Affirmative Aspect of the Rule*

Modern commentators have found the affirmative aspect of the insane delusion rule “not objectionable,”<sup>341</sup> but its operation can undermine a defendant’s general insanity defense. In jurisdictions without the insane delusion rule, mental health experts and triers of fact tend to evaluate insanity with few evidentiary restrictions.<sup>342</sup> Analysis of cases in these jurisdictions shows that evaluations tend to be far-ranging, context-dependent, and multi-variable. Typically, the trier of fact will consider the defendant’s diagnosis, the longevity of the disorder, severity of symptoms, history of hospitalizations, bizarre behavior and communications, and medication compliance.<sup>343</sup> Delusions factor into

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<sup>340</sup> See *infra* Part IV.B.

<sup>341</sup> PERKINS & BOYCE, *supra* note 41, at 967 (arguing “the delusion rule when properly understood and applied can never work to the disadvantage of the defendant”); WEIHOFEN, *supra* note 6, at 111 (“If the mistake of fact test is merely an *additional* test, or merely one specific application of the right and wrong test, it is not objectionable.”).

<sup>342</sup> See GOLDSTEIN, *supra* note 57, at 53-58; Hall, *supra* note 66, at 774 (“Although the M'Naghten Rules are phrased in terms of cognition, they are generally interpreted broadly by the courts, with the result that all psychiatric evidence relevant to the defendant’s mental condition is admitted.”).

<sup>343</sup> See, e.g., *State v. Armstrong*, 671 So. 2d 307, 312-13 (La. 1996) (reversing the conviction of second degree murder and finding the defendant not guilty by reason of insanity due to a “twenty-five year history of mental illness with delusions, auditory hallucinations, religious obsessions and occasional psychotic episodes, particularly when defendant was subjected to stress or failed to take his medication; the testimony of three psychiatrists and one psychologist who opined that defendant could not distinguish right from wrong at the time of the killing; evidence of defendant’s dispute with his bank causing him stress, a precursor of psychotic episodes, and of his involuntary commitment to a mental institution shortly before the killing and his violent behavior there; and extensive evidence of bizarre behavior, before and after the killing, which was consistent with conduct that has led to his numerous hospitalizations,” as well as his committing the crime in front of law enforcement); *State v. Currie*, 812 So. 2d 128, 138-39 (La. Ct. App. 2002) (vacating the original convictions and finding the defendant not guilty by reason of insanity on the basis of age at time of crime, family history, organic brain damage at birth, childhood head injuries, history of institutionalization, age of diagnosis of schizophrenia, history of medication compliance, “delusions, hallucinations and ideas of persecution for some time preceding the crime,” the way the crime was committed, and post-crime behavior).

the capacity assessment — including, broadly, whether the defendant, at the time of the act in question, subjectively *felt* justified (not, had the circumstances been as she supposed, whether she objectively *would have been* justified) — a much rougher, less exacting, gestalt inquiry.<sup>344</sup> The delusions may also signal a disordered thinking process.<sup>345</sup> This broad inclusion of evidence likely leads to a more holistic assessment of the defendant's culpability that reflects the extent to which a trier of fact feels sympathy for the defendant and feels that she deviates so markedly from healthy individuals that holding her responsible would be unjust or ineffective.<sup>346</sup>

On the other hand, the insane delusion rule trains expert witnesses' focus on the content of a defendant's delusions. This elevates delusions above other symptoms of mental disorder and results in an artificial division of mental health evidence. In addition, if a delusion does not satisfy the insane delusion test, mental health experts may minimize or even disregard delusions as probative evidence of general insanity.<sup>347</sup> Thus, even in jurisdictions that permit a defendant who fails the insane delusion test to appeal to the general right-and-wrong test, the insane delusion rule may reduce the defendant's likelihood of ultimately

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<sup>344</sup> See *supra* note 180 (detailing exemplar cases).

<sup>345</sup> See, e.g., *State v. Dye*, No. 08-0887, 2009 WL 3337617, at \*5 (Iowa Ct. App. Oct. 7, 2009) (discussing the opinion of a defense expert witness who opined that the defendant's alleged delusion "that God wanted him to undo the harm caused by Elvis's pedophilia by joining a crusade to kill pedophiles" showed he "had an impaired ability to make decisions"); *State v. Gerone*, 435 So. 2d 1132, 1134, 1137 (La. Ct. App. 1983) (finding the verdict of sanity contrary to a preponderance of the evidence and citing expert testimony that "his thinking was clouded" by "hallucinated voices telling him to commit the crime, to be relieved of suffering and to be transported to another plane" and feeling "he was under the direct control and influence of two men on the west coast").

<sup>346</sup> See *State v. Rawland*, 199 N.W.2d 774, 789 (Minn. 1972) (interpreting the *M'Naghten* standard to allow consideration of cognitive, emotional, and volitional evidence and stressing "this approach does, indeed, take account of the entire man and his mind as a whole . . . it enables the jury to consider all the relevant symptomatology . . . which enable it adequately to perform its historical function in the criminal case" (quoting *Pope v. United States*, 372 F.2d 710, 736 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968))); Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 36-39 (1990) (discussing the role of "ordinary common sense" in jury insanity verdicts). Studies finding no significant differences in acquittal rates among insanity instructions support the notion that that verdicts tend to align with the "gut" or "common sense, intuitive understanding of insanity" of the trier of fact. *Id.* at 37; see Norman J. Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW & HUM. BEHAV. 533, 534-35 (1991) (reviewing empirical studies finding no significant differences in mock jurors' verdicts when applying different insanity tests).

<sup>347</sup> See Klinck, *supra* note 40, at 465.

prevailing. In this situation, unless the defendant adduces substantial evidence of co-existing cognitive dysfunction beyond the delusions, she will have little chance of succeeding in her insanity claim — even if the delusional context evidences such deep disorder that understanding and appreciating wrongfulness was unlikely at the time of the act.

Some evidence supports this hypothesis. In 2013, Brandon A. Yakush (a forensic psychologist) and Melinda Wolbransky (a professor of psychology) published an article intended to guide forensic mental health professionals in assessing defendants' appreciation of wrongfulness in insanity cases.<sup>348</sup> They suggest that forensic mental health examiners, when assessing “whether or not the defendant's mental disorder or defect impaired his capacity to reason through the illegality of the act,”<sup>349</sup> largely ignore the potential contribution of delusions.<sup>350</sup> Yakush and Wolbransky justify this position with their belief that delusions do not implicate cognitive dysfunctions sufficiently corrosive of appreciation to warrant consideration in the general right-or-wrong test. They explain that, when a person's act was inspired by a delusion, “the processing of right and wrong was likely contaminated by delusional content,” but, “from a clinical perspective, the defendant likely knew the act was illegal in so far as much as he was capable of processing right- and wrong-level cognitions.”<sup>351</sup> Thus, the typical delusional defendant will be found sane.<sup>352</sup> They assert the insane

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<sup>348</sup> Yakush & Wolbransky, *supra* note 185, at 355.

<sup>349</sup> *Id.* at 360. The authors stated, “While this article focuses primarily on the issue of defining wrongfulness in California, the discussion is relevant for those other states and the federal courts that have adopted similar definitions of insanity.” *Id.* at 357.

<sup>350</sup> *See id.* at 366 (“Thus, the clinical component of insanity evaluations in California should focus primarily on the role of cognitive dysfunctions that could have impaired the defendant's ability to process right versus wrong decisions. Any other symptoms would be important only to the final decision if they somehow impaired the defendant's reasoning abilities (e.g., the auditory hallucinations were so constant and overwhelming that the individual was unable to think clearly).”).

<sup>351</sup> *Id.* at 360.

<sup>352</sup> *See id.* at 366 (“In essence, delusions or hallucinations in the absence of cognitive impairments would not ordinarily lead to the type of dysfunction necessary for the defendant to have not known his act was wrong, whether illegal or immoral.”); *id.* at 360 (“[I]f the belief that drives the illicit behavior is sourced in mental illness (e.g., delusional ideation) . . . from a clinical perspective, the defendant likely knew the act was illegal in so far as much as he was capable of processing right- and wrong-level cognitions. Due to an absence of mental disorganization, the reasoning skills necessary to reason right and wrong were typically present. Yet, the processing of right and wrong was likely contaminated by delusional content. Thus, the defendant was able to think about right and wrong decisions but came to the wrong conclusion due to false beliefs.”). This statement is true so long as a defendant maintained the capacity to know that society would view the act as wrong. *See id.* at 366.

delusion rule provides a limited exception: the rule allows delusions that involve perceived justification, such as acting in self-defense because of imminent danger, to qualify for insanity without additional signs of cognitive dysfunction.<sup>353</sup> This tendency to limit the import of delusions to their content may exist in any jurisdiction that recognizes the insane delusion rule.<sup>354</sup>

### C. Sound Versions of the Insane Delusion Rule

To avoid the tendency to telescope the issue of insanity<sup>355</sup> — either by confining the inquiry to the content of the delusion (and the satisfaction of the insane delusion rule) or by excising delusions from the general insanity evaluation — jurisdictions should restrict the insane delusion rule to its most affirmative aspect, i.e., prohibit its introduction unless the defense is supported by sufficient evidence. This version of the insane delusion rule is currently in operation in Texas and Georgia.<sup>356</sup> To assist the jury, the court should submit a jury instruction for the relevant perceived justification or excuse when it provides an insane delusion instruction.<sup>357</sup> Also, defense attorneys should make use of all evidence of cognitive and emotional impairments associated with delusions to make clear that delusional individuals are more likely to perceive an imminent threat than would non-delusional people on the same facts. It should be reversible error to offer an insane delusion instruction if the perceived, delusional facts would not constitute a defense because doing so could serve no useful purpose.<sup>358</sup> Thus, California — which permits the prosecution to raise the insane delusion rule over the objection of the defendant<sup>359</sup> — should reform

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<sup>353</sup> See *id.* at 366-67; see also Richard Rogers, *An Introduction to Insanity Evaluations*, in *LEARNING FORENSIC ASSESSMENT: RESEARCH AND PRACTICE* 97, 109 (Rebecca Jackson & Ronald Roesch eds., 2d ed. 2016) (“The crux of the determination can be stated simply: If the defendant’s beliefs and perceptions were accurate, would they justify his or her actions?”). In addition, individuals experiencing delusions that are “so bizarre that [they] fall[] outside of society’s moral framework,” such as the belief that the victim is a menacing alien, may qualify for insanity. Yakush & Wolbransky, *supra* note 185, at 367.

<sup>354</sup> See *supra* note 349 and accompanying text.

<sup>355</sup> Cf. Klinck, *supra* note 40, at 465 (highlighting the danger, inherent in the insane delusion rule, of saying “that where there is a specific delusion, one should not look beyond it to see whether there is more general insanity”).

<sup>356</sup> See *supra* Parts II.B.1.a, II.B.1.c.

<sup>357</sup> See *supra* Part II.B.1.a (describing Texas’s approach).

<sup>358</sup> PERKINS & BOYCE, *supra* note 41, at 967-68.

<sup>359</sup> See, e.g., *People v. Leeds*, 192 Cal. Rptr. 3d 906, 913-14 (Ct. App. 2015), as modified on denial of reh’g (“Over defense counsel’s objections, the trial court read a

its rule. In all cases, a defendant who asserts an insanity defense under an insane delusion theory should also be able to assert (and use her delusions to support) insanity under the general test.<sup>360</sup>

A second fairly unobjectionable use of the insane delusion rule — best exemplified in military and federal courts — is to inform the definition of “wrongfulness.”<sup>361</sup> The rule is certainly illustratively helpful in those states that opt to limit the term “wrong” to “illegal.” Indeed, it is difficult to fathom a defensible way of understanding “illegal” in a perceived justification case without resort to the specific elements of the justification. However, this use of the insane delusion rule should only be used by the court to justify its selection of particular instructions on “wrongfulness” for the jury, and perhaps in its decision whether to allow the defense to argue that the perceived facts of the defendant’s delusion led her mistakenly to believe her act was justified or excused (i.e., legal and thus not “wrong”).

Courts must be mindful of preserving the defendant’s ability to use a delusion and its associated impairments to advance a general insanity defense.<sup>362</sup> When the facts as the defendant perceived them approach a cognizable defense, evidence pertaining to cognitive biases — particularly those implicating an overreliance on System 1 intuitive processes and impaired engagement of System 2 cognitive override processes — as well as evidence of impaired ability to engage in effective emotion regulation, may be probative for demonstrating an inability to understand wrongfulness.<sup>363</sup> Relatedly, in all *M'Naghten* jurisdictions, judges and defense counsel should encourage forensic mental health professionals to develop a broad understanding of the possible relevance of delusions to general insanity.<sup>364</sup>

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modified version of CALCRIM No. 505 instructing jurors that they must accept it as ‘a standard jury instruction for the law of self defense.’”).

<sup>360</sup> See *infra* notes 362–64 and accompanying text. Rollin Perkins and Ronald Boyce argued these procedural restraints would ensure the insane delusion rule “never work[s] to the disadvantage of the defendant” and proposed jury instructions to achieve this objective. PERKINS & BOYCE, *supra* note 41, 967-68.

<sup>361</sup> See *supra* Part II.B.2.

<sup>362</sup> See *supra* notes 169–72 and accompanying text.

<sup>363</sup> See *supra* Part III; *infra* text accompanying note 394. For exemplar cases, see *supra* note 180.

<sup>364</sup> See GOLDSTEIN, *supra* note 57, at 104-05 (urging lawyers to solicit testimony “on the nature of perception, understanding, [and] appreciation of consequence”).

## CONCLUSION AND FURTHER LESSONS FOR INSANITY

Nine jurisdictions — accounting for roughly half the prison population in the United States — currently employ some version of the insane delusion rule, and recent case law indicates a strengthening of the rule.<sup>365</sup> While the rule carries some benefits, failing to satisfy its contours may impair a defendant's appeal to the general right-and-wrong test. A growing body of evidence in the cognitive sciences suggests that a strong set of cognitive and emotional distortions may contribute to the formation and maintenance of delusions and that these distortions may impair moral reasoning connected to those delusions.<sup>366</sup> The insane delusion rule should not operate in a way that would diminish the consideration of these impairments in the general insanity test. Thus, this Article argues that Nevada and California should reform or discard their versions of the insane delusion rule. Perhaps more importantly, courts, defense attorneys, and forensic mental health practitioners must develop a broader understanding of the possible relevance of delusions and their associated impairments for the insane delusion rule and the general wrongfulness test.

The science of delusions holds broader implications as well. First, it demonstrates that emotion is key to rationality and that impairments in emotion regulation can warp the reasoning process.<sup>367</sup> The primary thrust of the general test in *M'Naghten* is that a "disease of the mind" can produce a "defect of reason" such that a person should be held

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<sup>365</sup> See *supra* Part II.

<sup>366</sup> See *supra* Part III.

<sup>367</sup> See *supra* Part III.C. Other scholars have also examined the importance of emotion for reasoning. See, e.g., Theodore Y. Blumoff, *Rationality, Insanity, and the Insanity Defense: Reflections on the Limits of Reason*, 39 LAW & PSYCHOL. REV. 161, 167-68, 187-93 (2015) ("Knowing must run through the emotions, the passions, or else the motivation to do lacks psychological valence. The traditional view of insanity as an excusing condition [as reflecting a singular rational faculty that exists apart from affect] is thus incomplete and sometimes even incoherent."); Federica Coppola, *Motus Animi in Mente Insana: An Emotion-Oriented Paradigm of Legal Insanity Informed by the Neuroscience of Moral Judgments and Decision-Making*, 109 J. CRIM. L. & CRIMINOLOGY 1, 5-7, 30-49 (2019) (stressing "the critical role that emotions and emotional processes play either in informing or in hindering moral decision-making" and pointing to findings that "cognitive faculties alone cannot give rise to moral decisions without emotional influence"); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1399-409 (2006) (considering the differing effects that emotion has on elements of the decision-making model); Laura Reider, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 313-29, 341 (1998) (reasoning that "empirical sciences reveal that emotional capacities are inextricably intertwined with cognitive and intellectual capacities").

blameless for her acts.<sup>368</sup> This emphasis on mental disorder's effect on reasoning indicates that all symptoms of mental disease that could impair moral reasoning should be considered in the right-and-wrong insanity inquiry.<sup>369</sup> Thus, the conceptions of reasoning and rationality inherent in the *M'Naghten* standard should extend to emotional capacities,<sup>370</sup> as some courts have concluded.<sup>371</sup> To this end, defense attorneys should probe the relationship between delusions, emotional dysfunction, and reasoning in their examinations of forensic experts and include it in closing arguments. Defense lawyers should also accelerate the law's formal incorporation and recognition of emotion in the *M'Naghten* right-and-wrong test by requesting instructions for "know" or "appreciate" that include both cognitive and affective components and encouraging the development of case law on the subject.

Second, the science of delusions demonstrates that heightened emotion — such as panic or rage — may result in a loss of control (at least partially) through the mechanism of a truncated reasoning process.<sup>372</sup> Thus, impairments in cognition cannot easily be separated

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<sup>368</sup> See *supra* notes 62–63 and accompanying text.

<sup>369</sup> STEPHEN, *supra* note 66, at 163–64 (arguing that a person "unequal to the effort of calm sustained thought upon subjects connected with his delusions" cannot be said "to know or have a capacity of knowing that the act which he proposed to do is wrong"); DUFF, *supra* note 64, at 446–47, 450 ("For to understand something as a possible reason for action (even as a reason by which others claim I should be moved) is to grasp it as something about which I could care, and by which I could be moved to act; such a grasp must draw on my capacities for rational emotion."); see GOLDSTEIN, *supra* note 57, at 62.

<sup>370</sup> See *supra* note 369. Others have argued that reaching this result would require modification of the *M'Naghten* test. See COPPOLA, *supra* note 367, at 52–53 (proposing a tripartite insanity test with an emotional prong that "would assess agents' capacity to emotionally appreciate the moral significance of their actions" (emphasis omitted)); REIDER, *supra* note 367, at 333 (suggesting the insanity standard "should consist of a tripartite test" that assesses: (1) "the defendant's ability to know right from wrong"; (2) "the defendant's capacity for emotions, feelings, and particular body regulatory systems"; and (3) the defendant's "ability to control actions").

<sup>371</sup> See, e.g., *State v. Rawland*, 199 N.W.2d 774, 790 (Minn. 1972) (affirming that "the test [for knowing right from wrong] should be the accused's ability to emotionally and intellectually realize and appreciate, as an integrated personality, the nature and consequences of the moral choice presented" (citing W.E. Shipley, Annotation, *Modern Status of the M'Naghten "Right-and-Wrong" Test for Criminal Responsibility*, 45 A.L.R.2d 1447 (1956))).

<sup>372</sup> See COPPOLA, *supra* note 367, at 48 (arguing that neuroscientific findings suggest (1) self-control consists of interrelated cognitive, affective, and motivational processes; and (2) "[a] disruption in either cognitive or emotional processes . . . can equally endanger a given choice of appropriate behavior in response to certain stimulus"); *supra* Part III.

from volition.<sup>373</sup> In 1883, James Fitzjames Stephen explained the close relationship between “knowledge of wrongfulness” and self-control in this way:

[T]he power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer’s powers as to prevent him from attending or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control.<sup>374</sup>

For this reason, Stephen argued that volition is inherently part of the right-and-wrong test.<sup>375</sup> While not all agree,<sup>376</sup> other legal and medical scholars have offered this observation as well.<sup>377</sup> More recently, Stephen Morse has argued in an influential series of articles that “[v]irtually all cases of so-called control problems that plausibly raise a substantial question about the agent’s responsibility will prove on close analysis to be instances of irrationality, especially if the law continues to require that an abnormality is present.”<sup>378</sup> The science of delusions — and the

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<sup>373</sup> See GLUECK, *supra* note 46, at 250-51 (observing that “the fundamental, and probably the most important, mode of mental life of all, as we have so often said, is the conative-affective mode, of which the intelligence, consciousness, knowing, etc., are but the instruments of expression”).

<sup>374</sup> STEPHEN, *supra* note 66, at 170.

<sup>375</sup> See *id.* at 170-71.

<sup>376</sup> Some scholars argue the *M’Naghten* standard must be modified to excuse nonvolitional conduct. See, e.g., Steven Penney, *Impulse Control and Criminal Responsibility: Lessons from Neuroscience*, 35 INT’L J.L. & PSYCHIATRY 99, 99-100 (2012) (arguing, in a 2012 review of neuroscientific literature, that the insanity standard should be extended beyond the *M’Naghten* test’s focus on “moral and instrumental logic” to excuse mentally disordered persons who experienced a total incapacity to control their conduct).

<sup>377</sup> See, e.g., Hall, *supra* note 66, at 776-81 (explaining this view as the result of understanding man as a “unitary being” with an “integrated personality”); cf. HORACE GRAHAM WYATT, *THE PSYCHOLOGY OF INTELLIGENCE AND WILL* 156 (1930) (declaring that “[v]olition is the active aspect of intelligence”).

<sup>378</sup> Stephen J. Morse, *From Sikora to Hendricks: Mental Disorder and Criminal Responsibility*, in *THE EVOLUTION OF MENTAL HEALTH LAW* 129, 162 (Lynda E. Frost & Richard J. Bonnie eds., 2001). See generally Duff, *supra* note 64, at 452 (“Control over oneself is a matter of rational capacities: thus I have control over my actions insofar as I have the capacities necessary to recognize reasons and guide my actions by them, insofar as I am capable of engaging in practical reasoning and of actualizing its results.”); Morse, *Brain and Blame*, *supra* note 229, at 544 (“Self-control problems of volitionally unimpaired agents are better understood as rationality defects.”); Stephen J. Morse,

mechanisms through which delusions are created, reinforced, and expressed through reasoning processes — support these theories and the inclusion of aspects of volition within the “ability to know” portion of *M'Naghten's* right-and-wrong test. At least two state supreme courts agree.<sup>379</sup>

Third and relatedly, the cognitive and emotional impairments that underlie delusions presumably exist along a spectrum and therefore militate for the recognition of a partial excuse (similar to provocation) or general mitigation of punishment for delusional individuals who are substantially, but not severely, impaired.<sup>380</sup> The common law “heat of passion” defense provides:

if the act of killing was committed under the influence of passion or in heat of blood, produced by reasonable provocation, that is, such as is ordinarily calculated to excite the passion beyond control, and before a reasonable time has elapsed for the passion to cool and reason to resume its habitual control, out of regard for the frailties of human nature, the crime [of murder] is mitigated and designated as voluntary manslaughter and a lesser penalty inflicted.<sup>381</sup>

This defense provides a “partial allowance for emotional dysfunction,” recognizing “the wrongfulness of the homicide is mitigated when the emotionally charged reactivity restricts the actor’s

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*Culpability and Control*, 142 U. PA. L. REV. 1587 (1994) (arguing that “volitional problems are best understood as rationality defects”); Stephen J. Morse, *New Neuroscience, Old Problems*, in *NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE* 157, 177-81 (Brent Garland ed., 2004) (discussing the legal concept of responsibility through a neuroscientific lens); Morse, *Rationality and Responsibility*, *supra* note 69 (arguing that “[t]he general capacity for rationality in a particular context is . . . the primary criterion of responsibility and its absence is the primary excusing condition”); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1078 (2002) (“Control defects should be understood and adjudicated in terms of rationality defects, which are the best explanation of control problems.”).

<sup>379</sup> See *State v. Beckwith*, 46 N.W.2d 20, 30 (Iowa 1951), *abrogated on other grounds* by *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993) (“‘Irresistible impulse’ can be a factor under our decisions when, and only when, it so operates upon a diseased mind as to destroy the comprehension of consequences; it is not, in and of itself, a defense.”); *State v. Rawland*, 199 N.W.2d 774, 788-89 (Minn. 1972).

<sup>380</sup> On the basis of neuroscience evidence, Federica Coppola has argued for the extension of “[t]he applicability of the mitigating factors in the present EED [extreme emotional disturbance] and heat of passion defenses . . . to cover all crimes” and has observed that, in tandem with an expanded insanity standard, the diminished capacity doctrine could function as a partial-insanity doctrine. See Coppola, *supra* note 367, at 57-60.

<sup>381</sup> *Shorter v. Commonwealth*, 67 S.W.2d 695, 696 (Ky. 1934).

capacity for rational thought and reasoned behavior.”<sup>382</sup> The science of delusions demonstrates that, especially when under stress, a deluded person may have a reduced ability to engage in deliberative processing and may be prone to make decisions dominated by intuitively generated emotions.<sup>383</sup> To the extent that her impairments prompt her “to act rashly, or without due deliberation or reflection, and from passion rather than judgment,”<sup>384</sup> she should be afforded a partial defense similar to the heat of passion defense. Indeed, at least one state — Tennessee — has recognized that an insane delusion can create such “passion and agitation” as to warrant this treatment.<sup>385</sup> However, in contrast to the restricted use of the current heat of passion defense, no principled reason exists to restrict a partial defense due to mental disorder to cases of homicide. Framed differently — but motivated by similar concerns — some scholars have suggested a generic partial excusing condition based on diminished rationality,<sup>386</sup> while others have suggested a standard discount for mental disorder at sentencing.<sup>387</sup> The scientific evidence presented here may support those proposals and provide a basis to bridge these efforts. This possibility will be explored in future work.<sup>388</sup>

Finally, a strong scientific case can be made that a modified version of the insane delusion rule should be incorporated into — if not

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<sup>382</sup> Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 *NEW CRIM. L. REV.* 69, 69 (2009). Fontaine argues that the heat of passion defense should be reformulated to also account for cognitive dysfunction, namely “provocation interpretational bias — a set of cognitive difficulties by which certain ambiguous-provocation situations are interpreted as intentional, hostile, and wrongful by the reacting aggressor.” *Id.*

<sup>383</sup> See *supra* Parts III.C.1–2.

<sup>384</sup> *McHargue v. Commonwealth*, 21 S.W.2d 115, 117 (Ky. 1929) (citation omitted).

<sup>385</sup> See *Davis v. State*, 28 S.W.2d 993, 996 (Tenn. 1930).

<sup>386</sup> See FINGARETTE & FINGARETTE HASSE, *supra* note 64, at 199–261; Morse, *Diminished Rationality*, *supra* note 64, at 289. Such a defense bears some similarity to the diminished rationality defense in England which allows the jury in murder cases to find a defendant guilty of manslaughter if the defendant proves that she was “was suffering from an abnormality of mental functioning which . . . substantially impaired the defendant’s ability . . . to form a rational judgment.” Homicide Act 1957, 5 & 6 Eliz. 2 c. 11, § 2 (Eng.), <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/11/section/2> [<https://perma.cc/G4VQ-W2UY>]. Richard Moran reports, “Although limited in scope to murder cases, the defense of diminished responsibility has nearly replaced the insanity defense under the McNaughtan rules.” MORAN, *supra* note 25, at 3.

<sup>387</sup> See Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational – The Sentencing of Offenders with Mental Disorders*, 29 *HARV. HUM. RTS. J.* 1, 5–6 (2016); Michael Mullan, Essay, *How Should Mental Illness Be Relevant to Sentencing?*, 88 *MISS. L.J.* 255, 274–75 (2019).

<sup>388</sup> See Johnston & Leahey, *supra* note 24.

supplant — the wrongfulness inquiry of the *M'Naghten* standard.<sup>389</sup> The delusion rule asks the trier of fact to see the world through the defendant's eyes and then assess — had the situation been as the defendant supposed — whether her act would have been justified or excused. As currently applied, the delusion rule takes only the facts (disconnected from the defendant's perceived import of or emotional response to those facts) of the delusion as true.<sup>390</sup> But the science suggests that people with delusions may process and ultimately comprehend the facts inherent in delusions differently. In particular, they may exaggerate the nature of, and feel overwhelmed by, a perceived threat. Research suggests that individuals with persecutory delusions in moments of stress may be prone to misidentify a stimulus as threatening and rush to judgment without considering all information as a combined result of emotion regulation dysfunctions, hostile attributional bias, and cognitive biases.<sup>391</sup> Defense attorneys must find experts to explain these phenomena.

In addition, defense counsel should consider requesting an instruction that the jury, when assessing a delusional defendant's ignorance of the wrongfulness of her act, should attempt to interpret and experience the delusional facts as the defendant would have in that moment — or stated more concisely, from the viewpoint of the defendant.<sup>392</sup> It is only by interpreting the facts from the defendant's viewpoint that the trier of fact can determine if she actually lacked knowledge of the wrongfulness of her response to those facts. Given the

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<sup>389</sup> See Johnston, *Delusions and Moral Incapacity*, *supra* note 24. We are grateful to Christopher Slobogin for drawing our attention to this aspect of the scientific implications.

<sup>390</sup> See *People v. Leeds*, 192 Cal. Rptr. 3d 906, 914 (Ct. App. 2015), *as modified on denial of reh'g*.

<sup>391</sup> See *supra* Part III.C.

<sup>392</sup> Cf. Garvey, *supra* note 64, at 155 (“The delusion theory rests its verdict, sane or insane, on the law applied to the accused's delusional world. It requires stepping into the actor's crazy world and applying the law to the facts as they exist in that crazy world.”). In this way, the ignorance of wrongfulness component of the insanity test would resemble the “reasonableness” component of the Model Penal Code's extreme emotional and mental disturbance partial defense. See MODEL PENAL CODE § 210.3 (AM. LAW INST. 1962) (“A homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.”). See generally Richard Singer, *The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 291-304, 322 (1986) (providing thoughtful commentary on the history and then current use of the defense).

stressful and emotional nature of the factual settings of many insanity cases, one possible effect of such an instruction could be to hold delusional individuals to the gist (but not particulars) of a perceived justification or excuse.<sup>393</sup> Some jurisdictions appear to follow such an approach, grounding an acquittal in a defendant's perceived (delusional) need to use defensive force in a situation that would not, had it been true, meet the specifications of the self-defense justification.<sup>394</sup>

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<sup>393</sup> See Johnston, *Delusions and Moral Incapacity*, *supra* note 24.

<sup>394</sup> See, e.g., *supra* notes 169–71 and accompanying text (quoting the Court of Appeals for the Armed Forces in *United States v. Mott*); *supra* note 180 (discussing cases from Louisiana, Alabama, Washington, and Indiana). Adoption of this approach may require a change in orientation in those jurisdictions that strictly define wrong as illegal, particularly in those that employ the insane delusion rule to this effect. See *supra* Part II.B.2.