UNIVERSITY OF BIRMINGHAM
University of Birmingham Research at Birmingham

# Defending the delusional, the irrational, and the dangerous

Child, John; Crombag, Hans; Sullivan, Robert

*License:*
Creative Commons: Attribution-NonCommercial (CC BY-NC)

*Document Version*
Peer reviewed version

*Citation for published version (Harvard):*
Child, J, Crombag, H & Sullivan, R 2020, 'Defending the delusional, the irrational, and the dangerous', *Criminal Law Review*.

Link to publication on Research at Birmingham portal

**General rights**
Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

•Users may freely distribute the URL that is used to identify this publication.
•Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
•User may use extracts from the document in line with the concept of ‘fair dealing’ under the Copyright, Designs and Patents Act 1988 (?)
•Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

**Take down policy**
While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Download date: 21. Mar. 2025

# Criminalising the Mistakes of the Delusional, the Irrational, and the Dangerous

J.J. Child; H.S. Crombag; G.R. Sullivan*

At roughly 2 pm on Sunday 31st January 2016, Simon Taj came across the broken-down vehicle of Mohammed Awain and stopped to offer assistance.[1] Smoke was coming from the vehicle, and the doors were open; Awain is an electrician, and wires and equipment were visible in the open boot. Unfortunately, Taj mistook this equipment for components of a terrorist bomb that Awain was on the point of assembling to explode. Taj called the police, who attended the scene. Following police assurances as to Awain's innocence, Taj initially drove away, but soon returned still convinced that Awain was a terrorist, and that he must do something to stop him. At 2.46 pm, Taj launched a ferocious attack on Awain with a metal tyre lever, almost killing him. When police arrived and restrained Taj, he expressed surprise – 'why are you arresting me he's the terrorist'.[2] It was later discovered that Taj had been drinking heavily on Friday 29th January into the early hours of Saturday; but as Taj was so calm and lucid at interview, held immediately after the attack, the police officers present did not arrange for blood samples to be taken. Taj was charged with attempted murder, but claimed to have acted in self-defence on the basis of his mistaken belief.

Mistaken delusional beliefs of this kind, completely unfounded on 'any objective consideration of the facts',[3] present fundamental challenges to the legal system. Where mistaken beliefs are not rooted in observable reality, courts (and juries) cannot engage empathetically – these are not *relatable* mistakes, but the products of abnormality.[4] And yet beliefs, whether mistaken or not, are central to our moral and legal conceptions of culpability, and so it is vital that they are understood. It may be, for example, that D's delusional belief demonstrates a lack of criminal culpability (ie, it reveals a lack of mens rea, or provides the basis for a defence); or more fundamentally, D's delusion may reveal him as a non-rational agent whose conduct should not expose him to criminal conviction.[5] Of course, the mere fact of a delusion

---

* J.J. Child, Senior Lecturer in Criminal Law, University of Birmingham (J.J.Child@Bham.ac.uk); H.S. Crombag, Senior Lecturer (Psychology and Neuroscience), University of Sussex; G.R. Sullivan, Emeritus Professor of Law, UCL. We thank participants from the Criminal Law Conversations Conference (KCL) for comments on an earlier version of this article, as well as Dr Ailbhe O'Loughlin. Our research was assisted by access to the Expert Reports used in *Taj* [2018] EWCA Crim 1743, gained with the permission of Mr Taj (19th February 2019) and the assistance of his clinical team.

[1] Facts from *Taj* [2018] EWCA Crim 1743.

[2] Ibid [9].

[3] Ibid [64].

[4] Usefully discussed in Feinberg, *Doing and Deserving* (1970) Ch 11.

[5] The insanity rules are sometimes presented in these terms. D's lack of rationality can be analysed categorically, or (more plausibly) in relation to a time and fact specific event. See, Law Commission, *Insanity and Automatism* (Discussion Paper, 2013) Appendix A.

will not *always* undermine culpability. For example, D may be culpably responsible for causing harms *despite* his delusion, if that delusion is trivial or unrelated to his criminal conduct; or, alternatively, D may be culpably responsible *for* his delusion, where that delusion is caused by D's voluntary conduct and would or should have been foreseeable to him (ie, circumstances of 'prior fault'). Psychiatric experts and clinical psychologists can assist courts in identifying conditions and events that typically result in delusions, thereby reducing the risks of fabrication and malingering. It is for the law, however, to determine the implications of D's delusional and irrational beliefs for the purposes of liability.

The law must provide a clear and fair way forward. We can acknowledge the challenges posed by delusional and irrational beliefs, but still insist on rules that identify and track reliable markers of culpability, and which protect the public from potential future harms. Unfortunately, although these aims are acknowledged, the common law has developed a series of complex and convoluted rules that have struggled to give them coherent expression. Central here are the rules relating to non-insane automatism,[6] intoxication, and insanity. Aptly described as a 'quagmire'[7] of legal reasoning, clear (though admittedly difficult) questions of deluded culpability have become distorted and lost within complex and often intractable debates: distinguishing between basic and specific intent offences;[8] between internal and external causes;[9] between irrational/uncontrolled and involuntary conduct;[10] and so on.[11] Complex debates of this kind could be tolerated if they succeeded in marking genuine distinctions in moral culpability, but as we will discuss, this is typically not the case.

Our aim in this article is to expose the most fundamental problems with the current law as it applies to delusional and/or irrational beliefs, and to offer some suggestions for clarification and reform. The recent Court of Appeal decision in *Taj*, introduced above, will be used to exemplify many of these problems. Part 1 sets out and critiques the structure of the current law. In particular, we highlight the legal importance of identifying a single dominant cause for cases involving delusions or other irrational beliefs, and the problem this creates in cases of co-morbidity and/or causal uncertainty. Following this, we drill down to analyse each potentially applicable set of rules individually: intoxication in Part 2, insanity in Part 3, and delusions that fall outside both categories in Part 4. Our recommendations across each part of this article are directed to the courts, and have been consciously crafted to remain within the

[6] Hereafter 'automatism'.
[7] *Quick* [1973] QB 910, 922.
[8] Essential for the intoxication rules (*Majewski* [1977] AC 443), and *probably* for prior fault automatism (*Bailey* [1983] 1 WLR 760).
[9] Essential to distinguish insanity from non-insane automatism and intoxication (*Sullivan* [1984] AC 156).
[10] Essential to identify automatism (*Coley* [2013] EWCA Crim 223).
[11] Several others could be mentioned here. See *Simester and Sullivan's Criminal Law* (7th Ed, 2019) Ch 18-19; *Smith, Hogan and Ormerod's Criminal Law* (15th Ed, 2018) Ch 9.

legitimate scope of common law clarification. In doing so, we acknowledge (though certainly regret) that legislative reform remains unlikely.[12]

## 1. Structural Focus on Cause

In order to assess the relevance of a delusional and/or irrational belief within the current law, emphasis is first placed on identifying its cause. It is clear that insanity rules can only apply where delusions are *internally* caused, by contrast to cases of automatism or radical confusion caused by *external* physical impacts, alcohol, non-medicinal or medicinal drugs. Special intoxication rules relating to responsibility and culpability may apply if the externally induced state of automatism/confusion is caused by the voluntary consumption of a 'dangerous drug'.[13] These distinctions are not arbitrary, but have grown from (mostly outdated) psychological understandings that focus too narrowly on root causes. As per Devlin J (as he was then) in *Hill v Baxter*:

> If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again...[14]

As proxies for tests of future dangerousness (insanity) and prior-fault (intoxication), the blunt causal distinctions within the current law have been the subject of cogent criticism.[15] For insanity, the core assumption is that *internally* caused incapacity is blameless but presents a continuing danger, requiring treatment and/or constraint. However, just as we know internal causes may be temporary and/or non-dangerous[16] (and otherwise resistant to the insanity label[17]), so external causes may be long-lasting and give rise to substantial risks of reoccurrence;[18] and in the notable case of diabetic shock or coma, which can arise from either internal or external causes, the conditions and associated risks may be identical.[19] For intoxication and prior-fault, similar problems arise. The core assumption here is that *intoxicated* mistakes are blameworthy, requiring a special route to liability. However, again, this should be questioned; both as to the intrinsic blameworthiness of intoxication (discussed in Part 2), as well as the focus on intoxication over other blameworthy causes. For example,

---

[12] The most likely route to legislative reform is through the Law Commission. The Commission paused their project on insanity and automatism in 2013 (n5), prioritising related work on unfitness to plead. Following completion of the latter project, it is contended that the time is now right to reengage with the former.
[13] *Lipman* [1970] 1 QB 152.
[14] [1958] 1 QB 277, 285.
[15] Usefully summarised in Law Commission, (n5) Paras 1.37-1.47.
[16] E.g., an operable congestion of blood on the brain. See *Kemp* [1957] 1 QB 399.
[17] For example, sleep-walking and epilepsy. See, Mackay and Mitchell, 'Sleepwalking, Automatism and Insanity' [2006] CrimLR 901.
[18] E.g., external events leading to post-traumatic stress disorder. See Kormos, 'The Post Traumatic Stress Defence in Canada: Reconnoitring the "Old Lie"' (2008) 54 CrimLQ 189.
[19] *Hennessy* (1989) 89 Cr App R 10. See Rumbold, 'Diabetes and Criminal Responsibility' (2010) 174 CL&JW 21.

non-intoxicated prior fault can also lead to serious harms as well (eg, where D fails to manage blood sugar levels after injecting insulin), and yet prior fault of this kind is limited to the automatism rules; such rules (unlike intoxication) will not engage D who is caused to lack mens rea but is otherwise voluntary in their actions.[20] Similarly, where D's prior fault results in an internally caused incapacity that leads to harms (eg, where D fails to take anti-psychotic medication and uncontrollably attacks V), the common law does not recognise at all the operation of prior fault rules. In each case, the causal assumptions about dangerousness and blame that underpin the current law appear problematic.[21]

Unfortunately, although courts regularly acknowledge the uncertain tracing between these underlying policies and their doctrinal expression in the common law,[22] little has been done to address it. Rather, notable appeals on automatism, intoxication and insanity have been more likely to entrench and complicate existing doctrinal causal distinctions than to re-assess them in light of new understanding – deferring critical engagement to a legislative process that shows little sign of life.[23] The problem is made worse by the polarising legal outcomes that result from doctrinal capture within a certain set of rules. Where D's conduct is found to have been involuntary because of a blameless state of automatism, he will be given an unqualified acquittal; where D is found insane, he will be subject to the special verdict of not guilty by reason of insanity (with the potential for compulsory treatment and supervision[24]); and where D is found to have been voluntarily intoxicated, he will usually be convicted for *at least* a basic intent offence.[25] These differences are further marked by the reversed burden of proof applicable to insanity cases.[26] In this manner, not only do the doctrinal rules fail to track their underlying policy aims, but their strict application means that such failure will always have material effects on a defendant's legal position. Equally, the sharp causal distinctions required by the law are ill-equipped to deal with (far from uncommon) cases where cause is uncertain; where symptoms are non-specific,

---

[20] I.e. Lack of voluntary action is pre-requisite for automatism, and so it is also a pre-requisite for prior fault automatism. This makes prior fault automatism considerably narrower in application than intoxication. See Child and Reed, 'Automatism is Never a Defence' (2014) NILQ 167.

[21] See Child and Sullivan, 'When does the insanity defence apply? Some recent cases' (2014) CrimLR 788; Law Commission, (n5) Ch 6, proposing that prior fault rules should apply to any new defence of 'not criminally responsible by reason of recognised medical condition.'

[22] Even within the leading cases of *Sullivan* [1984] AC 156 (insanity) and *Majewski* [1977] AC 443 (intoxication) there are several references to the rules as not strictly logical or principled.

[23] See, for example, *Coley* [2013] EWCA Crim 223 on automatism, distinguishing 'irrational' from 'involuntary'; *Heard* [2007] EWCA Crim 125 on intoxication, distinguishing basic and specific intent; and *Johnson* [2007] EWCA Crim 1978 on insanity, distinguishing knowledge of legal and moral wrongdoing.

[24] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s5.

[25] D's voluntary intoxication will effectively substitute for any missing mens rea and lack of voluntariness for basic intent offences, and in the context of defences, will prevent D relying on unreasonable intoxicated beliefs. If D's intoxication did not prevent him from forming an intent required to prove the crime charged, D will be found guilty under the normal rules of liability.

[26] Usefully discussed in Jones, 'Insanity, Automatism, and the Burden of Proof on the Accused' (1995) LQR 475.

comorbid conditions exist, and tools for differential diagnosis are poor or altogether unavailable.

We are left with a series of mismatches that negatively impact the law as it is applied: mismatches between the doctrinal rules and their underlying policy goals, as well as mismatches between expert medical diagnosis that is frequently multi-factorial and probabilistic, and the entrenched legal requirement for simple, clear-cut causal identification. This can cause obvious unfairness, where the nature of D's condition leads to an apparently absurd outcome, for example where those suffering epileptic seizures or sleep walking are captured within the insanity rules. But equally concerning are the less obvious cases, those where advocates and courts are forced to identify a causal root in the face of scientific/clinical uncertainty and/or comorbidity. The issue here is the uncertainty and inconsistency of outcome, with factually complex causal relationships necessarily side-lined within the courts.[27]

The facts of *Taj* provide a valuable case in point. At the time of the attack, Taj was experiencing a delusional state of mind which led him to mistakenly believe that force was necessary to prevent Awain committing a terrorist act. Expert evidence initially identified the cause of his delusions as 'drug/alcohol induced psychosis' resulting from his prior drug and/or alcohol intake,[28] before later (the day before Taj's appeal) indicating that his symptoms may have been *alternatively* caused by an underlying mental illness, 'probably bipolar affective disorder (also known as manic depression)', separate from but potentially exacerbated by his historic drug and alcohol misuse.[29] In this way, the Court of Appeal was faced with facts that arguably raised voluntary intoxication, which would result in liability; yet facts not necessarily incompatible with a finding of insanity, resulting in the special verdict; or alternatively, facts involving delusions not caught within the intoxication or insanity rules, and where

---

[27] This is especially evident in the divide between intoxication and insanity. For example, D's intoxication may be taken to be the primary cause of his conduct despite evidence of (separate or secondary) mental illness, as we see in *Majewski* [1977] AC 443 (D was a drug addict and had a personality disorder) and *Lipman* [1970] 1 QB 152 (D was a drug addict); or dismissed as incidental, as we see in *Press* [2013] EWCA Crim 1849 (focusing instead on D's PTSD) and *Oye* [2013] EWCA Crim 1725 (focusing on D's psychosis as detached from the drug use that likely caused it to manifest), with often minimal discussion. A similar dismissal of intoxication is evident in *Roach* [2001] EWCA Crim 2698 in the context of automatism. For discussion of similar problems, including within the Australian context, see Loughnan and Wake, 'Of blurred boundaries and prior fault: Insanity, Automatism and Intoxication' in Reed and Bohlander (eds) *General Defences in Criminal Law* (2014) 113, Part 2.

[28] *Taj* [2018] EWCA Crim 1743, [61]. On the accepted facts, Taj was not under the direct influence of drugs at the time of the attack; he claimed not to have taken any alcohol or drugs since the early hours of the previous day, and no drugs test was performed by the police. Taj also had a long history of alcohol and drug use dating back to his early teens interlocked with previous occasions, starting in 2009, when he presented with psychiatric symptoms, which were attributed to his excessive use of drugs and alcohol. In the expert's 'Heads of Agreement' Statement from Drs. Reid and Browne (13th October, 2016), both 'drug induced psychosis' and 'drug/alcohol induced psychotic disorder' are mentioned as the cause of Taj paranoid state of mind. We presume these two phrasings (one using the wording 'disorder') to mean the same and to refer what others have named alcohol hallucinosis; a psychotic state of mind (with or without the presence of delusions) appearing subsequent to, but not directly caused by the presence of alcohol and/or drugs in the system.

[29] Psychiatric Report from Dr Alan Reid (25th April 2018).

the resolution of the case is less obvious. The following parts of this article explore these options in turn, highlighting general problems with their application, as well as specific challenges from *Taj*.

## 2. When to Apply the Intoxication Rules

The intoxication rules are grounded and justified by the simple intuition that 'no wrong is done' by criminalising D who causes harms having voluntarily taken 'a substance which causes him to cast off the restraints of reason and conscience'.[30] In other words, even where D's intoxication results in a lack of mens rea and/or voluntariness (for basic intent offences), and/or results in a mistaken belief that might otherwise avail him of a defence, liability should nevertheless be found. In order to achieve this intuitive goal, the intoxication rules are perhaps inevitably complex. However, a remarkable feature of their evolution at common law has been the avoidance of complexities wherever possible, even at the expense of legal principle and potential over-criminalisation. Debates illustrating this point are now familiar in the literature: the choice to present intoxication as a defence, framing the debate in terms of limiting exculpation due to drunkenness;[31] holding voluntary intoxication as an objectively understood wrong, avoiding the need for subjective foresight of harms[32] and questions of degree;[33] allowing intoxication to substitute for missing culpability at the (basic intent) 'offence' level, avoiding the need to identify intoxication as equivalent to a precise mens rea term;[34] and so on. This has resulted in the intoxication rules becoming an exceptionally punitive doctrine of prior fault inculpation.

Despite the (overly) punitive construction of these rules in creating liability, however, the initial gateway requiring a state of 'intoxication' has remained in place; strictly and consistently distinguished from cases of non-intoxication or insanity.[35] And this is despite a similar prior fault logic/intuition surely applying beyond drug taking; for example, where D recklessly or negligently fails to take medication, or drives when

---

[30] Majewski [1977] AC 443, 474.
[31] Simester, 'Intoxication is never a defence' [2009] CrimLR 3.
[32] Crombag, Child and Fortson, 'Understanding the "Fault" in Prior-Fault Intoxication: Insights from Behavioural Neuroscience' (forthcoming).
[33] Intoxication rules will apply regardless of D's exceptional or unexpected reaction to any degree of relevant intoxication. See *Coley* [2013] EWCA Crim 223, [18] where the effect of cannabis in inducing a vivid delusion which held D in its grip, which although a very rare occurrence, did not make the Court of Appeal receptive to arguments that his condition amounted to automatism or insanity rather than intoxication.
[34] The Law Commission recommended changes to the intoxication rules in 2009 that would have removed offence distinctions, with intoxication applying as a direct substitution for certain mens rea relevant to offence elements rather than whole offences: *Intoxication and Criminal Liability* (Law Com No 314, 2009). However, the Commission's recommendations were criticised as overly complex, and otherwise problematic, and were rejected by Government. See, Child, 'Drink, drugs and law reform: a review of Law Commission Report No.314' [2009] CrimLR 488.
[35] See *Beard* [1920] AC 479, 496-501 regarding the distinction between intoxication and mental illness resulting from chronic drugs use, as in addiction illness; and *Davis* (1881) 14 Cox CC 563 regarding the distinction between intoxication and post-intoxication withdrawal.

sleep deprived, etc.[36] There are several possible explanations for the focus on intoxication, including the historic disdain for psychoactive drugs and drug taking.[37] There are widely held but oversimplified beliefs about links between drug use and crime, as well as the apparent legal certainty provided by the term 'intoxication' over less determinate language such as 'prior fault'. It is true that we can identify some application of prior fault logic within automatism, and certain general defences, but not within the same broad terms that we see for intoxication.[38] The intoxication rules, therefore, remain a special case (and essentially a proxy) for intrinsic prior fault. But, despite this status, the intoxication rules are significantly limited by the prosecution being required to prove that D was intoxicated at the time of the alleged offence.

*Taj* is an important case because it is the first to reinterpret the boundaries of 'intoxication' rules, *at least* in the context of self-defence,[39] to allow for wider application of the prior fault doctrine. Because Taj was not blood-tested, it could not be claimed that he had drugs active in his system at the time of the attack (ie, the mistaken self-defence), but the expert evidence at trial agreed that his paranoid and delusional state of mind was the result of a psychosis or psychotic disorder resulting from his *previous* heavy use of alcohol and/or drugs (ie, cannabis and/or cocaine).[40] This was enough for the trial judge to hold that Taj's delusional mistaken belief was 'attributable to intoxication' and therefore excluded from consideration when applying self-defence in line with the intoxication rules,[41] effectively blocking his defence. The same logic was accepted by the Court of Appeal in upholding Taj's conviction: 'the words "attributable to intoxication" in s. 76(5) are broad enough to encompass … a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking.'[42]

This interpretation is *understandable* from a policy perspective, as even without alcohol or drugs active in his system, Taj's psychosis might conceivably have been caused by his recent and heavy use of intoxicants. The exclusion of intoxicated beliefs from the plea of mistaken self-defence rests on public safety concerns. Those concerns would seem even more in point in the case of persons, who, like Taj, become dangerous upon taking intoxicants and continue to be dangerous even when the intoxicants they have taken have ceased to be chemically active in their systems. From

[36] See Mitchell, *Self-Made Madness: Rethinking Illness and Criminal Responsibility* (Ashgate, 2003).
[37] See Handler, 'Intoxication and Criminal Responsibility in England, 1819–1920' (2013) 33 OJLS 243; Mitchell, 'The Intoxicated Offender – Refuting the Legal and Medical Myths' (1988) IntJLawPsy 77.
[38] See Child, 'Prior fault: blocking defences or constructing crimes' in Reed & Bohlander (eds) *General Defences in Criminal Law* (Routledge, 2014) 37.
[39] We discuss the wider potential application of the case below.
[40] During an initial interview by the consulting psychiatrist at HMP Thameside, Taj admitted he had consumed '7-10 cans of lager, and a few Jaeggerbombs, red bull and cocaine' prior to the offence. During his subsequent interview by the expert consulting psychiatrist, Taj's said he had only consumed alcohol (7-10 pints of lager, a few double vodkas and two glasses of champagne approximately 30 hours prior to the offense, as well as 'a few pints at various pubs' approximately 10 hrs prior to the offence) but he denied using any illicit drugs. This ended up in the expert 'Heads of Agreement' as 'drug induced psychosis' and 'drug and drug/alcohol induced psychotic disorder'.
[41] Criminal Justice and Immigration Act 2008, s76(5).
[42] *Taj* [2018] EWCA Crim 1743, [60].

a public safety perspective, it seems good sense to include Taj within the class of persons regarded as intoxicated when, in a deluded state of mind, he attacked Awain.

However, for reasons which will be developed more fully below, we believe that the court was wrong to find D's state to be one of 'intoxication' or 'attributable to intoxication'. This is not to say that his plea of mistaken self-defence should have been put before a jury. Instead, it will be argued, his delusion should have been taken to be an insane delusion. Until the decision in *Taj*, there was a sharp divide drawn between cases where D's disordered thinking was attributable to the effect of intoxicants which were chemically active, and disordered thinking arising beyond that period. Persons in the latter case were not regarded as intoxicated even when it was clear that their deluded state would not have occurred unless intoxicants had been taken. This separation should clearly be made when there is uncertainty, as we will argue there was in *Taj* as to what was the cause, or more likely the causes, of the deluded state that lead to his attack. Given Taj's long history of drink and drug taking we cannot even be sure that he was ever intoxicated in the ordinary sense of that word during his pre-attack drinking bout. The only certainty is that he was aware (or at least, could have been aware) that his drink/drug habit might make him violent.[43] That makes it all the more important to make an effective public safety response to his dangerous conduct. The better way to do that is not to equate 'drug induced' with 'attributable to intoxication'.[44] The better way is to find that Taj was insane when he attacked Awain.

### *Can we isolate prior taking of intoxicants as the cause of psychosis?*

In order to apply the intoxication rules beyond the 'simple' cases where drugs are present and active in D's system, in a way that has not previously been done in case law, the court in *Taj* sets out an essential premise:

> The fact is that medical science has advanced such that, in the modern age, the longer term *sequelae* of abusing alcohol or drugs are better known and understood; and, as in the present case, it was agreed that Taj's episode of paranoia which led him to mistake the innocent Mr Awain as a

[43] On several previous occasions Taj's drug and/or alcohol use had resulted in him experiencing psychiatric symptoms, described on one occasion in 2009 as 'paranoid, screaming and shouting' leading to his forcible hospital admission under Section 2 of the Mental Health Act. Furthermore, Taj admitted drug and/or alcohol intoxication were a common feature in a number of previous offences, including one for sexual assault and another for destruction/damaging of property; the latter of which resulted in a 3-week prison sentence.

[44] The lack of precedent defining 'intoxication' in law makes this point *arguable*, but there are good reasons to reject it. Natural (and scientific) understandings of 'intoxication' do not simply equate to the presence of a drug in D's system, this is necessary but not sufficient. Rather, to be intoxicated also requires threshold psychological effects on D's cognition and behaviour. The point here is that we should not equate 'drug induced' with 'intoxication induced' as the court does in *Taj*, and to do so represents a faulty mechanism for expanding liability.

terrorist was a direct result of his earlier drink and drug-taking in the previous days and weeks.[45]

It is noteworthy that despite this explicit appeal to medical science, the court chooses to rely on the Oxford Dictionary when interpreting both 'intoxication' and what it means for psychosis to be 'attributed' to intoxication;[46] and that although Taj is described as 'suffering from a *direct or acute reaction* to the voluntarily taken intoxicants, whether or not they were present in his system',[47] the terms 'direct and acute' are used clinically to *differentiate* intoxication when alcohol or drugs are present and active from subsequent more persistent or chronic effects.[48] However, even putting these curiosities to one side,[49] the court's claim that science allows us to make sufficiently accurate causal distinctions in cases of this kind remains crucial. It is also incorrect.

The court in *Taj* is not simply requiring us to identify psychosis that is attributable to previous intoxication *in some way*, though this in itself would be problematic. Rather, the judgment explicitly requires us to differentiate psychoses directly caused by preceding intoxication (caught within legal intoxication rules) from psychoses caused by acute withdrawal (delirium tremens), mental illness resulting from and secondary to historic drug use, and/or mental illness separate from and co-morbid with drug use (all of which fall outside legal intoxication rules).[50] If we accept the approach in *Oye*, the expectation even extends to distinguishing a single-step connection (ie, intoxication leading to post-intoxication psychosis) from the two-step approach used to establish insanity *and rule out* intoxication in that case (ie, intoxication leading to pathophysiological brain changes leading to post-intoxication psychosis).[51] These are fine grained distinctions that require a high level of scientific and diagnostic certainty if they are going to adjudicate the boundaries of liability.

Unfortunately, the court's confidence in medical science finds little support in the research literature or in the clinic, and this is borne out in the expert's reports in *Taj*. The expert 'Heads of Agreement' may have stated that his delusional state of mind was the result of a 'drug-induced psychotic disorder',[52] but as the experts make

---

[45] *Taj* [2018] EWCA Crim 1743, [57].
[46] Ibid. [21; 59].
[47] Ibid. [22] (emphasis added).
[48] In pharmacology, 'active' refers to the drug not merely being present in the blood circulation or tissue but, in the case of psychoactive drugs, binding to some target site in the brain (usually a neurotransmitter receptor) to produce a biological effect.
[49] A similar lack of scientific precision is found by Quilter and McNamara in a study of Australian cases, 'The Meaning of "Intoxication" in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170.
[50] *Taj* [2018] EWCA Crim 1743, [46-49; 57-60]. Referring to *Harris* [2013] EWCA Crim 223 and *Davis* (1881) 14 Cox CC 563 on withdrawal, and *Beard* [1920] AC 479 on addiction.
[51] *Oye* [2013] EWCA Crim 1725: summarising the position of the expert in this case, the court explain that '… the onset of the psychotic disorder was "precipitated" by use of skunk cannabis but "having reviewed the further evidence lately presented, it is now my opinion that [the defendant's] actions at the time of the allegation [sic] were as a cause of [sic] his psychosis, and not intoxication".' Cf *Coley* [2013] EWCA Crim 223, [18].
[52] *Taj* [2018] EWCA Crim 1743, [61].

clear in the accompanying reports,[53] this was a *likely* diagnosis built upon elimination rather than firm proof. Indeed, and crucially, the final expert report before Taj's appeal (following further treatment and observation), heavily qualifies that earlier agreement with a new diagnosis of mental illness, identified as an *alternative* potential cause.[54] Such diagnostic uncertainty should not be surprising: the symptoms for psychosis – principally delusions and hallucinations – can occur in a range of alcohol (or drug) related conditions including acute intoxication, withdrawal (delirium tremens), alcohol or drug-induced psychotic disorder (alcohol hallucinosis), disorders associated with alcoholism (eg, Korsakoff's dementia), etc; but equally can indicate the presence of a co-morbid (prodromal) mental illness separate from and/or triggered by drug and/or alcohol use. These (and other) alcohol and drug-related causes of psychotic symptoms are well recognised within the research and clinical literature as being epidemiologically distinct, but understanding of the precise phenomenological features and underlying neurobiological mechanisms is far from settled,[55] making clinical diagnosis to differentiate one from the others complex and prone to error. To this point, in a three-year follow-up study of 535 cases initially diagnosed as acute cannabis-induced psychosis, 44.5% were later re-diagnosed as (also) having schizophrenic-spectrum disorder.[56] Contrary to the court's statements in *Taj*, this is not an exact science.

If we accept the Court of Appeal's interpretation of 'attributable to intoxication' in *Taj*, we accept yet a further layer of uncertainty and imprecision in the application of intoxication rules, additional to those we have already identified. Without scientific clarity in determining a cause, yet with a set of legal rules built around strict causal distinctions, further inconsistent and unfair outcomes are inevitable.

### *Should we try to isolate the prior taking of intoxicants as the cause of psychosis?*

*Even if* firm scientific and clinical distinctions were possible, separating psychosis induced from previous intoxication *as opposed to* withdrawal or alcohol/drug-related or primary mental illness, it is contended that extending the intoxication rules to include such cases would be a mistake. Focusing on the intuitive appeal of prior fault rules, the court in *Taj* reflect that such a change would be 'an application of *Majewski*, rather than an extension of that decision or, at the highest, a most incremental extension.'[57]

[53] Discussed in the Psychiatric Report from Dr Alan Reid (24th July 2016), and accompanying addendums.

[54] Psychiatric Report from Dr Alan Reid (25th April 2018).

[55] Greenberg and Lee, 'Psychotic manifestations of alcoholism' (2001) 3(4) Current Psychiatry Reports, 314; Stankewicz and Salen, 'Alcohol Related Psychosis' in StatPearls (internet) *Treasure Island* (FL) 2019; Perälä et al, 'Alcohol-induced psychotic disorder and delirium in the general population' (2010) BJ Psychiatry, 197, 200-6.

[56] Arendt et al, 'Cannabis-induced psychosis and subsequent schizophrenia-spectrum disorders: follow-up study of 535 incident cases' (2005) BJ Psychiatry, 510.

[57] *Taj* [2018] EWCA Crim 1743, [57].

We agree that the interpretation in *Taj* builds on, as opposed to redefines, the prior fault logic from *Majewski*; but therein lies the problem.

The *Majewski* (intoxication rules) approach to prior fault, as we discussed above, is exceptional for its over-inclusive inculpatory effects. For example, although the court in *Taj* highlights D's prior awareness that becoming intoxicated could cause him to experience psychotic episodes,[58] subjective foresight of this kind is irrelevant to the rules' application: the intoxication rules will apply whenever D voluntarily consumes dangerous drugs leading to a lack of mens rea, and/or to an unreasonable mistaken belief, irrespective of whether D foresaw these possibilities when consuming the drugs. In this manner, it is questionable whether *any* expansion of the intoxication rules in their current state should be contemplated, with the objective fault of consumption already opening a potentially over-criminalising route to liability. Expanding the intoxication rules to cover post-intoxication psychosis will create a new route to liability based on objective fault for these defendants, potentially days or weeks after drug use.[59] It will also introduce a further layer of outcome luck, punishing D for his abnormal (and often unforeseen) reaction to drugs. In this manner, expansion would exacerbate existing problems with the law, as well as creating new ones.

Finally, we might ask why any normative prior fault led expansion of the intoxication rules should include post-intoxication psychosis, but stop short at withdrawal and alcohol or drug related mental illness. D's choice to take a dangerous drug (ie, D's prior fault) provides an identical route into each; and the psychotic episodes that result are likewise indistinguishable from a culpability perspective.[60] It may be that the court in *Taj* would have preferred to extend the intoxication rules into these categories as well, but felt unable to do so in light of conflicting case law. However, if this is correct, then the desire for such expansion should be acknowledged; as well as the burden to justify the application of prior fault rules to mental-illness and non-intoxicated states that may have arisen weeks, months or even years before the potentially criminal event.[61] If expansion of this kind was not the court's purpose, alternatively, we need to understand the normative case for an incremental expansion in this area alone, especially as it relies on a boundary that (if accepted) will cause significant forensic problems for courts and experts.

### *Evaluating the Taj precedent on intoxication*

---

[58] *Taj* [2018] EWCA Crim 1743, [16; 45].

[59] Highlighted for criticism in Dsouza, 'Intoxication, psychoses, and self-defence: Evaluating *Taj*' (2018) Arch Rev 6, 8; Laird Comment [2019] CrimLR 167, 170.

[60] The discussion in *Taj* can be read to indicate that intoxication induced psychosis is temporally closer to direct intoxication than the others. However, whether this is an intended implication or not, it is factually inaccurate. See Maldonado, 'An Approach to the Patient with Substance Use and Abuse' (2010) Medical Clinics of North America, 1169.

[61] The need for an intoxication-based cause would also become much harder to maintain.

*Taj* is directly concerned with the intoxication rules as they apply to self-defence, and to the meaning of 'attributable to intoxication' in that context. However, in the light of the discussion in *Taj* of *Harris* and *Majewski* in particular, the strong (*obiter*) implication is that the court's expanded definition of intoxication should be applied more generally (ie, including cases where the intoxication rules are used to replace missing mens rea elements).[62] This conclusion seems inevitable. Normatively, the justifications for liability offered in *Taj* do not discriminate between the different contexts in which the intoxication rules apply; and, practically, there is obvious merit in avoiding parallel contrasting definitions of intoxication and attributable to intoxication. The difficulty, of course, is that this would extend all the problems discussed in the last two sections to a considerably greater range of cases.

The Court of Appeal's interpretation of the intoxication rules in *Taj* thereby creates an unwelcome precedent, and one with considerable potential breadth. However, it is useful to acknowledge a certain fragility in the court's *ratio*. Although the court focuses their discussion on the intoxication rules, it also acknowledges the possibility (arising from an expert report just one day before the appeal was heard[63]) that Taj's psychosis was not drug-induced, but rather arose from a subsequently diagnosed independent mental disorder, namely manic depression (bipolar disorder). The court maintains that this evidence does not afford new grounds for appeal because evidence 'that a psychotic episode may have been precipitated without alcohol or drugs says nothing about whether it was (as Taj agreed he knew to be the case) in fact precipitated on this occasion by alcohol and drugs.'[64] This, with respect, is wholly unconvincing.

Where a prosecution relies on the intoxication rules to find liability (substituting for missing mens rea, or undermining an honest mistaken belief defence), they must discharge the burden of proving the elements of prior fault intoxication beyond reasonable doubt. D's subsequent diagnosis may not demonstrate 'as fact' that his psychotic episode was non-drug induced, but the significant chance of psychosis arising from causes unrelated to drug-taking certainly raises a reasonable doubt; and a doubt that is not dispelled by any acceptance by D that his delusion was drug-induced, especially if made at a time when he too was unaware of his mental illness diagnosis. The Court of Appeal appears to recognise something of this argument, highlighting that 'if we are wrong about … the foregoing conclusions'[65] then an alternative route to dismissing the appeal remains open. We explore this alternative below in Part 4. For present purposes, our aim is simply to highlight that the court's focus on the intoxication rules may itself be challenged, and should be used as a basis for future advocates and courts to question the authority of *Taj* on this point.

---

[62] Discussed in Laird Comment [2019] CrimLR 167; and an approach that has been previously adopted in Queensland in *Re Clough* [2007] QMHC 002.
[63] Psychiatric Report from Dr Alan Reid (25th April 2018).
[64] *Taj* [2018] EWCA Crim 1743, [61].
[65] *Ibid*, [62].

## 3. When to Apply the Insanity Rules

The insanity rules are unusual in that they apply *both* to those who would otherwise be liable for an offence, as a defence properly-so-called, as well as to those who rely on an internal condition to explain their lack of offending (no mens rea, or beliefs that would otherwise engage a separate defence). In both cases, where the insanity rules are satisfied, D will be found 'not guilty by reason of insanity'[66] and subject to a range of disposal orders, including options for compulsory restraint. This dual application of the insanity rules can be presented as a strength: ensuring insane defendants are not inappropriately blamed for their actions, whilst also ensuring through the special verdict that D and the public are protected from future harms. Indeed, the explicit inclusion of 'insane delusions' within the insanity rules has been hailed a 'humane step forward' in broadening application.[67] The insanity rules *should* therefore be central to our discussion of legal responses to delusional and irrational beliefs.

Despite the broad potential application of insanity rules, however, the reality is that they play a relatively minor role in practice. In *Taj*, for example, even when open to the possibility that D's delusional belief could have resulted from an underlying mental condition, the court (and experts) were quick to dismiss the insanity rules as inapplicable.[68] This is because, despite their broad potential, the terms of the insanity rules have been interpreted in a progressively narrow and strict manner at common law – both in relation to the problematic internal/external divide,[69] as well as to the other elements (discussed in the sections that follow). There are several possible reasons for this interpretive approach, including concerns that a loosening of the insanity rules might lead to their abuse through fabrication and/or over-reliance on expert evaluation.[70] But the result has been something of a retreat from relevance for the insanity rules. And within the broadening vacuum where insanity rules do not apply, delusional and potentially dangerous defendants are either inappropriately criminalised (where offence elements are satisfied) or perhaps inappropriately acquitted without protective qualification (where mens rea is absent, or a separate defence applies). We discuss the upshot of this vacuum in Part 4.

### *Insanity: Not knowing the nature and quality of action*

[66] Trial of Lunatics Act 1883, s2.
[67] *Sullivan* [1984] AC 156, 164.
[68] *Taj* [2018] EWCA Crim 1743, [21; 33].
[69] See Wilson et al, 'Violence, Sleepwalking and the Criminal Law. Part 2: The Legal Aspects' [2005] CrimLR 614.
[70] See Mackay, *Mental Condition Defences in the Criminal Law* (OUP, 1995) Chapter 2. It should also be acknowledged that a single set of doctrinal rules will always struggle to meet the competing demands of the current law: namely to sanction past culpability, yet to protect the non-culpable from sanction, whilst also protecting against future dangerousness in all cases, even where this means depriving access to pleas such as lack of mens rea or mistaken self-defence that would otherwise be available. See Child and Sullivan, (n21).

D's conduct will be caught within the insanity rules if he does not understand the nature and quality of his action, as a result of an internally caused defect of reason. This limb of the M'Naghten insanity rules has obvious relevance to delusional and irrational conduct, with oft repeated examples including D killing V under the insane delusion he is breaking a jar, or cutting V's throat believing it is a loaf of bread.[71] Indeed, this was the preferred route taken in *Oye*,[72] where D attacked police officers believing them to be possessed and with 'demon faces'. In each case, D's delusional belief demonstrates a lack of knowledge as to the nature and quality of his action, as well as engaging the delusion limb of M'Naghten, satisfying the insanity rules.

Despite the application of insanity rules to non-human and/or bizarre delusions of this kind, however, a much more restrictive approach has been applied elsewhere.[73] This is clearly evident in *Canns*,[74] for example, where a patient with chronic paranoid schizophrenia (described in expert evidence as 'one of the most disturbed patients you could get'[75]), killed a staff nurse (V) under the mistaken delusion that V was attempting to rape him; and yet, presumably because D knew he was killing a person as opposed to something more bizarre, the insanity rules did not apply. A similar approach is employed in *Harris*, where D was held to understand the nature and quality of his actions described narrowly as 'setting a fire', a description which made irrelevant for any finding of insanity that D's mental state meant he did not understand that fire could spread to adjoining properties.[76] Likewise in *Taj*, this limb of insanity is apparently avoided by describing D's conduct narrowly as 'attacking a person', thus relegating to mere background his delusion that V was a terrorist about to cause an explosion.[77] We see no normative justification for distinguishing these cases from *Oye* or others where insanity is found. The defendants may have understood their conduct under a certain narrow description, but they did not understand the nature and quality of their action under a fuller, more natural description relevant to the criminal law (ie, including relevant circumstances and results).[78]

The potential absurdity of the current rules becomes even clearer when we consider changeable delusional states. *Oye* provides a useful example.[79] The Court of Appeal focussed on D's delusional belief that the police had demon faces when he

---

[71] Taken from Steven's *Digest* (1947) and Kenny's *Outlines* (2007) respectively.
[72] [2013] EWCA Crim 1725, [16-19].
[73] See *Codere* (1916) 12 Cr App R 219; Mackay, 'Some Observations on the Second Limb of the M'Naghten Rules' [2009] CrimLR 80; Law Commission, (n5) Chapter 1.
[74] [2005] EWCA Crim 2264.
[75] Ibid, [17].
[76] *Harris* [2013] EWCA Crim 223, [54; 56]. As D was not found to be insane, his failure to understand that fires spread led to the quashing of his conviction for aggravated arson because he did not foresee the danger he was creating for third parties. See to similar effect *Stephenson* [1979] QB 695. In both cases a more appropriate verdict would be not guilty by reason of insanity.
[77] *Taj* [2018] EWCA Crim 1743, [21; 33].
[78] Similarly, where D cuts V's throat believing he is cutting bread, we could narrow down to a basic description of D's bodily movements to highlight these as understood and controlled (ie, the movement of D's arm). However, few would discount the insanity defence on this basis. See useful discussion, and a more appropriate interpretation of this limb, in *Loake* [2017] EWHC 2855.
[79] [2013] EWCA Crim 1725.

attacked them, satisfying this limb of the insanity rules combined with the delusional limb. However, the insanity verdict was also applied to D's first count of affray (before he was arrested) when he did not see demon faces, but *merely* believed his victims to be agents of evil spirits. Focusing on the first count, the approach in *Canns*, *Harris* and *Taj* suggests that the insanity rules should not have applied: D understood at that point that he was threatening people, he was simply deluded as to the circumstances. The court in *Oye* held (correctly in our view) that the insanity rules should apply here in exactly the same way as it did for D's later delusions.

Finally, we might highlight an additional concern arising from *Taj*, where a technical understanding of 'delusion' seems to have further restricted D's access to the insanity rules: implying that D's mistaken belief must satisfy the scientific understanding of delusional. This is evident where the expert evidence questions whether D's mistaken belief amounted to a 'fixed delusional state',[80] a point briefly highlighted by the court.[81] Where D's mental disorder causes him to believe something that is obviously inaccurate about the circumstances of his conduct, it is unclear why it should be of any legal consequence whether this false belief amounted to a 'delusion' as scientifically understood (ie, 'fixed' and therefore unshakable by rational argument), as long as it undermines his knowledge of the nature and quality of his actions at the relevant time. A non-scientific understanding of delusions is clear in M'Naghten,[82] and has not previously restricted the insanity defence[83] (or indeed other rules regulating mistaken beliefs[84]). It is important to guard against further unnecessary restrictions of this kind.

### *Insanity: Not knowing that an action is wrong*

D's conduct will be caught within the insanity rules if he does not understand that his actions are wrong, as a result of a defect of reason arising from an internal cause.[85] This limb of the insanity rules has been criticised for its narrow application, applying to a lack of knowledge as to legal wrongfulness, but not applying where D's condition undermines his moral knowledge alone.[86] This interpretation is now entrenched, and significantly limits the role of the insanity rules.[87]

An additional concern, relevant to *Taj*, is how legal wrongfulness has been interpreted and applied. Where D holds a mistaken belief that his conduct does not constitute an offence, it is clear that this limb of the insanity rules will apply. However,

---

[80] Discussed in Psychiatric Report from Dr Alan Reid (25th April 2018) and Addendum (15th May 2018).
[81] *Taj* [2018] EWCA Crim 1743, [33-34].
[82] M'Naghten (1843) 10 C&F 200, 211: When answering the 4th question.
[83] *Press* [2013] EWCA Crim 1849, [44].
[84] *Hatton* [2005] EWCA Crim 2951, [13]: D's mistaken belief is clearly caught within the intoxication rules whether technically delusional or not.
[85] *Burgess* [1991] 2 ALL ER 769.
[86] *Windle* [1952] 2 QB 826; *Johnson* [2007] EWCA Crim 1978.
[87] Usefully discussed in Law Commission, (n5) [1.49-1.51; 4.19-4.33].

it is less clear in cases where D knows he is committing a crime, but mistakenly believes he has a complete defence, even a justificatory rational-based defence.[88] Does D understand the legal wrongfulness of his actions in such cases? In M'Naghten, the House of Lords' answer to the 4th question concerning delusional beliefs suggests that insanity should apply; indeed, they illustrate this point using the example of mistaken self-defence.[89] However, in *Oye*, *Canns* and *Taj*, despite each case involving delusional beliefs in the need for self-defence, this limb of the insanity rules is not applied. *Oye* came within the insanity rules anyway, but in both *Canns* and *Taj* no complete defence is found. We do not see a justification for limiting the interpretation of 'legal wrongfulness' to exclude these cases.

## 4. What to Apply for 'Other' Delusions

Exacerbated by the narrow application of insanity rules, and to a lesser extent intoxication and automatism as well, the conduct of a growing category of delusional and potentially dangerous defendants is not captured within any of the legal rules already discussed. Indeed, if our analysis of the intoxication rules above is correct, and recognising current interpretations of insanity, the case of *Taj* also defaults into this category. In the absence of bespoke rules, we would expect cases here to generally apply the standard terms of offences and defences without the kinds of qualifications discussed above. However, in the context of delusional, irrational and potentially dangerous defendants, this is not always straightforward, and efforts to avoid perceived unfairness within individual cases have led to problematic distortions in the application of the law. This applies both to the application of offences and defences.

### *Does D commit an offence?*

Even where a delusional or irrational state does not qualify legally as insanity or intoxication, it remains relevant to whether D commits an offence. In certain cases, D's delusion may cause him to commit a crime: where, for example, D feels compelled to commit an offence, or is otherwise disorientated by the delusion. *Harris* would have been a case of this kind had he been charged with simple arson, as opposed to the aggravated form of the offence. Harris was clearly disorientated by his delusional state of mind, leading him to perform several bizarre acts, and to lack understanding that setting a fire might endanger neighbouring properties; but it was accepted that he intentionally caused a fire aware that this could damage his own property.[90] For such defendants, without an applicable defence, the only possible relief based on their delusion will come in the form of mitigation at sentencing. Due to the narrow application

[88] We are intentionally bracketing the ultimately unhelpful debate as to whether D's defence can be classified as negating an element of his offence.
[89] M'Naghten (1843) 10 C&F 200, 211.
[90] *Harris* [2013] EWCA Crim 223, [54].

of insanity rules, it is contended that certain defendants in this category are inappropriately criminalised, with sentence mitigation simply not sufficient. The Court of Appeal's choice in *Harris* to quash D's conviction for aggravated arson illustrates this concern, as the court opted to avoid a retrial on a non-aggravated charge that would have been straightforward to prove.[91]

Alternatively, D's delusion may be relevant to show that he did not commit the offence charged. This was the case in *Harris* regarding aggravated arson. Although a reasonable person would have foreseen that a house fire could spread and endanger the lives of those in neighbouring properties, it was accepted that D's delusional state meant that he may have lacked subjective foresight.[92] As D lacked men rea, and fell outside the insanity rules, he was acquitted. The issue here, because of the narrow application of insanity rules, is whether the criminal law is insufficiently equipped to restrain mentally disordered defendants who might pose a continuing danger to themselves or others. And it is a concern that has given rise to some problematic contentions. For example, one solution to the 'problem' that a 'bad case of insanity [could] make a good case of reasonable doubt,' has been to argue that delusional evidence short of insanity should be excluded from a court's consideration of mens rea (ie, excluded from consideration after insanity is ruled out).[93] A response of this kind, however, simply takes us back to inappropriate criminalisation: where D does not complete the elements of an offence, the default (absent prior fault) should never be a fiction of liability.

### *Can D rely on a defence?*

D's delusions may also/alternatively affect the application of defences, in cases where D completes an offence. In the first instance, delusions may result in the non-applicability of a defence. Even outside of delusions caused by intoxication (blocking defences) or insanity (supervening other defences), delusions of any kind can make it very difficult for D to satisfy the objective terms that typify most general defences within the current law. For example, if D's delusion causes him to commit an offence in mistaken circumstances of duress or necessity, or causes him to use excessive force in self-defence, the reasonableness requirements within each defence are unlikely to be satisfied. Where D is blameless for his inability to reach the reasonableness standard, the risk of inappropriate criminalisation is obvious, and pushes those supporting the use of objective elements to consider specific qualifications to take account of physical and mental impairments.[94]

More controversial however, and relevant to our discussion of *Taj*, are cases where D's delusion leads to the apparent satisfaction of a subjectively framed defence.

---

[91] Ibid, [60].
[92] Ibid, [59].
[93] Morris and Howard, *Studies in Criminal Law* (1964) 75-6. Discussed in Jones, (n26), 488.
[94] See Simester, 'Mistakes in Defence' (1992) OJLS 295, 305-309.

This has arisen most often in relation to mistaken self-defence, which is constructed to assess D's conduct in light of the facts as he honestly (though not necessarily reasonably) believed them to be.[95] Thus, where D's mistake causes him to believe that he is being attacked in a certain way, the necessity and proportional reasonableness of his response should be assessed *as if* his belief was a reality. The subjective construction of self-defence has been criticised as overly generous to D, with commentators questioning the appropriateness of *unreasonable* mistakes as grounds for acquittal.[96] However, in the context of defendants who are unable to satisfy a reasonableness standard by virtue of their non-culpable delusional state, a subjective approach of this kind is perhaps easier to justify.

What we see in practice, however, is something quite different. Rather than acquitting non-insane and non-intoxicated delusional defendants acting in mistaken self-defence (arguably the most sympathetic defendants in this context), a line of case law has developed to single out such defendants for special *inculpatory* treatment; introducing a new reasonableness criterion, and effectively blocking their use of the defence.[97] The denial of defences here is explicitly linked to the perceived need to protect society from delusional and potentially dangerous individuals, defaulting to liability in the absence of an insanity verdict.[98] In culpability terms, the outcome is perverse: typical defendants, those ostensibly able to meet a reasonableness standard, are allowed to rely on their unreasonable beliefs to gain an acquittal; whilst those unable to meet a reasonableness standard, due to their non-culpable delusional state, are uniquely held to that objective standard. Crucially, this is not the supervening effect of the insanity verdict (qualifying D's acquittal to allow for treatment and potential restraint), but the supervening imposition of criminal liability.

The unfairness of the current law has been obfuscated by the manner of its application, but remains in place. It is interesting, for example, that courts have avoided presenting the rules as a denial of the subjective limb of self-defence (avoiding *explicitly* denying delusional defendants the right to rely upon their honest beliefs, akin to intoxicated defendants), but have spoken instead of a qualification to the second already objective limb. We are told in *Martin*, that 'in deciding whether excessive force has been used [we should not] take into account whether the defendant is suffering from some psychiatric condition';[99] in *Canns*, that 'it cannot be right that the more psychotic a defendant may be the greater his chances of acquittal';[100] and in *Oye*, that an 'insane person cannot set the standards of reasonableness as to the degree of

[95] *Gladstone Williams* (1984) 78 Cr App R 273; codified within the Criminal Justice and Immigration Act 2008, s76(4)(b).
[96] See, eg, Simester, (n94).
[97] See *Martin* [2001] EWCA Crim 2245, *Canns* [2005] EWCA Crim 2264; *Oye* [2013] EWCA Crim 1725, and now *Taj*.
[98] Note the similarity here with our discussion, above, of non-insane and non-intoxicated delusions that result in missing offence elements.
[99] [2001] EWCA Crim 2245, [67].
[100] [2005] EWCA Crim 2264, [19], following *Martin*.

force used by reference to his own insanity'.[101] The problem with this analysis is that it disguises rather than addresses the issue: where D makes a mistake for *any* reason (including delusions) as to the necessity of defensive force, his response will never pass the second limb of self-defence unless the reasonableness of his force is measured against the facts as he honestly believed them to be. Allowing delusions within the first limb of the defence is therefore meaningless unless they are also allowed to qualify the application of the second limb.[102]

The unfairness of the current law has also been partly disguised by the availability of alternative defences: diminished responsibility in *Martin* and *Canns*, and insanity in *Oye*. In this manner, the unavailability of self-defence can be presented as a mechanism for diverting mentally disordered individuals to more appropriate bespoke defences. However, again, this is not sufficient. Outside of *Oye* and the narrow application of insanity rules, it is important to remember that liability is resulting from these cases. And even partial defences will not always be available, as we see in *Taj*. The court in *Taj* explains that, 'even if' D's delusion was caused by a non-insane and non-intoxicated delusion, applying the 'equally apposite' authority from *Oye* (under discussion) remains a straightforward basis for rejecting D's appeal.[103] We agree that this is the outcome of applying the rule from *Martin*, *Canns*, and *Oye*, but we do not agree that this is either appropriate or fair. *Oye* is better explained as an example of insanity rules supervening other defences, justified on the basis that D is still acquitted, although the court gains new protective disposal powers.[104] This explanation does not apply to *Taj*, who without even a partial defence was sentenced to 19 years imprisonment.

We acknowledge that there is a credible case for reforming the terms of self-defence to require an objectively reasonable belief in *both* the necessity and reasonableness of force.[105] However, it cannot be correct that an objective approach of this kind should only apply to those defendants who, without fault, are uniquely unable to meet that standard. Indeed, if self-defence were reformed to require objective tests across both limbs, we would expect the reasonableness standard to be explicitly qualified to take account of circumstances of this kind (as we see, to a greater and lesser extent, across other defences that apply objective tests).[106] It is never acceptable to criminalise non-culpable individuals simply in order to protect against

---

[101] [2013] EWCA Crim 1725, [47], following *Martin* and *Canns*.
[102] The debate here has been further confused by reference in *Martin* to the potential for a psychiatric condition to be taken into account in 'exceptional circumstances' (*Martin* [2001] EWCA Crim 2245, [67]), distracting from the more fundamental question of why it should ever be excluded. See Dingwall, 'Intoxicated Mistakes about the Need for Self-Defence' (2007) MLR 127, 131.
[103] *Taj* [2018] EWCA Crim 1743, [63-64]. Cf *Press* [2013] EWCA Crim 1849, [44].
[104] See Child and Sullivan, (n21).
[105] Cf Dsouza, *Rationale-Based Defences in Criminal Law* (2017) 41-43.
[106] See Simester, (n94) at 306.

the potential for future harms,[107] and yet it is difficult to explain the current law in any other way.

## 5. Conclusion

The law has tolerated inconsistencies and rough justice proxies in relation to delusional defendants for decades. However, as we begin to pick apart each of the causal routes at play, tracing the options discussed in *Taj* and other cases, the potential (and demonstrable) unfairness within the law becomes ever clearer. In line with our analysis in this article, simple clarifications can be made immediately at common law to improve the current position:

(i) D's status should only be described in terms of 'intoxication' or 'attributable to intoxication' where drugs are present and active in his system. This requires courts to reject the precedent from *Taj* on this point;

(ii) The insanity defence should be interpreted more permissively, taking account of circumstances and results when assessing D's understanding of her conduct, and taking account of belief in a defence when assessing D's knowledge of wrongfulness and when applying the delusional limb of the *Rules*; and

(iii) Where D has a mental disorder which results in a mistaken (potentially delusional) belief, the relevance of that belief to subjective elements within a defence should only be qualified/denied in circumstances of prior fault or insanity. This requires courts to abolish the line of precedent (*Martin*, *Canns*, *Oye*, and *Taj*) that qualifies the second limb of self-defence in this context.

When dealing with delusional, irrational and potentially dangerous defendants, there will always be challenges for the law, and these changes do not resolve the basic structural problem with the current law that we identified in Part 1 – that we are applying cause-directed legal rules to situations where cause is almost always uncertain. However, on each point, we believe that the clarifications we suggest can make the law fairer, more consistent, and more scientifically credible. In this manner, we contend, they provide the best route forward for the common law.

---

[107] See discussion of the distinction between 'clutchable' and 'criminal' defendants in Feinberg, (n4) at Chapters 10 and 11.