NOTE

INSANITY STEP ZERO: A MODERN APPLICATION OF *M'NAGHTEN*'S QUESTION FOUR TEST

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Defendants suffering from delusion currently are subject to inequitable treatment in our criminal justice system. They can genuinely believe, due to a delusion, that a person right in front of them has a gun and is about to kill them. Acting in what they believe is self-defense, they can draw a gun and kill their would-be assailant. Many in their same situation, facing what they believe to be an imminent threat against their life with no ability to escape, would do the exact same thing. In fact, the law in all fifty states would allow a defendant actually facing such a threat to raise a self-defense claim. However, under many states' laws, the defendant suffering from delusions still will be found guilty of murder. Mistake of fact doctrines generally require mistakes to be reasonable, so the defendant will not be entitled to a self-defense claim because delusions are inherently unreasonable. Yet only seven states have insanity defenses that explicitly account for delusions. Thus, the jury may still find them guilty under that jurisdiction's insanity test. This creates a paradox: defendants are too insane to qualify for the mistake of fact doctrine, yet too sane to escape punishment under the insanity defense. This paradox has become increasingly prevalent in recent years, as many jurisdictions seek to abolish or modify their insanity tests—often leaving defendants suffering from delusions behind in the process.

This Note proposes a novel test to fix this paradox: the step zero test. It is built off the fourth answer the Justices gave in the famous M'Naghten Case. While that answer has largely fallen to historical obscurity, my proposed test revives that answer and repurposes it to solve this modern problem. The test operates as follows: the jury is to accept the facts as the defendant in their delusional state believed them to exist. Accepting those facts as true, if the defendant would otherwise

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have an affirmative defense, the jury is required to acquit by reason of insanity. This instruction would be given before any other insanity instruction. After the jury performs this test, they would proceed to the jurisdiction's usual insanity test. Requiring the jury to go through this preliminary step to any insanity defense ensures that defendants suffering from delusions are, at a bare minimum, treated equally before the law as everybody else.

INTRODUCTION

No one disputes that Eric Clark suffered from delusions. Eric believed that his town of Flagstaff, Arizona, had been populated with aliens.[1] He believed that some of these aliens were impersonating government officials and that the aliens were out to kill him. Eric took precautions such as rigging his home with beads and wind chimes to alert him of intruders and keeping a bird in his car to alert him of airborne toxins. On June 21, 2000, a Flagstaff police officer responded to a complaint about Eric driving around a residential block blaring loud music.[2] The officer pulled Eric over and approached Eric's car. Eric shot and killed the officer. He fled the scene and hid the firearm but was later found, arrested, and charged with first-degree murder.

Psychiatrist testimony indicated that Eric was suffering from his delusions about aliens when he killed the officer.[3] Yet, the Arizona insanity test required that the defendant prove that he was "afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."[4] If he failed to do that, Eric could not use his delusions as evidence to disprove mens rea.[5] Arizona's insanity test thus eliminates the

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1 Clark v. Arizona, 548 U.S. 735, 745 (2006).
2 *Id.* at 743.
3 *Id.* at 745.
4 *Id.* at 744 (alteration in original) (internal quotation marks omitted) (quoting ARIZ. REV. STAT. ANN. § 13-502(a) (West 2001)).
5 *Id.* at 745.

first prong of the *M'Naghten* test, which asks if a defendant had the cognitive ability to know the nature and quality of his acts, and instead only allowed the defendant to prove insanity under the second prong of *M'Naghten*: whether or not the defendant knew that his actions were wrong.[6] Since Eric took steps that indicated he knew his actions were wrong, such as hiding the gun and evading police, the judge found him guilty of first degree murder—ignoring the delusions Eric was suffering from at the time of the murder.[7] The court relied on evidence that the officer was in uniform and pulled Eric over using a police car as proof that Eric knew he was a police officer.[8] He was not allowed to present evidence that his delusion prevented him from knowing that the police officer was actually a police officer instead of an alien.[9] Arizona law forced the judge "to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness."[10] The Supreme Court affirmed on the grounds that the Due Process Clause does not require any specific insanity test nor did it require Arizona to allow Eric to use his delusions to disprove mens rea.[11]

Arizona's law may jar the reader on policy grounds.[12] Imagine aliens actually invaded tomorrow and began impersonating government officials with the intent to kill us. You are pulled over by an officer the next day, who you correctly believe to be one of those killer aliens. You shoot the alien before it kills you. That would be a routine case of self-defense. Yet we punish Eric in a similar situation to this hypothetical because the facts were the creation of a mental illness which he had no control over.

This Note seeks to address that concerning scenario. My goal is to formulate a test that ensures that mentally ill defendants, who were experiencing delusions at the time of their crime, are at a bare minimum, treated equally before the crimi-

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6 *See id.* at 747–48; *see also* M'Naghten's Case (1843) 8 Eng. Rep. 718 (HL) 722 (laying out the two-pronged test).

7 *See Clark*, 548 U.S. at 745–46.

8 *Id.* at 743–44.

9 *Id.* at 788 (Kennedy, J., dissenting).

10 *Id.* at 800 (Kennedy, J., dissenting).

11 *Id.* at 753 ("[D]ue process imposes no single canonical formulation of legal insanity."); *see also* Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020) ("Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. . . . Which is all to say that it is a project for state governance, not constitutional law.").

12 This Note will not address the Supreme Court's constitutional holding in *Clark*. It focuses only on Arizona's choice of law as a policy matter.

nal law as everyone else. Currently, a defendant suffering from delusions can be punished merely for having a delusion, despite the fact that she conformed wholly to the criminal law, according to the facts as she perceived them to exist. Before I get into this Note's proposal, however, we need a working definition for delusions. I will explore the characteristics of delusions *infra* subpart II.A and Part III. But, for now, a cursory definition will suffice to ensure we are all on the same page. This Note will address people with delusional disorders, which are defined as "[a] mental disorder characterized by one or more delusions."[13] A delusion is defined as "a belief that is clearly false and that indicates an abnormality in the affected person's content of thought."[14] A person will hold firmly to their delusion regardless of evidence to the contrary. Delusions exclude beliefs about religious faiths and beliefs that are widely accepted in one's culture.[15]

To ensure defendants suffering from delusions are treated fairly, I suggest resurrecting a relatively obscure test for insanity. When most people think of the *M'Naghten* test, they think of the Justices' response to questions two and three that the Lords posed to them.[16] Yet, the Justices also answered a fourth question: how should the law treat a defendant experiencing a delusion at the time of the crime?[17] Their answer to that question was that the individual "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."[18] In other words, if their delusion was real, would they otherwise have a defense to the crime? This question has largely been forgotten both in courts and scholarship since it was pronounced.[19] Yet, I propose repurposing this test to solve the outlined problem.

To put the proposal succinctly, this question four test would serve as what I will call "step zero" to any insanity test.[20] This step would apply as a precursor to any insanity test, whatever it may be, that the jurisdiction performs.[21] If the

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13 *Delusional Disorder*, A DICTIONARY OF PSYCHOLOGY (4th ed. 2015).

14 Chandra Kiran & Suprakash Chaudhury, *Understanding Delusions*, 18 INDIAN PSYCHIATRY J. 3, 3 (2009).

15 *Delusion*, A DICTIONARY OF PSYCHOLOGY (4th ed. 2015).

16 *See* discussion *infra* notes 22–45.

17 *See* M'Naghten's Case (1843) 8 Eng. Rep. 718 (HL) 720.

18 *Id.* at 723.

19 *See* discussion *infra* notes 49–77.

20 *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (referring to the initial inquiry of whether the *Chevron* framework should apply at all in administrative law as "Step Zero").

21 *See* discussion *infra* subpart II.B.

defendant suffers from delusions, the jury would always be asked if, accepting the defendant's delusions as true, he would otherwise have a defense to the crime. If they answer the question in the affirmative, they return a verdict of not guilty by reason of insanity (or whatever that jurisdiction's equivalent verdict is). If they answer in the negative, the jury proceeds to the jurisdiction's insanity test as usual. By nature of being a step zero, this step would apply even if the jurisdiction has abolished the insanity defense. The only difference would be that if they answer the test in the negative, there are no further questions on the defendant's sanity.

Part I of this Note will explore the background to *M'Naghten's Case*, the rule that emerged, and the lesser-known fourth question the House of Lords presented the Justices. I will summarize the existing scholarship (or lack thereof) about the fourth question and discuss the negative reception the test received. Part II will explore the proposed "step zero" test. First, I will explain why the test is so important as to be performed as a precursor to any test. Next, I will describe the test's contours. Lastly, I will address some potential objections. Part III will ask if states can stop after step zero. I will analyze if states could use the question four test as the only test for insanity. In determining that they cannot, the Note will delve into the psychological literature about how delusions function. I will end with a conclusion.

I.
BACKGROUND

As with any paper discussing Daniel M'Naghten's[22] famous case, I begin with the talismanic recitation of the facts behind his delusion and crime. M'Naghten was the illegitimate son of a wood turner from Scotland.[23] After trying his hand at acting, M'Naghten took up his father's profession and opened his own shop.[24] Evidence suggests that M'Naghten suffered from paranoid schizophrenia, causing delusions that started to manifest

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22 There is debate over how to properly spell M'Naghten's name. *See generally* Bernard L. Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964) (outlining the dispute about how the name is properly spelled). M'Naghten seemed to spell his own name "McNaughtun" to which Justice Frankfurter quipped "[t]o what extent is a lunatic's spelling of his own name to be deemed an authority?" *Id.* at 87. This Note will use the traditional spelling of M'Naghten's name from the English reporter.

23 RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 42 (1981).

24 *See id.* at 43.

in 1841.[25] M'Naghten believed that the Tory political party was plotting against him and wanted to murder him.[26] He could not escape this tormenting, no matter where he went.[27] M'Naghten believed that killing the Tory Prime Minister, Sir Robert Peel, could end the torment and save his life.[28] On January 20, 1843, M'Naghten approached the Tory Prime Minister's private secretary, Edmund Drummond, and shot him in the back.[29] Drummond died five days later.[30] M'Naghten had believed Drummond to be Peel since Drummond was riding in Peel's carriage.[31] M'Naghten was tried for the murder six weeks later.[32] M'Naghten produced a litany of medical experts describing the abovementioned delusions he suffered from—none of which the prosecution countered.[33] The jury deliberated for all of two minutes, simply forming a huddle in the jury box, before returning a verdict of not guilty on the ground of insanity.[34]

To say there was public shock at the verdict is an understatement. The public was concerned that murderers could now kill with impunity and popular newspapers lambasted the legal system.[35] One may find a modern equivalent in John Hinkley's acquittal by reason of insanity for the attempted assassination of Ronald Reagan.[36] Queen Victoria also became fearful for her own life after the assassination, traveling with increased security.[37] She urged the House of Lords to alter the insanity defense.[38]

The House of Lords instead summoned the Justices of the Supreme Court of Judicature to give a definitive pronouncement on the law of insanity.[39] The House of Lords put five

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25 *Id.* at 96.

26 *Id.* at 10.

27 *Id.* at 97.

28 *See id.* at 105.

29 *Id.* at 7.

30 *See id.* at 8.

31 United States v. Freeman, 357 F.2d 606, 617 (2d Cir. 1966).

32 MORAN, *supra* note 23, at 14.

33 *See id.* at 18–19.

34 Given the court's instructions to the jury, it was practically a directed verdict. *See id.* at 108.

35 *See id.* at 19–21.

36 *See generally* Ralph Slovenko, *The Insanity Defense in the Wake of the Hinckley Trial*, 14 RUTGERS L.J. 373, 373 (1983) (describing the national backlash after Hinckley's acquittal).

37 MORAN, *supra* note 23, at 72. Two attempts within five weeks had already been made on her life. *See id.* at 33.

38 *Id.* at 21.

39 *Id.* at 22.

questions regarding the insanity defense to the Justices.[40] The second question—the most famous of the five—read as follows: "What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?"[41] The judges (over one dissent) opined that "it must be clearly proved that, at the time of the committing of the act, the party accused was 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."[42]

This answer became canonical. The *M'Naghten* test became ubiquitous in English and American courts for almost 100 years.[43] Currently, the *M'Naghten* test is the most popular insanity test in the United States, with twenty-one states recognizing it.[44] Elements of the Justices' second answer can be found in almost every test for insanity in the United States, although some courts have modified it from its original form.[45]

While this second question has been the focus of countless scholarly, judicial, and legislative works,[46] history has largely

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40 M'Naghten's Case (1843) 8 Eng. Rep. 718 (HL) 720.

41 *Id.* (spelling Americanized). The first, third, and fifth questions will not be relevant to this discussion.

42 *Id.* at 722 (spelling Americanized).

43 Sheila Hafter Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 567 (1972).

44 Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 21 (2014).

45 *See* Harvey B. Cohen, M'Naghten *v.* Durham: *A Discussion of the Legal Test for Insanity as Adopted by the Federal Courts*, 3 U.S.A.F. JAG BULL. 12, 12 (1961). *But see* State v. Pike, 49 N.H. 399, 407–08 (1870) (finding that a defendant is insane if their crime was the "product of" a mental disease or defect, thus making New Hampshire the only state to currently implement an insanity rule not derived from *M'Naghten*).

46 *See, e.g.*, Durham v. United States, 214 F.2d 862, 871–72 (D.C. Cir. 1954) (criticizing *M'Naghten's* psychological foundations); *Pike*, 49 N.H. at 414 (Doe, J., concurring) (criticizing *M'Naghten* for turning factual questions into legal questions); ANDREA L. ALDEN, DISORDER IN THE COURT: MORALITY, MYTH, AND THE INSANITY DEFENSE 54–55, 63–64 (2018) (summarizing scholarly work on the *M'Naghten* test); JOHN BIGGS, JR., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 107 (1955) (criticizing the *M'Naghten* test's internal contradictions); GABRIEL HALLEVY, THE MATRIX OF INSANITY IN MODERN CRIMINAL LAW 12 (2015) (collecting criticisms of the *M'Naghten* test); THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 52–55 (1985) (noting early criticisms that the *M'Naghten* test was too liberal); MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 81–84 (1994) (noting opposition and support to the test); HENRY

forgotten the fourth question the House of Lords asked the Justices. The Lords asked, "If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?"[47] The Justices responded that "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."[48] Throughout this Note, I will refer to this as the "question four test." While the second question has gone down in the annals of history, this fourth question has been relegated to the dustbin. The rule itself seems to be an anomaly: the Justices were asked to describe the current law of England and yet the question four test was wholly novel at the time.[49] Very few courts ever adopted it.[50] By the mid-twentieth century, one commentator described the question four test to be "obsolete" and in "desuetude."[51] Another scholar notes how the question four test raises many interesting questions, including whether the test adds anything to the canonical *M'Naghten* test.[52] Yet, he points out, modern courts and commentators do not address these questions anymore due to its modern irrelevance.

This Note will summarize, though, much of the small amount of scholarship that analyzed the rule beyond passing mention. Much of the early discussion from the late nineteenth and early twentieth centuries was negative. For example, many commentators criticized that the question four test was based on erroneous assumptions about delusions.[53] It is unfair to assume that a person in the throes of a delusion can reason normally. Most people who are hallucinating that a person is in front of them menacingly with a knife cannot otherwise calmly apply the criminal law's justification defenses. This rule, the critics argued, was based on an erroneous as-

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WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 63–68 (1954) (collecting criticisms of the *M'Naghten* test).

47 M'Naghten's Case, 8 Eng. Rep. at 720 (spelling Americanized).

48 *Id.* at 723.

49 E. Lea Johnston & Vincent T. Leahey, *The Status and Legitimacy of* M'Naghten's *Insane Delusion Rule*, 54 U.C. DAVIS L. REV. 1777, 1787 (2021). The rule may have been expounding upon the rule set out in *Hadfield's Case*. *See generally id.* at 1787 n.44 (describing the case and why the Justices in *M'Naghten* would have wanted to include the question four test).

50 WEIHOFEN, *supra* note 46, at 108 n.15–17.

51 GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 442, 500 (2d ed. 1961).

52 *See* Stephen P. Garvey, *Insanity*, *in* THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 387–88 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

53 *See, e.g.*, L. A. Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COLUM. L. REV. 933, 937–38 (1932) (collecting various criticisms about the question four test); *see also infra* notes 173–179.

sumption, prevalent at the time, that the brain "was an aggregate of independent parts, each of which contained a special 'faculty,' and each part capable of individual deterioration without general brain debilitation."[54] Instead, as even the psychological evidence that these early commentators had access to demonstrated, delusions can impact the entire brain and prevent rationality.[55] Put succinctly, those suffering from delusions often do not know what they are doing when they commit the crime. In addition, criticisms were levied that this defense bore no relation to the end it sought to achieve.[56] As already described, it did not serve to only punish the morally culpable because the individuals often did not know what they were doing. But it also did not protect the public. The dangers that these affirmative defenses are designed to protect against did not actually exist, as they were the product of a delusion, so there was no public safety rationale to apply them.

Moving to modern scholarship, for almost seventy years, Henry Weihofen provided the most recent comprehensive study of the question four test.[57] In it, he began with an overview of the question four test as it existed in 1954.[58] He then explored the test's history, dating it back to *Hadfield's Case*.[59] He characterized the test as an alteration to the mistake of fact doctrine for those suffering from delusions.[60] He noted that the rule has never been the majority rule in America.[61] Quite the opposite: seventeen American jurisdictions had repudiated it. He reiterated the criticisms, discussed *supra*, that the test is based on psychological fallacies.[62] He also noted the difficulty in distinguishing insane delusions and sane mistakes of fact.[63]

In the interim, some scholars utilized the question four test for suggested reforms. The best example comes from Christopher Slobogin. He proposes that states can abolish the insanity test,[64] so long as the state adopts a subjective approach

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54 H. Barnes, *A Century of the McNaghten Rules*, 8 CAMBRIDGE L.J. 300, 305 (1944).

55 *See* Tulin, *supra* note 53, at 937–38.

56 *Id.* at 938–39.

57 *See* WEIHOFEN, *supra* note 46, at 103–13.

58 *See id.* at 104–05.

59 *Id.* at 105.

60 *Id.* at 107.

61 *Id.* at 108.

62 *Id.* at 109–10.

63 *Id.* at 112.

64 This Note will discuss whether this is actually abolishing the insanity test *infra* Part III.

to crimes where we accept the world as the defendant saw it.[65] While Slobogin only briefly mentions the question four test,[66] his proposal clearly incorporates the test. Slobogin would accept the world as the defendant saw it and ask if that defendant would otherwise be entitled to a defense.[67] He argues that this proposal will reduce moral outrage at insanity verdicts by linking them to our existing justifications.[68] From a moral and criminological perspective, he asks what does it matter if you believe God ordained your crime?[69] The fact that somebody told you to commit a crime is not a defense. You need something more, such as a fear that God will strike you down otherwise, to be entitled to an insanity defense. Except for Slobogin's piece (which did not even directly link his test to the question four test), scholarship was virtually dormant on this subject otherwise. Some scholars made passing references to the test,[70] while others may have engaged in cursory discussions about the complexities it raises before dismissing these issues since the test has little modern relevance.[71] I could not locate a single Article, Note, or book chapter solely dedicated to the question four test since Weihofen until 2021.

Finally, in 2021, E. Lea Johnston and Vincent T. Leahey provided an updated survey on the question four test that, it turns out, was desperately needed.[72] They determined that it is not entirely accurate to call the test obsolete. Eight jurisdictions (California, Florida, Georgia, Oklahoma, Tennessee, Texas, the federal system, and the military system) use the question four test in their modern insanity scheme. Nevada uses the question four test as their only test for insanity.[73] Originally, in 1995, Nevada attempted to abolish its insanity

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65 Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1119, 1243 (2000).

66 *See id.* at 1210.

67 *See id.* at 1202–03.

68 *Id.* at 1243.

69 *Id.* at 1205.

70 *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 966–67 (3d ed. 1982) (briefly criticizing the question four test); Philip Lyons, *Responsibility Without Individual Responsibility?: The Controversy Over Defining Legal Insanity*, 45 U. COLO. L. REV. 391, 404 (1974) (noting the paradox of expecting the insane to act sane).

71 *See, e.g.*, Garvey, *supra* note 52, at 387 (noting that scholars disagree if the question four test adds anything to *M'Naghten*, but that courts have never answered the question since the test is so rarely utilized); Dennis R. Klinck, *"Specific Delusions" in the Insanity Defence*, 25 CRIM. L.Q. 458, 475–77, 479 (1983) (finding that the question four test added nothing to the *M'Naghten* test, instead serving to demonstrate its application).

72 Johnston & Leahey, *supra* note 49, at 1795.

73 *Id.* at 1796–97.

defense. But the Nevada Supreme Court struck that law down in *Finger v. State*, declaring that Due Process under the Nevada Constitution requires, at a bare minimum, delusional beliefs to be the "grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act."[74] Nevada has since amended its insanity law to allow a defendant to prove insanity if "[d]ue to [a] delusional state, the defendant either did not: (1) [k]now or understand the nature and capacity of his or her act; or (2) [a]ppreciate that his or her conduct was wrong, meaning not authorized by law."[75] The Nevada Supreme Court has interpreted this amendment as merely codifying the constitutional bare minimum it pronounced in *Finger*.[76] Thus, the only way to prove insanity in Nevada is to prevail under the question four test. These jurisdictions combined account for around half of the country's total prison population, making the question four test far from obsolete.[77]

In sum, the question four test never gained the same popularity that the answer to question two gained. It has largely been considered a dead letter throughout most of history and scholarship is sparse—and almost nonexistent in the past seventy years. However, that treatment is somewhat unwarranted as a few jurisdictions still utilize the rule today. This Note seeks to fill this scholarship gap by suggesting a modern use for the question four test as a preliminary step to any insanity test.

II
INSANITY STEP ZERO

This Part will explore the reasons behind my proposed test, its contours, and possible counterarguments. First, a note on terminology before we start. As mentioned above, this Note refers to the Justices' fourth answer to the questions in *M'Naghten* as the "question four test." This Note will refer to the proposal, to the extent it differs from the question four test, as the "step zero test," borrowing its name from administrative law,[78] due to its placement as a prerequisite to any insanity test.

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74 Finger v. State, 27 P.3d 66, 85 (Nev. 2001).

75 NEV. REV. STAT. § 174.035(6)(b) (2017).

76 *See* Brown v. State, 465 P.3d 220, 220 (Nev. 2020) (unpublished table decision).

77 Johnston & Leahey, *supra* note 49, at 1846.

78 *See* Sunstein, *supra* note 20, at 191.

A. The Reason

Before discussing the test's contours, it is first necessary to justify the test. In doing so, this Note will answer two major questions: (1) why should we treat delusions specially from any other type of insanity; and (2) why should jurisdictions that have made the policy decision to abolish the insanity test still apply this step zero?

First, what makes delusions special? There are many mental disorders that current insanity tests exclude, sparking disagreement from many scholars.[79] Out of all the mental disorders excluded from many insanity tests, why should delusions specifically have a universal test? The key lies in the nature of delusions and the inequities they create. Delusions alter the fabric of how one views reality, often resulting in the loss of one's grip on the real world.[80] They distort the "very structures of space, time, and identity" along with the "nature and reality of human consciousness itself."[81] Delusions can come in many forms. For example, persecutory delusions create a foreboding sense that somebody is out to get you.[82] Grandiose delusions cause you to believe you are incredibly important.[83] Some delusions can cause hallucinations and false memories.[84] They can play with your senses and make you hear, smell, and see things.[85] Some revolve around one's religious beliefs.[86] They can range in complexity from simple beliefs about an individual to entire intricate worlds that are completely different from our own.[87] This list barely scratches the surface.[88] But, what is important is that delusions can take almost any shape or form, thus altering the subject's perception of reality. The individual makes all judgments "from

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79 *See, e.g.*, Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205, 208–10 (2008) (arguing that the criminal law should, to some extent, excuse psychopathy).

80 *See* Florent Poupart et al., *Acting on Delusion and Delusional Inconsequentiality: A Review*, 106 COMPREHENSIVE PSYCHIATRY 152230, at 5 (2021), https://doi.org/10.1016/j.comppsych.2021.152230 [https://perma.cc/26ZR-P382].

81 LOUIS A. SASS, THE PARADOXES OF DELUSION: WITTGENSTEIN, SCHREBER, AND THE SCHIZOPHRENIC MIND 22 (1994).

82 PETER MCKENNA, DELUSIONS: UNDERSTANDING THE UN-UNDERSTANDABLE 2 (2017).

83 *Id.* at 11.

84 *Id.* at 3.

85 *See id.* at 12.

86 *Id.* at 11.

87 *See* Glenn Roberts, *The Origins of Delusion*, 161 BRITISH. J. PSYCHIATRY 298, 298 (1992).

88 *See generally* MCKENNA, *supra* note 82, at 10–12 (providing an overview of different types of delusions).

the perceived reality according to the facts" as they experience them.[89]

Most delusions are also accompanied by a "certain quality of perceptual concreteness" which makes them feel real to the individual.[90] They feel so real that people experiencing delusions will continue to accept them, even in the face of indisputable evidence that their beliefs are false.[91] Quite to the contrary, people experiencing delusions will feel absolutely certain in their beliefs and senses when presented with contrary evidence.[92] People experiencing delusions are so certain not only because of how real the delusions feel, but because they exasperate our fears, dreams, and fantasies.[93] All the while, the individual fails to recognize that they are having a delusion or even that their beliefs are idiosyncratic.[94]

Despite wholly existing in one's head, these delusions infect a person's entire life and feel exactly like reality. Yet many jurisdictions' laws are ill equipped to deal with delusions. The law does allow for mistakes of fact, like delusions can cause, to negate the mental state required for a crime.[95] However, a mistake of fact normally will only do so if it was a reasonable mistake.[96] Yet, due to their inherently fanciful nature, delusions are almost always going to be considered unreasonable mistakes of fact.[97] As a result, some jurisdictions have held that a delusional mistake of fact is really just an insanity claim,

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89 Caroline Skov Vestbjerg, *The Making of Delusions: From Imagination to Irreality*, 55 INTEGRATIVE PSYCH. & BEHAV. SCI. 297, 298 (2021), https://rdcu.be/ckEXY [https://perma.cc/5WEJ-XNG7].

90 SASS, *supra* note 81, at 24.

91 Johnston & Leahey, *supra* note 49, at 1828.

92 SASS, *supra* note 81, at 4.

93 *See id.* at 21–22.

94 *Id.* at 25.

95 *See, e.g.*, MODEL PENAL CODE § 2.04 (AM. L. INST. 1985) (providing that a mistake of fact is a defense when it negates mens rea).

96 *See, e.g.*, IND. CODE § 35-41-3-7 (1976) (allowing a mistake of fact defense only when the defendant was "reasonably" mistaken); *see also* Margaret F. Brinig, *The Mistake of Fact Defense and the Reasonableness Requirement*, 2 INT'L SCH. L. REV. 209, 216–19 (1978) (summarizing the doctrine). Though, an unreasonable mistake of fact can sometimes reduce the offense to a lesser charge. *See, e.g.*, In re Christian S., 872 P.2d 574, 577 (Cal. 1994) (noting that an unreasonable mistake of fact can reduce murder to manslaughter).

97 *See, e.g.*, Davis v. Johnson, 359 F. Supp. 3d 831, 867 (N.D. Cal. 2019) (applying California law); People v. McGehee, 201 Cal. Rptr. 3d 714, 730 (Cal. Ct. App. 2016) (holding defendant's delusion was an unreasonable mistake of fact, thus depriving him of an imperfect self-defense instruction); People v. Mejia-Lenares, 38 Cal. Rptr. 3d 404, 421 (Cal. Ct. App. 2006) (finding that a delusion alone cannot support a claim of self-defense); Carson v. State, 963 N.E.2d 670, 683–84 (Ind. Ct. App. 2012) (noting that the defendant's delusional mistake of fact was unreasonable); Mays v. State, 318 S.W.3d 368, 383 (Tex. Crim. App. 2010)

and thus must be presented under a jurisdiction's insanity defense instead of another defense.[98]

So, since a defendant suffering from a delusion is normally deprived a defense under the mistake of fact doctrine, she is left to rely on jurisdictions' insanity laws. Yet, these laws often do not ensure that a jury will accept a defendant's delusional mistakes of fact as true. Only nine jurisdictions have laws that explicitly account for insane delusions.[99] All other jurisdictions leave it up to the jury to divine that these defendants should not be held responsible under the jurisdiction's insanity defense. And many of these jurisdictions' rules are complex and ambiguous. For example, many scholars have argued that the question four test is inherently part of the right-wrong prong of *M'Naghten* because you cannot know that your action is wrong if your delusions make you believe that you are acting within an existing defense.[100] However, that fact is not apparent on the test's face. Other popular tests, like the product test or the irresistible impulse test, do not make this interpretation apparent either.[101] Thus, it can be easy for the fact finder to determine that these individuals are guilty without considering the defenses that would exist if these delusional facts were true.

The *Clark* case described in the Introduction provides one good example.[102] Even if the accused had put forward a mistake of fact argument, that defense would have been rejected because it is unreasonable to believe that aliens are impersonating government officials and trying to kill you. Yet, the judge rejected the insanity defense because Clark hid the gun and evaded the police—thus indicating he knew that he did something wrong.[103] Another example comes from California. In that case, the defendant killed a victim that he believed was transforming into the devil and that the victim was about to kill

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("[A]ppellant cannot rely upon evidence of his paranoia and psychotic thinking to raise a 'reasonable' mistaken belief concerning the officers' intentions.").

98 *See, e.g.*, People v. Elmore, 325 P.3d 951, 962 (Cal. 2014) ("A claim of unreasonable self-defense based solely on delusion is quintessentially a claim of insanity under the *M'Naghten* standard . . . .").

99 Johnston & Leahey, *supra* note 49, at 1795.

100 *See, e.g.*, Garvey, *supra* note 52, at 387 (noting that scholars disagree if the question four test adds anything to *M'Naghten*, but that courts have never answered the question since the test is so rarely utilized); Klinck, *supra* note 71, at 479 (finding that the question four test added nothing to the *M'Naghten* test, instead only serving to demonstrate its application).

101 *See* Garvey, *supra* note 52, at 393, 412 n.44.

102 *See supra* notes 1–11 and accompanying text (outlining the case's facts).

103 Clark v. Arizona, 548 U.S. 735, 746 (2006).

him.[104] The jury determined that he was sane under the *M'Naghten* test, yet the court rejected his self-defense claim because it was based on an unreasonable mistake of fact.[105]

This scheme creates an uncomfortable problem. The defendant in these cases can be acting in full conformity with society's laws, based on the facts she believes to exist, yet still be punished. Imagine that a defendant has a delusion that the person in front of her is a hitman sent to kill her. She has no chance to escape, so she kills him instead. Many of us, if presented with the same situation, would do the same thing. In fact, the law in every jurisdiction explicitly allows for that result. Both the delusional defendant and the sane defendant are doing the same thing: they are acting in self-defense based on how they perceive the situation. Yet, because the insane defendant was suffering from a delusion, many jurisdictions will still hold her responsible. This punishment is imposed even though delusions feel incredibly real and play on people's inherent fears and desires.[106] There is a clear paradox here: the defendant is too insane for their delusion to qualify under the mistake of fact doctrine, yet too sane to qualify under the insanity defense. We should not punish those who conform to our laws merely because they were suffering from a delusion. While there may be a relatively small[107]—but not nonexistent[108]—number of defendants suffering from delusions that do so, we should not ignore this inequality merely because their numbers are small.

Changes in the insanity defense over the past decade have amplified these concerns and made finding a solution more important now than ever. Following John Hinckley's acquittal by reason of insanity for attempting to assassinate President Ronald Reagan, there was nationwide backlash against the insanity defense.[109] Hinckley's acquittal spurred the federal gov-

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104 People v. Mejia-Lenares, 38 Cal. Rptr. 3d 404, 407 (Cal. Ct. App. 2006).

105 *Id.* at 406–07, 409.

106 *See supra* notes 89–94.

107 Luisa Stopa, Ruth Denton & Megan Wingfield, *The Fear of Others: A Qualitative Analysis of Interpersonal Threat in Social Phobia and Paranoia*, 41 BEHAV. & COGNITIVE PSYCHOTHERAPY 188, 201–02 (2013) (finding that most defendants that reported a sense of imminent danger expressed a desire to retreat to safety).

108 Jeffrey W. Swanson, Randy Borum, Marvin S. Swartz & John Monahan, *Psychotic Symptoms and Disorders and the Risk of Violent Behaviour in the Community*, 6 CRIM. BEHAV. & MENTAL HEALTH 309, 311 (1996) (noting how individuals suffering from persecutory delusions fairly frequently act on them if they feel threatened).

109 PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD J. BONNIE, THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 117 (1986). For a discussion of the case's facts and proceedings, *see generally id.* at 22–112.

ernment and half the states to change their insanity defense.[110] Many states narrowed their defenses in doing so. This trend has continued to the modern day, with twenty-eight states requiring the insane to demonstrate a complete loss of understanding. Three states also kicked off the trend of abolishing their insanity defense.[111] This number currently sits at six,[112] and the United States Supreme Court blessed this practice just two terms ago.[113] These trends have resulted in an increasingly narrow insanity defense. As *Clark* demonstrates, delusions have often been left behind in these reforms, leaving them lumped together with the general test for insanity. In fact, only seven states currently have tests specific to defendants suffering from delusions (none of which emphasize the test to the extent the proposed step zero test will).[114] In all other states, defendants experiencing delusions can slip through the cracks and are subject to the inequity described above. They are punished in most states not because of their failure to apply society's laws, but instead because they acted in conformity with our laws based on the circumstances they believed existed.

But why should jurisdictions that have abolished or curtailed the insanity defense care about these flaws? These states have made policy decisions that insanity should only bear on mens rea, meaning there is no special insanity defense.[115] Treating the insane differently marks them with a social stigma.[116] Abolitionists argue that the insanity defense provides a very broad and ambiguous defense when, in reality, only a small handful of people are so insane that they should not be held responsible.[117] But even abolitionists still accept "a few cases [where] the question of moral irresponsibility is so clear that there is no purpose in invoking the criminal process."[118] An instance of a defendant in a delusional state that

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110 *Id.* at 126–27.

111 *Id.* at 134 ("Three states (Montana, Idaho, and Utah) have abolished insanity as a separate defense.").

112 PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES 160 (2018).

113 *See* Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020).

114 Johnston & Leahey, *supra* note 49, at 1795.

115 *See, e.g.*, NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 177 (1970) ("The accused's mental condition should be relevant to the question of whether he did or did not . . . have the *mens rea* of the crime . . . .").

116 Claire Hogg, *The Insanity Defence: An Argument for Abolition*, 79 J. CRIM. L. 250, 253 (2015).

117 *See* MORRIS & HAWKINS, *supra* note 115, at 174, 179–80.

118 *Id.* at 179.

acts in accordance with society's laws, but for the mistake of fact their delusion causes, is one such case. Insane delusions do bear on a defendant's mens rea—at least as it is understood in a broad sense.[119] The defendant's mind is not guilty when they act in accordance with society's laws—and no different than anybody else would in their situation, as they believed it to exist. By accepting the world as they see it, we further eliminate the social stigma around insanity. And, lastly, the step zero test is narrow as to prevent against potential abuse.[120] Thus, the step zero test, which I will now outline, is in line with the abolitionist approach to the insanity defense. Therefore, even those jurisdictions who have eliminated the insanity defense should adopt it.

B. The Step Zero Test

The step zero test largely serves as a modification to the mistake of fact doctrine when the defendant is suffering from delusions.[121] Prior to any instruction on the jurisdiction's other insanity tests, if any, the jury would first be instructed on the insane delusion rule. The judge would give this instruction to the jury whenever the defendant has satisfied that jurisdiction's standard for when the jury is instructed as to the insanity defense. For example, in the Fifth Circuit, an insanity instruction is required "when the evidence would allow a reasonable jury to find that insanity has been shown with convincing clarity."[122] So, in the Fifth Circuit, the defendant would be entitled to the step zero instruction whenever he has presented evidence that would allow a reasonable jury to believe the defendant has demonstrated with reasonable clarity that he was suffering from a delusion at the time of the crime.

The judge would instruct the jury that, if they find that the defendant was suffering from a delusion at the time of the crime (under whatever burden of persuasion is required under the jurisdiction's insanity test),[123] they should accept the world as the defendant viewed it. This acceptance includes both the

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119 *See* Paul H. Robinson, *Mens Rea*, *in* ENCYCLOPEDIA OF CRIME & JUSTICE 995, 995 (Joshua Dressler ed., 2002) (defining mens rea in a broad sense).

120 For further discussion of how the test is narrow, see discussion *infra* notes 167–172.

121 *See* PERKINS & BOYCE, *supra* note 70, at 965 (comparing the insane delusion rule to a mistake of fact doctrine).

122 United States v. Eff, 524 F.3d 712, 717 (5th Cir. 2008) (quoting United States v. Dixon, 185 F.3d 393, 404 (5th Cir. 1999)).

123 *See generally* BARBARA E. BERGMAN, NANCY HOLLANDER & THERESA M. DUNCAN, 1 WHARTON'S CRIMINAL EVIDENCE § 2:14–15 (15th ed. 2021) (collecting the burdens of persuasion for the insanity test in various states).

attendant circumstances the defendant believed existed in her delusional world and the results she believes her actions will bring.[124] For example, the jury would accept as an attendant circumstance that the defendant had a delusion that the man in front of her had a gun and was about to kill her. In addition, the jury would also accept if the same defendant believed that smoking marijuana would form a protective barrier around her that would stop the man's bullet. Accepting both the defendant's belief about attendant circumstances and results is important to truly get inside the defendant's delusional mind and thus ensure that they are being treated equally to other defendants when they conform to society's laws.[125]

After the jury receives these instructions, they would be informed about the jurisdiction's law on the underlying defense the defendant is claiming. For example, if the defendant claims that their delusion caused them act in what they believed was self-defense, the jury would be instructed in the normal self-defense law. If the defendant puts forward a necessity defense, the jury will receive an instruction on the normal necessity law, and so on. Again, the question of when these defenses can go to the jury, what the burden of persuasion is, and who has the burden of proof are all governed by the jurisdiction's ordinary law for these defenses.

One disputed interpretation of the question four test was that it was exclusive; some argued that the only way for a partially delusional defendant to be excused was to comply with this test.[126] To the extent that one reads the question four test this way, this Note advocates changing the step zero test to not be exclusive. Instead, the jurisdiction would continue to instruct the jury on its normal insanity test after instructing it on step zero. For example, if the jurisdiction followed the *M'Naghten* test, it would instruct the jury on the first prong as step one, and the second prong as step two. If the jurisdiction had no insanity defense, the instructions would end after step zero.[127]

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124 *See* WILLIAMS, *supra* note 51, at 498 (noting the importance of accepting both delusional consequences and attendant circumstances).

125 *See infra* notes 145–149 and accompanying text (discussing the importance in the American justice system of ensuring a criminal is morally blameworthy).

126 *See* WEIHOFEN, *supra* note 46, at 111 ("But it is very different if the rule is so worded that a person committing a crime by reason of delusion is *not* relieved of responsibility *unless* the facts existing in his imagination would justify or excuse the act if they were true.").

127 *Cf.* Finger v. State, 27 P.3d 66, 85 (Nev. 2001) (noting the insane delusion rule is the only test for insanity in Nevada).

The major difference between this Note's step zero test and the question four test is its relation to the jurisdiction's insanity test. As its name implies, the jury would perform this test before any other insanity test the jurisdiction has. In cases where the defendant claims he was suffering from a delusion, the jury would be given the step zero instructions separately from the jurisdiction's insanity test. They would be told to evaluate that question first and only move on to any additional insanity test the jurisdiction might have if they reject the step zero defense. Simply articulating the step zero test as its own separate test has its benefits. Many scholars have suggested that the question four test adds nothing to the *M'Naghten* test because a defendant in a delusional state who acted in accord with a real-world defense, had their delusions been true, did not understand that their actions were wrong.[128] Ignoring the fact that not all jurisdictions follow prong one of the *M'Naghten* test,[129] if legal scholars have debated this point for almost two centuries since *M'Naghten*, a lay jury presented with these instructions at a trial can hardly be expected to divine that *M'Naghten* prong one's ambiguous language incorporates this insane delusion rule. They easily could overlook this nuance and ignore the defendant's delusional mistake of fact because it was unreasonable. Thus, by presenting the step zero test as a distinct step in reaching a jury's verdict, it forces them to acknowledge it and avoids any confusion—even if the jurisdiction's insanity test already theoretically incorporates the question four test.

The test's timing also serves as an escape valve for juries in complex insanity cases. Insanity cases are incredibly complex matters that often force the jury to delve deep into expert testimony and engage in messy counterfactuals about what would have happened had the defendant not suffered from mental illness.[130] Juries will often be confused by the conflicting and ambiguous testimony, which often causes them to get tangled up in making factual determinations and applying those facts to law.[131] These intricacies may cause the jury to miss the

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128 *See, e.g.*, Garvey, *supra* note 52, at 387 (stating that an individual does not know what they are doing is wrong when they properly apply a real-world defense to a delusion); Klinck, *supra* note 71, at 479 (stating that the question four test only qualifies the basic test and has created significant uncertainty).

129 *See* Robinson, *supra* note 44, at 22 (surveying American jurisdictions' insanity tests).

130 *See* Slobogin, *supra* note 65, at 1234 (noting the complex counterfactuals that juries often have to engage in).

131 Johnston & Leahey, *supra* note 49, at 1837.

simple issues right in front of them. Recall the facts of *Clark* from the Introduction. Imagine that Arizona's right-wrong test incorporated the question four test, and also that *Clark* was a jury instead of a bench trial.[132] It is easy to see how the jury could get confused. After hearing much conflicting expert testimony, they are then instructed that (1) Clark is insane if he did not know right from wrong when committing the crime; or (2) he is not guilty if the delusional facts, as he perceived him to be, would otherwise give him a defense. It is not hard to imagine that a lay jury would get wound up in discussing the philosophical question of what it means to know right from wrong and how the defendant's actions and thoughts fit into that answer. In doing so, the jury very well may forget or become confused about how the defendant's delusion fits into this scheme. In fact, it seems like the judge in the actual case got caught up in this ambiguity and confusion. If *M'Naghten's* first prong does incorporate the question four test,[133] it does not seem likely that Clark knew right from wrong since he thought government officials were aliens trying to kill him.[134] But, instead, the judge focused on how Clark hid the gun and evaded police to demonstrate he knew right from wrong. By placing the question zero test at the start, it prevents the trier of fact from getting distracted over the insanity test's intricacies when there is a much simpler defense available for the defendant suffering from a delusion.

Equally important is how this test ensures fair treatment for defendants experiencing delusions. By accepting the world as the defendant perceives it in their delusional state, this test solves the unfairness of punishing a defendant that is acting completely reasonably in the world as they perceive it. Instead of punishing the individual for merely having a delusion, this test asks how we would have acted had we been in their world, as the defendant perceived it. And it does so in a narrow fashion, using a minimally intrusive test. Since the test is designed to correct a narrow but important set of cases, the test is equally as narrow. But this narrowness is a strength, not a weakness.[135] Tests that are designed to be adopted nationally need to be appealing to all jurisdictions. Jurisdictions have taken wildly different views on insanity based on policy consid-

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132 *See* Clark v. Arizona, 548 U.S. 735, 746 (2006).

133 *See* sources cited *supra* note 128.

134 *Clark*, 548 U.S. at 745.

135 For further discussion, see discussion *infra* notes 153–159 and accompanying text.

erations.[136] A broad test would impose certain values and ideas on states that they might not agree with. For example, if the step zero test had a volitional component, it would undermine the policy in states that have rejected that test. A broad test would undermine the more agreeable proposition that those suffering from delusions should be treated, at a bare minimum, equally before the law as everybody else. Yet, this narrow but important test is likely to receive criticisms similar to those that the question four test has received. I will next address those criticisms.

C. The Objections

One common objection to the question four test is that it forces the jury to engage in nonsensical exercises.[137] To this point, I have presented easy cases. For example, if the defendant believes that the person standing in front of him is drawing a gun and about to shoot, the jury can easily place themselves in the defendant's place and apply self-defense doctrine. But those kinds of delusions are rare.[138] Many cases, however, are much more complex and foreign to the real world. So, let us use a more difficult hypothetical. The defendant in this case believes that, if she does not kill her husband, she will be damned to Hell for all eternity. Now, the jury is forced to grapple with some nonsensical question. Does damnation to Hell count as imminent bodily harm for the self-defense doctrine? Is murder the lesser evil compared to damnation to Hell? As Stephen Garvey puts it, "The criminal law is created for our world, not delusional ones."[139]

Yet there are three reasons why having juries engage in these nonsensical scenarios is not as concerning as one might think. This Note will go in order from least to most convincing. First, the judicial system trusts juries with incredibly complex and seemingly foreign subject matters all the time.[140] There is

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136 *See* Garvey, *supra* note 52, at 388.

137 *See, e.g.*, WILLIAMS, *supra* note 51, at 498–99 (discussing the challenges that evaluating facts from a delusional defendant's perspective pose); Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 155 (2018) (stating that the jury must apply the law to the facts of the defendant's delusion).

138 *See* Stopa, Denton, & Wingfield, *supra* note 107, at 201–02.

139 *See* Garvey, *supra* note 137, at 156.

140 *See, e.g.*, Wanetick v. OCT Partnership, 723 A.2d 100, 105 (N.J. Super. Ct. App. Div. 1999), *rev'd on other grounds sub nom.* Wanetick v. Gateway Mitsubishi, 163 N.J. 484 (2000) ("We trust juries to find all kinds of facts—the life and death issues as well as the full range of less consequential ones. Our jurisprudence is committed to the proposition that juries can and will follow the judge's charge and will do so best if they understand the legal consequences of their findings.").

a right to a jury trial in antitrust cases[141] and in intellectual property disputes.[142] These complex subject matters can be incomprehensible even to law students taking introductory courses in these subjects. To lay juries, they could seem wholly foreign and from another world.[143] Now, one may respond that, at least with these subject matters, we can have experts come in and explain the cases to the jury.[144] But, as I will discuss below, we can use psychologists' testimony to likewise explain the defendant's delusions to the jury, thus making them less foreign.

The second response to the criticism is that this is a natural effect of having a criminal justice system that makes a guilty mind a prerequisite to moral blameworthiness. Our criminal justice system not only requires one to commit the act, but also that they satisfy a subjective mental state, known as mens rea.[145] Thus, it is not enough for a defendant to be guilty of burglary that she broke into a another's dwelling at night with the intent to commit a felony. Instead, the prosecution must also prove that the defendant knew it was night, another's dwelling, and so on.[146] The reason our society requires this mental state is because we only find those with an insufficient concern for the law to be morally blameworthy, and thus worthy of state condemnation.[147] Otherwise, the punishment "isn't only unjust; it's illegitimate."[148] Yet, this subjective approach means jurors have to put themselves inside the defendant's mind; the jurors need to understand both what facts the defendant thought existed at the time of the crime and how those facts influenced the defendant's actions.[149] Return to the burglary example provided above. Pretend that the defendant had a rare type of blindness that prevented her from being able to tell if it was night or day (and that she was still able to commit the *actus reus* despite this blindness). The jury would have to place themselves in the defendant's shoes to not only understand her disability, but also to determine if there were

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141 Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 4 (1981).

142 Markman v. Westview Instruments, Inc., 517 U.S. 370, 377 (1996).

143 *See* Jorde, *supra* note 141, at 2.

144 *See, e.g.*, Michael J. Mandel, *Going for the Gold: Economists as Expert Witnesses*, 13 J. ECON. PERSPECTIVES 113, 114–15 (1999) (noting the exponential growth of economic expert testimony in antitrust litigation).

145 STEPHEN P. GARVEY, GUILTY ACTS, GUILTY MINDS 94 (2020).

146 *Id.* at 95.

147 *Id.* at 96.

148 *Id.*

149 *See id.* at 103–08 (discussing how ignorance relates to *mens rea*).

other context clues from which they could infer she knew it was night. For example, was there a nearby clock tower she heard, could her sleep schedule have indicated to her it was night, etc. This exercise may be difficult or confusing for the jurors, yet we require them to do so because we only consider those that are morally blameworthy to be condemnable.

These kinds of scenarios where we require the jury to suspend their knowledge of the existing world and instead place themselves in the defendant's shoes occur very often in self-defense cases. To use lethal force, in most jurisdictions, the actor must reasonably believe that deadly force is necessary to protect against imminent death or serious bodily injury.[150] This requirement, however, is normally based upon the facts that the defendant knew existed at the time.[151] Take the following hypothetical as an example: a plain clothes police officer sees the defendant selling drugs. He goes up to the defendant, grabs his arms, and says he is under arrest (without further identifying himself). Defendant turns around and sees that the officer is not in any kind of uniform and instead thinks the officer is a rival gang member trying to steal his money. Defendant continues to resist, and the two get into a physical altercation. The police officer, beginning to fear for his safety, pulls his gun. The defendant, still believing the officer is a rival gang member and now fearing for his own life, pulls out his gun faster and shoots the officer dead. In the criminal case, the jury would be asked to suspend their knowledge that the victim was actually a police officer. Instead, they would be asked to place themselves in the defendant's shoes and ask if it was reasonable for an individual in the defendant's situation, with his subjective beliefs and experiences in mind, to not know the victim was a police officer. This analysis could get very complex. They may have to understand details about gang life and culture that would inform the defendant's belief that the officer was actually a gang member. In a sense, they have to put themselves in another world to fully understand if the defendant was morally culpable for their actions.

Now, one might argue that, at least with this scenario, the jury is being asked to place themselves in a sane world. It is much easier to place oneself in a world of gangs and crime than

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150 *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST. 1985) ("The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury . . . .").

151 *See, e.g.*, People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (noting that a jury should consider factors such as the defendant's past experiences and knowledge about the situation in determining if his actions were reasonable).

it is to place oneself in a world where you will be banished to Hell if you do not murder somebody. Yet, as this Part's penultimate point demonstrates, these delusions are not too different from the real world. Thus, since the American criminal justice system is focused on only punishing those with guilty minds, and it already asks juries to suspend their disbelief to evaluate cases from the defendant's perspective, the justice system should not be too concerned with asking juries to place themselves in the defendant's delusion.

Third, the underlying premise—that these worlds are so foreign that juries cannot understand them—is flawed. Yes, many of the situations are foreign to us. Recall the earlier example of the wife that will be damned to Hell if she does not kill her husband. Hell is an amorphous concept that will mean different things to different people. For other people, it is a meaningless concept. But this question takes too macro-level of an approach to the defendant's delusion. While the facts of the defendant's world might be foreign and nonsensical, it is still possible to break her world down into the base human emotions that drive her actions. Instead of asking whether banishment to Hell justifies self-defense, the jury should ask what the defendant believes happens in Hell. What about Hell motivates the defendant to kill her husband? For example, does she think that she will be tortured for all of eternity? Grievous bodily injury is much more of a cognizable harm to which we can apply to self-defense law. Alternatively, does she not think Hell is all that bad, but she just wants to go to Heaven because it is nicer. Again, envy or desire are much more cognizable motivations, to which the jury can apply the necessity doctrine. Trials can use expert testimony, based on interviews with the defendant, to break these delusions down into their base human emotions. Emotions that humans can understand and empathize with.[152] At this point, after approaching at a micro-level, it is no different than asking the jury to use expert economists to make complex economic theories in antitrust cases more comprehendible to them. In many ways, it may be more realistic for the jury to evaluate these base human emotions—which we are all familiar with by human nature—

152 *See* PHILIP GERRANS, THE MEASURE OF MADNESS: PHILOSOPHY OF MIND, COGNITIVE NEUROSCIENCE, AND DELUSIONAL THOUGHT 6 (2014) ("We can empathize, sharing some of the same emotions.").

than to understand the anticompetitive effects of resale price maintenance agreements.[153]

The other major criticism to this proposal is that it is too strict. The age-old criticism of the question four test is that one cannot expect an individual in the midst of a delusion to rationally apply our ordinary laws.[154] This was one of the primary reasons why the question four test fell into desuetude in the first place.[155] Expecting this level of rationality from a defendant in a delusional state both places too great of a burden on the defendant and severely misunderstands the nature of a delusion. And the cases where a delusion presents such an imminent threat as a man holding a gun to your head are much rarer than delusions that do not present an imminent threat.[156] Thus, a relatively small percentage of defendants would find escape under this defense.[157]

These criticisms are all strong blows to the question four test. Yet, for this Note's proposed step zero test, they need not detain us for too long. All of these criticisms are reasons to add onto the foundation that step zero creates. If a state believes that this test is too narrow, perhaps it adds the two *M'Naghten* prongs as steps one and two. Or perhaps another state favors a more wholistic approach and simply asks at step one if, in light of the defendant's mental illness, should he be held responsible.[158] Or maybe this does not concern you: you believe that the "mentally ill must remain . . . responsible for their past conduct if they are ever to wrench some satisfaction from their lives," and therefore the defense should be abolished.[159] This is a policy decision that each state needs to make. But, regardless of what decision they make, that decision is independent of the step zero test. They would always apply the step zero test, regardless.[160] The step zero test is ultimately designed to en-

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153 *See generally* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–94 (2007) (describing the pro- and anticompetitive justifications of minimum resale price maintenance agreements).

154 *See supra* notes 53–55 (collecting criticisms).

155 *See* WILLIAMS, *supra* note 51, at 500.

156 Phillip J. Resnick, *From Paranoid Fear to Completed Homicide*, 15 CURRENT PSYCHIATRY 24, 24 (2016) (describing various examples of non-imminent, threatening delusions).

157 *See* Slobogin, *supra* note 65, at 1246 (noting the question four test, alone, would result in far fewer acquittals).

158 *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949–1953 REPORT 116 (1953).

159 *See* Norval Morris, Richard Bonnie, & Joel J. Finer, *Should the Insanity Defense be Abolished?*, 1 J.L. & HEALTH 117, 120 (1986).

160 *See* discussion *supra* subpart II.A (discussing why a state should apply this test, even if they have decided that the insanity test should be abolished).

sure that a portion of defendants suffering from delusions, albeit a narrow portion (but certainly not nonexistent), are treated equally as all other defendants.[161] While the test may be narrow, that is because its purpose is narrow. It is a feature, not a bug. Solving the question of which insanity test is appropriate to capture a suitable number of insane defendants is well beyond this Note's scope.

III
COUNTING TO ZERO: CAN STEP ZERO BE THE ONLY STEP?

This final Part will address whether step zero could serve as the only test for insanity. Could a jurisdiction apply step zero and then stop there? In other words, is step zero a sufficient insanity defense by itself? Slobogin considers this abolishing the insanity defense.[162] He argues that, so long as you apply a subjective approach to culpability by accepting the world as the defendant sees it as true, you can outright abolish the insanity defense.[163] Yet this is not actually abolishing the insanity defense (although it is close to it). For most crimes, the jury is not supposed to consider unreasonable mistakes of fact.[164] However, under Slobogin's approach, the jury would be able to consider unreasonable factual mistakes if the defendant has a mental disease or defect.[165] By nature of allowing only the insane to have access to a modified mistake of fact doctrine, this test provides some form of insanity defense—however narrow it may be. Now, one may respond that this subjective approach to criminal law should apply to everybody. Yet I do not think this is the best reading of his Article, as he does not address any of the traditional reasons for and concerns with allowing sane defendants to use unreasonable mistakes of fact.[166]

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161 *See supra* subpart II.A–B (describing how delusional defendants are currently treated unfairly and how the proposed test cures that inequity).

162 *See* Slobogin, *supra* note 65, at 1227, 1246–47.

163 *See id.* at 1207; *see also supra* notes 64–69 and accompanying text (summarizing Slobogin's Article further).

164 *See* sources cited *supra* note 95. The jury is typically allowed to consider an unreasonable mistake of fact in imperfect self-defense cases, thus allowing the defendant instead to be convicted of voluntary manslaughter. *See generally* 33 AM. JUR. PROOF OF FACTS 2D § 3.7 (1983) (describing the impact that reckless mistakes can have on self-defense claims). Even so, courts typically prohibit such mistakes to be the result of a delusion. *See, e.g.*, People v. Elmore, 325 P.3d 951, 955 (Cal. 2014) (holding that a defendant may not claim self-defense based on a mistake of fact when a delusion caused that mistake).

165 Slobogin, *supra* note 65, at 1202.

166 *See, e.g.*, Brinig, *supra* note 96, at 225–33 (comparing the subjective approach to mistake of facts with the reasonableness requirement); Stephen P.

So, this approach is not abolishing the insanity defense entirely; it is just heavily curtailing it. We can look to Nevada to see this system in action (although not applying the step zero framework, obviously). The state has not abolished the insanity defense, but it only allows it in the limited circumstances that the defendant satisfied the question four test.[167] Nonetheless, even without abolishing the defense, the step zero test would prove too narrow to be the only test for insanity. Obviously, if one already supports abolishing the insanity defense, the step zero test could serve as the only test as it simply solves the unfairness those suffering from delusions face and nothing else.[168] But, for those that do not support abolition, the step zero test is too strict. The affirmative defenses that the test gives those suffering from delusions access to are simply too narrow to provide the only means to an insanity defense. By nature, affirmative defenses are narrow and strict. Self-defense, for example, has a strict imminency requirement.[169] Necessity requires that the actor selected the lesser evil to avoid a greater evil.[170] Duress does not excuse murder in many jurisdictions.[171] They are exceptions to the norm of criminal liability if you have satisfied both the actus reus and mens rea.[172]

Since the dawn of the question four test, scholars have criticized it for expecting a defendant in the throes of a delusion to otherwise be able to rationally apply the law.[173] A little under two centuries more of psychological research reconfirms that many in a delusional state will not be able to think ration-

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Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 125–27, 146–55 (2008) (discussing and rejecting theories of how the reasonable belief rule can prevent a racist defendant from relying on racist mistakes of fact).

167 *See supra* notes 73–77 and accompanying text (describing the Nevada approach to insanity).

168 *See supra* notes 115–120 and accompanying text (addressing why even insanity-defense abolitionists should support the step zero test).

169 *See, e.g.*, MODEL PENAL CODE § 3.04(1) (AM. L. INST. 1985) (explaining that the use of force is justifiable when the actor believes such force is immediately necessary).

170 *See, e.g.*, *id.* § 3.02(1)(a) (explaining that conduct is justified under the necessity defense if the harm sought to be avoided is greater than the harm the law sought to prevent).

171 *See, e.g.*, People v. Anderson, 50 P.3d 368, 369 (Cal. 2002) ("[F]ear for one's own life does not justify killing an innocent person. Duress is not a defense to murder."); People v. Reichard, 949 N.W.2d 64, 71 (Mich. 2020) ("[W]hen someone has a choice between sparing his or her own life or that of an innocent, the law expects that individual to spare the innocent person's life.").

172 *See* MODEL PENAL CODE § 1.12(2)–(3) (AM. L. INST. 1985); Celia Goldwag, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 655 (1978).

173 *See supra* notes 53–55 (collecting criticisms).

ally while in said state.[174] Beyond simply causing delusions, psychotic disorders impair patients' emotional regulation—thus diminishing their ability to act rationally.[175] Delusions do not just alter one's perceptions and beliefs, but they also create a "delusional atmosphere" that pervades and overwhelms one's world.[176] Those suffering from paranoid delusions will often take ill-thought-out strategies to pursue short-term relief from the delusion.[177] Those suffering from delusions also fail to properly respond to environmental stressors.[178] All of these factors cause the defendant to have a decreased capacity to morally apprise a situation.[179]

For example, imagine an individual is suffering from a delusion that her overbearing father is following her around everywhere, verbally tormenting her. He randomly appears on strangers' faces, although she does not realize that the strangers are not her father. After months of verbal torment, she snaps and shoots her father in an attempt to obtain short-term relief from her delusion. Of course, that person is actually a stranger. The defendant would receive no relief under this Note's step zero test. The defendant never felt in fear for her life but instead wanted to be free from an annoyance (although, admittedly, one that was causing her mental anguish). Even if

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174 *See, e.g.*, SASS, *supra* note 81, at 5 (noting how a "delusional atmosphere" often accompanies delusions, thus effecting the individual's reasoning ability); Carl Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 U. MIAMI L. REV. 30, 39 (1959) ("Of course the accused *may* have been able so to reason; but the assumption that he must have been displays a crude and woefully inadequate appreciation of the disordered mind."); Johnston & Leahey, *supra* note 49, at 1831 ("[A] psychotic individual may have a diminished ability to appreciate the wrongfulness of an act when that act emanates from a delusion.").

175 *See* Lea Ludwig, Dirk Werner & Tania M. Lincoln, *The Relevance of Cognitive Emotion Regulation to Psychotic Symptoms—A Systematic Review and Meta-Analysis*, 72 CLINICAL PSYCH. REV. 1, 1–2, 8–9 (2019); *see also* Richard P. Bentall, Rhiannon Corcoran, Robert Howard, Nigel Blackwood & Peter Kinderman, *Persecutory Delusions: A Review and Theoretical Integration*, 21 CLINICAL PSYCH. REV. 1143, 1143 (2001) (equating persecutory delusions with paranoid delusions).

176 SASS, *supra* note 81, at 5 (internal quotation marks omitted).

177 *See* Stefan Westermann & Tania M. Lincoln, *Emotion Regulation Difficulties are Relevant to Persecutory Ideation*, 84 PSYCH. & PSYCHOTHERAPY: THEORY, RES. & SCH PRAC. 273, 273, 282 (2011) ("In the case of persecutory delusions, the usually functional emotion regulation strategy of reappraising emotional evocative situations in a neutral or non-threatening manner could be corrupted by hasty decisions due to jumping-to-conclusions . . . ." (internal citations omitted)).

178 Tania M. Lincoln, Maike Hartmann, Ulf Köther & Steffen Moritz, *Dealing with Feeling: Specific Emotion Regulation Skills Predict Responses to Stress in Psychosis*, 228 PSYCHIATRY RESSCH. 216, 219–20 (2015); *see also* David B. Arciniegas, *Psychosis*, 21 CONTINUUM 715, 715 (2015) (noting delusions are included within the definition of psychosis).

179 Johnston & Leahey, *supra* note 49, at 1835–36.

her father was actually stalking her and harassing her, the proper remedy is to go to the authorities, instead of shooting him.[180] Yet, most would agree that her actions were caused by the persistent voices in her head, following her around everywhere she went. She would at least have an arguable case under the *Durham* test, as her actions were the product of her mental illness.[181] She may even have arguments under the various other insanity tests. Alternatively, one could argue, it is never excusable to kill somebody just because they are causing you mental anguish. The fact that her mental illness caused her to place short-term relief over long-term ramifications is of no consequence: plenty of people are punished every day for focusing on short-term gain over long-term consequences. Whatever your opinion on the subject, the question four test does not engage with any of these complexities because it fundamentally misunderstands how delusions function. It fails to comprehend that the defendant might not have been able to rationally apprise the situation during her delusion, thus causing her to snap when she otherwise would not have.[182]

One of the best indicators that this test would be too strict is applying the facts of *M'Naghten* to the test. *M'Naghten* is described as a litmus test for the insanity defense.[183] If the insanity theory would find M'Naghten sane, it is not a good theory. But, under the existing defenses at the time, M'Naghten clearly would have been guilty under the question four test. Although M'Naghten believed that the Tory persecution was a threat to his life and accepting as true that killing Peel would have ended that threat,[184] M'Naghten would not have qualified for self-defense. There was no evidence that the conspiracy presented an imminent threat of death at the time he shot Drummond—in fact M'Naghten is the one who approached Drummond.[185] And, even if he thought that the conspiracy was about to kill him then and there, there was no evidence that he could not have retreated from that threat in-

180 *See* MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST. 1985) (allowing the use of deadly force only to prevent against deadly force, serious bodily harm, kidnapping, or rape).

181 *See* Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

182 *See* Ludwig, Werner & Lincoln, *supra* note 175, at 8 (noting that patients with psychosis differ in how they regulate emotions).

183 *See, e.g.*, Garvey, *supra* note 137, at 131 ("M'Naghten provides us with a litmus test for insanity tests.").

184 MORAN, *supra* note 23, at 105.

185 *See id.* at 7.

stead of seeking out and shooting Drummond.[186] Thus, the step zero test would not have acquitted M'Naghten, demonstrating that states should not apply it as the only test.

Why, though, can we not modify the question four test to make it more broadly applicable? In other words, can we salvage the question four test by modifying it to account for these centuries of experience with the test and delusions, thus allowing states to employ step zero as the only step to their insanity defense? In short, the answer is no. The prime defects that need to be corrected in the question four test is that it does not understand how delusions work.[187] Delusions do not just cause you to misapprehend the facts, but they often also impair your ability to rationally respond to those facts.[188] But altering the test to take account for that impairment introduces a new crux for the insanity test: rationality. Many scholars have proposed tests for insanity that turn on if the defendant was able to rationally respond in their own self-interest to external factors.[189] Yet this proposal is controversial and has not garnered much support in legislation.[190] Introducing rationality as an element of the question four test fundamentally changes its character. The test would no longer be about the defendant's delusional mistake of fact, but just a vehicle for a rationality test. Thus, the test would become detached from its original moorings.[191]

Johnston and Leahey attempt to salvage the question four test in a similar way by incorporating elements from the right-wrong test.[192] As they propose it, delusional beliefs can satisfy the insanity test "when the mental disorder that caused the delusional beliefs (of any content) substantially impaired the individual's capacity for moral reasoning."[193] They argue that lawyers should be able to explore the relationship between the delusion and the emotional disfunction that can accompany

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186 *See generally* Hunter G. Cavell, *Reasonable Belief: A Call to Clarify Florida's Stand Your Ground Laws*, 50 CRIM. L. BULL. 153, 154 (2014) (noting the long common law history of the duty to retreat).

187 *See supra* notes 172–178.

188 *See* Ludwig, Werner & Lincoln, *supra* note 175, at 1–2.

189 *See, e.g.*, JOEL FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 285 (1970) (emphasizing rationality as the important question for insanity tests to address).

190 *See generally* Walter Sinnott-Armstrong, *Insanity vs. Irrationality*, 1 PUB. AFFS. Q., 1 (1987) (criticizing three leading arguments for the rationality test).

191 WEIHOFEN, *supra* note 46, at 107 (describing the question four test as an alteration to the mistake of fact doctrine).

192 *See* Johnston & Leahey, *supra* note 49, at 1835–36.

193 *Id.* at 1784.

the delusion.[194] They additionally suggest that the loss of emotional control can result in a loss of volitional control, too.

Johnston and Leahey's theories, along with proposed rationality tests, may be wise policy choices that more accurately select some insane defendants to excuse from condemnation. States may be persuaded by these proposed tests and choose to adopt them. But, at this point, it becomes detached from the question four test's original purpose as a mistake of fact doctrine. It is no longer the question four test at all; instead, it is just an irrationality test, a right-wrong test, or whatever other new crux one chooses to introduce. It would be additionally inapt to incorporate a change like this into my step zero test because it would essentially force a rationality test onto the states. It would far exceed the narrow scope of the problem this Note tries to correct: states disregarding how delusions can impact the defendant's factual perceptions, thus causing them to be treated differently from sane defendants. If a state agrees with a rationality test, they are free to adopt it as step one of their own insanity defense. But this rationality test should not come bundled in step zero.

CONCLUSION

Most jurisdictions allow for the paradox that defendants suffering from delusions are sane enough to be convicted of their crime but too insane for their delusional mistakes of fact to be accounted for. This paradox creates a system where defendants having delusions can be punished for actions that complied with society's laws, had the delusion been real. The step zero test seeks to fix that paradox. It accepts the world as the defendant sees it, in their delusional state, and acquits him if he still acted in conformity with the law, given those facts. This test is relatively narrow, which makes it ideal for all jurisdictions to adopt as a precursor to their insanity test. It is not designed to replace the insanity defense, as those suffering from delusions cannot be expected to act in conformity to society's laws. But, when they do, the state should not have the authority to punish them merely for suffering from a delusion.

194 *Id.* at 1847–48.