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## Psychosis, Heat of Passion, and Diminished Responsibility

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# PSYCHOSIS, HEAT OF PASSION, AND DIMINISHED RESPONSIBILITY

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# PSYCHOSIS, HEAT OF PASSION, AND DIMINISHED RESPONSIBILITY

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**Abstract:** This Article calls for the creation of a generic partial excuse for diminished rationality from mental disability. Currently, most jurisdictions recognize only one partial excuse: the common law heat-of-passion defense. Empirical research demonstrates that populations with delusions experience similar impairments to decision-making capacities as people confronted with sudden, objectively adequate provocation. Yet, current law affords significant mitigation only to the latter group, which only applies in murder cases. Adoption of the Model Penal Code’s “extreme mental or emotional disturbance” (EMED) defense could extend mitigation to other forms of diminished responsibility. However, examination of jurisdictions’ adoption and utilization of the EMED defense shows that, of the few states that have adopted it, most have rejected its diminished responsibility potential. Instead, most retain key features of heat of passion such as requiring an external provoking event, rendering the defense inapplicable to many delusion-driven crimes. A better solution would be to create a generic partial excuse for diminished rationality from mental disability. Over the decades, several prominent scholars have offered proposals for generic partial excuses for partial responsibility, but, as of yet, none has inspired legislative action. This Article’s proposal differs from prior proposals in four key respects. First, it limits its purview to rationality impairments from mental disabilities, a traditionally recognized form of diminished blameworthiness. Second, to be workable and attractive to states, this proposal recommends that states draw definitions of partial responsibility from existing statutory frameworks, namely existing insanity or Guilty But Mentally Ill (GBMI) standards. Such an understanding of partial responsibility should carry greater local legitimacy, and the popularity of GBMI verdicts with legislatures and juries may mean that extending those statutes into

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the realm of partial responsibility would be more palatable to state legislatures than wholly new language. Third, in light of the realities of mental disorder and its lived experience, our proposal does not advocate for a lesser degree of mitigation for defendants who contributed to their irrationality through failure to comply with medical directives. Fourth, our proposal draws from GBMI statutes and partial responsibility standards outside the United States to suggest sentencing, treatment, and post-sentence options to accompany a partial responsibility verdict and respond to any possible threat to public safety. This Article examines the first two distinctive components of the partial excuse; the third and fourth aspects of the proposal will be developed in a future work.

## INTRODUCTION

In the American criminal justice system, the guilt phase of trial determines a criminal defendant's responsibility. The trier of fact generally must treat the issue of responsibility as "all or nothing," meaning that a defendant will be found either fully guilty or fully not guilty.<sup>1</sup> Mitigation of punishment is not considered until the sentencing phase of trial, when the trial judge generally holds discretion to reduce a defendant's sentence subject to applicable sentencing guidelines and mandatory minimums.

This bivalent system of determining guilt is problematic because it does not comport with the notion of just deserts. Capabilities necessary for responsibility—such as factual understanding, appreciation, practical reasoning, and ability to discern and respond to moral reasons for actions—exist along a spectrum, as do impairments destructive of those capacities.<sup>2</sup> Of particular concern, the guilt phase of trial treats a defendant who narrowly misses proving an affirmative defense the same as a defendant who offers no excuse at all—both are deemed guilty and convicted accordingly, often resulting in over-punishment of the former.

Currently, there is just one important—but narrow—exception to the bivalent nature of determining responsibility during the guilt phase of trial: provocation doctrines.<sup>3</sup> In homicide cases, provocation doctrines appeal to a

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<sup>1</sup> David. O. Brink, *Partial Responsibility and Excuse*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES* 39, 39 (Heidi M. Hurd ed., 2019).

<sup>2</sup> *Id.* ("Responsibility and excuse are *scalar* phenomena, because the capacities constitutive of the normative competence required for responsibility can be had to different degrees and their impairment can be a matter of degree.").

<sup>3</sup> Some states provide another partial defense to murder in the form of an "imperfect self-defense." This defense does not recognize the diminished capacities of the actor, but rather reduces murder to manslaughter when the defendant honestly but unreasonably believed she immediately needed to use deadly force in self-defense. *See In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994) (en banc); *Commonwealth v. Tilley*, 595 A.2d 575, 582 (Pa. 1991). Imperfect self-defense generally is not available when one is propelled by delusions. *See People v. Elmore*, 325 P.3d 951, 955 (Cal. 2014).

middle ground between full responsibility and acquittal by mitigating a charge of murder to manslaughter when certain conditions are satisfied. The precise test varies from jurisdiction to jurisdiction, with many states employing the common law heat-of-passion doctrine,<sup>4</sup> whereas other states use iterations of the Model Penal Code (MPC)'s "extreme mental and emotional disturbance" (EMED) partial defense.<sup>5</sup> Regardless of the test used, provocation doctrines are very narrow in scope, and thus most criminal trials shunt consideration of mitigating factors to sentencing.

In an ideal criminal justice system, responsibility for a crime would align with the individual defendant's level of culpability, such that the "near-miss" defendant would be sanctioned to a lesser degree than the defendant without any defense. Yet—with the narrow exception of provocation doctrines—the bivalent nature of the American criminal justice system does not permit the trier of fact to engage in reaching these granular distinctions, instead retaining focus on the all-or-nothing verdict: guilty or not guilty.

To illustrate the shortcomings intrinsic in the current bivalent system, consider four defendants who all killed their spouses.<sup>6</sup> Defendant Ann poisoned her husband's food after learning he was cheating on her. Defendant Bob, after witnessing his wife strike his daughter, attacked his wife and beat her to death. Defendant Charlie, who has a delusional disorder, stabbed his husband after mistakenly believing he was plotting to kill him and then hid his body and fled the scene. Diagnosed with schizophrenia, Defendant Donna shot and killed her wife during an acute psychotic episode where she delusionally believed her wife was an alien trying to abduct her.

Although each defendant committed the same act—homicide of a spouse—they clearly do not share equal degrees of culpability. Nevertheless, in the current bivalent system, the trier of fact would find each defendant responsible or not responsible. Assume that a jury trial is held for each defendant, with the following results: Ann and Charlie are each convicted of murder, Charlie having unsuccessfully raised the insanity defense; Bob is convicted of voluntary manslaughter after successfully raising a heat-of-passion partial defense;<sup>7</sup> Donna is acquitted after successfully raising an insanity defense.

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<sup>4</sup> See Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH. L. REV. 19, 24–25 (2014); *infra* Section I.A (discussing the elements of the heat-of-passion doctrine).

<sup>5</sup> See *infra* Part II (describing EMED and its current use in American jurisdictions).

<sup>6</sup> These examples are inspired by David O. Brink. See Brink, *supra* note 1, at 50–51.

<sup>7</sup> See *infra* Section I.A (providing an in-depth discussion of the heat-of-passion partial defense).

Charlie's insanity defense may fail for numerous reasons.<sup>8</sup> A jury could find that his delusional disorder does not qualify as a "mental disease or defect" for purposes of the insanity defense or that it did not cause his actions. The jury could construe his hiding of the body and flight as evidence of conscious wrongdoing. It is even possible that, in Charlie's jurisdiction, he did not qualify for an insanity defense because his delusion, had it been true, would not entitle him to acquittal on grounds of self-defense.<sup>9</sup>

Assuming Charlie was culpable for the homicide, we are left questioning whether his conviction for murder is just. Is his blameworthiness more akin to that of an intentional, cool-headed killer—or to one who killed in the "heat of passion" generated by a gravely upsetting source that understandably clouded his reason and diminished his powers of self-control? When comparing Charlie with Bob, most states would hold Charlie guilty of a higher degree of homicide.<sup>10</sup> This is because they recognize the diminished responsibility of provoked individuals but *not* the diminished responsibility of individuals with mental disorders short of insanity.

Yet empirical research in psychology, psychiatry, and neuroscience suggests that both Bob and Charlie may have suffered from similar impairments that hindered their ability to make deliberate moral decisions. Human decision-making is characterized by two discrete styles of thinking—one which is automatic, energy efficient, and operates subconsciously, and another which is deliberate, taxing, and requires conscious input.<sup>11</sup> Framed in this context, defendants Bob and Charlie, inflamed by passion, both killed their spouses as a result of an overreliance on the automatic, subconscious style of thinking coupled with diminished or impaired engagement of the reflective, conscious processes. Despite the core similarities in their decision-making processes, only Bob would be able to raise a provocation defense to mitigate his murder charge to manslaughter. Charlie, on the other hand, would be convicted of murder and thus over-punished.<sup>12</sup>

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<sup>8</sup> See *infra* notes 290–291 (discussing studies showing that defendants with psychosis are often not acquitted on grounds of insanity even though their delusions and hallucinations typically manifested at the time of, and often materially contributed to, their criminal acts).

<sup>9</sup> See E. Lea Johnston & Vincent T. Leahey, *The Status and Legitimacy of M'Naghten's Insane Delusion Rule*, 54 U.C. DAVIS L. REV. 1777, 1795–97 (2021) (examining the application of the insane delusion rule in Nevada, which denies defendants of an insanity defense if their delusion, if true, would not justify committing a criminal act).

<sup>10</sup> Charlie's mental impairment could then be considered at sentencing.

<sup>11</sup> See *infra* Subsection I.B.1 (describing in greater detail the "dual-process" style of thinking).

<sup>12</sup> Some jurisdictions permit defendants to use mental health evidence, including neuroscientific evidence, to rebut the mens rea of "purposely" to reduce a purposeful killing to one of recklessness or negligence. See Deborah W. Denno, *How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence*, 85 FORDHAM L. REV. 453, 462 (2016). Because Charlie intended to kill a human being, however, his attempt would not likely succeed. See, e.g., *Saranchak v. Beard*, 616 F.3d

This Article examines the most prominent provocation doctrine in the United States: the heat-of-passion partial defense to murder. The Article frames the heat-of-passion defense in the context of modern dual-process theories of decision-making and then demonstrates that populations with psychosis often experience similar impairments in decision-making to those benefiting from the heat-of-passion defense.<sup>13</sup> Nevertheless, because of multiple objective elements tied to a “reasonable person” standard, the heat-of-passion defense is out of reach for those whose mental disorder impaired their rationality. Fairness norms suggest that individuals with mental disorders should have access to a defense afforded to others with similar impairments.

This particular injustice could be—but is not—addressed by the EMED partial defense proposed by the American Law Institute (ALI) in section 210.3(1)(b) of the MPC. The ALI designed this mitigation to expand upon the traditional heat-of-passion doctrine and permit recognition of partial responsibility.<sup>14</sup> In the relatively few jurisdictions that have adopted some form of EMED, however, few practical differences exist between its application and common law heat of passion, and few jurisdictions exploit the partial responsi-

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292, 308 (3d Cir. 2010) (explaining that “expert testimony that the defendant suffered from depression, auditory hallucinations, schizoaffective disorder, delusion, pathological paranoia, and even a tenuous ability to apprehend reality is irrelevant to, and inadmissible in support of, a diminished capacity defense” because it would “not speak to mental disorders affecting the cognitive functions of deliberation and premeditation”).

<sup>13</sup> The terms “psychosis” and “psychotic disorder,” as used in scientific and medical literatures, often refer to a broad array of disorders, which range from intermittent to chronic and include an extensive variety of pathophysiological causes. Further, psychotic symptoms—such as delusions and hallucinations—exist along a spectrum and are present at attenuated levels in the general, nonclinical population. See generally J. van Os et al., *A Systematic Review and Meta-Analysis of the Psychosis Continuum: Evidence for a Psychosis Proneness-Persistence-Impairment Model of Psychotic Disorder*, 39 PSYCH. MED. 179 (2009). This Article primarily focuses on populations with delusions as a product of nonaffective psychoses, most notably those with a diagnosis along the “schizophrenia spectrum.” See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87 (5th ed. 2013) (“Schizophrenia spectrum” disorders “are defined by abnormalities in one or more of the following five domains: delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and negative symptoms.”).

<sup>14</sup> MODEL PENAL CODE § 210.3 cmt. 5, at 72–73 (AM. L. INST. 1980) (emphasizing courts’ role in determining whether evidence of mental abnormality will be admissible as part of the defendant’s “situation”). Partial or diminished responsibility can be understood as referring to two different concepts: (1) “diminished capacity,” a misleadingly titled rule of evidence that permits evidence of mental abnormality or incapacity to disprove a mental element of a charged crime; and (2) incomplete irresponsibility, or “[a] condition of mental unsoundness not sufficient to satisfy existing tests of irresponsibility nor of a kind to have resulted in the absence of a necessary mental element of the crime charged in the indictment.” S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 310 n.1 (1925). This Article concerns the latter conception. Additionally, it uses “partial responsibility” and “diminished responsibility” interchangeably.

bility potential of the doctrine.<sup>15</sup> Under this approach, minimizing over-punishment would require focused expansion of the EMED doctrine that aligns more closely with the ALI's intentions, an unlikely occurrence.

A better, more comprehensive option would be the creation of a generic partial excuse operating independently from provocation doctrines.<sup>16</sup> Rather than focusing on the provocation of the defendant, a generic partial excuse would concentrate on factors implicating diminished rationality,<sup>17</sup> including the impact of mental disability on decision-making.<sup>18</sup> In recent years, several scholars have offered generic partial excuse proposals, but none has been adopted in any American jurisdiction.

This Article offers what it hopes will be a more practical, workable solution: a generic partial excuse for diminished rationality from mental disability. Informed by contemporary scientific understandings of psychotic disorders, this proposal is limited to rationality impairments from mental pathology, a traditionally recognized form of diminished blameworthiness. Unlike prior proposals, which have urged adoption of a new approach to excuse with wholly new language, this proposal recommends that states draw definitions of partial responsibility from existing statutory frameworks. It identifies two possibilities: existing insanity<sup>19</sup> and Guilty But Mentally Ill (GBMI) statutes.<sup>20</sup> Examination of the history of contemporary insanity statutes shows their close relationship to reasoning impairments, making their substantial satisfaction a possibility for a principled partial responsibility standard. Another option would be the cooption of GBMI statutory language for this new context. A parsing of thirteen GBMI statutes' language shows that all but one involve versions of diminished responsibility, either lesser forms of insanity or rationality-marring impairments. Courts have lauded these statutes as clarifying the nature, and spectrum, of irresponsibility.

Crucially, jurors welcome and thoughtfully employ this verdict, which jurors (falsely) believe to be one of partial responsibility. Empirical studies demonstrate that jurors consider GBMI defendants to be at an intermediate level of responsibility, are more confident when employing this verdict than

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<sup>15</sup> See *infra* Section II.B (eliciting the current application of the EMED defense in American jurisdictions).

<sup>16</sup> See *infra* Part III (describing a proposal for a generic partial excuse for diminished rationality from mental disability).

<sup>17</sup> Whether a particular impairment—or constellation of impairments—sufficiently interfered with one's rationality to warrant an excuse is ultimately a moral and legal judgment left to the trier of fact. See Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 542, 547 (1996).

<sup>18</sup> See *infra* Part III (describing a proposal for a generic partial excuse for diminished rationality from mental disability).

<sup>19</sup> See *infra* Subsection III.B.1.

<sup>20</sup> See *infra* Subsections III.B.2.a–b.



when finding a person Not Guilty by Reason of Insanity (NGRI) or guilty, and feel the verdict more fairly captures the relationship between mental illness and responsibility. Studies of various methodologies also consistently show that jurors employ the verdict in a discerning manner that correlates with evidentiary factors, particularly the perceived mental status of the defendant.

The experience of GBMI statutes demonstrates that states have language at the ready for a partial responsibility verdict, courts will approve of it, and jurors will appreciate and prudently apply it. Generating a partial responsibility standard from these statutes should carry greater local legitimacy than crafting one from new cloth, and the popularity of GBMI verdicts with legislatures and juries may mean that extending those statutes into the realm of partial responsibility would be more palatable to state legislatures.<sup>21</sup> Because GBMI statutes typically do not reduce punishment or otherwise reflect diminished blameworthiness, however, those statutes provide insufficient guidance on the consequences that should accompany a partial responsibility verdict. Foreign jurisdictions' experience with partial responsibility—and the range of sentencing, treatment, and post-sentence schemes they employ—may provide better models.<sup>22</sup>

Part I of this Article discusses the components of the traditional heat-of-passion doctrine and explains its significance within the dual-process model of decision-making.<sup>23</sup> Part I then presents empirical data showing that populations with delusions—particularly those with persecutory delusions—are characterized by decision-making deficits akin to those of the heat-of-passion agent.<sup>24</sup> Next, Part II presents the EMED partial defense and examines its current application in American jurisdictions, specifically highlighting its limited practical expansion beyond the traditional heat-of-passion doctrine.<sup>25</sup> Finally, Part III proposes a generic partial excuse for diminished rationality due to mental disability. This partial excuse would better align guilt determinations with a defendant's actual level of culpability, thus reducing over-punishment during the guilt phase of criminal trials.<sup>26</sup>

## I. INDIVIDUALS WITH PSYCHOTIC DISORDERS DEMONSTRATE DECISION-MAKING IMPAIRMENTS SIMILAR TO THE HEAT-OF-PASSION AGENT

States typically recognize one limited form of partial responsibility: a partial excuse derived from the common law heat-of-passion defense, which miti-

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<sup>21</sup> See *infra* Subsection III.B.2.c.

<sup>22</sup> See *infra* note 238 (noting that future work will consider this issue in greater detail).

<sup>23</sup> See *infra* notes 27–69 and accompanying text.

<sup>24</sup> See *infra* notes 70–156 and accompanying text.

<sup>25</sup> See *infra* notes 157–240 and accompanying text.

<sup>26</sup> See *infra* notes 241–404 and accompanying text.

gates murder to manslaughter.<sup>27</sup> This defense recognizes that particular, provoking circumstances would likely undermine the rationality of a reasonable person. Hence, killing the provoker in a “heat of passion” in response to those circumstances reduces the offender’s culpability as compared to an unprovoked killer and warrants formal mitigation.<sup>28</sup> As this Article discusses below, a large body of scientific research suggests similarities between the mental states of those who kill in a heat of passion and those driven by delusions.<sup>29</sup>

Psychological accounts of decision-making provide a conceptual framework that explains *why* the heat-of-passion agent suffers from reduced rationality when killing. The prevailing theory posits that humans engage in two styles of decision-making—one is fast, reflexive, and involves primarily unconscious thought processes, and the other is slow, deliberate, and reflects conscious choice. These dual-process models emphasize that myriad factors, including

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<sup>27</sup> See *infra* Section II.B (discussing the eleven states that have replaced the common law defense with a (somewhat) broader standard). In addition, it is possible that a few states offer a more expansive “partial responsibility” defense that mitigates murder to manslaughter. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 26.03[A][1] (6th ed. 2012). First recognized in Scotland to reduce murder to noncapital “culpable homicide” for the “partially insane,” the California Supreme Court generated the defense in the mid-1900s by expanding the definition of malice aforethought to include aspects of criminal responsibility. *Id.* § 26.03[A][1] n.32, [A][2]; see *People v. Wolff*, 394 P.2d 959, 974–75 (Cal. 1964) (en banc), *superseded by statute*, Act of Sept. 10, 1981, ch. 404, § 7, 1981 Cal. Stat. 1591, 1593 (codified as amended at CAL. PENAL CODE § 189 (West 2022)), *as recognized in People v. Ramirez*, 479 P.3d 797 (Cal. 2021), *cert. denied*, 142 S. Ct. 784 (2022); *People v. Gorshen*, 336 P.2d 492, 501–03 (Cal. 1959) (en banc), *abrogated by People v. Lasko*, 999 P.2d 666 (Cal. 2000). Four states followed California’s lead, but it is unclear if any recognize the defense today. See MODEL PENAL CODE § 210.3 cmt. 5, at 67, 70 n.77 (AM. L. INST. 1980) (citing decisions by Hawaii, Ohio, Oregon, and Utah state courts). The California legislature abolished the defense in the 1980s. DRESSLER, *supra*, § 26.03[A][2].

<sup>28</sup> Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 29–30 (2009). Formal mitigation is mandatory upon the finding of a particular mitigating factor, whereas informal mitigation involves a judge’s exercise of discretion at sentencing. Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 829 n.15 (1977) (“Unlike informal mitigation, which occurs at sentencing, formal mitigation occurs at trial where the fact-finder reduces the defendant’s formal degree of criminal liability if the mitigating factor is proven.”); H.L.A. Hart, *The Presidential Address: Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELIAN SOC’Y 1, 14 (1960).

<sup>29</sup> For earlier accounts of psychological components of heat of passion, particularly provocation interpretation bias and reactive anger, see Fontaine, *supra* note 28, at 30–31. See generally Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 NEW CRIM. L. REV. 69 (2009) (discussing the inconsistencies of the provocation defense based on emotional dysfunction); Reid Griffith Fontaine, *Reactive Cognition, Reactive Emotion: Toward a More Psychologically-Informed Understanding of Reactive Homicide*, 14 PSYCH. PUB. POL’Y & L. 243 (2008) [hereinafter Fontaine, *Reactive Cognition*] (discussing the role of cognitive and emotional dysfunction in reactive homicide). Importantly, Fontaine’s focus is on the processes of cognitive dysfunction that impair rationality, not diagnostic categories. Fontaine, *Reactive Cognition*, *supra*, at 256–58.

emotion, can impact the decision-making process. In the traditional heat-of-passion context, decision-making is dominated by automatic thinking characterized by intense emotion, without reflection, due to temporary impairment of the deliberative reasoning process. Likewise, modern psychological and psychiatric research demonstrates that populations with psychosis exhibit similar impairments in dual-process modulation, and these impairments can adversely affect moral decision-making.<sup>30</sup> Viewed in this light, populations with psychosis often demonstrate impairments in decision-making comparable to those of heat-of-passion agents, yet a mitigating partial defense is available only to the latter.

Section A of this Part discusses the heat-of-passion partial defense in American jurisprudence and highlights its subjective and objective components.<sup>31</sup> Next, Section B conceptualizes provocation in light of psychological dual-process models by demonstrating how intense emotion temporarily impairs rationality, leading to provoked homicide.<sup>32</sup> Section C then discusses how individuals with psychosis often exhibit similar impairments in rational decision-making to those who are provoked, with a particular focus on domains bearing on moral decision-making—namely, cognitive, emotional, and stress-based factors.<sup>33</sup> Finally, Section D concludes by demonstrating how the rationale underlying provocation doctrines applies in full force to populations with delusions.<sup>34</sup>

### A. Heat-of-Passion Partial Defense

Common law judges developed the heat-of-passion doctrine to mitigate the crime of murder to voluntary manslaughter when the defendant killed in response to objectively adequate provocation that generated overwhelming emotion. Although definitions differ,<sup>35</sup> this partial defense typically requires facts showing “1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) [the] homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4)

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<sup>30</sup> See Johnston & Leahey, *supra* note 9, at 1823–35 (discussing the impact of cognitive biases in populations with delusions). Some of the ideas discussed in this Article stem from and build on research included in the author’s previous work, edited and published by the *Indiana Law Journal* in 2022. See generally E. Lea Johnston, *Delusions, Moral Incapacity, and the Case for Moral Wrongfulness*, 97 IND. L.J. 297 (2022) (using insight from scientific findings to unpack the relationship between mental incapacity and legal responsibility).

<sup>31</sup> See *infra* notes 35–48 and accompanying text.

<sup>32</sup> See *infra* notes 49–69 and accompanying text.

<sup>33</sup> See *infra* notes 70–148 and accompanying text.

<sup>34</sup> See *infra* notes 149–156 and accompanying text.

<sup>35</sup> See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 432, 432–34 (1982) (documenting common law “courts’ imprecise description of the elements of the defense”).

a causal connection between the provocation, passion and homicide.”<sup>36</sup> Thus, the partial defense includes both subjective and objective elements.

The main subjective component is the “heat of passion” experienced by the defendant at the moment she killed. The passion may consist of “any intense or vehement emotional excitement of the kind prompting violent and aggressive action, such as rage, anger, hatred, furious resentment, fright, or terror,” based “on impulse without reflection.”<sup>37</sup> Exhibiting a mechanistic view of emotion,<sup>38</sup> the doctrine assumes that an external trigger generates an emotional response which overwhelms a person’s reasoning capacities and impels action. The “emotional explosion” results in a “partial, temporary, and substantial lack of capacity” for self-control which renders the defendant less blameworthy than a person properly punished for murder.<sup>39</sup>

The objective elements limit the doctrine’s application to nonculpable circumstances that would predictably generate overwhelming emotions in an ordinary person. Foremost among these elements is the “adequate provocation” component. To determine the adequacy of provocation, the trier of fact must ask whether confronting those circumstances “would have roused in an ordinary person such a state of passion . . . as would eclipse the . . . capacity for reflection or restraint.”<sup>40</sup> Traditionally, courts limited legally cognizable provocation to certain categories of unlawful conduct by the victim such as assault, battery, adultery, or mutual combat,<sup>41</sup> but modern courts entrust the assessment of a provoking act’s adequacy to the common sense of the jury.<sup>42</sup> Because the

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<sup>36</sup> Tryon v. State, 423 P.3d 617, 638 (Okla. Crim. App. 2018) (quoting Cipriano v. State, 32 P.3d 869, 874 (Okla. Crim. App. 2001)); see also State v. Webster, 2017 VT 98, ¶ 41, 206 Vt. 178, 179 A.3d 149 (defining the elements of heat of passion as “(1) adequate provocation; (2) inadequate time to regain self-control or ‘cool off’; (3) actual provocation; and (4) actual failure to ‘cool off’”).

<sup>37</sup> State v. Woods, 348 P.3d 583, 600 (Kan. 2015) (quoting State v. Guebara, 696 P.2d 381, 385 (Kan. 1985)); see also State v. Ruffner, 911 A.2d 680, 687 (R.I. 2006) (“Although anger may be the emotion most often claimed in heat-of-passion cases, the defense is not so limited. ‘Passion’ includes any ‘violent, intense, high-wrought, or enthusiastic emotion.’” (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07[B][1] (2d ed. 1995))).

<sup>38</sup> See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 306 (1996).

<sup>39</sup> Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 974 n.68 (2002).

<sup>40</sup> Commonwealth v. Grassie, 65 N.E.3d 1199, 1205 (Mass. 2017) (citing Commonwealth v. Burgess, 879 N.E.2d 63 (Mass. 2008) (internal citation omitted); see also State v. Knighten, 347 P.3d 1200, 1212 (Kan. Ct. App. 2015) (“Provocation is legally adequate to justify a conviction for voluntary manslaughter if it is calculated to deprive a reasonable person of self-control and to cause the defendant to act out of passion rather than reason.”).

<sup>41</sup> Girouard v. State, 583 A.2d 718, 721 (Md. 1991).

<sup>42</sup> People v. Beltran, 301 P.3d 1120, 1128–29 (Cal. 2013) (detailing the evolution of California law).

test for adequate provocation is objective,<sup>43</sup> the standard calls for assessment from the perspective of an “ordinary person of average disposition”<sup>44</sup> and “precludes consideration of the innate peculiarities of the individual defendant.”<sup>45</sup>

The cooling time requirement serves a similar and related function. It asks whether a sufficient time passed between the provocation and the killing such that reason should have reasserted itself.<sup>46</sup> The amount of time needed for adequate cooling invokes a fact-specific inquiry considering the totality of the circumstances including “not only extraneous facts, such as the length of the cooling period and the violence of the assault, but also the showing made as to the effect on the accused as an average person.”<sup>47</sup> This element also ensures that mitigation does not extend to culpable killers with unusual sensitivities or inappropriate brooding tendencies. The next Section provides a framework that helps conceptualize the reasoning deficiencies in the heat-of-passion agent, and the following Section then demonstrates how populations with delusions share those deficits.<sup>48</sup>

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<sup>43</sup> State v. Elmore, 111 Ohio St. 3d 515, 2006-Ohio-6207, 857 N.E.2d 547, at ¶ 81 (“[T]rial courts must apply an objective standard: ‘For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.’” (quoting State v. Shane, 590 N.E.2d 272, 276 (Ohio 1992))); *infra* note 152 (discussing the reasonable person standard). Although some language in heat-of-passion cases could be interpreted to permit consideration of cognitive dysfunction, courts have not interpreted it that way. *See* Maher v. People, 10 Mich. 212, 221 (1862) (“In determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard—unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.”); People v. Sullivan, 586 N.W.2d 578, 583 (Mich. Ct. App. 1998) (disavowing the application of this language and holding that “[t]he fact that defendant may have had some mental disturbance is not relevant to the question of provocation”), *aff’d by equal division of the court*, 609 N.W.2d 193 (Mich. 2000) (unpublished table decision).

<sup>44</sup> Beltran, 301 P.3d at 1129.

<sup>45</sup> State v. Molina, 325 P.3d 1142, 1152 (Kan. 2014) (quoting State v. Guebara, 696 P.2d 381, 386 (Kan. 1985)).

<sup>46</sup> State v. Jackson, 34,076, p. 3 (La. App. 2 Cir. 12/6/00); 774 So. 2d 1046, 1049; *see also* State v. Leger, 2005-0011, pp. 92–93 (La. 7/10/06); 936 So. 2d 108, 171 (stating that “time for cooling” is a question “for the jury to be determined under the standard of the average or ordinary person” (quoting State v. Deal, 2000-434, p. 5 (La. 11/28/01); 802 So. 2d 1254, 1260)).

<sup>47</sup> State v. Lyle, 513 N.W.2d 293, 300 (Neb. 1994).

<sup>48</sup> Mental disorder is a source of mental disturbance (or “passion”) that society has long deemed nonculpable and worthy of mitigation or exculpation. *See infra* notes 274–279, 283, 307 and accompanying text. Given the unique status of mental disorder, particularly psychotic disorders, the concerns animating the objective components of provocation—to cabin the defense to individuals whose loss of rationality was nonculpable and, indeed, understandable—should not apply, so long as the disorder generates the requisite impairments.

## *B. Reconceptualizing Heat of Passion as a Dual-Process Modulation Failure*

To understand the parallels between “heat of passion” and impairments associated with delusions, it is useful to frame the former in the context of modern theories of decision-making. Researchers in the fields of psychology and psychiatry have developed a dual-process model for human decision-making that suggests humans engage in two styles of thinking—one which is fast and largely unconscious, and another which is slower and requires conscious input. Dual-process accounts suggest that intense emotion temporarily drives toward increased use of the unconscious processes. This phenomenon supports the basic theory underlying the heat-of-passion doctrine—that intense emotion can infringe upon an individual’s capacity for rational analysis. This Section will first discuss the dual-process model of decision-making before applying it to the heat-of-passion doctrine.

### 1. Dual-Process Model of Human Decision-Making

As proposed by psychologist Daniel Kahneman, human decision-making reflects the interplay of two styles of cognitive processing.<sup>49</sup> “System 1”<sup>50</sup> processing “operates automatically and quickly, with little or no effort and no sense of voluntary control,” and “System 2” processing involves conscious, reflective decision-making.<sup>51</sup> Although System 2 allows for more reasoned decision-making, its use requires a significant expense of mental energy; by

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<sup>49</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 19–30 (2011). Kahneman’s dual-process model has been applied in the context of decision-making in populations with delusions, the population of focus in this Article. See William J. Speechley & Elton T.C. Ngan, *Dual-Stream Modulation Failure: A Novel Hypothesis for the Formation and Maintenance of Delusions in Schizophrenia*, 70 MED. HYPOTHESES 1210, 1211–13 (2008) (proposing a modified dual-process model for delusions in schizophrenia); 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, 82–83 (2019) (summarizing research using the dual-process framework in populations with delusions); see also *infra* Section I.C (applying the dual-process model to conceptualize deficits in populations with delusions). Despite Kahneman’s dual-process model’s wide acceptance in the fields of psychology, psychiatry, and cognitive neuroscience, it is not without criticism. For a discussion of and response to the “five major themes . . . identified in the leading critiques of dual-process and dual-system theories,” see Jonathan St. B.T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSPS. ON PSYCH. SCI. 223, 227 (2013).

<sup>50</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 exclusively refers to the processes as “System 1” and “System 2.”

<sup>51</sup> KAHNEMAN, *supra* note 49, at 20–21; *id.* at 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.” (emphasis omitted)).

contrast, System 1 requires very little mental energy.<sup>52</sup> Scholars often refer to Kahneman's dual-process model as having a "default-interventionalist" structure, which refers to the relationship by which System 1 produces intuition-based responses that System 2 can either effortlessly endorse or expend energy to modify.<sup>53</sup> This relationship reflects the body's preference for System 1 for most everyday behaviors.<sup>54</sup>

Despite the characterization of System 2 as generating more reasoned, situationally appropriate responses, it does not follow that System 1 is inferior or cannot produce suitable output. Rather, Kahneman observes that System 1 "executes skilled responses and generates skilled intuitions, after adequate training."<sup>55</sup> In other words, System 1 functions well in familiar situations, but its reliability breaks down in novel scenarios, which require oversight and input from System 2.<sup>56</sup> System 1 also dominates during rapid threat assessments, which can be key to an individual's survival.<sup>57</sup> Importantly, Kahneman suggests that in new situations, negative or "bad impressions" are often quick to become salient and are insensitive to disconfirming (contradictory) evidence.<sup>58</sup>

Imagine, for example, that you are outside pulling weeds from your garden, when out of the corner of your eye you notice a snake-like object in the grass just a few feet from you. Instinctively (and perhaps with a shriek), you jump backward away from the object. Your brain—through System 1—detected a potential threat and accordingly activated the body's fight-or-flight response. Now at a safe distance, you look more closely and realize that the object is merely a stick, so you return to weeding. Your brain—this time through System 2—consciously reappraised the object and found no threat, and it accordingly overrode the fight-or-flight response to return to weeding. Here, although System 1 provided the "wrong" response (in the sense that it misidentified the object), it was not situationally inappropriate, since waiting for System 2 input could have resulted in a snake bite. And although System 2 ultimately provided corrective behavior, it was not until after System 1 had caused a bodily response (jumping back), the effects of which will linger even after returning to weeding (e.g., increased heart rate, increased breathing).

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<sup>52</sup> See *id.* at 39–49 (explaining the varying degrees of mental effort expended to power System 1 and System 2 cognitive functions, especially simultaneously).

<sup>53</sup> See *id.*

<sup>54</sup> E.g., Evans & Stanovich, *supra* note 49, at 227.

<sup>55</sup> KAHNEMAN, *supra* note 49, at 105.

<sup>56</sup> Cf. Fiery Cushman, *Action, Outcome, and Value: A Dual-System Framework for Morality*, 17 PERSONALITY & SOC. PSYCH. REV. 273, 276–78 (2013) (illustrating this phenomenon within the context of learning).

<sup>57</sup> See KAHNEMAN, *supra* note 49, at 300–02.

<sup>58</sup> *Id.* at 302 (noting a psychologist's observation "that a single cockroach will completely wreck the appeal of a bowl of cherries, but a cherry will do nothing at all for a bowl of cockroaches").

In the field of cognitive neuroscience, Joshua Greene and colleagues have applied Kahneman's dual-process theory to conceptualize how humans engage in moral decision-making.<sup>59</sup> Greene's dual-process model—supported by neuroimaging studies<sup>60</sup>—posits that human decision-making involves input from a “socio-emotional” and a “cognitive” pathway, which reflect Systems 1 and 2, respectively.<sup>61</sup> Researchers have tested Greene's dual-process model through the use of moral probes, which require participants to analyze a lethal scenario and choose whether to commit a harmful act in order to save the greatest number of lives.<sup>62</sup> Consistent with Greene's dual-process model, moral probes elicit judgments stemming from competing streams of input: an intuitive resistance to committing harm (generated via System 1), which can be overcome by a conscious effort focused on saving the maximum number of lives (via System 2).<sup>63</sup>

## 2. Heat-of-Passion Doctrine Within the Dual-Process Framework

Michal Buchhandler-Raphael has recently proposed that dual-process theory holds special significance within the context of provocation law.<sup>64</sup> Her proposal focuses on a variation of dual-process theory that distinguishes between “hot” and “cool” modes of thinking, where “[hot] processing is the af-

<sup>59</sup> See Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 389 (2004).

<sup>60</sup> *Id.* at 391–98 (comparing participants' neural activity while exercising personal and impersonal moral judgments).

<sup>61</sup> *Id.* at 389–90; see Cushman, *supra* note 56, at 285. Although Greene's model imagines a strict competition between the two pathways, others emphasize a more dynamic interaction. See, e.g., Cushman, *supra* note 56, at 277–78. Greene himself has even acknowledged that the interactions between the competing pathways may be complex in some cases. See Joshua D. Greene, *The Rat-a-gorical Imperative: Moral Intuition and the Limits of Affective Learning*, 167 COGNITION 66, 68 (2017). This Article focuses on the more basic models posited by Kahneman and Greene because its main focus, the effect of inflamed passions on decision-making, can be achieved without delving into the complexities of the more dynamic dual-process models.

<sup>62</sup> See Joshua Greene & Jonathan Haidt, Review, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCIS. 517, 519 (2002). The paradigmatic scenario is the “trolley” dilemma, where an out-of-control train is rapidly approaching five people standing on the tracks in its path. See *id.* 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, effectively dooming the five people in the train's path but sparing the large man. See *id.*

<sup>63</sup> *Id.*; see Cushman, *supra* note 56, at 285.

<sup>64</sup> See generally Michal Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815, 1845–59 (2020) (critiquing the “loss of self-control” theory, which underlies the provocation defense, and arguing for an alternative theory founded on dual-process-based principles). Professor Buchhandler-Raphael frames her discussion around provocation law more generally, of which heat-of-passion doctrine is one piece. This Article, however, focuses on the common law doctrine because it forms the bedrock for—and is typically more restrictive than—other modern provocation doctrines. For a brief but relevant discussion about the relationship between existing provocation law variants in American jurisprudence, see *id.* at 1822–29.



fective, or emotion-based [System 1],” and “the ‘cool’ form is the cognitive, thought-based [System 2].”<sup>65</sup> Critically, this theory argues, “Criminal behavior results from the sole operation of the ‘hot’ mode,”<sup>66</sup> and that “since these emotive processes occur at the subconscious level of awareness, rather than being consciously experienced, individuals’ ability to influence them is rather limited.”<sup>67</sup> This overuse of System 1 coupled with delayed—or even impaired—engagement of System 2 may lead to violent outcomes which, though perhaps objectively unreasonable, are understandable and thus deserving of a partial excuse. Buchhandler-Raphael explains:

[W]henver actors’ decision-making is triggered by reflexive thought processes, it bypasses the corrective mechanisms that the competing fully reasoned thought system offers and prevents the intervention of deliberate and calculated modes of thinking. . . . While these overreactions are often not objectively reasonable, they are nonetheless understandable given the circumstances that the actors faced, such as experiencing anger and fear in response to victims’ behaviors.<sup>68</sup>

The following example may help elucidate how a provoking event can be understood in terms of dual-process theory. Recall Defendant Bob, who witnessed his wife strike his daughter, leading Bob to attack his wife and ultimately beat her to death.<sup>69</sup> Assume these additional details: After witnessing his daughter’s assault, Bob attacked his wife and incapacitated her. Although Bob had successfully subdued his wife, he reached for a nearby tire iron and struck her repeatedly in the head. Even after his wife had lost consciousness, Bob continued to strike her, ultimately crushing her skull and killing her.

Were Bob unprovoked and in a less intense emotional state, his System 2 would consciously reassess the situation and provide him with the clarity needed to stop attacking his wife upon subduing her. However, Bob had become overwhelmed by anger in seeing her strike his child, which compromised his ability to engage in his normal decision-making style in favor of an impulsive, System 1-dominated style. Thus, during this fit of rage, Bob continued to beat his wife with an insubstantial capacity to reflect on his actions. It was not until after his wife had died and Bob had calmed down that System 2 reengaged, allowing Bob to reflect.

As illustrated, the heat-of-passion doctrine fits well within a dual-process framework, which may help explain why the doctrine exists as the only partial

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<sup>65</sup> *Id.* at 1854.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1856.

<sup>68</sup> *Id.* at 1857.

<sup>69</sup> See *supra* notes 6–12 and accompanying text (describing the Defendant Bob example).

excuse in American jurisprudence. The doctrine holds that a defendant cannot be wholly excused for homicide, since the killing itself is morally wrong. Even so, it also holds that the defendant should not be held entirely responsible either, since extreme emotion, through “hot” System 1 processing, may dominate or temporarily impair the capacity for “cool,” reasoned judgment provided by System 2. But what about criminal defendants who have impairments to the dual-process system itself that result in habitual overuse of System 1 coupled with diminished engagement of System 2? The next Section examines empirical data revealing that populations with delusions may exhibit dysfunctional dual-process modulation across several domains bearing on moral decision-making. The final Section in this Part then explores the implications of these findings for the heat-of-passion and related defenses.

### *C. Impaired Dual-Process Modulation in Populations with Delusions*

A growing body of research in the fields of psychology and psychiatry indicates that populations with delusions suffer from a variety of reasoning impairments reflecting overreliance on System 1 processes coupled with impaired engagement of System 2 processes. The data suggest that populations with delusions may have a diminished capacity for sound moral decision-making when the choice concerns the context or subject of the delusion.<sup>70</sup> This Section will examine evidence from three domains bearing on the capacity for moral decision-making in populations with delusions: exaggerated cognitive biases, emotional deficits, and difficulties with stress management.<sup>71</sup>

#### 1. Cognitive Biases

Populations with delusions exhibit several exaggerated cognitive biases, each of which demonstrates a shift toward overreliance on System 1 processing or underutilization of System 2 processing. Cognitive biases relating to overuse of System 1 include the “jumping-to-conclusions” (JTC) bias,<sup>72</sup> liberal acceptance,<sup>73</sup> and threat-appraisal biases.<sup>74</sup> Biases reflecting impaired engagement

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<sup>70</sup> See Fontaine, *Reactive Cognition*, *supra* note 29, at 250 (“A cognitive bias in its extreme form may stem from, or act as, an actual deficit in processing in that the person’s operating may be so distorted that he or she is literally unable to otherwise process information.”); *id.* at 253 (“Translated into terms of criminal culpability, individuals with processing tendencies that are strictly biased and occur rapidly in real time are less able (or perhaps even unable) to process incoming social information in ways that promote nonaggressive, adaptive emotional and behavioral functioning.”).

<sup>71</sup> For a fuller review of these topics, see Johnston & Leahey, *supra* note 9, at 1823–35; Johnston, *supra* note 30, at 316–29.

<sup>72</sup> See, e.g., Ward & Garety, *supra* note 49, at 80, 82–83.

<sup>73</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

of System 2 include belief inflexibility<sup>75</sup> as well as a bias against disconfirmatory evidence and a bias against confirmatory evidence.<sup>76</sup> Below, each of the cognitive biases are described and supporting empirical data briefly reviewed.

Beginning with the cognitive biases causing overreliance on System 1, the JTC bias represents “making hasty, fully convinced decisions with little contextual evidence”<sup>77</sup> and has been consistently observed as exaggerated in populations with delusions.<sup>78</sup> This data-gathering bias is characterized by rapid assessment of ambiguous or anomalous information, which leads to false—or even delusional—conclusions or judgments without fully evaluating the evidence or considering alternatives.<sup>79</sup> Critically, JTC bias is associated with delusions across psychiatric diagnoses,<sup>80</sup> which has led some scholars to conclude that the bias may be integral in delusion formation.<sup>81</sup> JTC bias represents overuse of System 1 because it does not permit gathering and reflecting upon sufficient evidence.<sup>82</sup>

PSYCH. 127, 128–29 (2007) (theorizing that individuals with schizophrenia exhibit a liberal acceptance bias in situations with high ambiguity).

<sup>74</sup> See, e.g., Raymond W. Novaco, *Cognitive-Behavioral Factors and Anger in the Occurrence of Aggression and Violence*, in 1 THE WILEY HANDBOOK OF VIOLENCE AND AGGRESSION: DEFINITION, CONCEPTION, AND DEVELOPMENT 329, 333 (Peter Sturmey ed., 2017) (noting that the threat-perception component of anger “carries urgent priority, preempting other information processing”).

<sup>75</sup> See Ward & Garety, *supra* note 49, at 83.

<sup>76</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. 344–50 (2017) (explaining the methods and results of analyses focusing on the relationship between the “jumping to conclusions” (JTC) bias, bias against disconfirmatory evidence, and bias against confirmatory evidence in schizophrenic populations with and without current delusions).

<sup>77</sup> Estrella Serrano-Guerrero, Miguel Ruiz-Veguilla, Agustín Martín-Rodríguez & Juan F. Rodríguez-Testal, *Inflexibility of Beliefs and Jumping to Conclusions in Active Schizophrenia*, 284 PSYCHIATRY RSCH., no. 112776, 2020, at 1, 1.

<sup>78</sup> See Suzanne Ho-wai So et al., Review, ‘Jumping to Conclusions’ Data-gathering Bias in Psychosis and Other Psychiatric Disorders—Two Meta-analyses of Comparisons Between Patients and Healthy Individuals, 46 CLINICAL PSYCH. REV. 151, 160 (2016) (synthesizing results across various studies involving individuals with delusions with a diagnosis of schizophrenia and other psychiatric disorders and finding “a hastier decision-making style in patients than controls”); 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, 656–63 (2016) (discussing findings that indicate that “the JTC bias is specifically associated with psychosis” and “involves a degree of delusion-specificity”); see also Ward & Garety, *supra* note 49, at 80 (“Systematic reviews and meta-analyses demonstrate a large and consistent evidence base in over 50 studies, in which the clear majority show that individuals with delusions and psychosis make decisions on the basis of . . . the so-called ‘jump-to-conclusions’ (JTC) data-gathering bias.”).

<sup>79</sup> See Ward & Garety, *supra* note 49, at 80.

<sup>80</sup> McLean et al., *supra* note 76, at 351–52.

<sup>81</sup> See Ward & Garety, *supra* note 49, at 81. *But see* Dudley et al., *supra* note 78, at 656 (concluding that JTC bias is “neither a sufficient or necessary cause of psychosis or delusions”).

<sup>82</sup> See Ward & Garety, *supra* note 49, at 82.

Next, liberal acceptance refers to the phenomenon of an individual assigning meaning and momentum to weakly supported evidence as a result of a relatively low “subjective threshold of significance.”<sup>83</sup> Empirical evidence demonstrates that populations with delusions require less evidence to adopt a hypothesis as true, which results in premature decisions characterized by an increased rate of error.<sup>84</sup> In other words, “The [liberal acceptance] account holds that fragmented and partial information is taken as sufficient evidence to accept a response option,” and may be the mechanism that causes an individual to jump to conclusions.<sup>85</sup> Additionally, a positive association exists between the prevalence of liberal acceptance and severity of delusions.<sup>86</sup> Liberal acceptance supplements the explanation of JTC bias in populations with delusions and signifies overuse of System 1 processing.

Third, populations with delusions—especially those with persecutory delusions<sup>87</sup>—exhibit threat-appraisal biases, including a hostile attribution bias and an attentional bias, which collectively represent overuse of System 1. Hostile attribution bias is defined broadly as responding in a hostile manner to ambiguous cues,<sup>88</sup> often resulting in anger.<sup>89</sup> It manifests in populations with de-

<sup>83</sup> Steffen Moritz et al., *Reasoning in Psychosis: Risky but Not Necessarily Hasty*, 21 COGNITIVE NEUROPSYCHIATRY 91, 93 (2016) [hereinafter Moritz et al., *Reasoning in Psychosis*] (emphasis omitted); see Steffen Moritz et al., *A Two-Stage Theory of the Positive Symptoms of Psychosis. Highlighting the Role of Lowered Decision Thresholds*, 56 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 12, 13–14 (2017) (noting that individuals with a diagnosis of schizophrenia tended to exhibit a lower decision threshold than the control group).

<sup>84</sup> Moritz et al., *Reasoning in Psychosis*, *supra* note 83, at 100.

<sup>85</sup> Steffen Moritz, Todd S. Woodward & Daniel Hausmann, *Incautious Reasoning as a Pathogenic Factor for the Development of Psychotic Symptoms in Schizophrenia*, 32 SCHIZOPHRENIA BULL. 327, 327 (2006).

<sup>86</sup> See McLean et al., *supra* note 76, at 349–50.

<sup>87</sup> Persecutory delusions hold special significance in criminal law as the delusion subtype most often associated with episodes of serious violence. See, e.g., Robert Keers, Simone Ullrich, Bianca L. DeStavola & Jeremy W. Coid, *Association of Violence with Emergence of Persecutory Delusions in Untreated Schizophrenia*, 171 AM. J. PSYCHIATRY 332, 335 (2014) (noting that violence in untreated patients with schizophrenia was more likely than those treated for schizophrenia or without psychosis, and is partially due to persecutory delusions); 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, 1177 (2014) (finding that heightened “elation and anger due to delusions were significantly associated with serious violence”); Jeremy W. Coid et al., *The Relationship Between Delusions and Violence: Findings from the East London First Episode Psychosis Study*, 70 JAMA PSYCHIATRY 465, 467, 468 (2013) (finding “strong associations between anger related to delusions and both minor and serious violence” across a study of nearly five hundred individuals with first-episode psychosis); Matthew M. Large & Olav Nielssen, *Violence in First-Episode Psychosis: A Systematic Review and Meta-Analysis*, 125 SCHIZOPHRENIA RSCH. 209, 209–10 (2011) (noting that the risk of schizophrenic individuals that have never been treated for their disorder committing a homicide is approximately “one in 630 presentations”).

<sup>88</sup> See Erin B. Tone & Jennifer S. Davis, *Paranoid Thinking, Suspicion, and Risk for Aggression: A Neurodevelopmental Perspective*, 24 DEV. & PSYCHOPATHOLOGY 1031, 1039 (2012).

lusions as a focus on negative information and a tendency to recall negative memories.<sup>90</sup>

Moreover, attentional bias,<sup>91</sup> associated with threat appraisal,<sup>92</sup> is characterized by hypervigilance and increased sensitivity and awareness of potential threats.<sup>93</sup> The leading theory about the profile of this attentional bias is the “vigilance-avoidance” model, which observes that populations with persecutory delusions exhibit “an initial automatic attentional bias towards threatening material, but a subsequent controlled attentional bias away from threat.”<sup>94</sup> This theory substantially overlaps with dual-process theory; whereby the first automatic attentional bias is characterized by misinterpreting a threat in an ambiguous situation, the second controlled bias prevents reconsideration of the misperceived information.<sup>95</sup>

For cognitive biases associated with impaired engagement of System 2, populations with delusions exhibit belief inflexibility—a diminished tendency to reflect upon available evidence to analyze and update initially held beliefs or interpretations.<sup>96</sup> In contrast to healthy individuals, those with delusions ex-

<sup>89</sup> See Novaco, *supra* note 74, at 333.

<sup>90</sup> Fumiaki Ito et al., *Emotional Processing During Speech Communication and Positive Symptoms in Schizophrenia*, 67 PSYCHIATRY & CLINICAL NEUROSCIENCES 526, 527 (2013).

<sup>91</sup> Antonella Trotta, Jungwoo Kang, Daniel Stahl & Jenny Yiend, *Interpretation Bias in Paranoia: A Systematic Review and Meta-Analysis*, 9 CLINICAL PSYCH. SCI. 3, 4 (2021) (“Attentional bias is thought of as the preferential selection, for further processing, of one stimulus from among multiple competing stimuli. A bias occurs when the selected stimulus is consistently of one particular type, such as threat in the case of anxiety or paranoid in the case of paranoia.”).

<sup>92</sup> Raphael Underwood, Veena Kumari & Emmanuelle Peters, Review, *Cognitive and Neural Models of Threat Appraisal in Psychosis: A Theoretical Integration*, 239 PSYCHIATRY RSCH. 131, 133 (2016) (“[T]hreat appraisal’ . . . refers to classifying a stimulus based on its capacity for harming the organism.”).

<sup>93</sup> *Id.* at 134.

<sup>94</sup> Melissa J. Green & Mary L. Phillips, Review, *Social Threat Perception and the Evolution of Paranoia*, 28 NEUROSCIENCE & BIOBEHAVIORAL REV. 333, 339 (2004); see K. Prochwicz & J. Kłosowska, *Attentional Focus Moderates the Relationship Between Attention to Threat Bias and Delusion-Like Experiences in Healthy Adults*, 39 EUR. PSYCHIATRY 27, 31 (2017) (noting that the vigilance-avoidance model is comprised of an initial stage in which the individual is focused on threat and a later stage of detachment from threat).

<sup>95</sup> See Green & Phillips, *supra* note 94, at 339; see also Johnston, *supra* note 30, at 333–37 (reviewing empirical data supporting each of the biases in the vigilance-avoidance model).

<sup>96</sup> Note that the JTC and liberal acceptance biases discussed earlier refer to the genesis of a delusional conclusion, whereas belief inflexibility refers to the diminished capacity for reflecting upon and modifying that conclusion. In contrast, healthy individuals display belief flexibility, a meta-cognitive (i.e., higher order) reasoning construct involving “reflecting on one’s own beliefs, changing them in light of reflection and evidence, and generating and considering alternatives.” 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 PSYCH. 59, 60 (2017) (quoting Philippa A. Garety et al., *Reasoning, Emotions, and Delusional Conviction in Psychosis*, 114 J. ABNORMAL PSYCH. 373, 374 (2005)).

hibit impairments in “accepting the possibility of being mistaken,” generating “alternative explanation[s],” and “changing conviction[s]” in light of contradictory evidence.<sup>97</sup> A recent meta-analysis found a robust association between belief inflexibility and global severity of delusions and revealed a particularly strong association with delusional conviction.<sup>98</sup>

In addition to belief inflexibility, populations with delusions demonstrate global evidence-integration biases unrelated to delusional content. The most frequently studied bias in this category is the bias against disconfirmatory evidence, which refers to an individual’s unwillingness to modify a hypothesis in light of contradictory evidence.<sup>99</sup> A recent meta-analysis revealed a significant association between these biases and delusions irrespective of clinical diagnosis, finding that the bias was positively associated with delusional severity.<sup>100</sup> Closely related is the bias against confirmatory evidence, characterized by an individual’s “fail[ure] to adequately up-rate the plausibility of the true interpretation despite additional supporting evidence.”<sup>101</sup>

Together, these evidence-integration biases reflect an overreliance on, or overuse of, System 1 intuitive processing coupled with an impaired or diminished—though not completely abolished<sup>102</sup>—engagement of System 2 reflective processing.<sup>103</sup> Collectively, these biases lead populations with delusions to make decisions and judgments on the basis of limited information with little to

<sup>97</sup> Ward & Garety, *supra* note 49, at 81.

<sup>98</sup> Zhu et al., *supra* note 96, at 59, 75 (analyzing sixteen studies, with a total sample of 1,065, and finding in all a significant association between belief flexibility and all dimensions of delusions—conviction, distress, and preoccupation).

<sup>99</sup> See N. Sanford et al., *Impaired Integration of Disambiguating Evidence in Delusional Schizophrenia Patients*, 44 PSYCH. MED. 2729, 2730 fig.1, 2734 (2014) (showing that, when performing a task to measure a bias against disconfirmatory evidence, patients with delusions and a diagnosis of schizophrenia “show a relative unwillingness to down-rate” initially plausible statements as subsequent statements make those initial statements increasingly implausible).

<sup>100</sup> McLean et al., *supra* note 76, at 349–50.

<sup>101</sup> *Id.* at 345.

<sup>102</sup> The impairment, or incomplete absence, of System 2 in populations with delusions has been demonstrated by the effectiveness of cognitive therapies in reengaging System 2. See, e.g., Steffen Moritz et al., *Complementary Group Metacognitive Training (MCT) Reduces Delusional Ideation in Schizophrenia*, 151 SCHIZOPHRENIA RSCH. 61, 62 (2013) (describing MCT, which uses model-based learning in group settings to raise an individual’s awareness of her own cognitive biases to reduce their impact on decision-making to effectively reduce delusions); 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, 75–76 (2019) (discussing cognitive-based therapy, which “involves reframing appraisals and modifying behavior related to psychotic symptoms, to reduce distress and improve functioning and well-being,” as an effective treatment for reducing the causal and maintenance factors of delusions).

<sup>103</sup> See Ward & Garety, *supra* note 49, at 83 (“[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 beliefs are maintained and even strengthened over time.”).

no reflection *even after the presentation of contradictory evidence*. In sum, these biases may contribute to a delusional individual's intuitive decision-making without corrective reflection in a particular circumstance.

## 2. Emotional Deficits

Emotional dysfunction in populations with delusions provides further evidence of impaired dual-process modulation that results in exaggerated use of System 1 with diminished engagement of System 2. Scholars generally agree that emotions play a vital role in reasoning<sup>104</sup> and moral judgment.<sup>105</sup> Importantly, researchers view emotion as key in both arms of Greene's dual-process model.<sup>106</sup> Regarding the "socio-emotional" component (System 1), emotions can be generated intuitively, and emotion regulation can become habitual over time.<sup>107</sup> And for the "cognitive" pathway (System 2), emotion regulation can be consciously engaged to up- or down-regulate emotions.<sup>108</sup> Additionally, emotions may contribute to the thematic content of delusions<sup>109</sup> and to the formation, maintenance, and aggravation of delusional ideation.<sup>110</sup> Thus, emotions play an important role in both delusions and moral judgments.

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<sup>104</sup> See, e.g., 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, 313–27, 328–29, 341 (1998) (explaining the importance of emotions and feelings in one's rationality in the context of the criminal justice system); Theodore Y. Blumoff, *Rationality, Insanity, and the Insanity Defense: Reflections on the Limits of Reason*, 39 LAW & PSYCH. REV. 161, 167–68, 187–93 (2015) (discussing the legal understandings of emotion, reasoning, and rationality as they relate to the insanity defense); 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) (discussing insights from neuroscientific research concerning how emotion impacts rationality and its relationship to legal insanity); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1399–409 (2006) (exploring the role emotion plays in an individual's capacity for making rational decisions and its relationship to an adjudicative competency standard).

<sup>105</sup> See, e.g., Chelsea Helion & Kevin N. Ochsner, *The Role of Emotion Regulation in Moral Judgment*, 11 NEUROETHICS 297, 299–300 (2018) (discussing current research trends finding that emotions stem from both automatic and controlled human processes). See generally Yana R. Avramova & Yoel Inbar, *Advanced Review, Emotion and Moral Judgment*, 4 WIREs COGNITIVE SCI. 169 (2013) (discussing claims that emotion follows from and amplifies moral judgments, and in some instances may directly cause such judgment).

<sup>106</sup> See Helion & Ochsner, *supra* note 105, at 299–300.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See Daniel Freeman & Philippa A. Garety, *Connecting Neurosis and Psychosis: The Direct Influence of Emotion on Delusions and Hallucinations*, 41 BEHAV. RSCH. & THERAPY 923, 933 (2003) (observing that all major emotions—*anxiety, depression, anger, happiness, disgust, and jealousy*—correspond to delusion subtypes with a shared theme).

<sup>110</sup> Lea Ludwig, Dirk Werner & Tania M. Lincoln, *Review, The Relevance of Cognitive Emotion Regulation to Psychotic Symptoms – A Systematic Review and Meta-Analysis*, 72 CLINICAL PSYCH. REV., no. 101746, 2019, at 1, 1; see also Antonio Preti & Matteo Cella, *Paranoid Thinking as a Heu-*

A 2019 systematic review and meta-analysis found that emotion regulation skills are “markedly impaired in patients with psychotic disorders.”<sup>111</sup> Emotion regulation skills are “goal directed processes functioning to influence the intensity, duration and type of emotion experienced.”<sup>112</sup> The meta-analysis revealed that populations with psychosis self-reported employing relatively fewer adaptive emotion regulation strategies, such as cognitive reappraisal,<sup>113</sup> and relatively more maladaptive strategies, like suppression<sup>114</sup> and rumination,<sup>115</sup> as compared to healthy controls.<sup>116</sup> Further, correlative data implicated a positive association between the presence of maladaptive emotion regulation strategies and positive symptoms of psychosis, including delusions.<sup>117</sup> These results were consistent with an earlier review and meta-analysis regarding habitual use of emotion regulation strategies in populations with psychoses.<sup>118</sup>

Several recent studies using experimental methodologies have questioned whether populations with psychosis possess diminished emotion regulation skills compared to healthy populations.<sup>119</sup> A recent meta-analysis nevertheless

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*ristic*, 4 EARLY INTERVENTION PSYCHIATRY 263, 263–64 (2010) (discussing the importance of negative affect as preceding persecutory delusions).

<sup>111</sup> Ludwig et al., *supra* note 110, at 1.

<sup>112</sup> Anett Gyurak, James J. Gross & Amit Etkin, *Explicit and Implicit Emotion Regulation: A Dual-Process Framework*, 25 COGNITION & EMOTION 400, 401 (2011) (emphasis omitted); see also Clara Marie Nittel et al., *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 PSYCH. 291, 294–95 tbl.1 (2018) (defining and explaining seven of the most prominently used emotion regulation strategies). Adaptive strategies tend to result in better mental health outcomes compared to maladaptive strategies. Nittel et al., *supra*, at 293.

<sup>113</sup> Cognitive reappraisal means a “cognitive change that involves changing the subjective interpretation of an emotion-eliciting event in a way that alters its emotional impact.” Nittel et al., *supra* note 112, at 294 tbl.1.

<sup>114</sup> Suppression refers to a “conscious inhibition of expressive or behavioural components of an emotion.” *Id.* at 295 tbl.1.

<sup>115</sup> Rumination means “passive and repetitive focus on negative emotions or symptoms of distress.” *Id.*

<sup>116</sup> Ludwig et al., *supra* note 110, at 6, 8.

<sup>117</sup> *Id.* at 8 (noting this correlation for the maladaptive strategies of self-blaming, suppression, rumination, and maladaptive coping).

<sup>118</sup> See generally Ciarán O’Driscoll, Jennifer Laing & Oliver Mason, *Cognitive Emotion Regulation Strategies, Alexithymia and Dissociation in Schizophrenia, A Review and Meta-Analysis*, 34 CLINICAL PSYCH. REV. 482 (2014) (finding a greater use of maladaptive strategies among individuals with schizophrenia than in healthy individuals).

<sup>119</sup> See Sandra M. Opoka, Lea Ludwig, Stephanie Mehl & Tania M. Lincoln, *An Experimental Study on the Effectiveness of Emotion Regulation in Patients with Acute Delusions*, 228 SCHIZOPHRENIA RSCH. 206, 211 (2021) (finding no significant difference in utilization of emotion regulation skills in a population with psychosis compared to a healthy control group); Lea Ludwig, Stephanie Mehl, Katarina Krkovic & Tania M. Lincoln, *Effectiveness of Emotion Regulation in Daily Life in Individuals with Psychosis and Nonclinical Controls—An Experience-Sampling Study*, 129 J. ABNORMAL



confirmed that populations with schizophrenia experience “more negative emotion and less positive emotion” than healthy populations.<sup>120</sup> Thus, the experimental findings of intact emotion regulation skills in populations with psychosis can best be classified as “puzzling”: such individuals demonstrate elevated levels of negative affect which may not be attributable to emotion regulation deficits.<sup>121</sup> One plausible explanation for these seemingly inconsistent results is that populations with psychosis have a higher baseline level of negative affect, and thus would require *more* effective emotion regulation skills to reduce negative affect to levels similar to those of healthy populations.<sup>122</sup> Framed another way, “[o]ne could conclude that [populations with psychosis] are effective in regulating their affect but not effective enough to reduce [negative affect] to a satisfactory level.”<sup>123</sup> Populations with psychosis may not be able to exert the additional level of effort required for sufficient down-regulation of negative affect due to depleted cognitive resources.<sup>124</sup>

Thus, despite the precise mechanism and dynamics of emotion regulation among populations with psychosis being indeterminate, the upshot of this discussion is that such populations cannot down-regulate negative affect to prevent negative emotion from dominating their decision-making. In the context of the dual-process model, it seems as if these populations’ increased levels of negative affect prevent them from consciously controlling decision-making with System 2, instead relying on a decision-making style characterized by “hot” System 1 action.

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PSYCH. 408, 417 (2020) (finding that emotion regulation strategies were as effective in a group with psychosis as in a non-clinical group).

<sup>120</sup> Hyein Cho et al., *Do People with Schizophrenia Experience More Negative Emotion and Less Positive Emotion in Their Daily Lives? A Meta-Analysis of Experience Sampling Studies*, 183 SCHIZOPHRENIA RSCH. 49, 53 (2017). Interestingly, the authors of this meta-analysis suggest that deficient emotion regulation skills in the schizophrenia groups could explain the findings. *See id.*

<sup>121</sup> Ludwig et al., *supra* note 119, at 417.

<sup>122</sup> *See* Opoka et al., *supra* note 119, at 211 (“[I]t could . . . be argued that [psychosis] patients would need to be even more effective than healthy controls in applying [emotion regulation] strategies to reach an equivalent emotion intensity level.”).

<sup>123</sup> Ludwig et al., *supra* note 119, at 418.

<sup>124</sup> *See* Lisa A. Bartolomeo, *Emotion Regulation Monitoring Dynamics in Schizophrenia* 42 (2020) (M.S. Thesis, University of Georgia) (ProQuest) (suggesting that relative to healthy populations, “more time is required [for populations with schizophrenia] to decrease negative emotion when positive symptoms are present, and that individuals with higher negative symptoms are less likely to persist in emotion regulation attempts, potentially due to motivational deficits”); *id.* at 43 (finding that abnormalities in emotion regulation monitoring dynamics “may be highly demanding on physiological and cognitive systems, thus taxing already limited resources in [schizophrenia]”).

### 3. Difficulties with Stress Management

Finally, populations with psychosis, particularly those with persecutory delusions, exhibit elevated levels of negative affect when exposed to stressful situations.<sup>125</sup> Several studies have established the difficulty that individuals with psychosis and those with persecutory delusions experience in regulating stress. For example, one such study revealed that populations with psychosis demonstrate a stronger reaction—both subjectively and objectively—to stressors compared to healthy populations.<sup>126</sup> Within the psychosis group, the ability to accept and regulate emotions predicted both the strength of the physiological response to stress and the change in the level of paranoia.<sup>127</sup>

Similarly, another study compared two groups of patients with persecutory delusions to test the stress reactions associated with exposure to an urban environment.<sup>128</sup> The authors chose to study this population because for “many patients with persecutory delusions, leaving their homes triggers paranoid thoughts. Being in busy, noisy places, surrounded by other people can be especially difficult.”<sup>129</sup> The study had one group enter a busy urban environment to complete a task, while the control group remained in a calm indoor environment.<sup>130</sup> The results showed that exposure to the stressful condition “was associated with increases in anxiety, depression, negative views about the self, negative views about others, and hallucinations” compared with those who remained in the calm environment.<sup>131</sup> These findings were consistent with an earlier study on patients with persecutory delusions using a similar experimental setup.<sup>132</sup>

These results are further explained by the stress-induced-deliberation-to-intuition (SIDI) model. According to the SIDI model, when an individual experiences stressful conditions, “intuitive responses may bypass the examination

<sup>125</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, 216 (2015) (“That environmental stress is implicated in the development of psychotic symptoms can be considered as one of the most convincingly established facts in schizophrenia research.”).

<sup>126</sup> *Id.* at 219 (finding that individuals in the psychosis group demonstrated more reactivity to noise stressors through both self-report measures (subjective) and physiological measures (objective)).

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

<sup>128</sup> Daniel Freeman et al., *The Stress of the Street for Patients with Persecutory Delusions: A Test of the Symptomatic and Psychological Effects of Going Outside into a Busy Urban Area*, 41 SCHIZOPHRENIA BULL. 971, 972 (2015).

<sup>129</sup> *Id.* at 971.

<sup>130</sup> *Id.* at 974, 975 tbl.1.

<sup>131</sup> *Id.* at 975.

<sup>132</sup> See Lyn Ellett, Daniel Freeman & Philippa A. Garety, *The Psychological Effect of an Urban Environment on Individuals with Persecutory Delusions: The Camberwell Walk Study*, 99 SCHIZOPHRENIA RSCH. 77, 78 (2008) (detailing a study in which one group of individuals with current persecutory delusions was exposed to a busy city street and another group stayed in a quiet room indoors).

of reasoning and reach the threshold to become final decisions”]; this means that “stressed individuals may fall back more on intuition and involve less amounts of conscious reasoning.”<sup>133</sup> The SIDI model is explicitly described as consistent with the dual-process model, suggesting that “[s]tress should enhance the System 1 intuition related neural activity . . . and decrease System 2 reasoning associated brain activity.”<sup>134</sup> In sum, the SIDI model suggests that stress causes decision-making to be influenced by an intuitive, rather than reflective, style of thinking.<sup>135</sup>

Viewed within the context of the SIDI model, the difficulties populations with psychosis and persecutory delusions experience suggest a decision-making style dominated by System 1 with little cognitive reflection by System 2. As observed by the studies that this Article reviews above, elevated stress correlates with increased levels of negative affect, especially in the context of persecutory delusions. As a result of this heightened emotional state, populations with delusions are prone to make hasty decisions that are substantially influenced by negative emotion and may include acts of violence.

Although most individuals with psychosis will never commit an act of serious violence, studies have associated psychosis with a generalized increased risk of violent behavior.<sup>136</sup> Violence is specifically associated with positive symptoms of psychosis, particularly persecutory delusions.<sup>137</sup> Moreover, vio-

<sup>133</sup> Rongjun Yu, *Stress Potentiates Decision Biases: A Stress Induced Deliberation-to-Intuition (SIDI) Model*, 3 NEUROBIOLOGY STRESS 83, 84 (2016).

<sup>134</sup> *Id.* at 90.

<sup>135</sup> *Id.* at 92 (“[T]he SIDI model does not imply that stress is always detrimental for decision-making. In certain circumstances, certain levels of stress might be beneficial for decision makers.”). The model’s developer also highlights the lack of cognitive control associated with decisions made under stress, stating that “stress makes decision makers more impulsive and more likely to make unexamined responses,” that is, decisions made “before all available alternatives [have] been systematically considered.” *Id.* at 88.

<sup>136</sup> See Large & Nielssen, *supra* note 87, at 209–10 (noting that the risk of homicide in untreated schizophrenia is one in 630 and that there exists “a modest but consistent association between psychosis and violent offending and that rates of violence are particularly high among cohorts of patients who have both schizophrenia and substance abuse disorders” (citations omitted)). Of note, numerous studies suggest that the relationship between psychosis and serious violence is significantly moderated by comorbid substance abuse. See, e.g., Seena Fazel et al., *Schizophrenia, Substance Abuse, and Violent Crime*, 301 JAMA 2016, 2020 (2009) (finding that the rate of violent crime in individuals with a diagnosis of schizophrenia and comorbid substance abuse was nearly twenty percent greater than in those individuals without comorbidity); Seena Fazel et al., *Schizophrenia and Violence: Systematic Review and Meta-Analysis*, 6 PLOS MED., no. e1000120, Aug. 2009, at 1, 7 (analyzing results across twenty different studies and finding that the risk of violent outcomes was about four times greater in individuals diagnosed with schizophrenia and comorbid substance abuse than without comorbidity).

<sup>137</sup> See Katrina Witt, Richard van Dorn & Seena Fazel, *Risk Factors for Violence in Psychosis: Systematic Review and Meta-Regression Analysis of 110 Studies*, 8 PLOS ONE, no. e55942, Feb. 2013, at 1, 3, 5 (conducting a review and meta-analysis of 110 studies including 45,533 patients with psychoses (87.8% schizophrenia, 0.4% bipolar disorder, and 11.8% other psychoses) and finding that the risk of violence of psychosis is specifically associated with positive, but not negative, symptoms);

lent behavior in populations with psychosis has consistently been observed as preceded by feelings of anger.<sup>138</sup>

Importantly, two large-scale studies found nearly identical results associating threat-based delusions with violent outcomes, mediated by anger.<sup>139</sup> The first study, which considered first-episode psychosis patients over the twelve months prior to contact with psychiatric services, found a significant association between “serious” violence<sup>140</sup> and anger due to delusions of being spied on, persecution, and conspiracy.<sup>141</sup> The second study considered individuals with psychosis following discharge from acute inpatient facilities and found that anger mediated the pathway between “serious” violence<sup>142</sup> and five delusion subtypes: “being spied upon, being followed, being plotted against, having thoughts inserted, and being under external control.”<sup>143</sup> Critically, both studies controlled for comorbid psychopathy and ruled out any effects of trait anger, indicating that the angry affect mediating violence stemmed from delusional content specifically.<sup>144</sup>

Notably, all of the delusional beliefs associated with violence in the two studies imply threat to the individual, suggesting that anger develops as a response to feelings of being threatened.<sup>145</sup> It is well-accepted that “[t]hreat perception is fundamental to anger activation,” and anger is viewed as a natural response to survival challenges.<sup>146</sup> Although “[a]nger is neither necessary nor

Keers et al., *supra* note 87, at 335–36 (finding that persons with untreated schizophrenia were more than three times more likely to commit a violent act compared to their treated counterparts, a relationship that was modified, in part, by the emergence of persecutory delusions).

<sup>138</sup> See, e.g., Shuja Reagu, Roland Jones, Veena Kumari & Pamela J. Taylor, Review, *Angry Affect and Violence in the Context of a Psychotic Illness: A Systematic Review and Meta-analysis of the Literature*, 146 SCHIZOPHRENIA RSCH. 46, 47, 51 (2013) (conducting a systematic review and meta-analysis of eleven studies with a variety of psychiatric diagnoses and finding significantly higher levels of angry affect in violent groups compared to non-violent groups).

<sup>139</sup> Compare Coid et al., *supra* note 87, at 467–70 (assessing a group of 458 ethnically diverse patients with first-episode psychosis with varying diagnoses and finding “strong associations between anger related to delusions and both minor and serious violence”), with Ullrich et al., *supra* note 87, at 1175–78 (examining a group of 1,136 individuals with primarily white ethnic backgrounds and a variety of psychiatric diagnoses in a longitudinal study following discharge from an acute psychiatric facility and finding a strong association between anger due to delusions and violence).

<sup>140</sup> Coid et al., *supra* note 87, at 467 (defining “serious” violence as “assault resulting in injury or involving use of a lethal weapon, threat with a lethal weapon, or sexual assault”).

<sup>141</sup> *Id.* at 468.

<sup>142</sup> Ullrich et al., *supra* note 87, at 1176 (defining violence as “serious” if it involved “(1) batteries that resulted in physical injury or involved the use of a weapon; (2) sexual assaults; or (3) threats made with a weapon in hand”). The study did not include violent acts in self-defense in its definition of serious violence. *Id.*

<sup>143</sup> *Id.* at 1179.

<sup>144</sup> Coid et al., *supra* note 87, at 468; Ullrich et al., *supra* note 87, at 1177.

<sup>145</sup> See Ullrich et al., *supra* note 87, at 1178–80.

<sup>146</sup> Novaco, *supra* note 74, at 333.

sufficient for aggression or violence, . . . it impels aggression, particularly when its intensity overrides regulatory control mechanisms,” including “[p]hysical constraints, expectations of punishment or retaliation, empathy, consideration of consequences, and prosocial values.”<sup>147</sup> As this Article reviews above, populations with psychosis exhibit difficulties down-regulating negative emotions to a level where they do not influence decision-making, so aggressive behavior resulting in violence is likely a consequence of elevated levels of negative affect.<sup>148</sup>

In sum, the evidence that this Section presents suggests that decision-making in populations with psychosis is skewed toward overreliance on intuitive, “hot” System 1 coupled with impaired engagement of reflective, “cool” System 2. Difficulties in coping with distressing emotions lead populations with delusions—especially those exhibiting persecutory delusions—to sustain elevated levels of negative affect, which influences behavior that System 1 produces. When feelings of anger are inadequately mitigated, individuals with persecutory delusions may act aggressively, resulting in episodes of violence. The next Section discusses these findings in connection with the heat-of-passion doctrine.

#### *D. Application of Heat-of-Passion Rationale to Populations with Delusions*

The discussion in the previous Sections adds three insights to the heat-of-passion doctrine. First, expanding upon the work of Buchhandler-Raphael, this doctrine can be conceptualized within the structure of the dual-process model of decision-making.<sup>149</sup> Under this framework, the jury can reduce a murder charge to manslaughter during the guilt phase if it finds the defendant killed while her decision-making processes were so dominated by emotions (expressed by intuitive System 1) that she lacked sufficient capacity for reflective correction (by System 2).

Second, the psychological processes that explain the diminished responsibility of heat-of-passion agents also typify certain populations of criminal defendants with impairments to the dual-process system itself. In particular, dysfunction of the dual-process system’s modulation, which characterizes populations with delusions, may lead to a morally bereft decision-making style through the overuse of System 1 and a diminished or absent engagement of System 2. But, despite the similarities between a heat-of-passion agent and a

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<sup>147</sup> *Id.* at 331.

<sup>148</sup> *Cf. id.* (noting that higher intensities of anger increase the likelihood that inhibition of aggression will be overridden).

<sup>149</sup> *See supra* Subsection I.B.1.

delusional agent under the dual-process system, a defendant who kills while under the influence of delusional ideation is ineligible for a provocation partial defense. This is because, even though a delusional agent may satisfy the subjective component of the partial defense (i.e., she was actually laboring under a heat of passion at the time of committing the act),<sup>150</sup> the objective element of the reasonable person standard precludes the defendant from showing adequate provocation.<sup>151</sup> Since the objective “reasonable person” does not, by definition,<sup>152</sup> suffer from delusions, actions impelled by delusional ideation cannot be found objectively reasonable.

Third, given the marked similarities between the heat-of-passion and delusional agents discussed above, the differential availability of substantial mitigation is unjust. The negative emotions which skew toward System 1 decision-making in both agents will often stem from a perceived, inciting belief about the victim, and both heat-of-passion and delusional killers act on that belief without System 2 reflection. In fact, two differences exist between the defendants, neither of moral significance. First, the firmly held belief about the victim has a factual predicate for the non-delusional defendant but a factually mistaken predicate in the delusional defendant.<sup>153</sup> And second, the impaired engagement of System 2 results from temporal constraints in the non-delusional defendant but psychological constraints in the delusional defendant. Nonetheless, the objective elements of adequate provocation and insufficient cooling time generally bar the heat-of-passion partial excuse from those with serious mental illness and delusions, even though their nonculpable upset may be “grave enough to justify the accused’s loss of control and invoke the compassion of the law.”<sup>154</sup> Indeed, the upset of those with psychosis, who often struggle to distinguish between the external and internal world, may be *less* culpable than that of those who benefit from the heat-of-passion defense when they, tethered to reality, temporarily lose their temper.

The following Parts discuss efforts to expand the heat-of-passion defense to populations with mental disorders. Part II examines the largely unsuccessful

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<sup>150</sup> See *supra* notes 37–39 and accompanying text.

<sup>151</sup> See *supra* notes 40–45 and accompanying text (eliciting the objective standard applied to analyze the adequacy of provocation).

<sup>152</sup> Dressler, *supra* note 35, at 428. There is no singular definition of a “reasonable person,” but no iteration of the standard would characterize the reasonable person as having delusional ideations. For a review of the reasonable person standard, see generally John Gardner, *The Many Faces of the Reasonable Person*, 131 LAW Q. REV. 563 (2015) (discussing in-depth the reasonable person standard and analyzing how courts use this extra-legal standard within a legal framework).

<sup>153</sup> The effect of the provoking belief about the victim is the same in both defendants: negative affect generated intuitively by System 1.

<sup>154</sup> Alan Reed, *R v Baillie: Provocation as a Concession to Human Frailty*, 61 J. CRIM. L. 439, 440 n.4 (1997).

attempt of the MPC to combine the partial defenses of diminished responsibility and provocation.<sup>155</sup> Part III proposes a new solution, grounded in existing statutory frameworks, that would expand a diminished responsibility defense beyond the context of homicide and provide relief to those with mental impairments short of insanity.<sup>156</sup>

## II. CURRENT STATUS OF THE EXTREME MENTAL AND EMOTIONAL DISTURBANCE DEFENSE

Discontent with the narrow reach of the heat-of-passion doctrine has led to calls for the broadening and subjectivizing of the partial excuse, thereby extending access to individuals with other forms of diminished responsibility. The MPC's EMED defense—if faithfully adopted and implemented—would extend formal mitigation to those whose upset stems from cognitive impairments. As this Part demonstrates, however, states largely have rejected the partial responsibility aspects of this proposal, choosing instead to hew to the traditional heat-of-passion defense. Therefore, in most states, individuals with mental impairments short of insanity have no means of formal mitigation to reflect their diminished blameworthiness. Section A of this Part explains the ALI's proposal and endorsement of the EMED defense.<sup>157</sup> Section B then analyzes the limited adoption of the EMED defense across several states.<sup>158</sup>

### *A. Expansion of the Heat-of-Passion Defense*

The ALI proposed the EMED portion of its homicide provisions in 1962. MPC section 210.3(1)(b) provides for the mitigation of murder to manslaughter when:

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is 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.<sup>159</sup>

This provision recognizes the diminished culpability of a person whose choice-capacity was substantially impaired by overwhelming mental or emotional

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<sup>155</sup> See *infra* notes 157–240 and accompanying text.

<sup>156</sup> See *infra* notes 241–404 and accompanying text.

<sup>157</sup> See *infra* notes 159–175 and accompanying text.

<sup>158</sup> See *infra* notes 176–240 and accompanying text.

<sup>159</sup> MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST. 1980).

turmoil at the moment of a killing.<sup>160</sup> The drafters explicitly intended EMED to be “a substantial enlargement” of the common law partial defense of heat of passion.<sup>161</sup> “[R]igid” limitations on the reach of the heat-of-passion defense were eliminated, including the “arbitrary exclusion of some circumstances” from “adequate provocation,”<sup>162</sup> the requirement that the victim be the provoking agent, and the criterion of insufficient cooling time.<sup>163</sup>

Importantly, the ALI also sought to “qualif[y] the rigorous objectivity” of the common law<sup>164</sup> by dictating that evaluation of the reasonableness of the excuse for the disturbance shall be assessed from “the viewpoint of a person in the actor’s situation [under] the circumstances as he believes them to be.”<sup>165</sup> This subjectivity encompasses “personal handicaps and some external circumstances,” like “blindness, shock from traumatic injury, and extreme grief,” while excluding the actor’s particular moral values.<sup>166</sup> Other characteristics less clearly associated with diminishment of blameworthiness or “moral depravity”—such as extreme sensitivity to particular insults or “an abnormally fearful temperament”<sup>167</sup>—were left to courts’ discretion.<sup>168</sup> The objective component of the reasonableness standard dictates that a concession due to reasonclouding emotion should “not be granted if the presence of the emotion is itself blameworthy.”<sup>169</sup> The ALI stressed, “In the end, the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.”<sup>170</sup>

The ALI has noted that, by placing greater emphasis on the actor’s subjective mental state, the MPC formulation of EMED “may allow an inquiry into areas which have been treated as part of the law of diminished responsibility or

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<sup>160</sup> See Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 162 (2009) (noting that the approach in the MPC concerns the defendant’s impairment and state of mind rather than an objective reasonableness standard).

<sup>161</sup> MODEL PENAL CODE § 210.3 cmt. 3, at 49.

<sup>162</sup> *Id.* § 210.3 cmt. 5, at 61. The ALI apparently intended to retain some provocation requirement, however. See *id.* § 210.3 cmt. 3, at 49 (“This formulation treats on a parity with classic provocation cases situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event that arouses extreme mental or emotional disturbance.”); *id.* § 210.3 cmt. 5, at 61 (explaining that section 210.3 “abandon[s] preconceived notions of what constitutes adequate provocation and . . . submit[s] that question to the jury’s deliberation”).

<sup>163</sup> *Id.* § 210.3 cmt. 5, at 61.

<sup>164</sup> *Id.* at 61–62.

<sup>165</sup> *Id.* § 210.3(1)(b).

<sup>166</sup> *Id.* § 210.3 cmt. 5, at 62.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 63.

<sup>169</sup> Bernard E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y. L.F. 565, 572 (1966).

<sup>170</sup> § 210.3 cmt. 5, at 63.



the insanity defense.”<sup>171</sup> The MPC’s defense may thus be characterized as encompassing “two separate bases for mitigation: (1) the emotional disturbance prong,” which significantly expands upon common law heat of passion, and “(2) the extreme mental disturbance prong,” a form of a partial responsibility defense reserved for mental dysfunction short of insanity.<sup>172</sup> The ALI’s decision to collapse provocation into diminished responsibility has been met by scholarly criticism.<sup>173</sup> Reflecting similar discomfort, states have largely—though not completely<sup>174</sup>—jettisoned or minimized the diminished responsibility component of the defense.<sup>175</sup>

### B. States’ Limited Adoption and Modification of EMED

Eleven states and two American territories currently include EMED-like provisions in their criminal codes.<sup>176</sup> Of these jurisdictions, all but five (Hawaii, Montana, New Hampshire, American Samoa, and Guam) omit the term “mental” in the MPC’s suggested “extreme mental and emotional disturbance”

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<sup>171</sup> *Id.* at 54.

<sup>172</sup> Buchhandler-Raphael, *supra* note 64, at 1826 n.67.

<sup>173</sup> See Dressler, *supra* note 39, at 987, 989 (arguing that blending provocation with diminished responsibility “can confuse lawyers and jurors” and “expands the [heat of passion] doctrine beyond reasonable lines[.] . . . unnecessarily bring[ing] the heat-of-passion defense into disrepute,” and may result in underdeveloped diminished capacity claims); Pillsbury, *supra* note 160, at 163 (observing that the MPC appears to presume “that psychology . . . will provide sufficient norms for decision-making,” which “creates potentially significant proof problems in the courtroom”); Chris Morgan, Comment, *Loss of Self-Control: Back to the Good Old Days*, 77 J. CRIM. L. 119, 124 (2013) (arguing that “each person has personality traits which could be material in justifying acting in a certain way” and voicing the concern that, given the “sliding scale or continuum of our mental health,” “there is no indication of what an acceptable range of conduct would be” (quoting B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, *Pleading for Provoked Killers: In Defence of Morgan Smith*, 124 LAW Q. REV. 675, 688 (2008))). Nevertheless, others have expressed admiration for the EMED standard as a whole. See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 704 (1988) (praising the MPC’s adoption of the EMED standard for allowing the use of the partial defense of diminished capacity and acknowledging “that an ordinary person’s capacity for self-control can be affected by conditions that do not fit the specific categories recognized by the common law”); Jack K. Weber, *Some Provoking Aspects of Voluntary Manslaughter Law*, 10 ANGLO-AM. L. REV. 159, 169 (1981) (summarizing “high praise” of the MPC and its influence).

<sup>174</sup> New York, Connecticut, and Oregon maintain EMED standards most faithful to the MPC’s proposal. See *infra* notes 205–222 and accompanying text.

<sup>175</sup> See *infra* Subsection II.B.1.

<sup>176</sup> AM. SAMOA CODE ANN. § 46.3504(a)(2) (2021); ARK. CODE ANN. § 5-10-104 (2021); CONN. GEN. STAT. § 53a-54a (2021); DEL. CODE ANN. tit. 11, § 641 (2022); 9 GUAM CODE ANN. § 16.50(a)(2) (2021); HAW. REV. STAT. § 707-702 (2021); KY. REV. STAT. ANN. § 507.020 (West 2022); MONT. CODE ANN. § 45-5-103 (2021); N.H. REV. STAT. ANN. § 630:2 (2022); N.Y. PENAL LAW § 125.25 (McKinney 2022); N.D. CENT. CODE § 12.1-16-01 (2021); OR. REV. STAT. § 163.135 (2021); UTAH CODE ANN. § 76-5-205.5 (LexisNexis 2022).

standard in favor of the simpler “extreme emotional disturbance.”<sup>177</sup> More importantly, all but four states (Connecticut, Hawaii, New York, and Oregon) require an external provoking event as an element of the EMED defense, thus eliminating its applicability to internally generated disturbances. Some of these jurisdictions retain other features of the common law defense as well.<sup>178</sup> The following Subsections explore the retention of heat-of-passion limitations and discuss the role that mental disorders play in light of these constraints.

## 1. Retention of Common Law Limitations

A majority of the eleven states with EMED-like provisions retain components of the heat-of-passion defense. Of these, the external provocation requirement is the most common, followed by the cooling time limitation, the bar on third-party provocation, and lastly the objective “reasonable person” standard. These common law requirements render the EMED defense inapplicable to those whose diminished rationality was solely a function of their mental disorder.

Seven of the eleven states require some provoking event to trigger an emotional disturbance.<sup>179</sup> In some states, this requirement is quite strict. For instance, Arkansas limits adequate provocation to “physical fighting, a threat, or a brandished weapon”<sup>180</sup> by the victim.<sup>181</sup> New Hampshire specifies that the “extreme provocation” necessary for an EMED defense cannot consist of mere words or lawful conduct by the victim, even physical violence.<sup>182</sup> Similarly, Utah’s statute provides that “extreme emotional distress” must be “predominantly caused by the victim’s highly provoking act” and cannot be “comprised of words alone.”<sup>183</sup> Yet the triggering requirement in other EMED states is less demanding than it would be under the common law. For example, Delaware merely holds that provoking events must be external to the accused and not attributable to her.<sup>184</sup> Moreover, in 1980, in *Gall v. Commonwealth*, the Su-

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<sup>177</sup> See *infra* Subsection II.B.2. For ease of presentation, this Article will refer to all EMED-like provisions as “EMED.”

<sup>178</sup> Because so little case law exists applying the EMED provisions of Guam and American Samoa, those territories are excluded from this analysis.

<sup>179</sup> These states include Arkansas, Delaware, Kentucky, Montana, New Hampshire, North Dakota, and Utah. See *generally* N.H. REV. STAT. ANN. § 630:2; N.D. CENT. CODE § 12.1-16-01; UTAH CODE ANN. § 76-5-205.5; *Bankston v. State*, 205 S.W.3d 138 (Ark. 2005); *Kail v. State*, 14 S.W.3d 878 (Ark. 2000); *Moore v. State*, 456 A.2d 1223 (Del. 1983); *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1992); *State v. MacGregor*, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

<sup>180</sup> *Spann v. State*, 944 S.W.2d 537, 540 (Ark. 1997).

<sup>181</sup> *MacKool v. State*, 213 S.W.3d 618, 621 (Ark. 2005).

<sup>182</sup> N.H. REV. STAT. ANN. § 630:2; *State v. Smith*, 455 A.2d 1041, 1043 (N.H. 1983).

<sup>183</sup> UTAH CODE ANN. § 76-5-205.5(2)(b), (4)(c).

<sup>184</sup> *Moore*, 456 A.2d at 1226.

preme Court of Kentucky found that “it is possible for any event, or even words, to arouse extreme mental or emotional disturbance.”<sup>185</sup> Oregon also permits words to satisfy the provocation requirement.<sup>186</sup>

Five of the seven EMED jurisdictions with a provocation requirement also retain the cooling time limitation of the common law heat-of-passion defense.<sup>187</sup> For instance, Kentucky demands “uninterrupted” provocation, mandating there be insufficient time between the provocation and the killing for the defendant’s emotion to cool.<sup>188</sup> Likewise, in 2012, in *State v. Kirkpatrick*, when considering a killing occurring seven months after the death of the defendant’s daughter, the Supreme Court of North Dakota found that, at a certain point, “the emotional disturbance has to become attenuated” unless the killer in some way re-experiences the provoking event prior to the killing.<sup>189</sup> Other states take a different approach.<sup>190</sup> In 1978, in *Boyd v. State*, the Supreme Court of Delaware recognized that “it may be that a significant mental trauma has affected a defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.”<sup>191</sup> However, five years later, in *Moore v. State*, the same court required that an emotional disturbance stem from an external provoking event and not from “the accused’s own mental disturbance.”<sup>192</sup>

Not every state has ruled on the subject, but at least four also appear to follow the common law in requiring the victim to be (or reasonably appear to be) the source of the provocation.<sup>193</sup> For example, the Supreme Court of Ar-

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<sup>185</sup> 607 S.W.2d 97, 108 (Ky. 1980), *overruled on other grounds* by *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981).

<sup>186</sup> *See State v. Carson*, 640 P.2d 586, 590 (Or. 1982) (en banc) (“Words alone can now be sufficient to invoke the [provocation] doctrine . . . .” (citation omitted)).

<sup>187</sup> States retaining the common law cooling time limitation include Arkansas, Kentucky, New Hampshire, and Utah. *See, e.g.*, *Kail v. State*, 14 S.W.3d 878, 880–81 (Ark. 2000); *Fields v. Commonwealth*, 44 S.W.3d 355, 359 (Ky. 2001); *State v. Soto*, 34 A.3d 738, 742 (N.H. 2011); UTAH CODE ANN. § 76-5-205.5. Also, North Dakota appears to retain the cooling time requirement to some degree. *See infra* note 189 and accompanying text.

<sup>188</sup> *Fields*, 44 S.W.3d at 359.

<sup>189</sup> 2012 ND 229, ¶ 35, 822 N.W.2d 851, 860.

<sup>190</sup> Both Delaware and Montana employ a provocation requirement that rejects the cooling time. *See Boyd v. State*, 389 A.2d 1282, 1287–88 (Del. 1978) (quoting *People v. Patterson*, 347 N.E.2d 898, 907–08 (N.Y. 1976), *aff’d*, 432 U.S. 197 (1977)); *Hans v. State*, 942 P.2d 674, 685 (Mont. 1997), *overruled on other grounds* by *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

<sup>191</sup> *Boyd*, 389 A.2d at 1288 (quoting *Patterson*, 347 N.E.2d at 908); *see Ross v. State*, 482 A.2d 727, 737–38 (Del. 1984) (reiterating that *Boyd v. State* quoted the selection from *People v. Patterson* with approval and not objecting to the defendant’s use of *Patterson*).

<sup>192</sup> 456 A.2d 1223, 1226 (Del. 1983).

<sup>193</sup> These states include Delaware, Utah, and Arkansas. *See DEL. CODE. ANN. tit. 11, § 641* (2022); UTAH CODE ANN. § 76-5-205.5 (LexisNexis 2022); *MacKool v. State*, 213 S.W.3d 618, 622 (Ark. 2005). In addition, New Hampshire has made clear that adequate provocation must involve

kansas, citing a heat-of-passion case from 1906, imposed the third-party limitation in the context of EMED, noting that it had “previously declined to recognize provocation by a third party as sufficient to require instructions on manslaughter.”<sup>194</sup> Delaware and Utah impose this restriction by statute.<sup>195</sup> Yet, at least two of the EMED jurisdictions that have a provocation requirement have rejected the heat-of-passion limitation on third-party provocation.<sup>196</sup>

Finally, some states have strengthened the objective aspect of the “reasonable person” test or have eliminated the subjective component entirely. Many EMED states follow the MPC in directing that the reasonableness of the explanation for a disturbance be determined from the perspective of a person in the defendant’s situation under the circumstances that the defendant believed existed.<sup>197</sup> Others, on the other hand, have made the test more objective.<sup>198</sup> For instance, Montana’s EMED statute states, “The reasonableness of the explanation or excuse must be determined from the viewpoint of a *reasonable* person in the actor’s situation,” without mention of the actor’s belief in the surrounding circumstances.<sup>199</sup> At least two states, New Hampshire and Utah, employ a completely objective reasonable person standard with no subjective component.<sup>200</sup> Indeed, the EMED defenses of a handful of states retain so many aspects of the common law heat-of-passion defense that, in practice, they are nearly indistinguishable from their common law ancestor.<sup>201</sup>

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unlawful conduct, listing assault, battery, mutual combat, and adultery as examples. *See* *State v. Smith*, 455 A.2d 1041, 1043 (N.H. 1983).

<sup>194</sup> *MacKool*, 213 S.W.3d at 622 (citing *Dow v. State*, 92 S.W. 28 (Ark. 1906)).

<sup>195</sup> *See* DEL. CODE ANN. tit. 11, § 641 (requiring a “causal relationship between the provocation, event or situation which caused the extreme emotional distress and the victim of the murder”); UTAH CODE ANN. § 76-5-205.5(2)(b) (similar).

<sup>196</sup> *See* *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980), *overruled on other grounds by* *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981); *State v. Huber*, 361 N.W.2d 236, 239–40 (N.D. 1985).

<sup>197</sup> *See, e.g., State v. Ortiz*, 588 A.2d 127, 130 (Conn. 1991); *State v. Magner*, 732 A.2d 234, 241 (Del. Super. Ct. 1997); *State v. Dumlao*, 715 P.2d 822, 825 n.2 (Haw. Ct. App. 1986), *overruled in part on other grounds by* *State v. Seguritan*, 766 P.2d 128 (Haw. 1988); *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980).

<sup>198</sup> In Oregon, for instance, “The reasonableness of the explanation for the disturbance must be determined from the standpoint of an *ordinary* person in the actor’s situation under the circumstances that the actor *reasonably* believed them to be.” OR. REV. STAT. § 163.135(1) (2021) (emphasis added). Hawaii has also made its statute more objective. *See infra* note 212 and accompanying text.

<sup>199</sup> MONT. CODE ANN. § 45-5-103(1) (2021) (emphasis added).

<sup>200</sup> *See* *State v. Smith*, 455 A.2d 1041, 1043 (N.H. 1983); *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988), *overruled on other grounds by* *State v. Menzies*, 889 P.2d 393 (Utah 1994), *superseded on other grounds by constitutional amendment*, UTAH CONST. art. I, § 12.

<sup>201</sup> *See* N.H. REV. STAT. ANN. § 630:2(I)(a) (2022) (requiring “extreme mental or emotional disturbance caused by extreme provocation”); *State v. Soto*, 34 A.3d 738, 745 (N.H. 2011) (interpreting “extreme provocation” to require provocation by the victim through unlawful conduct that produced a “sudden emotional disturbance from which the defendant had no time to regain control of his passions”); UTAH CODE ANN. § 76-5-205.5(1)(a), (2)(b), (4)(a) (LexisNexis 2022) (limiting extreme

## 2. Mental Disorder and EMED

As mentioned, all but three EMED-like states limit the defense to “extreme emotional disturbance,” thus disallowing a defense premised on a “mental disturbance” without extreme emotional effects.<sup>202</sup> The reasoning of the Supreme Court of Oregon in 1991, in *State v. Counts*, is typical: “The removal of ‘mental’ . . . served to make the point that ‘mental disease or defect,’ as used in the responsibility defenses [i.e., partial responsibility and insanity], is different from the type of disturbance required to be proven under [EMED].”<sup>203</sup>

Nonetheless, focusing on the “mental” element in EMED is misleading: the element of provocation and the level of objectivity of the reasonableness assessment play a much more decisive role in determining whether, and how, impairments from mental disorder factor into an EMED defense. For example, Montana, which includes “mental” in its EMED formulation, requires that any mental or emotional disturbance arise from “some sort of direct provocation,”<sup>204</sup> thus rendering its EMED defense unavailable to a delusion-inspired defendant.

Four states—Connecticut, Hawaii, New York, and Oregon—do not require an external provoking event.<sup>205</sup> These states permit mental disorder to contribute to an EMED defense in different ways and to differing degrees.<sup>206</sup> New York permits mental disorder to contribute to both prongs of the EMED standard, no matter how severe the mental illness, so long as it produces the

emotional disturbance to “an overwhelming reaction of anger, shock, or grief,” “predominantly caused by the victim’s highly provoking act immediately preceding the defendant’s actions” that “would cause an objectively reasonable person to be incapable of reflection and restraint,” and specifying that mitigation is unavailable if “the time period after the victim’s highly provoking act and before the defendant’s actions was long enough for an objectively reasonable person to have recovered from the extreme emotional distress”; *Kail v. State*, 14 S.W.3d 878, 880–81 (Ark. 2000) (requiring that the defendant killed “in the moment following ‘provocation in the form of physical fighting, a threat, or a brandished weapon’” by the victim (quoting *Spann v. State*, 944 S.W.2d 537, 540 (Ark. 1997)); *supra* notes 180–181 and accompanying text (discussing Arkansas law).

<sup>202</sup> Only Hawaii, Montana, and New Hampshire retain the “mental” element in EMED, plus Guam and American Samoa. *See supra* note 176 and accompanying text (listing the statutes).

<sup>203</sup> 816 P.2d 1157, 1161 (Or. 1991) (citations omitted). The Oregon court’s statement echoes similar expressions by courts in other jurisdictions. *See State v. Dumlao*, 715 P.2d 822, 828 (Haw. Ct. App. 1986), *overruled in part on other grounds by State v. Seguritan*, 766 P.2d 128 (Haw. 1988); *McClellan v. Commonwealth*, 715 S.W.2d 464, 467–68 (Ky. 1986).

<sup>204</sup> *State v. MacGregor*, 2013 MT 297, ¶ 50, 372 Mont. 142, 311 P.3d 428; *accord Hans v. State*, 942 P.2d 674, 685 (Mont. 1997), *overruled on other grounds by Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

<sup>205</sup> *See State v. Elliott*, 411 A.2d 3, 7 (Conn. 1979); *State v. Espiritu*, 176 P.3d 885, 903 (Haw. 2008); *People v. Patterson*, 347 N.E.2d 898, 908 (N.Y. 1976), *aff’d*, 432 U.S. 197 (1977); *State v. Corbin*, 516 P.2d 1314, 1320 (Or. Ct. App. 1973). For a short discussion of current confusion in Hawaii law concerning its treatment of mental disorder, see *infra* note 212 and accompanying text.

<sup>206</sup> *See infra* note 212 and accompanying text (discussing Hawaii specifically).

requisite effects.<sup>207</sup> In New York, “[a] defendant cannot establish an extreme emotional disturbance defense without evidence that he or she suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control.”<sup>208</sup> Crucially, a “mental infirmity” need not be established in reference to a psychiatric disorder, and psychiatric testimony is not necessary to establish the defense.<sup>209</sup> Instead, “‘mental infirmity’ . . . refers more broadly to any reasonably explicable emotional disturbance so extreme as to result in and become manifest as a profound loss of self-control,” which may be inferred from a defendant’s behavior.<sup>210</sup> Although case law establishes that the mental infirmity in an EMED defense must “not ris[e] to the level of insanity,” this condition appears to be a nod to the reality that, if a defendant is insane, she should be acquitted.<sup>211</sup>

Connecticut and Oregon permit mental disorder to support an EMED defense, but only if the defendant’s emotional disturbance did not stem from a mental condition that satisfies the insanity standard.<sup>212</sup> In Connecticut, trial

<sup>207</sup> See *People v. Sepe*, 972 N.Y.S.2d 273, 285 (App. Div. 2013) (holding that the defendant’s mental disorder contributed to both prongs of the EMED standard). In 2013, in *People v. Sepe*, the Supreme Court of New York, Appellate Division held that a jury verdict rejecting the defendant’s EMED verdict was against the weight of the evidence and emphasized—in its assessment of both prongs of the defense—the defendant’s “significant mental trauma,” “lengthy psychiatric history” of treatment for depression and anxiety, deteriorating mental state in the months preceding the homicide, and “seriously weakened psychiatric state” at the moment of the killing. *Id.* at 284–85.

<sup>208</sup> *People v. Roche*, 772 N.E.2d 1133, 1138 (N.Y. 2002).

<sup>209</sup> *People v. McKenzie*, 976 N.E.2d 217, 220–21 (N.Y. 2012).

<sup>210</sup> *Id.* at 221.

<sup>211</sup> *Roche*, 772 N.E.2d at 1138. In New York, the model jury instructions for EMED do not include the element of a “mental infirmity not rising to the level of insanity.” See *id.* Apparently, a defendant need not prove, nor the trier of fact find, that a mental disorder falls short of insanity for an EMED defense to be successful. See *id.*

<sup>212</sup> In Hawaii, doubt surrounds the status of mental disorder in EMED cases. In 1986, in *State v. Dumlao*, the Hawaii Intermediate Court of Appeals of Hawaii established that mental disorder can support an EMED instruction and explained that a defendant’s mental abnormalities should factor into both the existence of the disturbance and its reasonableness. 715 P.2d 822, 829–30 (Haw. Ct. App. 1986) (concerning a defendant whose disturbance allegedly stemmed from paranoid personality disorder), *overruled in part on other grounds by* *State v. Seguritan*, 766 P.2d 128 (Haw. 1988). In interpreting Hawaii’s then-current EMED statute, the court drew from commentary and cases interpreting MPC section 210.3. See *id.* at 829–30. However, in 2003, the Hawaii legislature changed its reasonableness standard by replacing the phrase “from the viewpoint of a *person in the defendant’s situation* under the circumstances as he believed them to be” with the phrase “from the viewpoint of a *reasonable person* in the circumstances as the defendant believed them to be.” 2003 Hawaii Sess. Laws 115 (amending the reasonableness standard); see HAW. REV. STAT. ANN. § 707-702(2) (2002) (emphasis added); HAW. REV. STAT. ANN. § 707-702(2) (2021) (emphasis added). On its face, this amendment appears aimed at barring certain personal characteristics of the defendant from being considered in the reasonableness assessment. The effect of this amendment is unclear, as the most substantive discussion of this change to date both highlighted the difference in language and characterized it as “in consonance with the subjective/objective dichotomy recognized in a long line of supreme court cases predating . . . the 2003 amendment.” *State v. Calaro*, 114 P.3d 958, 969 (Haw. Ct. App. 2005). In

judges will instruct the jury that a defendant must establish, as part of the affirmative defense of EMED, that her “emotional disturbance was not a mental disease or defect that rises to the level of the affirmative defense of” insanity.<sup>213</sup> Commentators have complained that this requirement “is wrong and should be eliminated.”<sup>214</sup> One Connecticut superior court judge argues: “[The requirement] is inaccurate, for an extreme emotional disturbance may, under some circumstances, rise to the level of insanity. It is also confusing, for it distracts the jury’s attention from the central concern of the statute and enshrouds the statutory language ‘in a mystifying cloud of words.’”<sup>215</sup> According to this judge, this is especially so when an EMED defendant does not concurrently assert an insanity defense, thus requiring the trial court to explain the elements of a defense not before the jury.<sup>216</sup>

In Oregon, emotional impairments of mental disorders less severe than insanity can factor into both prongs of an EMED defense, and the defendant need not prove sanity. In *Counts*, the Supreme Court of Oregon held that a trial court must consider a defendant’s EMED claim even if it finds the defendant “guilty except for insan[e].”<sup>217</sup> The court reasoned that, although insanity and EMED “relate to different psychological occurrences,” it is possible that “both conditions may . . . arise in the same defendant” such that she may be both insane and extremely emotionally disturbed.<sup>218</sup> Yet because the legislature dictated that the “reasonableness” of the defendant’s excuse for her emotional disturbance must “be evaluated from the viewpoint of ‘an *ordinary* person’ and . . . the circumstances . . . examined . . . ‘as the actor *reasonably* believes them to be,’” an actor’s “mental disease or defect” that rises to the level of insanity should not factor into the reasonableness assessment of an EMED defense.<sup>219</sup> Less severe mental infirmities, though, should still be considered. In 2017, in *State v. Zielinski*, the Court of Appeals of Oregon treated “lesser mental infirmities,” such as anxiety disorder, as a “*personal* characteristic” (like “gender, sexual orientation, pregnancy, and physical disability”) that should factor into

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addition, in 2014, the Supreme Court of Hawaii stated that, with one exception that does not apply here, “*Dumlao’s* analysis of EMED manslaughter remains good law.” *State v. Adviento*, 319 P.3d 1131, 1146 n.12 (Haw. 2014) (quoting *State v. Moore*, 921 P.2d 122, 131 n.9 (Haw. 1996)).

<sup>213</sup> 5A DAVID M. BORDEN, DAVID P. GOLD & LEONARD ORLAND, CONN. PRAC., CRIMINAL JURY INSTRUCTIONS § 8.2 (4th ed.), Westlaw 5A CTPRAC (database updated Sept. 2021).

<sup>214</sup> Jon C. Blue, *Defining Extreme Emotional Disturbance*, 64 CONN. BAR J. 473, 480 (1990).

<sup>215</sup> *Id.* at 480–81 (footnote omitted) (quoting *People v. Casassa*, 404 N.E.2d 1310, 1317 (N.Y. 1980)).

<sup>216</sup> *Id.* at 481.

<sup>217</sup> 816 P.2d 1157, 1159 (Or. 1991) (quoting OR. REV. STAT. § 161.295(1) (2021)).

<sup>218</sup> *Id.* at 1162.

<sup>219</sup> *Id.* at 1163 (quoting OR. REV. STAT. § 163.135(1) (2021) (emphasis added)).

an “actor’s situation” in the reasonableness prong of the EMED defense.<sup>220</sup> However, the court prohibited consideration of any mental illness that “intertwined” with the actor’s “*personality characteristics*,” such as a personality disorder.<sup>221</sup> Other states—including Hawaii and New York—may permit personality disorders to support an EMED claim.<sup>222</sup>

In jurisdictions that require an external provoking event, some states permit mental disorders to inform the reasonableness of the defendant’s excuse. In 2001, in *Fields v. Commonwealth*, the Supreme Court of Kentucky explained that although “the mere presence of mental illness, standing alone, does not constitute [EMED],” the “[presence of mental illness] is entirely relevant to a subjective evaluation of the reasonableness of the defendant’s response to the provocation.”<sup>223</sup> Similarly, in 1997, in *State v. Magner*, the Superior Court of Delaware held that evidence of mental disorder is probative because it “allows the trier of fact to discern the ‘accused’s situation’” and also “to demonstrate the existence of a reasonable excuse or explanation for the existence of [EMED].”<sup>224</sup>

Other states, however, appear to prohibit consideration of mental disorder in EMED cases altogether. Arkansas, for example, has held that mental disorder should not factor into the assessment of the provoking nature of an event,<sup>225</sup> the actor’s “situation,” or the “circumstances” as she believed them to be at the time of the offense.<sup>226</sup> In 2005, in *Bankston v. State*, the Supreme Court of Arkansas explained:

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<sup>220</sup> 404 P.3d 972, 977, 978 (Or. Ct. App. 2017) (first quoting *Counts*, 816 P.2d at 1164 n.13; then citing *State v. Ott*, 686 P.2d 1001, 1013 (Or. 1984) (en banc); and then quoting OR. REV. STAT. § 163.135). Lesser “mental disorders . . . may be the focus of clinical attention.” *Id.* These disorders “can involve acute symptoms and . . . [are] susceptible to psychological and medical treatment” and so they “bear[] a closer resemblance to physical illness or disability than . . . to nonclinical personality traits like ill temperament, dishonesty, or stubbornness.” *Id.*

<sup>221</sup> *Id.* at 977–78.

<sup>222</sup> See *State v. Dumlao*, 715 P.2d 822, 830–31 (Haw. Ct. App. 1986) (ruling that evidence of paranoid personality disorder and jealousy together warranted an EED instruction), *overruled in part on other grounds by State v. Seguritan*, 766 P.2d 128 (Haw. 1988); *Linnen v. Poole*, 766 F. Supp. 2d 427, 462–63 (W.D.N.Y. 2011) (observing that New York case law has “not fixed with precision the contours of what constitutes a ‘mental infirmity’”).

<sup>223</sup> 44 S.W.3d 355, 359 (Ky. 2001). Kentucky’s definition of EMED stresses that EMED is “not a mental disease in itself.” *McClellan v. Commonwealth*, 715 S.W.2d 464, 469 (Ky. 1986).

<sup>224</sup> 732 A.2d 234, 243 (Del. Super. Ct. 1997) (citation omitted).

<sup>225</sup> See *Kail v. State*, 14 S.W.3d 878, 880 (Ark. 2000) (stating that defendants cannot “present any evidence whatsoever” when claiming EMED “in the absence of some physical provocation”); *Spann v. State*, 944 S.W.2d 537, 540 (Ark. 1997) (“[P]assion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible.” (quoting *Rainey v. State*, 837 S.W.2d 453 (Ark. 1992) (citation omitted))).

<sup>226</sup> *Bankston v. State*, 205 S.W.3d 138, 143 (Ark. 2005).



A plain reading of [the EMED statute] reveals that [the] factors [of “situation” and “circumstances”] are to be considered by the jury only to evaluate the reasonableness of the excuse for causing the victim’s death. The excuse refers to the event of provocation. Thus, the jury is to consider the reasonableness of the event of provocation from the viewpoint of the defendant, considering the particular situation, *i.e.*, whether it involved a fight or a threatening encounter, and the circumstances as he or she believed them to be, *i.e.*, whether the victim was brandishing a weapon.<sup>227</sup>

Thus, the state’s supreme court affirmed the trial court’s refusal to admit expert testimony pertaining to the defendant’s mental condition, reiterating that “[t]he defendant’s particular . . . mental infirmities are not part of the consideration.”<sup>228</sup> Similarly, Utah’s EMED statute appears largely, if not completely, to exclude consideration of a defendant’s mental disorder, although little case law has applied its recently enacted statutory language.<sup>229</sup>

Obviously, the more a state’s EMED standard permits formal mitigation in response to an actor’s mental and emotional impairments, the more that standard realizes the potential envisioned by the ALI when proposing MPC section 210.3. The few states that recognize partial responsibility trumpet this accomplishment. For instance, in 1976, in *People v. Patterson*, the Court of Appeals of New York pronounced it “consistent with modern criminological thought to reduce the defendant’s criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy.”<sup>230</sup> The court explained that its new EMED statute “can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma.”<sup>231</sup>

In contrast, states that require an external provoking event are sometimes quite explicit in their rejection of partial responsibility. For instance, in 1986, in *McClellan v. Commonwealth*, the Supreme Court of Kentucky characterized EMED as only a “somewhat less limited” “replacement for the old ‘sudden

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> UTAH CODE ANN. § 76-5-205.5(1)(a), (2)(b) (LexisNexis 2022) (specifying that “[e]xtreme emotional distress” must be “predominantly caused by the victim’s highly provoking act immediately preceding the defendant’s actions,” must “cause an objectively reasonable person to be incapable of reflection and restraint,” and “does not include a condition resulting from mental illness”).

<sup>230</sup> 347 N.E.2d 898, 908 (N.Y. 1976), *aff’d*, 432 U.S. 197 (1977).

<sup>231</sup> *Id.* Other states have quoted *Patterson* in articulating the motivations behind, and aims of, their EMED statutes. *See, e.g.*, *State v. Elliott*, 411 A.2d 3, 8 (Conn. 1979); *State v. Counts*, 816 P.2d 1157, 1165 (Or. 1991).

heat of passion” and emphasized that it does not encompass a lesser form of insanity.<sup>232</sup> Unlike insanity, the court continued, “a mental disease which does not destroy the capacity to appreciate criminality of conduct or to conform one’s actions to the requirement of law is simply not a defense at all,” but may entitle the actor to treatment while incarcerated.<sup>233</sup> Repeatedly, the court emphasized, “Extreme emotional disturbance is something different from . . . mental illness,”<sup>234</sup> so it must be something other than the “substantially impaired capacity to use self-control, judgment, or discretion which can be related to physiological, psychological, or social factors.”<sup>235</sup>

In summary, only New York, Connecticut, and Oregon (and possibly Hawaii)<sup>236</sup> use EMED to extend formal mitigation to those who killed with diminished responsibility due to a mental disorder in the absence of external provocation. The few states with EMED-like provisions typically both retain heat-of-passion constraints and disallow mental disturbance as a condition warranting mitigation on its own.<sup>237</sup> This is likely due to desires to confine the partial excuse to situations in which non-disordered people might have been similarly emotionally overwhelmed and to limit excuses on grounds of mental impairment to the domain of insanity. This state of affairs discriminates between individuals with similar levels of diminished rationality—denying formal mitigation only to those whose impairment results from mental disorder. As individuals with mental disorders are unlikely to be culpably responsible for their impairments, this difference in treatment is especially unjust.<sup>238</sup>

Reinvigorating EMED and expanding its adoption by states would rectify this particular injustice, but states’ reception to the partial defense to date makes this option unlikely. Instead, states’ near-universal recognition of criminal irresponsibility through insanity statutes and some states’ adoption of GBMI provisions suggest another option: using these statutes as the basis for a partial responsibility statute that, unlike EMED, would apply beyond the context of homicide. Because impairments associated with delusions, as with other forms of mental pathology,<sup>239</sup> are not crime-specific, a generic partial excuse

<sup>232</sup> 715 S.W.2d 464, 468 (Ky. 1986).

<sup>233</sup> *Id.* (citing *Edwards v. Commonwealth*, 554 S.W.2d 380 (Ky. 1977)).

<sup>234</sup> *Id.* (citing *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985)).

<sup>235</sup> *Id.* (citing KY. REV. STAT. ANN. § 504.060(5) (current version at § 504.060(6) (West 2022)).

<sup>236</sup> See *supra* note 212 (discussing the role of mental disorder in EMED in Hawaii).

<sup>237</sup> See, e.g., UTAH CODE ANN. § 76-5-205.5 (LexisNexis 2022).

<sup>238</sup> See E. Lea Johnston, *Mental Disability as Partial Excuse* (Apr. 2022) (unpublished manuscript) (on file with the author) (discussing this issue and whether culpable responsibility for one’s impairment should factor into a partial responsibility standard); *infra* note 285 and accompanying text (identifying some factors in support of this position).

<sup>239</sup> For example, many mental illnesses are associated with global cognitive dysfunction, as well as emotional deficits. See generally Olivia K.L. Hamilton et al., *Cognitive Impairment in Sporadic Cerebral Small Vessel Disease: A Systematic Review and Meta-Analysis*, 17 ALZHEIMER’S & DE-

like this would better align with evolving scientific knowledge of mental dysfunction and decision-making over wider adoption of a robust EMED standard. Moreover, because this standard would derive from existing law, it may prove more practical than EMED or the generic partial excuses proposed by others.<sup>240</sup>

### III. PROPOSED DIMINISHED RESPONSIBILITY PARTIAL EXCUSE

Evolving scientific knowledge of mental pathology and associated impairments supports the creation of a generic partial excuse for rationality-diminishing mental disabilities.<sup>241</sup> Criminal responsibility requires normative competence—which, at a minimum, should include the capacity to evaluate one’s own choices and respond to the moral reasons to be held responsible for a particular wrongful act.<sup>242</sup> As some scholars have explained, the law conceives of a person as a “practical reason[er]” who uses legal rules as reasons to

MENTIA 665, 665 (2021) (analyzing the impact of small vessel disease (SVD), meaning various neurological abnormalities, and concluding that SVD impacts “all major domains of cognitive ability”); Marilyne Joyal et al., *Characterizing Emotional Stroop Interference in Posttraumatic Stress Disorder, Major Depression and Anxiety Disorders: A Systematic Review and Meta-Analysis*, 14 PLOS ONE, no. e0214998, Apr. 2019 (finding emotional deficits due to posttraumatic stress disorder, major depressive disorder, and anxiety disorders); P.L. Rock, J.P. Roiser, W.J. Riedel & A.D. Blackwell, *Cognitive Impairment in Depression: A Systematic Review and Meta-Analysis*, 44 PSYCH. MED. 2029 (2014) (concluding that global cognitive dysfunction is a key feature of depression).

<sup>240</sup> See *infra* note 246 and accompanying text.

<sup>241</sup> “Reasoning” and “rationality” are normative concepts best left to the common sense of the jury. HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 203 (1972); see Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIM & JUST. 329, 383 (1998) (“How much irrationality [in the practical reasoning that produced the criminal conduct] is necessary is a normative, moral, and legal judgment that even the best scientific and clinical understanding of a syndrome cannot dictate because responsibility is not a scientific or clinical question.”). Crucially, rationality in this context does not have a specific psychological or medical meaning, but rather is a notion of everyday language and legal tradition. Herbert Fingarette, *Insanity and Responsibility*, 15 INQUIRY 6, 12 (1972).

<sup>242</sup> The reasons-responsiveness approach is now a leading theory of responsibility. See, e.g., David O. Brink, *The Nature and Significance of Culpability*, 13 CRIM. L. & PHIL. 347, 355 (2019) (“Normative competence . . . involves two forms of reasons-responsiveness: an ability to recognize reasons for or against conduct, in particular, wrongdoing and an ability to conform one’s will to this normative understanding.”); R.A. 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.”); Douglas Husak, *“Broad” Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 465 (2012) (“[C]riminal law . . . requires moral reasons for acting. Thus a person who is sufficiently non-responsive to moral reasons lacks criminal responsibility . . . .” (footnote omitted)). See generally JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (1998) (exploring the various ways in which human morality impacts social perception of individual behavior); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994) (delving into theoretical notions of fairness, emotional reactivity, accountability, blame, and moral sanction).

guide her actions.<sup>243</sup> Thus, rationality is necessary for responsibility, and “non-culpable irrationality or lack of normative competence is an excusing condition.”<sup>244</sup> A generic partial excuse for rationality-diminishing mental disabilities would recognize that diminished rationality exists along a continuum and would better proportion criminal liability to blameworthiness.<sup>245</sup>

Over the decades, a number of prominent scholars have offered proposals for generic partial excuses for diminished responsibility.<sup>246</sup> Many of these intend to capture the gamut of individuals with diminished responsibility warranting formal mitigation.<sup>247</sup> Most (but not all)<sup>248</sup> derive from the groundbreaking work of Herbert Fingarette and Ann Fingarette Hasse, who proposed the

<sup>243</sup> Morse, *supra* note 241, at 339; see Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik*, 9 CRIM. L. & PHIL. 645, 673–77 (2015) (identifying nine “criteria of personhood and moral agency,” including practical rationality).

<sup>244</sup> Morse, *supra* note 241, at 341.

<sup>245</sup> See *infra* note 350 and accompanying text (discussing Paul Robinson’s principle of blameworthiness proportionality).

<sup>246</sup> See HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 247–57, app. I (1979) (outlining the Disability of Mind doctrine and plea—which focus on the capacity of rational conduct regarding the criminal significance of the act—and providing guidance for its execution, with culpable and nonculpable “Partial Disability of Mind” verdicts representing forms of diminished responsibility); NORMAN J. FINKEL, INSANITY ON TRIAL 292–96 (1988) (outlining an expanded Disability of Mind test as an affirmative defense); Brink, *supra* note 1, at 53–59 (proposing a tripartite or tetravalent responsibility structure that includes a culpability assessment either at the guilt phase or a separate culpability phase of adjudication); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 300 (2003) (“The jury may find the defendant [Guilty But Partially Responsible or] GPR if, at the time of the crime, the defendant suffered from substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant’s criminal conduct.” (emphasis omitted)); FEDERICA COPPOLA, THE EMOTIONAL BRAIN & THE GUILTY MIND: NOVEL PARADIGMS OF CULPABILITY AND PUNISHMENT 158 (2021) (proposing this situational prong for addition to Morse’s GPR standard: “The jury may find the defendant GPR if, at the time of the crime, the defendant acted under a non-culpable state of substantial psychological distress for which there is a reasonable explanation or excuse”); Stephen P. Garvey, *Dealing with Wayward Desire*, 3 CRIM. L. & PHIL. 1, 12 & n.11 (2009) (advocating a “supplement” to Morse’s GPR standard that recognizes defects of will in addition to defects of reason); Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219, 263 (2020) (outlining the proposal that “[a]n offender is entitled to a mitigation in liability and punishment if the offense circumstances and the offender’s situation and capacities meaningfully reduce the offender’s blameworthiness for the violation” and listing three factors to consider); cf. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 360 (2002) (proposing, in light of the science of consciousness, that the voluntary act requirement be broadened to recognize a “third category of semi-voluntary acts,” which “would include individuals who were either previously shoehorned into the first two categories [of voluntary or involuntary acts] or wrongly given the insanity defense”).<sup>247</sup> See COPPOLA, *supra* note 246, at 158; Garvey, *supra* note 246, at 12; Morse, *supra* note 246, at 300; Robinson, *supra* note 246, at 263.

<sup>247</sup> See COPPOLA, *supra* note 246, at 158; Garvey, *supra* note 246, at 12; Morse, *supra* note 246, at 300; Robinson, *supra* note 246, at 263.

<sup>248</sup> See Brink, *supra* note 1, at 52–59; Robinson, *supra* note 246, at 255–62 (sourcing the proposal’s nonessential factors from EMED cases and commentary).

“Partial Disability of the Mind” verdict in their seminal 1979 book, *Mental Disabilities and Criminal Responsibility*.<sup>249</sup> This proposal assesses both the defendant’s ability to act rationally with regard to the criminal prohibitions bearing on her conduct and her culpability in inducing the mental disability responsible for that irrationality.<sup>250</sup> Fingarette, Hasse, and their successors have done the important work of recognizing partial responsibility as a moral imperative and explaining why the trier of fact should determine it.<sup>251</sup> These proposals have generated much scholarly enthusiasm, especially for the structural role the verdicts would play in our legal scheme of excuses.<sup>252</sup> But, as of yet, they have not enjoyed traction among state legislatures.

This Article’s proposal differs from prior proposals in four key respects. First, it limits the partial excuse to diminished rationality from a mental disability<sup>253</sup> that is capable of impairing rationality or the capacity to freely choose to violate a moral or legal norm of society.<sup>254</sup> Second, the proposal derives its standard for diminished responsibility from existing statutory definitions of

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<sup>249</sup> FINGARETTE & HASSE, *supra* note 246, at 254–57; Morse, *supra* note 246, at 299 n.23 (acknowledging that Fingarette and Hasse “proposed a similar verdict that . . . substantially influenced [his] conceptualization” of the GPR verdict).

<sup>250</sup> See FINGARETTE & HASSE, *supra* note 246, at 206, 247–57, app. I.

<sup>251</sup> See *id.* at 7, 203–05; Brink, *supra* note 1, at 46–51; Morse, *supra* note 246, at 298–99; Robinson, *supra* note 246, at 264–65. Of course, others disagree. See Arenella, *supra* note 28, at 849–53, 857–60 (outlining critiques of a diminished capacity defense).

<sup>252</sup> See Husak, *supra* note 242, at 468.

<sup>253</sup> This Article does not suggest a definition for “mental disability,” as this would be an issue for states’ determination. See *infra* note 282 and accompanying text. It anticipates, however, that the term may include any abnormality of mind arising from an underlying, pre-existing condition that is not transitory. This condition could be mental, psychological, physical, physiological, or genetic in nature. Cf. Carl-Friedrich Stuckenberg, *Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility*, 4 BERGEN J. CRIM. L. & CRIM. JUST. 48, 53 (2016) (observing that, in insanity standards cross the globe, “[t]he cause of the mental disorder mostly is of no concern, whether it is a ‘disease of the mind’ or psychosis like schizophrenia, bipolar disorder, but also epilepsy, somnambulism, certain psychoneuroses, hyper- and hypoglycemia *etc.*, or a ‘defect’ or ‘natural mental infirmity’ the person was born with, like abnormally low intellect”); HANS JOACHIM SALIZE & HARALD DREIBING, CENT. INST. OF MENTAL HEALTH, PLACEMENT AND TREATMENT OF MENTALLY ILL OFFENDERS—LEGISLATION AND PRACTICE IN EU MEMBER STATES 37–38, 38 tbl.3 (2005), [https://ec.europa.eu/health/ph\\_projects/2002/promotion/fp\\_promotion\\_2002\\_frep\\_15\\_en.pdf](https://ec.europa.eu/health/ph_projects/2002/promotion/fp_promotion_2002_frep_15_en.pdf) [<https://perma.cc/ET9G-CYPT>] (listing the legal terminology for the necessary mental state in forensic legislation within fifteen European countries and observing that the terms and descriptors “are particularly non-specific, widely varied[,] . . . have little relation to the classification systems established in international mental health care[,]” and “embrace[] all kinds of mental disorders[,] and allow[] broad scope in their construction”). Fingarette and Hasse limited their proposal to mental disability as well, but their proposal captures a broader set of impairments than those envisioned here, including temporary conditions induced by intoxicants. FINGARETTE & HASSE, *supra* note 246, at 7; see *id.* at 207 (defining “Disability of Mind” as including, “from a psychological standpoint, . . . any kind of individual mental abnormality, pathology, impairment, defect, or disorder, and from whatever origin”).

<sup>254</sup> Mental disability, like rationality, is a normative concept, not a strictly medical one. See Fingarette, *supra* note 241, at 7.

insanity or GBMI statutes. In this way, the partial excuse hews much more closely to traditionally recognized bases for irresponsibility and thus should enjoy more popular support. Third, the proposal does not advocate for a lesser degree of mitigation for defendants who contributed to their irrationality through nonadherence to treatment directives.<sup>255</sup> Fourth, the proposal includes detailed measures to reduce any threat to public safety generated by the partial excuse.<sup>256</sup>

The following Sections in this Part explore the benefits of confining a partial responsibility excuse to mental dysfunction and defend the premise that states' insanity and GBMI statutes provide appropriate templates for such an excuse. Section A examines arguments for limiting the partial excuse to mental disability.<sup>257</sup> Section B explores the extent to which jurisdictions' insanity standards and GBMI verdicts could provide useful grounding for a partial excuse for impaired rationality from mental disability.<sup>258</sup>

### *A. Limiting the Partial Excuse to Mental Disability*

The decision to limit the partial excuse to mental disability—and to model it on imperfect conceptualizations of irresponsibility currently in circulation<sup>259</sup>—will no doubt be controversial.<sup>260</sup> But allowing a partial excuse to ex-

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<sup>255</sup> See *infra* note 285 (identifying some factors in support of this position); cf. FINGARETTE & HASSE, *supra* note 246, at 201 (including inquiry into “culpability in regard to the context of origin of the D.O.M. [disability of mind]” in their proposed test); FINKEL, *supra* note 246, at 296–98 (proposing a third phase of adjudication to assess the defendant’s full or partial culpability for her DOM); Morse, *supra* note 246, at 300 (“The first criterion of the proposal also requires that the rationality diminution must be non-culpable, which means that the defendant’s impaired rationality must be justifiable or excusable.”).

<sup>256</sup> The same impairments that decrease responsibility may increase dangerousness, but, as some critics of partial responsibility excuses have noted, a partial responsibility defense would privilege the former assessment at the guilt phase while shunting consideration of the latter to sentencing where it may be less influential in the ultimate disposition. See Arenella, *supra* note 28, at 857. Other proponents of partial responsibility excuses have highlighted this issue, but most have not offered a comprehensive means of dealing with it. See FINGARETTE & HASSE, *supra* note 246, at 202–05 (recognizing that “a successful defense to the effect that a criminal harm arose out of a Disability of Mind always warrants . . . post-trial mental examination of the defendant” but stressing “that the D.O.M. doctrine contains no implication whatsoever about the specific nature of the post-verdict diagnostic, protective, or rehabilitative measures, or about the specific policies of law that should apply”); Morse, *supra* note 246, at 303 (proposing, in recognition that “in many cases the defendant’s impaired rationality may present a continuing, substantial danger,” “that the amount of punishment reduction should be inversely related to the seriousness of the crime”); FINKEL, *supra* note 246, at 306–09 (discussing sentencing, treatment, and involuntary civil commitment considerations). The third and fourth aspects of the proposal will be developed in subsequent work. See Johnston, *supra* note 238.

<sup>257</sup> See *infra* notes 259–294 and accompanying text.

<sup>258</sup> See *infra* notes 295–404 and accompanying text.

<sup>259</sup> Appellate decisions have characterized GBMI verdicts as reflecting assessments of partial responsibility. See *infra* notes 359–368 and accompanying text.

tend to all rationality-diminishing impairments, regardless of origin, is untenable.<sup>261</sup> As Part I establishes, individuals with delusions and those without them both experience impairments hostile to moral decision-making. Indeed, myriad impairments, mental and emotional states, and sources of social adversity may impede rationality.<sup>262</sup> Recognizing that the underlying irrationality (not the pathology) does the excusing work in an irresponsibility defense,<sup>263</sup> Stephen Morse's proposed "Guilty But Partially Responsible" verdict would recognize "substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant's criminal conduct"—regardless of its source.<sup>264</sup> (Partially)<sup>265</sup> decoupling diminished rationality from its source certainly contributes to the theoretical purity and exhaustive scope of Morse's proposal, but it also likely contributes to its cool reception by legislatures. Providing a partial defense for grief,<sup>266</sup> stress, fatigue, trauma,<sup>267</sup> rage, jealousy,<sup>268</sup> or poverty<sup>269</sup> would open the floodgates to bogus claims and to a

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<sup>260</sup> Indeed, general comments to articles 12 and 14 of the Convention on the Rights of Persons with Disabilities suggest that "recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability." Human Rights Council, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, ¶ 47, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009), <https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf> [<https://perma.cc/8ZN8-HXLG>].

<sup>261</sup> See Arenella, *supra* note 28, at 859–60 (arguing that expanding the diminished responsibility doctrine to socio-economic and cultural factors would mean that "a large percentage of . . . defendants would qualify for formal mitigation, a result which would certainly interfere with the legislature's grading of offenses and punishments" and "tear the fabric of the criminal law as an instrument of social control").

<sup>262</sup> See Morse, *supra* note 246, at 305; cf. Robinson, *supra* note 246, at 254 (arguing for recognition, through a partial excuse, of "empathetic circumstances that drove [individuals'] offenses").

<sup>263</sup> See Morse, *supra* note 241, at 351–52; Morse, *supra* note 246, at 305.

<sup>264</sup> Morse, *supra* note 246, at 300 (emphasis omitted); see *id.* at 305.

<sup>265</sup> Under Morse's proposal, the trier of fact would consider the origin of the diminished rationality when determining if the defendant was responsible for its creation. See *id.* at 300–01.

<sup>266</sup> *Id.* at 301.

<sup>267</sup> Morse, *supra* note 241, at 400 (listing stress, fatigue, and trauma).

<sup>268</sup> See Richard J. Bonnie, *Why "Appreciation of Wrongfulness" Is a Morally Preferable Standard for the Insanity Defense*, in PROCEEDINGS: THE AFFIRMATIVE DEFENSE OF INSANITY IN TEXAS 50, 58 (2003), <https://www.txpsych.org/wp-content/uploads/2016/02/insanitytranscript.pdf> [<https://perma.cc/7VLW-ECSM>] ("If the law regarded irrationality as a basis for non-responsibility, overwhelming rage or jealousy might be a defense.").

<sup>269</sup> See Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114, 153–54 (William C. Heffernan & John Kleinig eds., 2000) (raising the concern that poverty could serve as the basis for a GPR verdict if a defendant were able to establish a link between poverty and diminished rationality); Elisabeth Winston Lambert, *A Way Out of the "Rotten Social Background" Stalemate: "Scarcity" and Stephen Morse's Proposed Generic Partial Excuse*, 21 U. PA. J.L. & SOC. CHANGE 297, 317–32 (2018) (using the "science of 'scarcity'" to demonstrate that Morse's GPR defense "would create space for a viable

deluge of formally meritorious ones that society may or may not agree are worthy of mitigation.<sup>270</sup> As a result, the partial defense could sully the legitimacy of the criminal justice system, undermine the law's social control function, and even hollow internalized norms of personal responsibility.

In contrast, this Article's proposal limits formal mitigation to impairments from mental disabilities.<sup>271</sup> In this way, the partial excuse would function as a kind of "imperfect insanity" defense.<sup>272</sup> Although many sources of irrationality exist,<sup>273</sup> "that mental disability has a distinctive bearing on culpability . . . has been a deep and persistent intuition of common men and the common law over the centuries."<sup>274</sup> Scholars have struggled to discern the distinctive aspect of mental disability for criminal responsibility.<sup>275</sup> Fingarette has perhaps come the closest by identifying the central core of the "centuries-old and still current notion of mental disorder"<sup>276</sup> as irrationality,<sup>277</sup> defined as an incapacity to grasp the relevance of the moral, legal, and practical considerations essentially relevant to one's act.<sup>278</sup> With mental disorder, this irrationality is ascribed to the person rather than to an external influence such as an intoxicant.<sup>279</sup>

Crucially, "mental disability"—like rationality and insanity<sup>280</sup>—is not strictly a medical concept but "a notion . . . independent of any . . . psychological or psycho-physiological doctrines."<sup>281</sup> This (admittedly vague) element of a

poverty defense if defendants use the theory of scarcity to establish a connection between severe financial need and an impaired normative capacity").

<sup>270</sup> See Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 85 (2010) (indirectly criticizing Morse's proposal by suggesting it would result in unjust diminishment of responsibility for "stressed or depressed men driven to kill by rage at their inability to control women").

<sup>271</sup> See *supra* note 253 and accompanying text.

<sup>272</sup> See *infra* note 298 and accompanying text (discussing the meaning of this term).

<sup>273</sup> See Morse, *supra* note 246, at 305; Moore, *supra* note 243, at 665–68 (rejecting the arguments that mental illness is a stronger cause of behavior than causes unrelated to mental illness, that individuals with mental illness have less free will than those without illness, and that mental illness is a stronger cause of behavior than causes of normal behavior).

<sup>274</sup> FINGARETTE & HASSE, *supra* note 246, at 3.

<sup>275</sup> See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 272 (1970) (arguing that there is something "special" about mental illness because it "has an independent significance for questions of responsibility not fully accounted for by reference to its power to deprive one of the capacity to be law-abiding"). Feinberg suggested as distinctive a mental disability's expression as motivations into which the actor lacks insight that are unintelligible, irrational, senseless, and incoherent and thus "likely to seem alien, not fully expressive of their owner's essential character." *Id.* at 288

<sup>276</sup> Fingarette, *supra* note 241, at 6.

<sup>277</sup> *Id.* at 27.

<sup>278</sup> *Id.* at 18.

<sup>279</sup> *Id.* at 27.

<sup>280</sup> See *supra* note 241 and accompanying text (listing sources discussing how rationality is a normative, not medical, concept).

<sup>281</sup> Fingarette, *supra* note 241, at 6.



partial responsibility test could evolve with scientific advances and allow for the recognition of any mental disease or defect capable of producing the rationality-diminishing impairments called for by the standard.<sup>282</sup> The exceptionalism of mental abnormality and the desirability of adopting a broad mental disability element is suggested by foreign partial responsibility standards, which typically include such a criterion.<sup>283</sup> Moreover, although not all scholars agree,<sup>284</sup> mental disorder could plausibly serve as a rough proxy for clean hands—individuals with mental pathology are generally not culpably responsible for manifesting symptoms of that pathology—or, at least, a workable standard to fairly evaluate that culpability does not exist.<sup>285</sup> In addition, limiting a partial excuse to those with mental disability would cabin retrenchment of the law’s deterrence function and might increase the likelihood of consistent and principled application of the partial excuse.<sup>286</sup>

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<sup>282</sup> See 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 7.2(b)(1) (3d ed.), Westlaw SUB-CRL (database updated Dec. 2021) (observing that whether a particular mental abnormality constitutes a “mental disease or defect” depends on its capacity to produce the responsibility-diminishing impairments articulated in the insanity test). To the extent a jurisdiction opts to fashion its partial excuse on an imperfect insanity or GBMI standard, as Section B of this Part suggests, importing the medical component of that original test—and its interpretive case law—may hold obvious advantages.

<sup>283</sup> See Coroners and Justice Act 2009, c. 25, § 52(1) (Eng. & Wales), <https://www.legislation.gov.uk/ukpga/2009/25/section/52> [<https://perma.cc/772B-JUS8>] (limiting the plea for diminished responsibility to those “suffering from an abnormality of mental functioning which . . . arose from a recognised medical condition”); *Crimes Act 1900* (NSW) s 23A(1) (Austl.) (limiting the plea to those whose “capacity to understand events, or to judge whether [their] actions were right or wrong, or to control himself or herself, was substantially impaired by a mental health impairment or cognitive impairment”); Criminal Law (Insanity) Act 2006 (Act No. 11/2006) §§ 1, 6(1) (Ir.), <https://www.irishstatutebook.ie/eli/2006/act/11/enacted/en/html> [<https://perma.cc/A5P6-7UR7>] (limiting the plea to those “suffering from a mental disorder,” which “includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication”); Penal Code 1871, s 300 exception 7 (2022) (Sing.), <https://sso.agc.gov.sg/Act/PC1871?ProvIds=pr300-> [<https://perma.cc/PX6V-38JT>] (limiting the plea to those “suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development or any inherent causes or induced by disease or injury)”); see also *infra* note 406 (describing other foreign partial responsibility structures).

<sup>284</sup> See, e.g., Edward W. Mitchell, *Culpability for Inducing Mental States: The Insanity Defense of Dr. Jekyll*, 32 J. AM. ACAD. PSYCHIATRY & L. 63, 65–66 (2004) (arguing that an insanity defense should be denied to individuals who culpably create their defense-causing conditions by, for instance, discontinuing medication despite evidence that their symptoms return when they do).

<sup>285</sup> Theoretically this proxy could be overinclusive—a person with a psychotic disorder, while in a rational (medicated) state, could decide to stop taking medication knowing that she would likely return to a psychotic state in which she would be prone to commit the type of harm (or worse) that ultimately occurred. See Johnston, *supra* note 238. However, an examination of the peculiarities of mental disorder, its lived experience, the nature of the culpable omission, and the complicated, multi-factorial inquiry required to assess (and balance) the defendant’s insight, competence to self-administer medication, freedom of choice, and subjective anticipation of future harm—as well as the efficacy of the rejected medication and its side-effects—reduces the force of this concern and demonstrates the unworkability of any measure to assess culpability. *Id.*

<sup>286</sup> See Bonnie, *supra* note 268, at 53 (stressing the need “to minimize the risk of fabrication, moral mistakes, and unequal administration of the law” by “avoid[ing] unnecessary elasticity” in the

Mental disability in the abstract would certainly include psychosis.<sup>287</sup> Psychosis, characterized by detachment from reality, is universally understood as destructive of rationality.<sup>288</sup> Indeed, of all types of disorder, this category of severe mental illness most often satisfies the “mental disease or defect” element of states’ insanity standards.<sup>289</sup> Despite conforming to historical images of madness, defendants with psychosis are not always (or even usually) acquitted on grounds of insanity<sup>290</sup>—even though their positive symptoms (e.g., delusions and hallucinations) typically manifested at the time of, and often mate-

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definition of insanity). In light of widespread racial bias and the inherently empathetic inquiries that many proposed excusing conditions call for, it is foreseeable that such excuses could disproportionately benefit some demographics while being of little use to others.

<sup>287</sup> See *supra* note 13 and accompanying text. As Michael Moore has explained when discussing the relationship of psychosis to criminal responsibility, “psychosis” is typically used to denote “a particular kind of symptom, one having to do with the lack of reality testing due to hallucination, delusion, or other thought disorder.” This term is often used as a synonym for “‘madness’ and ‘craziness.’” Moore, *supra* note 243, at 683, 686.

<sup>288</sup> Fingarette, *supra* note 241, at 23–24; Bonnie, *supra* note 268, at 54; see Moore, *supra* note 243, at 680 (explaining that psychosis “prevents propositional knowledge from being appreciated as a normally sane adult person would appreciate it,” so individuals in the throes of psychosis lack “the attributes that mark the moral agency of persons”).

<sup>289</sup> See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* § 8.02, at 206 (4th ed. 2018) (stating that “virtually all studies of the subject indicate that the majority (60–90%) of defendants acquitted by reason of insanity are diagnosed as psychotic”).

<sup>290</sup> See Janet I. Warren et al., *Opinion Formation in Evaluating Sanity at the Time of the Offense: An Examination of 5175 Pre-trial Evaluations*, 22 BEHAV. SCIS. & L. 171, 180 (2004) (finding that, of the 35% (n=1078) of subjects evaluated for insanity who had psychotic disorders, 24% (n=255) were found insane); Robert E. Cochrane, Thomas Grisso & Richard I. Frederick, *The Relationship Between Criminal Charges, Diagnoses, and Psycholegal Opinions Among Federal Pretrial Defendants*, 19 BEHAV. SCIS. & L. 565, 574 tbl.1, 575 tbl.2 (2001) (finding that, of the 32% (n=529) of subjects evaluated for incompetence and insanity who had psychotic disorders, 40% (n=185) were evaluated as insane and 43% (n=465) as incompetent); Janet I. Warren, W. Lawrence Fitch, Park Elliott Dietz & Barry D. Rosenfeld, *Criminal Offense, Psychiatric Diagnosis, and Psycholegal Opinion: An Analysis of 894 Pretrial Referrals*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 63, 66–68 (1991) (finding that, of 617 defendants referred by Virginia courts for evaluation of criminal responsibility, those with schizophrenia (n=50) or other psychotic disorder (n=18) were determined to be insane by evaluators 25% (17/68) of the time). Many factors explain this phenomenon. See, e.g., Bonnie, *supra* note 268, at 55 (explaining that, even when psychotic symptoms are clearly established, “the adjudication of an insanity claim is going to involve a moral judgment about how those symptoms affected the experience of choosing at the time of the offense” and whether the defendant can be fairly blamed for acting on those symptoms—judgments that will turn on the intensity of the psychotic experience); Stephanie R. Penney, Andrew Morgan & Alexander I.F. Simpson, *Motivational Influences in Persons Found Not Criminally Responsible on Account of Mental Disorder: A Review of Legislation and Research*, 31 BEHAV. SCIS. & L. 494, 498, 499–501 (2013) (discussing the importance of motivation as distinguishing between incidents by defendants with serious mental illness that are symptom-based from those that are not); cf. Norman J. Finkel & Solomon M. Fulero, *Insanity: Making Law in the Absence of Evidence*, 11 MED. & L. 383, 398 (1992) (“One problem endemic to insanity outcome research is that there is no unarguably ‘correct verdict’ in the most interesting and contentious cases.”).

rially contributed to, their criminal acts.<sup>291</sup> To the trier of fact, this disconnect may generate particular distress over the absence of a middle verdict between the two poles of responsibility.<sup>292</sup> Although this Article advocates for a broad mental disability criterion, some jurisdictions may wish to limit a partial responsibility excuse to “severe” mental illnesses like psychotic disorders, as they do with their insanity tests.<sup>293</sup>

Confining a partial responsibility excuse to the context of mental disability—severe or otherwise—would preclude availability of formal mitigation (from this device) for commonly experienced conditions such as grief and stress and for situational conditions like poverty or history of abuse. To the extent that rationality is diminished by these conditions, that may seem unfair. But moral unease due to under-inclusiveness does not establish that a limiting principle should be rejected on moral, much less practical, grounds. The tragic reality is that trauma and social disadvantage mark the lives of most justice-involved individuals.<sup>294</sup> Rather than offering a partial excuse to reduce the punishment of most criminal defendants, it may be more efficient, prudent, and transparent to address widespread over-punishment through systemic reforms, as by introducing and reforming (i.e., scaling downward) sentencing guidelines. Excuses should attend the unusual.

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<sup>291</sup> See Pamela J. Taylor, *Motives for Offending Among Violent and Psychotic Men*, 147 BRIT. J. PSYCHIATRY 491, 494, 497 (1985) (finding that (1) 93% (112/121) of the men diagnosed with a form of psychosis detained prior to trial “showed active symptoms at the time of committing [the] criminal offense,” (2) 46% of the actively ill psychotic individuals were either directly (20%) or probably (26%) “driven to offend by their psychotic symptoms,” and (3) the offenses of 36% of the actively ill psychotic individuals likely reflected indirect consequences of psychosis (e.g., disorganization, chaotic existence, disability)).

<sup>292</sup> Indeed, many commentators have opined that covert “compromise verdicts” recognizing partial responsibility are not infrequent occurrences. See FINGARETTE & HASSE, *supra* note 246, at 234–35 (observing “that in actual practice, in one legalistic guise or another, juries do distinguish an intermediate condition in regard to the presence or absence of mental disability”); FINKEL, *supra* note 246, at 180–81 (“From the way jurors construe and contextualize insanity cases, it is clear that they oftentimes see other options [than guilty and NGRI] as best fitting, but run into difficulties and end up with ‘curious’ verdicts when those options are unavailable.”).

<sup>293</sup> See Johnston, *supra* note 30, app. (identifying Alabama, Ohio, Tennessee, Texas, and the federal system as requiring a “severe” mental disease or defect, and Nevada as requiring a “delusional state,” in their insanity tests).

<sup>294</sup> See Nancy Wolff, Jessica Huening, Jing Shi & B. Christopher Frueh, *Trauma Exposure and Posttraumatic Stress Disorder Among Incarcerated Men*, 91 J. URB. HEALTH 707, 707 (2014) (“For incarcerated adult males, trauma exposure rates range from 62.4 to 87 %.”); Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1, 5–9 (2015) (discussing the relationship between poverty and incarceration in the United States). See generally Nancy Wolff, Jing Shi & Jane A. Siegel, *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE & VICTIMS 469, 474 (2009) (finding, “based on a random sample of approximately 7,500 inmates housed in 12 adult male prisons and one female prison in a single state,” that 56% of males, and 54% of females had a history of childhood physical abuse).

### B. Deriving a Standard from Existing Statutory Frameworks

Related to the limiting principle of mental disability, this proposal recommends that states draw definitions of partial responsibility from existing insanity or GBMI standards. Others' proposals would require states to impose a new responsibility structure with wholly new language.<sup>295</sup> States' unresponsiveness to these proposals may reflect a balking at the "thorough sweeping of excuse-based doctrines" which adoption would entail.<sup>296</sup> In contrast, deriving understandings of partial responsibility from existing statutory frameworks should carry greater local legitimacy. In particular, as detailed below, the popularity of GBMI verdicts with legislatures and juries may make state legislatures more willing to extend those statutes into the realm of partial responsibility.<sup>297</sup>

#### 1. Advantages of "Imperfect Insanity"

Providing formal mitigation for "imperfect insanity"<sup>298</sup> or for a less restrictive constellation of impairments may be a more attractive option for states than a generic partial excuse fashioned from new cloth.<sup>299</sup> Authors of other generic partial excuse formulas, including Morse and Paul Robinson, have acknowledged this.<sup>300</sup> In particular, Robinson bemoans "current law's failure to recognize the need to take account of 'near excuses' by providing a mitigation where [a disability] reduces but does not extinguish blameworthiness, as the blameworthiness proportionality principle requires."<sup>301</sup>

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<sup>295</sup> Robinson's proposal, however, includes language derived from the MPC's EMED standard, commentary, and case law. See Robinson, *supra* note 246, at 263.

<sup>296</sup> Reid Griffith Fontaine, *On Passion's Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207, 237 (2009) (responding to Morse's proposal).

<sup>297</sup> Yet, because GBMI statutes do not reduce punishment or otherwise reflect diminished blameworthiness, those statutes yield few (but not zero) examples of sentencing options to accompany a partial responsibility verdict. But as will be discussed in future work, they do suggest possible means to address treatment and public safety concerns.

<sup>298</sup> By this, we mean the substantial satisfaction of a state's insanity standard. See Robinson, *supra* note 246, at 229 (arguing that formal mitigation should be provided to reflect reduced blameworthiness when the extent of disability "falls just short of that complete-defense point"); Dora W. Klein, *Rehabilitating Mental Disorder Evidence After Clark v. Arizona: Of Burdens, Presumptions, and the Right to Raise Reasonable Doubt*, 60 CASE W. RES. L. REV. 645, 651 n.31 (2010) ("Diminished responsibility defense is a sort of imperfect insanity defense." (citing Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1250 n.183 (2007))). We are grateful to Meredith Martin Rountree for suggesting this term.

<sup>299</sup> The proportionality rationale would also militate toward giving formal mitigation for other "near-defenses" such as immaturity, self-defense, duress, and mistake.

<sup>300</sup> See Morse, *supra* note 241, at 329; Robinson, *supra* note 246, at 219, 231–32, 250, 271. Ultimately, however, Robinson finds modifying each existing defense likely to be infeasible and, "[m]ore importantly, even if this collection of reforms could be enacted, it would only fix the discrete subset of problematic cases affected by specific doctrines." Robinson, *supra* note 246, at 250.

<sup>301</sup> Robinson, *supra* note 246, at 231.

Among possible partial excuses, imperfect insanity holds particular appeal. The insanity defense is a relatively stable fixture of our culture.<sup>302</sup> The basic elements of the defense reflect centuries of common law wisdom about the normatively desirable components of responsibility and, in most jurisdictions, the deliberation of representatives of the polity. As Michael Perlin has written, the insanity defense reflects “‘the fundamental moral principles of our criminal law,’ resting on ‘assumptions that are older than the Republic’ and ‘beliefs about human rationality, deterrability and free will.’”<sup>303</sup> A jurisdiction’s insanity defense hence holds the imprimatur of that community, and residents are at least somewhat familiar with the standard. Also, the large body of case law that typically accompanies the defense could provide a valuable interpretive guide.

Differences between jurisdictions’ insanity standards increase their value as starting points for a partial excuse. As the U.S. Supreme Court has recently emphasized, diversity exists in how jurisdictions have chosen to define criminal responsibility.<sup>304</sup> These variations reflect the thoughtful, continued engagement of elected legislators, and a partial excuse derived from a jurisdiction’s particular standard should hold greater legitimacy in that location than a generic, universal standard. As the community’s representatives should determine a particular offender’s responsibility, so should the community’s political representatives establish the standards of responsibility. Moreover, the degree of variation has been exaggerated: of the forty-eight jurisdictions with an affirmative insanity defense, forty-five recognize “moral incapacity” (i.e., they hold irresponsible “a defendant who did not understand the wrongfulness of [the] criminal act due to mental disease or defect”).<sup>305</sup> This component, of course, mirrors a generally accepted aspect of irresponsibility.<sup>306</sup> Indeed, the broad consensus around hold-

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<sup>302</sup> Four states—Idaho, Kansas, Montana, and Utah—have abolished their affirmative insanity defenses. See *Kahler v. Kansas*, 140 S. Ct. 1021, 1026 & n.3 (2020) (listing these states and erroneously including Alaska as having abolished its affirmative insanity defense; Alaska recognizes cognitive, but not moral, incapacity, see ALASKA STAT. §§ 12.47.010(a), .020 (2021)); see also IDAHO CODE § 18-207(1), (3) (2022); KAN. STAT. ANN. § 21-5209 (2022); MONT. CODE ANN. § 46-14-102 (2021); UTAH CODE ANN. § 76-2-305 (LexisNexis 2021).

<sup>303</sup> 4 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 9A-2 (2d ed. 2002) (citing *United States v. Lyons*, 739 F.2d 994 (5th Cir. 1984) (Rubin, J., dissenting) (internal citations omitted)). See generally Deborah W. Denno, *Neuroscience and the Plummeting Use of the Insanity Defense Across Twelve Decades: 1900–2020* (unpublished manuscript) (on file with author) (discussing Perlin’s work and the fundamental nature of the insanity defense).

<sup>304</sup> *Kahler*, 140 S. Ct. app. at 1051–59 (Breyer, J., dissenting) (compiling current insanity standards).

<sup>305</sup> See Johnston, *supra* note 30, at 308.

<sup>306</sup> See, e.g., Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongoers*, 42 TEX. TECH. L. REV. 247, 253 (2009) (“[P]eople should not be excused for their wrongdoing unless they can show that, at the time of the offense, they substantially lacked the capacity or fair opportunity

ing irresponsible a person who, due to mental abnormality, could not understand the wrongfulness of her offense is reflected in insanity standards around the globe.<sup>307</sup> Besides, to the extent that scholars fret over the precise wording of the partial excuse, numerous empirical studies demonstrate that words are of little, if any, consequence in insanity verdict distributions.<sup>308</sup>

At their heart, contemporary standards of insanity recognize reasoning impairments from mental pathology. Because only seven states specify that a relevant impairment must arise from a “defect of reason,”<sup>309</sup> this conclusion requires some explanation. States generally measure a defendant’s moral incapacity by her ability to “appreciate” (following the example set by the ALI in its model insanity statute)<sup>310</sup> or “know” (following the language of the 1843 *M’Naghten’s Case* decision by the House of Lords)<sup>311</sup> the moral or legal wrongfulness of her act at the time it was committed.<sup>312</sup> Roughly an equal number of jurisdictions employ each term in practice, if not in the express language of their statutes.<sup>313</sup>

Reviewing the origin and current use of “appreciate” and “know” reveals the centrality of rationality and reasoning abilities. Commentary to the MPC shows that the ALI chose the term “appreciate” to convey the relevance of the full spectrum of reasoning capacities, including both affective and cognitive

to understand the relevant facts surrounding their conduct, appreciate that their conduct violates society’s mores, or conform their conduct to the dictates of the law.”)

<sup>307</sup> See generally RITA J. SIMON & HEATHER AHN-REDDING, *THE INSANITY DEFENSE, THE WORLD OVER* (2006) (establishing that moral incapacity is recognized in the insanity standards of Canada, Argentina, Brazil, Germany, Great Britain, Bulgaria, Poland, Israel, Turkey, India, Japan, Nigeria, South Africa, and Australia).

<sup>308</sup> See, e.g., Norman J. Finkel, Ray Shaw, Susan Bercaw & Juliann Koch, *Insanity Defenses: From the Jurors’ Perspective*, 9 LAW & PSYCH. REV. 77, 81–92 (1985) (finding no significant effect in the use of six insanity instructions in the verdict distributions of mock jurors); James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509, 522–23 (1991) (finding no significant effects for insanity instructions, the assignment of burden of proof, or standard of proof).

<sup>309</sup> These jurisdictions include Minnesota, Mississippi, New Jersey, North Carolina, Oklahoma, Pennsylvania, and South Dakota. See Johnston, *supra* note 30, at 309 & n.79.

<sup>310</sup> See MODEL PENAL CODE § 4.01(1) (AM. L. INST. 1985) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” (alteration in original)).

<sup>311</sup> See *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 722 (HL) (“[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 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>312</sup> Johnston, *supra* note 30, app.

<sup>313</sup> Though “the insanity tests of only thirteen jurisdictions include the term ‘know,’ states conditioning insanity on an inability to distinguish or tell right from wrong typically interpret this language in accordance with the *M’Naghten* standard.” *Id.* at 310 n.83 (internal citation omitted).

abilities.<sup>314</sup> Consequently, courts interpreting this term tend to “permit consideration of any cognitive or emotional impairment relevant to reasoning, judgment, and the evaluation of the moral nature of one’s act.”<sup>315</sup>

The meaning of “know” is more contested and over time has been a source of fervent disagreement.<sup>316</sup> Many commentators have asserted that “know” must refer only to cognitive abilities,<sup>317</sup> given contemporary understandings of rationalism at the time *M’Naghten* was decided.<sup>318</sup> Moreover, some have argued that “inability to know” can only be satisfied by total impairment of cognitive processes, or by “totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots.”<sup>319</sup> Under this interpretation, an act motivated by pathological reasoning or impulses would be deemed sane so long as the defendant understood in an intellectual sense that the action was wrong.<sup>320</sup>

Yet, properly understood, “know” and “appreciate” should carry similar meanings and encompass similar abilities.<sup>321</sup> *M’Naghten* specified that “knowledge” must be the product of rational thinking.<sup>322</sup> 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 “he did not know” the act’s wrongfulness.<sup>323</sup> The opinion also conditions criminal responsibility on sufficiency of reason.<sup>324</sup> Therefore, consideration of “knowledge” should include any ability requisite to rational decision-making, including both cognitive and affective capacities.<sup>325</sup> It appears that modern courts largely, though not completely, agree.<sup>326</sup>

<sup>314</sup> See MODEL PENAL CODE § 4.01 app. C, at 212 (discussing the importance of reason to justice of blame); *id.* § 4.01 cmt. 2, at 166, cmt. 3, at 169.

<sup>315</sup> Johnston, *supra* note 30, at 311.

<sup>316</sup> See COPPOLA, *supra* note 246, at 22–24.

<sup>317</sup> See *id.* at 14–15, 26; Arval A. Morris, *Criminal Insanity*, 43 WASH. L. REV. 583, 605 (1968).

<sup>318</sup> R.J. Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111, 121 (1975).

<sup>319</sup> GREGORY ZILBOORG, *MIND, MEDICINE, & MAN* 273 (1943).

<sup>320</sup> Morris, *supra* note 317, at 606 n.113 (quoting Henry A. Davidson, *Criminal Responsibility: The Quest for a Formula*, in *PSYCHIATRY AND THE LAW* 61, 61–62 (Paul H. Hoch & Joseph Zubin eds., 1955)).

<sup>321</sup> See *Commonwealth v. McHoul*, 226 N.E.2d 556, 561 (Mass. 1967) (“We think that the use of ‘appreciate’ rather than ‘know’ expresses what the word ‘know’ in the classical statement of the rule means in the light of modern knowledge. Many psychiatrists, as indicated in the records in recent cases, appear to have recognized this.”).

<sup>322</sup> FINGARETTE, *CRIMINAL INSANITY*, *supra* note 241, at 198.

<sup>323</sup> *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 722; see FINGARETTE, *supra* note 241, at 198, 210–11.

<sup>324</sup> *M’Naghten*, 8 Eng. Rep. at 772.

<sup>325</sup> See Johnston & Leahey, *supra* note 9, at 1791 n.66 (listing scholars who “have advocated for a broad conception of knowledge”).

<sup>326</sup> *Id.* at 1790–93 (asserting that courts typically construe “knowledge” of wrongfulness to include appreciation, rationality, and capacity to reason).

Thus, a partial responsibility standard derived from an existing insanity test would arguably sufficiently identify its “central excusing notion”—here, impaired rationality.<sup>327</sup> Granted, tests that other scholars propose are drafted more tightly and explicitly around diminished rationality. Fingarette and Hasse, for instance, suggested granting mitigation when there was “a lack of mental capacity for conduct that is rational (in regard to the criminal significance of the act)” and that lack of rationality played a material—but not the chief—role in the defendant’s commission of the criminal act.<sup>328</sup> Similarly (but more pithily), Morse would find a defendant guilty but partially responsible when “the defendant suffered from substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant’s criminal conduct.”<sup>329</sup> No existing insanity standard is drafted so neatly around impaired rationality. But, understanding the physical and moral nature of one’s action is certainly a component of rationality, and the origin of modern insanity standards and many jurisdictions’ precedent indicate that assessment of those abilities evinces concern for a broad range of reasoning impairments.

Nonetheless, as drafted, contemporary insanity standards are imperfect, and the many modeled on the *M’Naghten* standard have been subject to withering criticism, especially as to their narrow scope and ambiguous meaning.<sup>330</sup> Thus, using these standards as the model for a partial responsibility defense could perpetuate the imperfections inherent in modern insanity doctrines. Urging courts to interpret key terms broadly (such as “know”) is one way to mitigate, at least in part, unfairness in the greater (and lesser) excuse and allow irresponsibility to better accommodate scientific understandings of reasoning and moral decision-making.

Examples exist, however, for using criteria other than the substantial satisfaction of a state’s existing insanity test as the basis for a partial responsibility standard. The next Subsection explains how the experience of GBMI statutes supports the creation of a partial responsibility excuse. These statutes also may provide clearer language that could be used for this purpose.

## 2. Model of Guilty but Mentally Ill Verdicts

States’ history with GBMI statutes suggests that legislatures may be willing to endorse a partial responsibility standard, and these statutes could pro-

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<sup>327</sup> Dressler, *supra* note 39, at 986 n.114 (arguing that “any generic partial excuse ought to be . . . explicit . . . regarding the ‘central excusing notion’”).

<sup>328</sup> FINGARETTE & HASSE, *supra* note 246, at 265 (parentheses added). The degree of mitigation afforded would vary based on the defendant’s culpability for her irrationality. *See id.* at 199.

<sup>329</sup> Morse, *supra* note 246, at 300 (emphasis omitted).

<sup>330</sup> *See* DRESSLER, *supra* note 27, § 25.04[C][1][b].



vide model language for this purpose. Thirteen states currently provide a GBMI verdict,<sup>331</sup> and two additional states offer a “Guilty Except for Insanity” (GEI) verdict.<sup>332</sup> GBMI statutes vary widely,<sup>333</sup> but one commonality is their provision of a “middle ground” verdict between “guilty” and “not guilty by reason of insanity.”<sup>334</sup> In particular, these verdicts permit a jury to find guilty but label as “mentally ill” a defendant with a mental disorder that causes (or, at the moment of the crime, caused) certain rationality impairments.<sup>335</sup> States enacted these statutes in an effort to reduce the (mis)perceived high number of undeserving insanity acquittals by providing a “compromise” option for juries.<sup>336</sup> Although exceptions exist,<sup>337</sup> they typically carry no mandatory treat-

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<sup>331</sup> ALASKA STAT. § 12.47.030 (2021); DEL. CODE ANN. tit. 11, § 401 (2022); GA. CODE ANN. § 17-7-131 (2021); 720 ILL. COMP. STAT. 5/6-2 (2021); IND. CODE § 35-36-2-3 (2021); KY. REV. STAT. ANN. § 504.130 (West 2022); MICH. COMP. LAWS § 768.36 (2022); NEV. REV. STAT. § 174.035(1) (2020); OKLA. STAT. tit. 22, § 1161(A)(1) (2022); 18 PA. CONS. STAT. § 314 (2022); S.C. CODE ANN. § 17-24-20 (2021); S.D. CODIFIED LAWS § 23A-26-14 (2022); UTAH CODE ANN. § 76-5-205.5 (LexisNexis 2022).

<sup>332</sup> ARIZ. REV. STAT. ANN. § 13-502 (2022); OR. REV. STAT. § 161.295 (2021). The implications of these statutes for a possible partial responsibility standard will be assessed in a future work.

<sup>333</sup> See *infra* Subsection III.B.2.c.

<sup>334</sup> See Roy E. Pardee III, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 245 (1994). Oklahoma is an exception. See *infra* note 371 and accompanying text.

<sup>335</sup> See *infra* Subsection III.B.2.c. (reviewing criteria).

<sup>336</sup> Whether legislatures sought to reduce the number of insanity verdicts—or merely *improper* insanity verdicts—is contested. Compare *State v. Hornsby*, 484 S.E.2d 869, 872 (S.C. 1997) (“The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society’s benefit while incarcerated.”), and Ronald L. Poulson, Ronald L. Braithwaite, Michael J. Brondino & Karl L. Wuensch, *Mock Jurors’ Insanity Defense Verdict Selections: The Role of Evidence, Attitudes, and Verdict Options*, 12 J. SOC. BEHAV. & PERSONALITY 743, 744 (1997) (“It was clear that the role of the GBMI verdict option was to cause a reduction in what might otherwise have been [NGRI] verdicts.”), with *People v. Ramsey*, 375 N.W.2d 297, 301 (Mich. 1985) (“The major purpose in creating the [GBMI] verdict is obvious. It was to limit the number of persons who, in the eyes of the Legislature, were *improperly* being relieved of all criminal responsibility by way of the insanity verdict.”). Michigan enacted the first GBMI statute in 1975. See Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 CIN. L. REV. 943, 954, 987 (1987). Twelve states—Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Nevada, New Mexico, Pennsylvania, South Carolina, South Dakota, and Utah—followed Michigan’s lead after the acquittal of John Hinckley in 1982 for the attempted assassination of President Ronald Reagan. See *id.* at 946–48; Mark A. Woodmansee, *The Guilty but Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 341–45 (1996). In 2010, New Mexico repealed its GBMI law. 2010 N.M. Laws 859. Oklahoma added its GBMI verdict in 2016. 2016 Okla. Sess. Laws 932.

<sup>337</sup> See Woodmansee, *supra* note 336, at 358–60; ALASKA STAT. § 12.47.050(b) (2021); KY. REV. STAT. ANN. § 504.150 (West 2022).

ment consequences and no diminution of punishment.<sup>338</sup> Scholars have widely condemned GBMI statutes as confusing and unjust.<sup>339</sup> Yet they have been upheld—and even lauded—by courts, in part for their ability to draw attention to the “spectrum of criminal responsibility” and to clarify the nature of irresponsibility. GBMI statutes have proven popular with juries, and empirical studies demonstrate their powerful effect on verdict distributions.<sup>340</sup> Juror experience, courts’ endorsement, and the language of their standards may make GBMI statutes fruitful sources of inspiration for a partial responsibility verdict.

### *a. Accords with Jurors’ Intuitions of Justice*

Empirical research documents that jurors view the GBMI verdict as a more just option for some defendants than alternatives. Interestingly, jurors appear to use the verdict to “correct” both NGRI and guilty verdicts.<sup>341</sup> Trial

<sup>338</sup> For discussions on the lack of mandatory treatment requirements, see Jennifer S. Bard, *Rearranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL’Y 1, 37–40 (2004–2005); Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 512–14 (1985). For discussions of the failure to reduce punishment, see Anne S. Emanuel, *Guilty but Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 38 (1989) (noting that GBMI offenders are still eligible for the death penalty in all GBMI states except for Alaska and Michigan); Lauren G. Johansen, *Guilty but Mentally Ill: The Ethical Dilemma of Mental Illness as a Tool of the Prosecution*, 32 ALASKA L. REV. 1, 10–11 (2015); Slobogin, *supra*, at 512, 518, n.111; Woodmansee, *supra* note 336, at 360.

<sup>339</sup> See, e.g., Bard, *supra* note 338, at 38–39 (characterizing the verdict as “a gimmick to encourage jurors to deliver a guilty verdict, even though it is obvious that the defendant suffers from mental illness”); Linda C. Fentiman, “*Guilty but Mentally Ill*”: *The Real Verdict Is Guilty*, 26 B.C. L. REV. 601, 622–24, 628 (1985) (framing the problems of jury compromise and confusion as a due process objection to the GBMI verdict); Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 528 (1982) (objecting to the GBMI verdict on the ground that it could cause jury confusion and compromise); Ralph Slovenko, *Commentaries on Psychiatry and Law: “Guilty but Mentally Ill,”* 1982 J. PSYCHIATRY & L. 541, 544 (asserting that, contrary to most jurors’ belief, the GBMI verdict is “a distinction without a difference” when compared to the guilty verdict: it “could just as well be ‘guilty but cirrhosis’ or ‘guilty but flat feet’”); Woodmansee, *supra* note 336, at 374 (arguing that, by punishing a GBMI defendant as if plainly guilty, “the penal system ignores the defendant’s reduced level of culpability”).

<sup>340</sup> See *infra* note 341 (discussing outcomes of simulated and field studies).

<sup>341</sup> Simulated studies involving GBMI, NGRI, guilty, and not guilty verdicts have found that providing a GBMI option displaces both NGRI and guilty verdicts. See, e.g., Poulson et al., *supra* note 336, at 744–45 (summarizing studies). Field studies measuring the effect of GBMI statutes on NGRI verdicts have reached conflicting conclusions. Compare John Klofas & Ralph Weisheit, *Guilty but Mentally Ill: Reform of the Insanity Defense in Illinois*, 4 JUST. Q. 39, 43 (1987) (finding no effect on NGRI verdicts in Illinois), with Lisa A. Callahan, Margaret A. McGreevy, Carmen Cirincione & Henry J. Steadman, *Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict: Georgia’s 1982 GBMI Reform*, 16 LAW & HUM. BEHAV. 447, 450–52 (1992) (finding, in a ten-year study on the effects of the Georgia GBMI verdict, that the total number of NGRI findings decreased by roughly 10%).

judges typically do not inform jurors of the consequences of a GBMI pronouncement,<sup>342</sup> and studies indicate that jurors equate GBMI verdicts with verdicts of lesser responsibility.<sup>343</sup> Indeed, when researchers have asked subjects to rate defendants' responsibility capabilities, the ratings of those defendants found GBMI have fallen neatly between the ratings of those found NGRI and guilty.<sup>344</sup> Studies have concluded that jurors finding defendants GBMI are more confident in their verdict.<sup>345</sup> In addition, GBMI jurors "more strongly agreed that such verdicts fairly captured the relationship between mental illness and responsibility than did persons reaching guilty and NGRI verdicts."<sup>346</sup>

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<sup>342</sup> See Erin E. Cotrone, *The Guilty but Mentally Ill Verdict: Assessing the Impact of Informing Jurors of Verdict Consequences* 4–5 (Nov. 12, 2016) (Ph.D. dissertation, University of South Florida), <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=7683&context=etd> [<https://perma.cc/HQ5J-E7AD>].

<sup>343</sup> See Finkel & Fulero, *supra* note 290, at 395–96 (discussing studies and concluding "that subjects are using the [third option of a 'diminished responsibility' verdict] as a partial responsibility verdict"); John D. Melville & David Naimark, *Punishing the Insane: The Verdict of Guilty but Mentally Ill*, 30 J. AM. ACAD. PSYCHIATRY & L. 553, 554 (2002) ("Research indicates that juries view GBMI as an intermediate verdict for persons not quite as culpable as guilty, but more culpable than NGRI." (footnotes omitted)); Caton F. Roberts, Erica L. Sargent & Anthony S. Chan, *Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty but Mentally Ill Instructions*, 17 LAW & HUM. BEHAV. 261, 273 (1993) (concluding that "the evidence here is highly suggestive that some jurors may be using a GBMI verdict to signify diminished blame and punishment").

<sup>344</sup> See Roberts et al., *supra* note 343, at 268 tbl.2 (finding that the mean ratings of GBMI voters fell between the mean ratings of guilty and NGRI voters as to the defendant's level of mental disorder, capacity for controlling psychotic beliefs, capacity for displaying rational behavior, and levels of deserved blame and punishment); Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 LAW & HUM. BEHAV. 349, 366 (1991) (finding that GBMI voters' perceptions of the responsibility capacities of defendants were intermediate between ratings of NGRI and guilty voters); Norman J. Finkel & Kevin B. Duff, *The Insanity Defense: Giving Jurors a Third Option*, 2 FORENSIC REPS. 235, 249–51, 257 (1989) (finding, in an experiment regarding a third verdict called "diminished responsibility," that subjects' ratings of diminished responsibility defendants' responsibility for their acts and deserved degree of mitigation differed significantly from ratings of defendants found NGRI or guilty); Poulson et al., *supra* note 336, at 746 (describing the findings of a previous study, which found that the mean ratings of GBMI voters fell between the mean ratings of guilty and NGRI voters as to: "1) whether the defendant could appreciate the criminality of the crime; 2) whether he could have conformed his conduct to the requirements of the law; and, 3) whether the defendant was believed to have suffered from an antisocial personality disorder or from schizophrenia").

<sup>345</sup> Caton F. Roberts, Stephen L. Golding & Frank D. Fincham, *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 226 (1987) (reporting higher confidence ratings for GBMI voters than those deciding NGRI or guilty).

<sup>346</sup> Roberts & Golding, *supra* note 344, at 366; *see id.* at 368–69 (finding, in a study using a sample of 145 undergraduates and 144 jury-eligible community residents, that "[o]ver 80% of . . . subjects felt that the phrase 'guilty but mentally ill' captured the relationship between mental illness and criminal responsibility in a way that was fair and moral"); Roberts et al., *supra* note 345, at 226 ("The overwhelming majority (86%) of subjects felt that the GBMI sentencing alternative was moral, just, and an adequate means of providing for the treatment needs of mentally ill offenders.").

These expressions suggest the GBMI verdict satisfies the important principle of “blameworthiness proportionality,” one of the nine “shared intuitions of justice” identified by Robinson. Reflecting his decades of empirical research on community notions of justice,<sup>347</sup> Robinson has crystalized “nine core principles that the evidence suggests have near universal appeal across demographics, cultures, and history.”<sup>348</sup> As Robinson explains, these diverse bodies of evidence document the fundamental intuition that “the extent of liability and punishment should be proportionate to the offender’s wrongdoing and blameworthiness.”<sup>349</sup> Discussing the empirical data, Robinson observes:

The principle of blameworthiness proportionality applies not only to varying punishment according to level of culpability but also to varying punishment according to level of cognitive or control incapacity. Thus, even where an offender may not get a complete excuse defense for . . . insanity . . . or any other excusing condition, subjects typically would provide reduced liability and punishment to the extent that such incapacity reduces the offender’s blameworthiness for the offense.<sup>350</sup>

Simulated studies indicate that jurors employ the GBMI verdict in this manner, and jurors’ feelings of confidence and their expressed appreciation for the verdict’s more accurate reflection of culpability support Robinson’s core insight.

Despite concerns that juries will use the GBMI verdict to “avoid grappling with the difficult moral issues inherent in adjudicating guilt or innocence,”<sup>351</sup> and wind up “convicting persons who were not responsible for their acts,”<sup>352</sup> jurors’ selection of the GBMI verdict appears to be discerning, not arbitrary, and correlates with evidentiary factors.<sup>353</sup> Across various experimental methodologies, settings, and samples, simulated studies confirm that

<sup>347</sup> See Robinson, *supra* note 246, at 249 n.84; PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 239–400 (2013) (describing empirical research exploring the public’s ideas about just desert and proper punishment).

<sup>348</sup> Paul H. Robinson, *Criminal Law’s Core Principles*, 14 WASH. U. JURIS. REV. 153, 192 (2021).

<sup>349</sup> *Id.* at 182.

<sup>350</sup> *Id.* at 190. To effectuate blameworthiness proportionality, Robinson has proposed a generic mitigation provision. See *id.* at 211; Robinson, *supra* note 246, at 255–62.

<sup>351</sup> AM. PSYCHIATRIC ASS’N, STATEMENT ON THE INSANITY DEFENSE 9 (1982).

<sup>352</sup> Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 277 (1982).

<sup>353</sup> See Finkel & Duff, *supra* note 344, at 235 (concluding that, in a study of fifty-four mock jurors using four insanity cases and verdicts of guilty, NGRI, and a third “diminished responsibility” (DR) option, “[m]ock jurors used the DR verdict selectively (no exclusive use found), discriminately (significant case-by-case differences), and appropriately (consistent with their construals and judgments of the cases)”). One problem inherent in testing the effect of the GBMI verdict is the lack of an independent criterion for correctness of a verdict. *Id.* at 238.

choosing a GBMI verdict reflects jurors' view of the evidence.<sup>354</sup> Construal of the defendant's mental status appears to have the strongest effect on verdict selection, with GBMI voters interpreting the defendant's level of mental impairment at an intermediate level between NGRI and guilty voters' interpretations.<sup>355</sup> GBMI voters also tend to fall between those voter categories in how credible they find defense versus prosecution experts.<sup>356</sup> In addition, unlike guilty voters, GBMI voters tend to believe the defendant can be rehabilitated.<sup>357</sup> As some have argued, "It appears that jurors who vote GBMI may best described [sic] as middle-of-the-road jurors . . . ."<sup>358</sup> In sum, empirical research on the use of the GBMI verdict demonstrates that jurors treat the verdict as one of partial responsibility and employ it in a discerning, principled manner.

### *b. Courts' Views Pertaining to Responsibility*

In rejecting various constitutional challenges, state and federal courts have recognized the value of GBMI statutes in clarifying the nature of irresponsibility.<sup>359</sup> For example, the Supreme Court of New Mexico characterized the verdict as:

[C]larify[ing] for the jury the distinction between a defendant who is not guilty by reason of insanity and one who is mentally ill yet not criminally insane and, therefore, is criminally liable. . . .

By focusing the jury's attention on the question of legal culpability, the statute increases the likelihood that the jury will return a verdict in accordance with the appropriate legal standards—and it is a legitimate state interest to see juries return verdicts that accord with the law.<sup>360</sup>

This clarifying function is particularly valuable given the "complicated and to some extent conflicting" meanings that "insane" holds in society, medicine, and law.<sup>361</sup>

Notably, appellate courts in these discussions have recognized that GBMI verdicts reflect assessments of partial responsibility. The Court of Appeals of

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<sup>354</sup> Poulson et al., *supra* note 336, at 752.

<sup>355</sup> *See id.* at 753; Roberts et al., *supra* note 345, at 221.

<sup>356</sup> *See* Poulson et al., *supra* note 336, at 753–54.

<sup>357</sup> *See id.* at 753.

<sup>358</sup> *See id.* at 752.

<sup>359</sup> *State v. Hornsby*, 484 S.E.2d 869, 874 (S.C. 1997) (endorsing its state statute for "ensur[ing] the jury applies the legal definition of insanity correctly by underscoring that a person may be mentally ill, yet not legally insane" (citations omitted)).

<sup>360</sup> *State v. Neely*, 819 P.2d 249, 252 (N.M. 1991).

<sup>361</sup> *See id.* at 252–53 (quoting *U.S. ex rel. Weismiller v. Lane*, 815 F.2d 1106, 1112 (7th Cir. 1987)).

Michigan expressed that “such instructions, by disclosing the full spectrum of criminal responsibility, may afford the jurors a better understanding of the gradation of responsibility in the law . . . and thereby help their assessment of the case.”<sup>362</sup> The supreme courts of South Dakota, South Carolina, and New Mexico quoted this language in upholding their GBMI statutes, as did the U.S. Court of Appeals for the Seventh Circuit regarding Illinois’s GBMI statute.<sup>363</sup> Similarly, the U.S. Court of Appeals for the Tenth Circuit emphasized that, by “disclosing gradations of criminal responsibility,” the GBMI verdict “may actually serve to clarify the jury’s duty.”<sup>364</sup> Also reflecting a partial responsibility notion, multiple courts have likened the availability of a GBMI verdict to lesser included offense instructions.<sup>365</sup>

Reflecting a different understanding of the verdict, the Seventh Circuit has equated a state’s provision of a GBMI verdict with a decision to allow “a jury to decide the presence or absence of [a] mitigating factor.”<sup>366</sup> The court explained:

[T]he finding of guilty but mentally ill provides a sentencing guide to the trial judge. . . . Under Illinois law, a sentencing judge is directed to consider in mitigation “substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.”

. . . A defendant is “mentally ill” under Illinois law if he suffered from a “substantial disorder of thought, mood, or behavior . . . at the time of the commission of the offense . . . which impaired [his] judgment, but not to the extent that he [was legally insane].” Such a condition quite obviously, in the language of the statute, “tends to excuse” the defendant’s conduct, although not establishing a complete defense.<sup>367</sup>

In this way, the GBMI statute facilitates “the just sentencing of mentally ill defendants.”<sup>368</sup>

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<sup>362</sup> *People v. Bailey*, 370 N.W.2d 628, 630 (Mich. Ct. App. 1985) (citing *People v. Rochowiak*, 330 N.W.2d 669 (Mich. 1982)).

<sup>363</sup> See *Weismiller*, 815 F.2d at 1113; *Neely*, 819 P.2d at 253; *Hornsby*, 484 S.E.2d at 873; *State v. Baker*, 440 N.W.2d 284, 288 (S.D. 1989).

<sup>364</sup> *Neely v. Newton*, 149 F.3d 1074, 1081 (10th Cir. 1998).

<sup>365</sup> See *Hornsby*, 484 S.E.2d at 874 (“The risk of a compromise is neither greater than nor different from that presented when a jury is instructed on lesser included offenses, which have not been found to create an impermissible risk of jury compromise.”); *Weismiller*, 815 F.2d at 1113 (similar).

<sup>366</sup> *Weismiller*, 815 F.2d at 1111–12.

<sup>367</sup> *Id.* at 1111 (some alterations in original) (first quoting ILL. REV. STAT. ch. 38, ¶ 1005-5-3.1(4) (current version at 730 ILL. COMP. STAT. 5/5-5-3.1(4) (2021)); and then quoting ILL. REV. STAT. ch. 38, ¶ 6-2 (current version at 720 ILL. COMP. STAT. 5/6-2(d) (2021))).

<sup>368</sup> *Id.*

Five conclusions may be drawn from courts' discussion of the legitimate state interests served by GBMI statutes.<sup>369</sup> First, rather than confuse jurors, GBMI statutes help clarify the nature of insanity. Second, in assessing whether a defendant meets the standard for GBMI or another verdict, jurors are determining where the defendant falls on a spectrum of responsibility. Third, GBMI criteria are excusing in nature. Fourth, impaired judgment due to mental disorder (which does not reach the threshold of insanity) is an appropriate basis for a unique verdict. Fifth, jurors are fully capable of distinguishing between certain levels of impairment and responsibility. Each of these conclusions drawn from GBMI precedent indirectly supports the creation of a generic partial excuse for diminished rationality due to mental disability.

The positive experience of legislatures, jurors, and courts with GBMI verdicts suggests these statutes' language could serve as useful models for partial responsibility standards. Indeed, taking these statutes and adding appropriate punishment reduction and treatment measures would go a long way in meeting some of the most powerful objections raised against GBMI verdicts.<sup>370</sup>

### *c. Language*

States' GBMI statutes include substantive criteria indicative of diminished responsibility which could be of use in a partial responsibility construct.<sup>371</sup> The approach and precise language of GBMI statutes vary. Some jurisdictions use the ALI insanity standard, or aspects of that standard, as the basis of their GBMI verdicts. A larger number of states define "mental illness" as including impairments to rationality and decision-making. The Subsections below highlight variations in GBMI language that, due to their clarity or express relationship to rationality impairment, may be particularly useful for a partial responsibility standard. A future article will assess lessons that GBMI statutes, and the partial responsibility standards of foreign jurisdictions, offer for potential treatment and post-sentence consequences of partial responsibility.<sup>372</sup>

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<sup>369</sup> Courts have identified other state interests as well, such as identifying individuals likely to need treatment. *See, e.g., Newton*, 149 F.3d at 1081.

<sup>370</sup> *See supra* note 338 and accompanying text.

<sup>371</sup> Oklahoma presents a stark exception. Its "Guilty with Mental Defect" standard does not include any rationality impairment. Instead, it merely excludes from the population of those meeting the criteria for insanity those who have "been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged." OKLA. STAT. tit. 22, § 1161(H)(4) (2022).

<sup>372</sup> *See Johnston, supra* note 238.

### i. Model Penal Code

A few states use the ALI's insanity test as the basis for their GBMI standards.<sup>373</sup> These states typically employ the *M'Naghten* standard or one of its components as their insanity test, allowing the GBMI verdict to recognize a different aspect of irresponsibility and sometimes a lesser degree of moral incapacity. For example, Pennsylvania recognizes cognitive and moral incapacity in its traditional *M'Naghten* insanity test.<sup>374</sup> In contrast, its GBMI standard requires a lesser degree of moral incapacity and includes a volitional incapacity component through incorporation of the ALI standard.<sup>375</sup> Similarly, Alaska limits insanity to cognitive incapacity<sup>376</sup> and authorizes a GBMI verdict when the defendant "lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of [the criminal] conduct or to conform that conduct to the requirements of the law."<sup>377</sup> Finally, South Carolina limits insanity to those lacking moral capacity,<sup>378</sup> and treats as GBMI those who "because of mental disease or defect . . . lacked sufficient capacity to conform [their] conduct to the requirements of the law."<sup>379</sup> Each of these states treats as GBMI those who lack volitional incapacity while reserving acquittal on grounds of insanity for those who experienced cognitive or moral incapacity when committing the criminal act.

Likewise, the ALI's insanity standard could provide useful fodder for a partial responsibility statute. Section 4.01 of the MPC reflects a decade of research and drafting.<sup>380</sup> Throughout this process, the ALI's esteemed body of judges, practicing lawyers, and academics sought to craft a clear and compre-

<sup>373</sup> See *supra* note 310 and accompanying text.

<sup>374</sup> 18 PA. CONS. STAT. § 314(c)(2) (2022) (defining "legal insanity" as "the defendant . . . laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong").

<sup>375</sup> Pennsylvania's GBMI statute defines "mentally ill" as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *Id.* § 314(c)(1).

<sup>376</sup> See ALASKA STAT. § 12.47.010(a), (d) (2021) (limiting the affirmative defense of insanity to defendants who were, at the time of commission, "unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct").

<sup>377</sup> *Id.* § 12.47.030(a).

<sup>378</sup> S.C. CODE ANN. § 17-24-10(A) (2021) ("It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.").

<sup>379</sup> *Id.* § 17-24-20(A) ("A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in [the insanity statute], but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.").

<sup>380</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323–24 (2007).



hensive version of the insanity test that represents accepted principles of irresponsibility.<sup>381</sup> Their formulation was originally “based on the view that a sense of understanding broader than mere cognition, and a reference to volitional incapacity[,] should be achieved directly in the formulation of the defense, rather than left to mitigation in the application of *M’Naghten*.”<sup>382</sup> Indeed, the ALI’s inclusion of a volitional component was one of its most widely lauded innovations,<sup>383</sup> and at one time over half the states had adopted it.<sup>384</sup> For those states currently employing a stringent *M’Naghten* test, the ALI’s language may possess the clarity and reflect the attributes that a state would find attractive in a partial responsibility standard.

## ii. Impaired Rationality

As an alternative, a partial responsibility standard could specify impairments that diminish responsibility. Doing so may hold the advantage of more clearly specifying the source of the excuse.<sup>385</sup> Again, GBMI statutes could provide useful templates, although jurisdictions would need to ensure that daylight clearly exists between their insanity and partial responsibility standards to avoid juror confusion.<sup>386</sup> Delaware’s GBMI statute, for instance, identifies as GBMI a defendant who:

[A]t the time of the conduct charged, . . . suffered from a mental illness or serious mental disorder which substantially disturbed such person’s thinking, feeling or behavior and/or that such mental illness or serious mental disorder left such person with insufficient will-

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<sup>381</sup> See MODEL PENAL CODE § 4.01 cmts. 2 & 3, at 165–74 (AM. L. INST. 1985) (discussing the ALI’s reasoning process); Francis A. Allen, *The Rule of the American Law Institute’s Model Penal Code*, 45 MARQ. L. REV. 495, 500 (1962) (“This language reveals on its face several of the assumptions that guided Professor Weschler and others who assisted him in drafting the Model Penal Code formulation. First, a test of responsibility should give expression to an intelligible principle. It is the obligation of the law to determine the applicable principle and to express it with all possible clarity and exactitude.”).

<sup>382</sup> MODEL PENAL CODE § 4.01 cmt. 3, at 168.

<sup>383</sup> See Eugene M. Fahey, Laura Groschadl & Brianna Weaver, “*The Angels That Surrounded My Cradle*”: *The History, Evolution, and Application of the Insanity Defense*, 68 BUFF. L. REV. 805, 819 (2020).

<sup>384</sup> See *id.*

<sup>385</sup> See *supra* note 327 and accompanying text.

<sup>386</sup> See Morris, *supra* note 339, at 527–28 (comparing the wording of Michigan’s insanity and GBMI tests to show the difficulty of ascertaining the relative level of impairment required for each). In addition to states drafting the partial excuse to maximize clarity, judicial instructions could emphasize the differences between insanity and partial responsibility. Advising the jury of the consequences of each verdict could perhaps best impart an understanding of the relative stringency of the standards.

power to choose whether the person would do the act or refrain from doing it, although physically capable . . . .<sup>387</sup>

Most GBMI statutes specify rationality-diminishing impairments through their definitions of “mental illness.” Indiana defines “mentally ill” as “having a psychiatric disorder which substantially disturbs a person’s thinking, feeling, or behavior and impairs the person’s ability to function.”<sup>388</sup> Utah uses a similar definition.<sup>389</sup> Both Georgia and Michigan define “mentally ill” as “having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life”<sup>390</sup>—with Michigan calling even further for a “substantial disorder.”<sup>391</sup> South Dakota and Illinois focus solely on diminution of judgment.<sup>392</sup> In addition to judgment, Kentucky manifests concern for “substantially impaired capacity to use self-control . . . [and] discretion in the conduct of one’s affairs and social relations.”<sup>393</sup>

Most GBMI statutes limit “mental illness” to some kind of mental disorder or psychiatric condition that can impair thought, mood, or behavior, but some are much broader.<sup>394</sup> A few statutes expressly include intellectual disabil-

<sup>387</sup> DEL. CODE ANN. tit. 11, § 401(b) (2022). In contrast, Delaware provides that “it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the wrongfulness of the accused’s conduct.” *Id.* § 401(a).

<sup>388</sup> IND. CODE ANN. § 35-36-1-1 (2021); *cf.* NEV. REV. STAT. § 433.164 (2020) (“‘Mental illness’ means a clinically significant disorder of thought, mood, perception, orientation, memory or behavior which seriously limits the capacity of a person to function in the primary aspects of daily living, including, without limitation, personal relations, living arrangements, employment and recreation.”).

<sup>389</sup> *See* UTAH CODE ANN. § 76-2-305(4)(b)(i) (LexisNexis 2022) (“‘Mental illness’ means a mental disease or defect that substantially impairs a person’s mental, emotional, or behavioral functioning.”).

<sup>390</sup> GA. CODE ANN. § 17-7-131(a)(3) (2021).

<sup>391</sup> MICH. COMP. LAWS § 330.1400(g) (2022); *see also* ALASKA STAT. § 12.47.130(5) (2021) (defining “mental disease or defect” as “a disorder of thought or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life” or an intellectual disability).

<sup>392</sup> *See* 720 ILL. COMP. STAT. 5/6-2(d) (2021) (defining “mental illness” as “a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person’s judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior”); S.D. CODIFIED LAWS § 22-1-2(24) (2022) (defining “mental illness” as “any substantial psychiatric disorder of thought, mood or behavior which affects a person at the time of the commission of the offense and which impairs a person’s judgment, but not to the extent that the person is incapable of knowing the wrongfulness of such act”).

<sup>393</sup> *See* KY. REV. STAT. ANN. § 504.060(6) (West 2022) (“‘Mental illness’ means substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors[.]”).

<sup>394</sup> *See, e.g., id.*

ity,<sup>395</sup> and some exclude “a mental state manifested only by repeated unlawful or antisocial conduct.”<sup>396</sup>

Nearly all statutes specify that impairment must be substantial,<sup>397</sup> although it need only be significant in Georgia and Michigan.<sup>398</sup> Illinois and South Dakota do not set a threshold degree of impairment to qualify as mentally ill, but the disorder itself must be substantial.<sup>399</sup>

Interestingly, some definitions of mental illness specify that the disorder must have impaired the defendant at the time of the offense<sup>400</sup> or use past tense for the impairment (e.g., “impaired”), presumably signifying the disorder must have had that effect at the time the crime was committed.<sup>401</sup> Most statutes, however, use the present tense (e.g., “impairs”), which might suggest that—though the defendant must have had such a disorder at the moment of the offense, the impairment need not have materially contributed to it.<sup>402</sup>

This overview of the substantive components of GBMI statutes demonstrates their common feature of “lesser” forms of irresponsibility and impairments to rational decision-making capacity. The discussion also emphasizes their variety, which would permit states using them as models to choose from among a range of frameworks, types of impairment, degrees of impairment, and sources of mental dysfunction when crafting a partial responsibility standard. As this Article mentions, empirical studies consistently show the wording of insanity standards does not have a significant effect on verdict distributions.<sup>403</sup> This research suggests the wording of a partial responsibility statute will also be of little practical consequence. Nonetheless, the content of substantive standards is important for a standard’s legitimacy, for guiding discretion and reducing the manifestation of implicit bias,<sup>404</sup> and for connecting the standard to a location’s history and body of experience.

<sup>395</sup> ALASKA STAT. § 12.47.130(5); IND. CODE ANN. § 35-36-1-1 (2021); UTAH CODE ANN. § 76-2-305(4)(b)(i).

<sup>396</sup> See, e.g., GA. CODE ANN. § 17-7-131(a)(1); see also S.D. CODIFIED LAWS § 22-1-2(24) (“Mental illness does not include abnormalities manifested only by repeated criminal or otherwise antisocial conduct.”); UTAH CODE ANN. § 76-2-305(4)(b)(ii) (similar).

<sup>397</sup> These states include Alaska, Delaware, Indiana, Utah, and Kentucky.

<sup>398</sup> See GA. CODE ANN. § 17-7-131(a)(3); MICH. COMP. LAWS § 330.1400(g) (2022).

<sup>399</sup> See 720 ILL. COMP. STAT. 5/6-2(d) (2021); S.D. CODIFIED LAWS § 22-1-2(24).

<sup>400</sup> See S.D. CODIFIED LAWS § 22-1-2(24).

<sup>401</sup> See 720 ILL. COMP. STAT. 5/6-2(d); KY. REV. STAT. ANN. § 504.060(6) (West 2022).

<sup>402</sup> See, e.g., GA. CODE ANN. § 17-7-131(a)(3); IND. CODE ANN. § 35-36-1-1 (2021); MICH. COMP. LAWS § 330.1400(g).

<sup>403</sup> See *supra* note 308 and accompanying text.

<sup>404</sup> See Jeffrey E. Pfeifer & James R.P. Oglöf, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCH. 1713, 1721 (1991) (finding that provision of jury instructions decreased expression of juror prejudice and explaining that “the instructions provide participants with guidelines that enable them to focus on legally relevant information such as the ele-

## CONCLUSION

This Article begins building a case for the creation of a generic partial excuse for diminished rationality from mental deficiency. The current bivalent nature of the guilt phase of criminal trials in the United States—resulting in adjudication of guilty or not guilty—is incompatible with the actual culpability of many criminal defendants. Criminal responsibility exists along a continuum, but the all-or-nothing nature of the guilt phase restricts consideration of intermediate levels of culpability. This results in a system that over-punishes many, especially those who suffer from mental impairments that impinge upon the capacity for rational decision-making but cannot satisfy a jurisdiction’s strict insanity defense.

Provocation doctrines, most notably the traditional heat-of-passion partial defense, provide the lone exception to the bivalence of the guilt phase. This partial excuse does not extend relief to those with mental impairments, even though a large and growing body of empirical research suggests that delusional defendants share the same core characteristics as the classic heat-of-passion agent. Adoption of the ALI’s EMED proposal could remedy this injustice, but states have largely rejected the partial responsibility aspect of EMED in favor of retaining traditional heat-of-passion limitations. In addition, both heat of passion and EMED are arbitrarily limited to the context of homicide.

This Article advocates for a new solution: a partial excuse for rationality-diminishing mental impairments. It identifies two possible models for such an excuse: states’ insanity and GBMI verdicts. First, a state could opt to recognize the substantial satisfaction of its insanity standard as a partial excuse. Insanity standards reflect centuries of common law wisdom about the normatively desirable components of responsibility and the values of the local community. Contemporary insanity tests recognize reasoning impairments, often both cognitive and affective in nature, which are destructive of normative competence.

Second, states could draw from GBMI standards, which center on “less-er” forms of insanity and rationality impairments and thus could easily serve as the basis for a partial responsibility standard. Empirical studies demonstrate jurors’ belief that GBMI standards reflect partial responsibility, their appreciation for and confidence in these verdicts, and their application of the verdict in a discerning manner. In addition, state and federal courts have recognized the legitimate aims these statutes serve in clarifying the nature of irresponsibility. All suggest that among jurors, a partial responsibility verdict would be popu-

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ments of the crime rather than on their prejudicial attitudes when evaluating the guilt of the defendant”).

lar, thoughtfully applied, and recognized as serving an important function in our justice system.

This Article is the first part of a broader discussion that will be continued in a future work.<sup>405</sup> That article will assess important aspects of the partial excuse, including why such an excuse should not include assessment of a defendant's culpability in exacerbating irrationality through treatment nonadherence, possible sentencing and treatment options that could accompany a partial responsibility verdict, and whether the verdict should carry post-sentence consequences. Foreign partial responsibility structures may provide useful models for determining these consequences.<sup>406</sup> Although such a partial excuse would offer an incomplete solution to the broader problem of blameworthiness proportionality,<sup>407</sup> it would improve upon the current bivalent system of responsibility and could be an important step in achieving a more just system of criminal justice.

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<sup>405</sup> See Johnston, *supra* note 238.

<sup>406</sup> See, e.g., Code pénal [C. pén.] [Penal Code] art. 122-1, para. 2 (Fr.) (providing for diminished responsibility due to psychic or neuropsychic disorders and mandating a reduction of punishment by one-third, or down to thirty years if the punishment would otherwise be life or solitary confinement); Strafgesetzbuch [StGB] [Penal Code], §§ 20–21, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html) [<https://perma.cc/CX8B-MG8F>] (Ger.) (providing a full excuse for those “incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disorder of consciousness, mental deficiency or any other serious mental abnormality” and a partial excuse when one of those capacities is “substantially diminished” for one of those reasons); Codice penale [C.p.] art. 89 (It.) (providing for diminished responsibility due to mental infirmities and requiring a reduction in punishment); KEIHŌ [KEIHŌ] [PEN. C.] art. 39, para. 2 (Japan) (providing that an act committed with diminished capacity induces a lesser punishment); KODEKS KARNY [K.K.] [PENAL CODE] art. 31, § 2 (Pol.) (providing that the court may apply mitigations when a person has acted with diminished capacity to control those acts); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 21 (Spain) (providing for two levels of partial responsibility and listing the relevant mitigating circumstances); TÜRK CEZA KANUNU [TCK] [PENAL CODE] art. 32, para. 2 (Turk.) (providing that an individual whose ability to control his behavior was diminished should receive a reduction of punishment by no more than one-sixth, or down to twenty-five years if the punishment would otherwise be life); *supra* note 283 and accompanying text.

<sup>407</sup> See *supra* note 350 and accompanying text (discussing Robinson's principle of blameworthiness proportionality).