When God Demands Blood: Unusual Minds and the Troubled Juridical Ties of Religion, Madness, and Culpability

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"Why is it when we talk to God we're said to be praying—but when God talks to us, we're said to be schizophrenic?"

Lily Tomlin[1]

The deific decree doctrine allows criminal defendants who believe that God commanded them to kill to plead not guilty by reason of insanity to murder. The insanity defense has remained moored to its Judeo-Christian roots, which has artificially limited its bounds. While civil law has focused on individualism within religion, criminal law has imposed state-defined limits on what religion (or socially acceptable religion) is. This article argues that the deific decree doctrine is too closely tied to artificial limits on insanity imposed by nineteenth-century developments in the mental health profession and criminal law. The doctrine unacceptably privileges certain mentally ill criminal defendants whose delusions fit within an outdated model that is not psychiatrically valid. Moreover, it has disparate gender consequences that harm women with postpartum psychosis who kill their children while supporting men who kill their female partners. The article concludes by calling for the end of the deific decree doctrine and expanding the insanity defense so it more accurately tracks psychiatric understanding of mental illness.

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1. *See Lily Speaks*, LILY TOMLIN, http://classic.lilytomlin.com/lily/quotes.htm (last visited Feb. 28, 2015).

I. INTRODUCTION

When Robert Crenshaw and his wife were on their honeymoon in Canada in 1982, Robert got into a fight and was deported back to the United States.[2] He found a motel room just across the border in Blaine, Washington and waited for his wife.[3] Upon her arrival two days later, Robert had the immediate suspicion that she had been unfaithful, that "'it wasn't the same Karen . . . she'd been with someone else.'"[4] Robert "took [his wife] to the motel room and beat her unconscious."[5] He then went to a store, stole a knife, and stabbed her twenty-four times.[6] After stabbing her, Robert left his now-dead wife, drove to a farm where he had previously worked, and borrowed an ax.[7] When he returned to the motel room, Robert decapitated Karen.[8]

After being apprehended by police, Robert voluntarily confessed and claimed that he thought it was his duty as a Moscovite to kill Karen, whom he believed had been unfaithful.[9] At trial, the court faced a quandary: were Crenshaw's actions religious or insane?[10] And what did the answer say about his criminal responsibility?[11] When Robert was apprehended and charged with first-degree murder, he argued that he should be found not guilty by reason of insanity.[12] The case ultimately reached the Washington Supreme Court, which upheld his first-degree murder conviction.[13] The dilemma divided the justices, who, like so many jurists before, struggled to draw sensible boundaries and bridges between faith, madness, and responsibility.[14] The legal system was forced to grapple with a doctrine that was making its reappearance in

2. State v. Crenshaw, 659 P.2d 488, 490 (Wash. 1983).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.* at 491, 494 ("Crenshaw argued only that he followed the Moscovite faith and that Moscovites believe it is their duty to kill an unfaithful wife. This is not the same as acting under a deific command. . . . Crenshaw's personal 'Moscovite' beliefs are not equivalent to a deific decree and do not relieve him from responsibility for his acts.").
10. *See id.* at 491.
11. *See id.*
12. *See* WASH. REV. CODE § 9A.12.010 (West 2011); *Crenshaw*, 659 P.2d. at 491.
13. *See Crenshaw*, 659 P.2d. at 490.
14. *See id.* at 498–99, 502.

criminal trials after a long absence: the doctrine of deific decree.[15]

Unusual minds that turn violent raise some of the most difficult questions of criminal responsibility. When aberrant thoughts take on a religious cast, the problem becomes even more complex, as judges must determine whether religious fervor has slipped into mental illness and what impact this mental state has on culpability. This article traces judicial attempts to navigate three paradigms for understanding abnormal thoughts—religion, psychiatry, and criminal law—by examining the 170-year history of a doctrine predicated upon their collision. The defense of deific decree holds that if God commanded a defendant to kill another person, then the defendant can successfully plead not guilty by reason of insanity to first-degree murder.[16] Although the basic statement of the doctrine has changed little across its long existence, its operation and underlying theory have shifted considerably as the social, judicial, and scientific understandings of religion, mental illness, and criminality between which the doctrine mediates have themselves undergone transformations.[17]

Three stages animate this article. First, the emergence and early articulation of deific decree doctrine (1844–1915) illustrates the extent to which Christianity bound together judicial and psychiatric notions of religion, mental illness, and culpability during the formative years of what came to be the modern insanity defense. Second, in the nearly eight decades that followed, from 1915 to 1982, the judiciary expanded its conceptions of insanity and religion in ways that untethered mental illness, culpability, and religion from Christian norms. These years saw the deific decree defense recede in deference to more capacious definitions

15. *See id.* at 494.

16. Murder is defined by degrees. First-degree murder is defined generally as an unjustified killing manifesting purpose and intent to cause death or a killing during the course of a major felony. *See* JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 291 (5th ed. 2004). In deific decree cases, the defendant is not challenging that he caused the death of another or that he intended to do so; it is *why* the defendant caused the death that is at issue. *See Crenshaw*, 659 P.2d at 494. It is important to note that a finding of not guilty by reason of insanity is different than an acquittal by another defense. In an acquittal, the defendant is free to go, while the state can retain custody of a legally insane defendant until he or she is deemed not a danger to society. *See* RALPH SLOVENKO, PSYCHIATRY IN LAW/LAW IN PSYCHIATRY 217 (2d ed. 2009). Thus, a legally insane defendant potentially could remain committed longer than he could be imprisoned if found legally sane and guilty. *See id.*

17. Though it may seem to be a quirky exception, deific decree has received extensive discussion in case law and casebooks. *See, e.g.*, Wilson v. Gaetz, 608 F.3d 347, 354 (7th Cir. 2010) (Judge Posner discussing the doctrine of deific decree); Ivery v. State, 686 So. 2d 495, 500–02 (Ala. Crim. App. 1996); People v. Serravo, 823 P.2d 128, 139 (Colo. 1992); State v. Wilson, 700 A.2d 633, 641 (Conn. 1997); State v. Worlock, 569 A.2d 1314, 1322 (N.J. 1990); State v. Rice, 757 P.2d 889, 904 (Wash. 1988); State v. Cameron, 674 P.2d 650, 654 (Wash. 1983); GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 215 (3d ed. 2007).

of insanity. Third, as the insanity defense narrowed following the 1982 acquittal of John Hinckley by reason of insanity for shooting Ronald Reagan, deific decree defenses reemerged.[18] These twinned developments illuminate the extent to which the Court's reinterpretation of religion as a personal choice put faith on a collision course with culpability—and the free will presumed to underlie it.

The protagonists of this history are the experts. As judges who specialize in questions of culpability have confronted defendants who perceive otherworldly commands, they have had to make choices about the extent to which they will draw on and defer to theologians and psychiatrists. As the mental health field professionalized and courts increasingly sought to avoid entanglement with religion, judges asked psychiatrists to carry more of the burden of explanation within the judicial system, and psychiatrists willingly accepted. Ironically, as psychiatrists increasingly claimed the ability to map out normal and abnormal human behavior, their skill at capturing the impact of religion and culture on behavior diminished. As expert mental-health testimony became pervasive, it provided ever less guidance to judges seeking to navigate religious compulsion and culpability.

Discussing religion as a concern of criminal law rather than as the subject of First Amendment litigation relieves the tensions that this article explores. Too often, baroque First Amendment doctrine encourages scholars to treat collisions between law and religion as doctrinal brainteasers solvable through clever analysis rather than as emblematic of deep, unresolvable tensions. Here, the criminal context makes visible how legal conceptions of religion respond to and collide with shifts in popular ideas and expert knowledge. Although modern First Amendment law seeks to construct a firm divide between rationalist legal reasoning and humanistic religious faith, this neat dichotomy collapses in deific decree cases. Courts cannot evaluate deific decree claims without consideration of defendants' beliefs. Defendants and their lawyers encourage this entanglement by renouncing claims that the killer was a modern-day Joan of Arc on a prophetic divine saintly mission that has a rational basis. Instead, they argue that the defendant both believed himself compelled to act by divine instruction and that the defendant's perception of that divine instruction was mistaken and *insane*.

This article proceeds as follows. Part II examines the origins of deific decree doctrine, which was christened into U.S. law by the Massachusetts Supreme Court in 1844. The same case that introduced the

18. *See* Deborah Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 13 (2003); Lisa Callahan et al., *Insanity Defense Reform in the United States—Post*-Hinckley, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987).

deific decree doctrine to the United States also spawned the "right-wrong" test that deemed defendants insane if at the time of doing the act they did not know the difference between right and wrong.[19] Deific decree, therefore, operated from the outset in relation to the right-wrong test—its better-known fraternal twin.[20] The right-wrong test represented an exception to the general criminal law presumption that people exercise free will and so can be held responsible for their illegal behavior. Depending upon the court, the test has been understood to require that a defendant be unable to comprehend either the illegality of his actions or the social opprobrium that others will attach to them. Deific decree also covered a potential third case: the defendant who felt compelled by divinity to act despite knowing that doing so would bring legal sanction and societal condemnation.[21]

Explicitly framed in Judeo-Christian terms—the doctrine requires an order from God, not a supernatural entity in general—deific decree reflected the prevailing sentiment among leading Americans that divine law reigned supreme above human law.[22] For psychiatrists still seeking to establish themselves within their field, the expansion of the insanity defense presented opportunities; defendants who might become patients of their asylums, forums in which to appear as high-profile experts, and audiences for their theories linking mental illness and sin. Such testimony, in turn, reassured jurists that criminality would beget punishment. Divine lawbreakers, psychiatric testimony reassured, were punished by God with the affliction of madness, would face confinement in institutions, and often suffered internally for having committed violent acts. Judges' almost pathological rehearsals of the story of Abraham and Isaac—and their grim imaginings of the consequences of a sacrifice not aborted by God—further emphasized jurists' concern that bad acts not go unpunished.

Part III traces three transformations in the law and science of

19. *See* Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 502–03 (1844) ("In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has the capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.").

20. *See id.*

21. *See id.* at 503 (describing two situations in which an insane delusion might excuse a criminal act, including "where he [the defendant] fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power").

22. *See id.* (describing the command of God as that which "supersedes all human laws, and the laws of nature").

religion and madness. Beginning in 1961, the U.S. Supreme Court abandoned its longstanding identification of religion with Judeo-Christian principles in favor of a focus on individual moral choices.[23] Supernatural beings, communities of faith, and non-secular beliefs, it argued, were not necessary parts of religion.[24] During a similar period, psychiatry embraced a biomedical model of mental illness that sought clear separation between normal and abnormal mental behaviors.[25] Mental processes associated with both religion and mental illness proved a stumbling block for the new approach, which the field has come to acknowledge but made little progress toward resolving.

Part IV discuses the expansion of the definition of insanity, first to include actions that were the result of irresistible impulses and then to embrace acts merely caused by mental disease or defects. During the period of expansion, defense lawyers mothballed deific decree defenses in favor of newer alternatives. But the expansion of the definition of insanity and the dormancy of deific decree rapidly unwound in response to public outrage over the Hinckley verdict.[26]

Part V analyzes the post-1983 reemergence of the deific decree. Where Christian psychiatrists and judges once found in the doctrine a means of vindicating Christianity, culpability, and the professionalization and institutionalization of psychiatry, deific decrees today seem increasingly anachronistic. Psychiatry long ago established its primacy in mental health matters, abandoned claims to authority based on Christian credentials, and ceased portraying mental illness as divine punishment for sin. The field stands to gain little from its practitioners' testimony in deific decree cases. Given the difficulties modern psychiatry has distinguishing mental illness from religious belief, such cases may even undermine the field. The doctrine also offers few guarantees that culpable acts will be punished. As the Hinckley backlash demonstrated, the public does not perceive civil commitment to be a substitute for punishment, a view reflected in doctrine in the increasingly formal civil and criminal distinction.[27] Few jurists today believe that madness is retribution for sin. Where the deific decree doctrine once affirmed the official and scientific belief that Christian law was supreme over secular law, its emphasis on the commands of a Judeo-Christian God today runs

23. *See* Welsh v. United States, 398 U.S. 333, 339 (1970) (stating that "sincere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion").

24. *See Rogers*, 48 Mass. (7 Met.) at 495–96 & n.11.

25. *See infra* Part III.B.

26. *See* Denno, *supra* note 18, at 13; Callahan et al., *supra* note 18, at 55.

27. *See infra* notes 205–06 and accompanying text.

counter to understandings in both law and psychiatry of the nature of religion.

Worse yet, its scope appears to be vanishingly small. Where it once reflected a scientific and official acceptance of an autonomous realm for Christianity distinct from culpability and mental illness, that belief is now absent from both discourses. Cases reveal disappearance of deific decrees in practice, as courts attribute defendants' claims to hear divine instructions as symptomatic of either ongoing mental illness or provocation.[28] To the extent that it continues to have force, it does so by shining a harsh light on the modern insanity standard. Most defendants who assert a deific decree defense are either abusive men who kill their girlfriends and wives and then claim to be acting on orders from God or women suffering severe postpartum depression that causes delusions of divine instructions to kill their children.[29] At the expense of throwing a lifeline to abusers, deific decree offers a small number of women who kill as a result of postpartum depression a defense while denying reprieves to the greater share whose mental illness manifest in ways other than delusions of orders from God.[30] This article concludes that deific decree doctrine has outlived its usefulness. A somewhat more generous insanity defense would reduce the inequities and irrationalities that deific decrees involve without appreciably loosening standards for criminal culpability.

II. Early Cases: 1843–1915

There is a well-established history of exonerating or imposing a milder punishment for people who are considered "insane."[31] Pronouncements about the problem of punishing mentally impaired criminal defendants are longstanding.[32] Plato wrote that insane murderers should endure one year of exile instead of the death penalty that other murderers should face.[33] During the Middle Ages, the insane were "routinely exonerated," a practice that continued in English common law.[34] Sir Edward Coke wrote that "the act and wrong of a mad man shall not be imputed to him . . . ."[35] Blackstone agreed: "idiots and lunatics are

28. *See infra* Part V.A.

29. *See infra* Part V.C.

30. *Id.*

31. *See* Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 Case W. Res. L. Rev. 19, 23 (2007) (citing Plato, The Laws of Plato 258, §§ 864d–e (Thomas L. Pangle trans., 1980)).

32. *See id.*

33. *See id.*

34. Daniel N. Robinson, Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present 71 (Harvard Univ. Press 1996).

35. Brief of the Treatment Advocacy Center as Amicus Curiae in Support of Neither Party at

not chargeable for their own acts. . . ."[36]

The key question was determining *who* was insane. Deific command was entangled with this issue for centuries in Anglo-American law. Judge Tracy formally recognized what became known as the "wild beast" test for insanity in *Rex v. Arnold* in 1724:

> [T]he jury . . . should acquit by reason of insanity if it found the defendant to be a madman which he described as "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[37]

The "wild beast" test set the standard for English criminal law throughout the eighteenth century.[38] The English case *Rex v. Arnold* also noted the possibility of a "visitation by God" in the jury instructions:

> If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man.[39]

In this context, "under the visitation of God" was used as a term for delusional behavior.

In 1800, James Hadfield, believing that he was acting on God's orders, attempted to assassinate King George III.[40] Hadfield received a jury acquittal based on the fact that he was "under the influence of insanity at the time the act was committed."[41] Thus, *Hadfield*

> represented a departure from the wild beast test in two ways. First, "it rejected the argument that the defendant must be totally deprived of all mental faculty before acquitt[al]." Second, it was the first time that a verdict of not guilty by reasons of insanity (NGBI) "became a separate verdict of acquittal."[42]

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6 n.5, Clark v. Arizona, 126 S. Ct. 2709 (2006) (No. 05-5966) (citing EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND; OR A COMMENTARIE UPON LITTLETON, NOT THE NAME OF A LAWYER ONELY, BUT OF THE LAW IT SELFE 247b (2d ed. 1629)).

36. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 345–46, § 24 (1893).

37. Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 14 (2007) (citation omitted).

38. *See id.*

39. Rex v. Arnold (1724) (Ct. Com. Pl.) (Eng.), *reprinted in* 16 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 695, 764 (1816).

40. *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 L. & SOC'Y REV. 487, 492 (1985).

41. *See id.* at 508.

42. Fradella, *supra* note 37, at 15.

English criminal law went back to the stricter wild beast standard a few years after *Hadfield*, until *M'Naghten* was decided in 1843.[43]

The deific decree defense appears for the first time in American jurisprudence in 1844.[44] *Commonwealth v. Rogers* is a notable case in American law not only for the first appearance of deific decree, but also for importing the *M'Naghten* "right-wrong" test—the current prevailing test of insanity—from England.[45] *M'Naghten*, a case decided a year before *Rogers*, held that the test for insanity was "whether the accused at the time of doing the act knew the difference between right and wrong."[46] The doctrine reflects a fundamental principle of criminal law: because people have the ability and free will to choose socially acceptable behavior, the state can hold people responsible and punish those who engage in socially unacceptable behavior that violates the law.[47] For people who are unable to make this choice, the state does not classify them as blameworthy or punishable.[48] Thus, the insanity defense "separates the 'bad' . . . from the 'mad' . . . ."[49] *M'Naghten* uses a cognitive standard as a dividing line between madness and badness.[50] That is, the individual must suffer from a "disease of the mind" that overwhelms her ability to know socially acceptable behavior or emotional impetuosity.[51] *M'Naghten* also requires total impairment, as reflected in the *Rogers* requirement of a "[full] belief"; people who are

43. *See id.* at 15 ("[W]ithin a few years of the *Hadfield* decision, English jurisprudence reverted to using Justice Tracy's wild beast test, which did require a near complete deprivation of mental faculties for an acquittal.").

44. *See* Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 503 (1844). The theme had appeared in American literature prior to its discussion in the law. For example, in *Wieland, or the Transformation, An American Tale*, by B. C. Brown, Wieland, the central character, is ordered by God to kill his wife and child. *See* Christopher Hawthorne, "*Deific Decree": The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1809 n.341 (2000) (citing B. C. BROWN, WIELAND, OR THE TRANSFORMATION, AN AMERICAN TALE (1811)).

45. *See Rogers*, 48 Mass. (7 Met.) at 503; Daniel M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 722.

46. *See M'Naghten's Case*, (1843) 8 Eng. Rep. at 722. Daniel M'Naghten was charged with murder for attempting to kill the Tory prime minister and killing his secretary instead. *See* RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 5 (1981). M'Naghten insisted, unsuccessfully, that the Tories were persecuting him. *See id.* Though the courts and most commentators have treated Daniel M'Naghten's assertions of persecution as mental illness, Richard Moran has made a compelling argument that M'Naghten was in fact correct that the Tories were persecuting him and that the trial should be seen in a political, and not an exclusively psychiatric, light. *See id.*

47. *See* Grant H. Morris & Ansar Haroun, "*God Told Me to Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 997 (2001).

48. *See id.*

49. *See id.* at 998.

50. *See M'Naghten's Case*, (1843) 8 Eng. Rep. at 719.

51. *See id.*

only partially affected by insanity cannot succeed under *M'Naghten*.[52]

Rogers did not include an explicit claim of deific decree, although the defendant did plead not guilty by reason of insanity.[53] The mention of deific decree came in Judge Shaw's majority opinion offering an example of a delusion that might be successful in receiving a not guilty verdict due to insanity:

> [W]here he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature.[54]

Judge Shaw's deific decree instruction reflects the prevailing sentiments of the period.[55] Divine law is above human law and the court cannot question or prevent it.[56] The focus is on the delusion, what form it takes, and the speaker. The command must be immediate and direct; the defendant cannot conclude based on rational deduction that killing is the only recourse.[57] The speaker must be God, instead of another good or bad supernatural entity.[58] Even though deific decree only allows commands by God, Judge Shaw does not provide an explicit reason why God receives such exclusive treatment under the law.[59] Other scholars have argued that because God takes up all of the space within a morality framework, humans are powerless against God because there is no way to argue against Him.[60]

Judge Shaw's standard suggests that mental health doctors are not the only ones able to identify those who are insane due to deific decree. Mental health doctors could indicate whether the person is delusional, but the court presumes that normal people would be suspicious of such a command.[61] Compounding this dilemma, Judge Shaw presumes that although the deific decree assumes the coloration of a religious command, it is clear that it is not one, evidencing Judge Shaw's belief that

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52. *See* Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 503 (1844).

53. *See id.* at 501.

54. *See Rogers*, 48 Mass. (7 Met.) at 503.

55. Religion and mental illness were closely linked, so it would be in keeping with that link that religion would present fertile ground for a hypothetical case involving mental illness. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 625–26 (1989–90); Morris & Haroun, *supra* note 47, at 1002.

56. *See Rogers*, 48 Mass. (7 Met.) at 503.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See* Morris & Haroun, *supra* note 47, at 1004–05; Andrew J. Demko, Note, *Abraham's Deific Defense: Problems with Insanity, Faith, and Knowing Right from Wrong*, 80 NOTRE DAME L. REV. 1961, 1961–62, 1977 (2005); Hawthorne, *supra* note 44, at 1758–59.

61. *See Rogers*, 48 Mass. (7 Met.) at 503.

God would not ask a person to commit such an act, even though this was exactly the case in the story of Abraham and Isaac.[62]

In nineteenth-century America, religion—or more specifically, Christianity—and mental disorder, shared a strong connection.[63] A diagnosis of insanity implied more than a "pure" medical diagnosis.[64] Mental disorder was a "condition inflicted by God . . . as a deific punishment for some mortal sin."[65] Thus, while insanity separated badness from madness, at the time that *Rogers* was decided, the professionalization of mental health was in its infancy. Many of these new professionals were advocates who drew on their religious faith to argue for the benevolent treatment of the mentally ill.[66] The initial leader in asylum building was the Reverend Louis Dwight, an agent for the American Bible Society.[67] Dwight toured prisons and was appalled at the management of the mentally ill.[68] In 1833, he created a lunatic hospital in Worcester, Massachusetts that quickly became a model for other asylums built throughout the United States in the 1830s and 1840s.[69] In addition, Dorothea Dix, a devout Unitarian who taught a religious class in a jail in Massachusetts, led the charge for caring for the mentally ill in public asylums.[70] In 1844, the year the *Rogers* case was decided, the Association of Medical Superintendents of American Institutions for the Insane, the precursor to the American Psychiatric Association, was created.[71]

In contrast to the mental health doctors of the first wave of asylum building in the late 1700s and early 1800s, which stalled due to a lack of funding and of paying patients, mental health doctors of the mid-1800s relied on prevailing public sentiment to establish themselves as professionals and lobby for state funding for their work.[72] Though the justification for their expertise was the cure—or at least the identification and management—of the mentally ill, the foundation for their claims was fragile.[73] As Gerald Grob argues: "In articulating their views, psychiatrists employed language derived from science and medicine as well as

62. *See* Morris & Haroun, *supra* note 47, at 1003–04; *Genesis* 22:2.

63. *See* Morris & Haroun, *supra* note 47, at 1002.

64. *See id.*

65. *See id.*

66. *See* GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL 56–57 (1994).

67. *See id.* at 43.

68. *See id.*

69. *See id.* at 44–45.

70. *See id.* at 50.

71. *See id.* at 45.

72. *See id.* at 50–51.

73. *See id.* at 58.

religion. The absence of persuasive empirical data was largely overlooked; the psychiatric claim to legitimacy and authority derived from the character of practitioners and their institutional position as superintendents."[74] In the mid-1800s, this meant emphasizing their moral as well as their medical bona fides. Thus, Thomas Kirkbride, the biggest influence in asylum development during the mid-1800s, was described as a "Christian *and* Physician."[75]

Since there was little empirical evidence for mental illness, mental health doctors diagnosed patients based on observation,[76] classified mental illness into three broad diagnoses,[77] and grouped the causes of insanity into two rough categories, physical/moral or emotional.[78] For example, insanity occurred when a physical accident or the patient's violation of divine law (such as through alcoholism) caused "lesions on the brain, the organ of the mind."[79] Mental health doctors often referred to the mind as synonymous with the soul, so ultimately mental illness was the physical expression of the illness of the soul.[80] As mental health professionals felt that they had more influence over the moral causes of insanity than the physical, they emphasized (Protestant) morality in their arguments to the public and in their treatments.[81]

In the 1860s and 1870s, English and American mental health doctors criticized *M'Naghten* because it only looked at mental illness originating in the "intellectual faculties" instead of the emotional.[82] Despite their criticisms of the insanity doctrine, mental health doctors eagerly embraced the prospect of testifying in court as a way to bolster their authority, since insanity hearings provided a public demonstration

74. *Id.*

75. *See id.* at 57 (emphasis added). Kirkbride was a devoutly orthodox Quaker. *See id.*

76. *See id.* at 58.

77. CHARLES E. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE 53–54 (1968). People were diagnosed with "congenital or traumatic mental deficiency, raving mania or stupor, and . . . irrational belief or illogical action." *Id.*

78. *See* GROB, *supra* note 66, at 58, 60 ("The holistic concept of mental illnesses which saw physical disorder of the brain as the cause of the insanity required of most American psychiatrists an act of faith. Except for a few cases in which autopsies revealed the presence of a brain tumor or other gross abnormality, the link between the brain and madness remained a mystery.").

79. *Id.* at 58.

80. *Id.* "The major causal factors in mid-nineteenth-century psychiatric thought included intemperance, masturbation, overwork, domestic difficulties, excessive ambitions, faulty education, personal disappointments, marital problems, excessive religious enthusiasm, jealousy, and pride." *Id.* at 60; *see also* ROSENBERG, *supra* note 77, at 74–75. *See generally* JOHN H. WARNER, THE THERAPEUTIC PERSPECTIVE: MEDICAL PRACTICE, KNOWLEDGE, AND IDENTITY IN AMERICA 1820–1885 (1986).

81. *See* GROB, *supra* note 66, at 58–63. For example, Edward Jarvis, a prominent psychiatrist, told the Massachusetts Medical Society that the length of people's lives depended "upon our obedience to those laws which God has stamped upon our frames." *See id.* at 63.

82. *See* ROSENBERG, *supra* note 77, at 55, 68.

of their abilities. Specialists in mental health did not receive special status in court, however, as testimony on the defendant's mental status was not considered solely the province of mental health doctors.[83] Witnesses ideally provided the right mixture of status and intimacy for factfinders to believe their testimony about the defendant's life. Thus, anyone, including ministers, neighbors, and friends, was permitted to offer evidence on the defendant's mental state.[84]

In this time period, mental health doctors attempted to increase their status in the court system by convincing the court that they were the best authorities (unlike ministers) on the "true" nature of the defendant.[85] Mental health doctors did have an advantage over other witnesses in that they could offer a place for an insane defendant to stay, separated from the rest of society, once the trial ended; mental health doctors presented courts the possibility of finding defendants insane without worrying about releasing them upon the public. In addition, mental health doctors' emphasis on the moral aspects of insanity reassured courts that defendants were not escaping scot-free by pleading insanity.[86]

The next major case to invoke deific decree, the trial of Charles Guiteau for the assassination of President Garfield in 1882, received substantial attention, although mostly due to the victim.[87] Guiteau's case generated a trial record 3,000 pages in length and illustrated new legal shifts in the framing of mental health, religion, and criminal responsibility. Mental health doctors saw Guiteau's trial as a great opportunity to showcase their developing expertise and authority in a trial that captured public attention. The court system was also under pressure to perform its expertise on criminal punishment to a wider public audience. Given that the President had died after prolonged suffering within public view, this pressure included finding the defendant sane so that he could be punished at the end of the trial. As a result, the judge for this case not only had to steer the jury through the competing testimony of multiple "experts" on Guiteau, he also had to shape the jury's—and the public's—perception of insanity, religion, and criminal responsibility.[88]

During this time, neurologists and psychiatrists still felt that insanity was the end of a continuum that determined normal psychologi-

83. *See id.* at 67.

84. *Id.*

85. *See id.*

86. *See id.* at 68 ("In legal contexts the term 'moral insanity' implied an inability to conform to the moral dictates of society—as consequence of disease, not depravity . . . .").

87. Guiteau's Case, 10 F. 161, 162 (D.C. 1882).

88. *See id.* at 179–82.

cal health.[89] Above all, they agreed that insanity was a physical disease, that emotional problems could cause or exacerbate mental illness, and that insanity was curable.[90] During the 1880s, the definition of mental illness was also expanded to include not only "psychoses," but also "neuroses" and "character disorders."[91]

Despite their unanimity on the physical nature of mental illness, mental health doctors were sharply divided on the relationship between mental illness and criminal responsibility.[92] Conservatives supported a narrow interpretation of *M'Naghten* that rejected the idea of emotional and behavioral differentiation for mental illness and did not believe that insanity occurred throughout the defendant's life.[93] Liberal doctors rejected behavioral determinism and a narrow reading of *M'Naghten*, instead finding emotions to be significant.[94]

Disagreements also occurred along continental lines. Europeans followed Cesare Lombroso's emerging model of criminal anthropology, which emphasized biological and mechanistic rationales for mental illness and criminality.[95] In their view, people were born insane or with criminal propensities.[96] In contrast, American psychiatrists rejected a strictly deterministic approach and emphasized the continuing importance of morality—and particularly sin—as a fundamental aspect of individual responsibility and social control and stability.[97] As John P. Gray, the influential head of the Utica Asylum in New York, argued in 1878: "A defendant . . . may be cunning, shrewd, active; he may deceive the best of men constantly; he may have no delusion whatever, no disease, only this propensity, this thieving; and out of this shall we originate the word kleptomania, and call him a lunatic?"[98]

Consequently, for American mental health doctors, morality encompassed both physical qualities (mental functioning) and spiritual ones (sin).[99] Neurologists thought that patterns of behavior wore grooves along nerve paths, so that habit redirected impulse and sin reshaped indi-

89. *See* ROSENBERG, *supra* note 77, at 64.

90. *Id.* ("Insanity, American physicians agreed, was a disease of the brain. And disease, no medical man doubted, was of necessity a physical phenomenon; insanity was essentially a material ailment, no different in essence than mumps or typhoid fever.").

91. *Id.* at 68.

92. *Id.* at 63.

93. *Id.*

94. *Id.* at 63–64.

95. *See id.* at 69.

96. *See id.*

97. *See id.*

98. *Id.* at 63, 70. In addition, Gray believed his European counterparts expressed "excessive and morbid sentimentalism toward criminals" due to "a lack of religious training" and a focus on "European materialism and sensualism." *Id.* at 73.

99. *See id.* at 73.

vidual volition.[100] As a result, even though criminal defendants were unable to control themselves when the crime occurred, this did not indicate that they were not criminally responsible, because defendants were responsible for the series of immoral actions that led to the criminal act.[101] Therefore, a key objective of mental health doctors at this time was to separate immoral criminals from sinful lunatics.

As mental health doctors framed insanity as a physical and moral disease, they emphasized the defendant's record of criminality. If he had a long criminal record, then the instant crime would be in keeping with his previous behavior: "His crime was simply the result of evil impulse, not mental illness."[102] On the other hand, if the crime was an aberrant event in the defendant's life, mental health doctors were more inclined to attribute his or her behavior to mental illness.[103] Both popularly and medically, insane acts of violence were unpremeditated.

Thus, Guiteau was a poor fit for pleading insanity, since the defendant had organized and planned the crime.[104] Moreover, his history of instability and immorality indicated a bad character, which made him responsible.[105] Despite these disadvantages, Guiteau claimed deific decree as his justification for the killing.[106] This argument was ultimately unsuccessful, although the case included a deific decree instruction to the jury where Judge Cox cited *Roger*'s rendition of deific decree.[107] In addition, Judge Cox added the following scenario:

> [A] man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule,

100. *See id.* at 59.

101. *See id.* Rosenberg cites a Methodist clergyman that stated: "men are to be held responsible not only for their immediate choices, conscious volitions, willful acts, deliberate intentions, but withal for all choices, volitions, willful acts, intentions—conscious or otherwise, intentional or unintentional—which may be traced to, or regarded as, the natural and legitimate outcome of self-induced character . . . . Why, indeed, should not a moral agent be held to a strict account for all the remote as well as the immediate results of his free, intelligent choices." *Id.*

102. *Id.* at 64–65.

103. *Id.* at 65.

104. *See* Guiteau's Case, 10 F. 161, 179, 181–82 (D.C. 1882).

105. ROSENBERG, *supra* note 77, at 194.

106. *See id.* at 86 (describing Guiteau's defense strategy, whereby "[f]irst, he would appeal to the public, explaining his inspiration, detailing his pious life, and outlining the legal arguments that justified his acquittal," and second, either as alternative or supplementary line of defense, "he would establish his insanity and irresponsibility by proving that the Lord had stripped him of free will").

107. *See supra* note 54 and accompanying text.

> which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.[108]

In his decision, Judge Cox provides an extensive exegesis on the difference between beliefs and delusions, both sane and insane. Social and political beliefs—including religious beliefs—arise from and respond to reasoning and reflection, but delusions do not.[109] Judge Cox qualifies this assertion by arguing that certain religious beliefs, such as "animal magnetism" and "spiritualism," are absurd and result from poor reasoning, ignorance, fraud, or "perverted moral sentiments."[110] Nonetheless, he separates even absurd religious beliefs from delusions, including deific decrees, which do not stem from reason: If a man "acts under the delusive but sincere belief that what he is doing is by the command of a superior power," this belief would be an "imaginary inspiration amounting to an insane delusion."[111] Judge Cox notes that some religious believers, such as certain Christians, would disagree with his assessment. "[M]any Christians believe . . . that they . . . receive special providential guidance and illumination in reference to both their inward thoughts and outward actions, and, in an undefined sense, are inspired to pursue a certain course of action; but this is a mere sane belief, whether well or ill founded."[112] Thus, even though a Christian would believe that reason did not produce his or her religious belief, Judge Cox would argue that the reasoning process had in fact occurred. In effect, Judge Cox positions himself as an expert who is able to understand religion better than those who are religious believers.

Judge Cox, though, does not explain why deific decrees are delusions while religious beliefs in themselves are not. He does propose that if there was a sudden change in a defendant's belief system, then the change is probably due to mental disorder, not religious revelation.[113] However, since he characterizes religious beliefs as amenable to alteration and as possibly absurd, it is difficult to discern the difference between an unanticipated absurd religious revelation and an abrupt insane delusion. Strikingly, Judge Cox confidently believes that his example is an insane delusion, even though his example is a literal retelling of the story of Abraham and Isaac.[114] Moreover, his example

108. *Guiteau's Case*, 10 F. at 172. For discussion of a similar hypothetical, see *supra* note 62 and accompanying text.

109. *Guiteau's Case*, 10 F. at 171.

110. *Id.*

111. *Id.* at 177, 192.

112. *Id.*

113. *See id.* at 171; *see also id.* at 172 ("Inasmuch as these disorders are of gradual growth and indefinite continuance, if he is shown insane shortly before or after the commission of the crime, it is natural to conjecture, at least, that he was so at the time.").

114. *See supra* note 62.

clearly does not fit the scenario of Guiteau's crime. Judge Cox's example signals the difficulty of a father who despite his deep affection for his child must obey a supernatural authority. His example illustrates the dilemma of choosing between the two most personal relationships of the man's life: betraying the child that he is supposed to protect and obeying the supernatural deity in whose name morality exists. While the court "understands" the position of the person caught in such a dilemma, religion is bracketed by societal obligation: this type of person is not held criminally responsible, but neither is he set free or his behavior condoned as normal. In contrast, Guiteau had no such personal relationship with President Garfield. His crime must be understood within the realm of the political (and the delusional), not within the boundaries of personal affection, either to a human or to a God.

In the last early case defining deific decree, *People v. Schmidt*, in 1915, the defendant argued that he was commanded by God to kill a woman.[115] Hans Schmidt had impersonated a Catholic priest and was accused of killing Anna Aumuller, a servant in his church who was pregnant with Schmidt's child.[116] Schmidt argued that God told him to kill and dismember Aumuller as a sacrifice.[117] The jury in the trial convicted him of murder.[118] After the conviction, Schmidt confessed to inventing the story about God commanding him to kill and asked for a new trial on the charge of manslaughter, instead of murder.[119] In addition, Schmidt argued that there was an error in the trial because the trial judge defined "wrong" in the "right-wrong" test to mean "contrary to the law of the state."[120] Future Supreme Court Justice Benjamin Cardozo, one of the most renowned judges of Anglo-American law, rendered the verdict for the Appellate Court of New York.[121] Unlike *Guiteau*, a trial case in which Judge Cox had to give instructions to the factfinders and navigate the evidentiary proceedings in the face of a huge audience, *Schmidt* was an appellate case in which a panel of judges rendered a decision on questions of law, not fact. Moreover, the case was already decided by the time that Judge Cardozo actually wrote his musings on the right-wrong test and deific decree. Thus, Judge Cardozo's reasoning was probably forward-looking, intended to provide guidelines as to how future judges should define "wrongness," rather than merely to explicate the decision at hand.

115. People v. Schmidt, 110 N.E. 945, 945 (N.Y. 1915).
116. *Id.*
117. *Id.*
118. *Id.* at 950.
119. *Id.* at 945.
120. *Id.* at 946.
121. *See id.* at 945.

In his decision, Judge Cardozo distinguishes between a religious cult that practices polygamy or human sacrifice and a real religion—Christianity.[122] These cult believers would not receive the protection of an insanity defense; they would be considered criminally responsible because, "however false according to our own standards, [their beliefs are] not the product of disease."[123] Thus, in *Schmidt*, Judge Cardozo illustrates what the court should do when personal belief and social beliefs conflict.

Judge Cardozo declined to grant a new trial, but he agreed that the trial court erred in defining the word "wrong" from the *M'Naghten* right-wrong test to mean "contrary to the law of the state."[124] Instead, Judge Cardozo argued that "wrong" should encompass "moral wrong" as well as "legal wrong."[125] He agreed with the definitions of deific decree provided in *Rogers* and *Guiteau*,[126] and in his version of the doctrine, he presents the problem of a defendant who thinks that what she does is morally right, although it is legally wrong:

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.[127]

Judge Cardozo argued that a crime inspired by deific decree was the strongest case for finding defendants not guilty by reason of insanity: "We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify [finding this hypothetical mother criminally liable]. No jury would be likely to find a defendant responsible in such a case, whatever a judge might tell them."[128] Deific decree was used as a justification for an interpretation of *M'Naghten* and as the best example of the court's ability to force defendants to alter their behavior according to legal conceptions of right and wrong.

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122. *See id.* at 950.

123. *Id.*

124. *Id.* at 946.

125. *Id.*

126. *Id.* at 948 (quoting Guiteau's Case, 10 F. 161, 182 (D.C. 1882)) ("'If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it.' Such a man is no less insane because he knows that murder is prohibited by human law. Indeed, it may emphasize his insanity that, knowing the human law, he believes that he is acting under the direct command of God.").

127. *Id.* at 949.

128. *Id.*

III. The Latent Period of Deific Decree: 1915–1983

A. *Supreme Court Jurisprudence on Religion*

As scholars Grant Morris and Ansar Haroun note, Supreme Court religious jurisprudence is the direct opposite of its jurisprudence on pornography: while the Court "knows pornography when [it] sees it," only individuals "know" religion, while the Court does not.[129] This section briefly reviews the Supreme Court's treatment of religion under the First Amendment. The cases in this section underscore that the Court's treatment of religion is tentative at best, that religion is defined by an individual's "sincere belief," and that the definition of religion has broadened over time. Though this section demonstrates the Court's increased willingness to expand its definition of religion beyond Judeo-Christian boundaries, its refusal to mine the details of what encompasses a religion and its insistence on separating religious beliefs from other types of beliefs hinders efforts to construct a coherent thesis out of Supreme Court religious jurisprudence.

In the 1890 case of *Davis v. Beason*, the Court constructed a narrow definition of religion as a belief in a deity.[130] "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[131] This definition encompassed the conventional Judeo-Christian belief in and worship of God and little else. In the same year, in *Church of Jesus Christ of Latter-Day Saints v. United States*, the Court characterized polygamy as a nonreligious belief.[132] Polygamy did not receive the protection of religion because it was "contrary to the spirit of Christianity and of the civilization which Christianity ha[d] produced . . . ."[133]

The Court kept the narrow Judeo-Christian definition of religion from *Davis* and *Church of Latter-Day Saints* for the next seventy years. In 1961, in *Torcaso v. Watkins*, the appellant argued that a state constitutional provision requiring an applicant for public office to declare a belief in God unconstitutionally infringed upon his freedom of belief.[134] The Court agreed, holding that the Constitution prohibited the government from enacting laws that favor all religions to the disadvantage of

129. *See* Morris & Haroun, *supra* note 47, at 986 (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

130. *See* 133 U.S. 333, 341–43 (1890), *overruled by* Romer v. Evans, 517 U.S. 620 (1996).

131. *Id.* at 342. In addition, religions—and not cults—were granted constitutional protection. *See id.*

132. *See* 136 U.S. 1, 49 (1890).

133. *Id.*

134. *See* 367 U.S. 488, 489 (1961).

"non-believers" or laws that favor religions based on a belief in God over religions based on different beliefs.[135] In his majority opinion, Justice Black cited Buddhism, Taoism, Ethical Culture, and Secular Humanism as examples of nontheistic religions.[136]

When the Supreme Court encountered challenges to the Military Selective Service Act, it radically expanded the definition of religious belief. The Military Selective Service Act exempts from the draft people with religious training and beliefs who are conscientiously opposed to participation in war.[137] In the Act, "religious training and belief" was defined as the "individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," but did not and still "does not include essentially political, sociological, or philosophical views or a merely personal moral code."[138] In 1965, *United States v. Seeger* interpreted the Military Selective Service Act's "Supreme Being" requirement to include people who have a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . ."[139] The Court concluded that though Seeger was doubtful that God existed, he genuinely believed in "goodness and virtue for their own sakes," and thus he qualified for conscientious objector status.[140] The Court based its expansive decision on Congress' use of the phrase "Supreme Being" instead of "God" in section 6(j) of the Universal Military Training and Service Act.[141] In 1970, *Welsh v. United States* took *Seeger* even further by granting conscientious objector status to Welsh, who explicitly denied a religious basis to his objections to all war.[142] Instead, the Court held that Welsh's formation of his beliefs through "reading the fields of history and sociology" was sufficient.[143]

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135. *See id.* at 495–96.

136. *See id.* at 495 n.11.

137. *See* 50 U.S.C. §§ 451–73 (2012). The statute was initially the Universal Military Training and Service Act, Pub. L. No. 51, § 1, 451(a), 65 Stat. 75, 75 (1951). It was then changed to the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1, 451(a), 81 Stat. 100, 100 (1967).

138. *See* Selective Service Act of 1948, Pub. L. No. 759, § 7, 62 Stat. 604, 613 (1948) (codified as amended at 50 U.S.C. § 456(j) (1958)).

139. 380 U.S. 163, 176 (1965). The Act was amended after the *Seeger* decision to delete the reference to a "Supreme Being." *See* Morris & Haroun, *supra* note 47, at 983 n.50 (citing Military Selective Service Act of 1967 § 7, 456(j)). As Morris and Haroun note, however, the Act keeps the distinction between religious beliefs and "political, sociological, or philosophical views, or a merely personal moral code." *See id.*

140. *See Seeger*, 380 U.S. at 166.

141. *Id.* at 175.

142. *See* 398 U.S. 333, 341 (1970).

143. *Id.* Justice Harlan's concurrence in *Welsh* argued that the Court should engage the Establishment Clause directly and strike down the statute because it exempted those with religious objections to war but not those with secular objections. *See id.* at 345 (Harlan, J., concurring). Justice Harlan's argument, however, was not shared by a majority of the Court and did not

Since *Welsh,* the Supreme Court has not directly considered the definition of religion, although they have attempted to maintain a distinction between the secular and the religious.

Though the umbrella of religion expanded from *Davis* to *Welsh*, the Supreme Court consistently considered religious beliefs to be personal. For example, in their 1890 cases, the Court focused on the individual's view of their relationship with his or her Creator. Moreover, the Court has argued that although they try to distinguish the religious from the secular, it is absurd to separate the religious from the personal. Furthermore, the Court has held that religious belief is not limited to those in a monotheistic religion, those who think that all Gods are good, or those who believe in illogical beliefs.

For example, in 1944, the Court in *United States v. Ballard* admitted that a person's religious views might seem "incredible, if not preposterous, to most people."[144] The majority flatly declared, "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."[145]

More recently, in 1981, the Court in *Thomas v. Review Board of the Indiana Employment Security Division* did not analyze whether Thomas' refusal to work under provisions that violated his beliefs as a Jehovah's Witness was religious or nonreligious.[146] The Court accepted on its face Thomas' statement that he could not work because of his religion.[147] Chief Justice Burger argued for the majority that courts are not allowed to determine whether a belief is religious by asking whether it is "acceptable, logical, consistent, or comprehensible to others."[148] According to the majority of the Court, even if an individual cannot articulate his beliefs with "clarity and precision," and even if an individual admits that he is "struggling with his position," courts are not permitted to dissect them further and say they are not religious.[149] Furthermore, even if other members of the same religion interpret the requirements of the religion differently, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a

provide the basis for subsequent decisions. *Cf., e.g.*, Gillette v. United States, 401 U.S. 437 (1971).

144. *See* 322 U.S. 78, 87 (1944).

145. *See id.* at 86.

146. *See* 450 U.S. 707, 716 (1981).

147. *See id.*

148. *Id.* at 714. *See also* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

149. *See Thomas*, 450 U.S. at 715.

religious sect."[150] This refusal to examine the boundaries of religion is justified because courts do not have the competence nor is it their function to determine which individual correctly understands the beliefs of their religious faith. These boundaries, however, do not encompass claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause [of the First Amendment]," but the Court does not provide an example of such a claim.[151] Thus, courts are not allowed to classify beliefs as religious or nonreligious, even though they must make a distinction between the two because religious beliefs are constitutionally protected. Moreover, a religious belief does not have to be shared by others or be logical on its face even to the individual holding the belief. The Court does, however, bracket out claims that are so "bizarre" that they are not religious, even though there are no guidelines for distinguishing these bizarre nonreligious claims from illogical religious ones.

The Supreme Court's analysis of religion has not provided a complete picture that could guide lower courts. Lower court judges must fall back on their own sense of each case and of religion; that is, their interpretation of a "sincere" belief, or a "bizarre" one, thus creating a patchwork of cases on religion guided by their judges' backgrounds and cultural assumptions on what religion means. Furthermore, since the Court started with a core definition of religion reflective of "traditional" Judeo-Christianity and worked its way outward, the most precariously positioned religious beliefs are those that seem the least like the beliefs of Judeo-Christianity. This is the case even though the Court could not articulate a coherent and consistent reason why certain beliefs would fall on the wrong side of their dividing line. Likewise, the Court's claim that they do not probe into religious beliefs is disingenuous. The parties must present their beliefs to the Court for examination, and the Court must decide whether the beliefs are religious at all.

B. *Mental Health Developments*

The general confusion over the definition of religion, notwithstanding the privileging of deific decree in the law, does not track the psychi-

150. *See id.* at 715–16.

151. *Id.* at 715. *See also* Morris & Haroun, *supra* note 47, at 986 (citing Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979)). In *Brown*, the plaintiff argued that he was discriminated against because of his religious belief that "'Kozy Kitten People/Cat Food . . . is contributing significantly to [his] state of well being . . . [and therefore] to [his] overall work performance' by increasing his energy." *Brown*, 441 F. Supp. at 1383–84 (alterations in original). His claim was denied by the Equal Opportunity Commission, and the court determined his claim was frivolous because his belief was a "mere personal preference." *See id.* at 1385.

atric understanding of delusions or psychotic commands.[152] While there is a legal understanding of insanity, psychiatrists who are called as expert witnesses for criminal trials rely upon their own diagnostic rubric for assessing mental states.[153] The "bible" of mental health professionals is the *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM*"), which is the handbook of the American Psychiatric Association and was first published in 1952.[154] The first version—*DSM-I*—encompassed less than seventy diagnoses and followed a psychodynamic model akin to the model of mental health developed in the 1800s.[155] Normality and abnormality were on a behavioral continuum. Patients shifted their position on the continuum through their reactions to environmental factors that altered their behavior. *DSM-III*, published in 1980, changed the *DSM* from a psychodynamic model to a biomedical model that had a clear separation between normal and abnormal mental behavior.[156] *DSM-IV*, published in 1994 and revised in 2000, ballooned to over 300 diagnoses collected into five axes of disorder.[157] The current version of the *DSM*, *DSM-5*, was issued in 2013.[158] While it still contains the voluminous catalog of diagnoses from its predecessor, the *DSM-5* eliminated the axes model of *DSM-IV* and instead substituted a life-span approach, where diagnoses tracked people over the course of their lives.[159]

DSM-IV allocates more room in its glossary section to "delusion"

152. Command hallucinations are quite frequent. *See Hallucinations*, ENCYCLOPEDIA OF MENTAL DISORDERS, http://www.minddisorders.com/Flu-Inv/Hallucinations.html (last visited Apr. 11, 2015) (discussing command hallucinations without differentiating between religious and nonreligious command hallucinations).

153. Bernard L. Diamond, *The Psychiatrist as Expert Witness*, *in* THE PSYCHIATRIST IN THE COURTROOM: SELECTED PAPERS OF BERNARD L. DIAMOND, M.D. 233 (Jacques M. Quen ed., 1994).

154. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952) [hereinafter DSM-I]. The International Statistical Classification of Diseases and Related Health Problems ("ICD"), first published by the American Public Health Association in 1898 and published by the World Health Organization since 1948, is the international standard for mental health diagnosis, except for the United States where the *DSM* predominates.

155. *See* DSM-I, *supra* note 154. *See also* text accompanying note 89.

156. Dena T. Smith & Jennifer Hemler, *Constructing Order: Classification and Diagnosis*, *in* SOCIAL ISSUES IN DIAGNOSIS: AN INTRODUCTION FOR STUDENTS AND TECHNICIANS 15, 26 (Annemarie Goldstein Jutel & Kevin Dew eds., 2014).

157. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 819–28 (4th ed. 1994) [hereinafter DSM-IV]. A key factor for the publication of the *DSM-IV* was to change the *DSM*'s coding for insurance purposes, so that it aligned better to the ICD's coding. The diagnoses, however, remained the same.

158. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5]. The American Psychiatric Association ("APA") changed the *DSM* from Roman numerals to Arabic numerals in order to indicate official revisions in the future. Thus, the next revision will be named *DSM 5.1*.

159. *See id.* at xlii.

than to any other term.[160] According to the *DSM-IV*, a delusion is a "false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof of evidence to the contrary."[161] Strikingly, the glossary specifically excludes religious beliefs from the delusion category: "The belief is not one ordinarily accepted by other members of the person's culture or subculture (e.g., it is not an article of religious faith)."[162] The description goes on to describe false beliefs that use value judgments (e.g., "I am the most brilliant psychiatrist in the world.").[163] These statements are considered delusions if the "judgment is so extreme as to defy credibility."[164] The definition then lists twelve types of common delusions.[165] Though "persecutory delusions," "grandiose delusions," and "bizarre delusions" are included, "religious delusions" are not.[166] *DSM-5* eliminates the specific carve out for religion and instead lists an *array* of delusions: "Delusions are fixed beliefs that are not amenable to change in light of conflicting evidence. Their content may include a variety of themes (e.g. persecutory, referential, somatic, religious, grandiose). . . . Delusions are deemed bizarre if they are clearly implausible and not understandable to same-culture peers and do not derive from ordinary life experiences."[167]

Delusions are only one part of the diagnosis of a mental disorder. One can be delusional but not have a formal mental disorder. The most common diagnosis for a person invoking deific decree is schizophrenia. Under the *DSM-IV*, a diagnosis of schizophrenia requires that a person have either: (1) two or more of five symptoms during a one-month period (delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, or negative symptoms such as affective flattening, alogia or avolition); or (2) experience "bizarre" delusions.[168] Delusions are bizarre, according to the *DSM-IV* glossary, if they "involve[ ] a phenomenon that the person's culture would regard as totally implausible" and, according to the definition under schizophrenia, if "they are clearly implausible and not understandable and do not derive from ordinary life experiences."[169] *DSM-5* ends the bizarre/non-bizarre distinction and instead requires that two symptoms be present, at

160. *See* DSM-IV, *supra* note 157, at 819–28.
161. *Id.* at 821.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 821–22.
166. *Id.*
167. DSM-5, *supra* note 158, at 87.
168. DSM-IV, *supra* note 157, at 299.
169. *Id.* at 299, 821.

least one of which must be hallucinations, delusions, or disorganized speech.[170] The previous classification was eliminated due to "limited diagnostic stability, low reliability, and poor validity."[171]

Research indicates sharp disagreement among clinicians as to what a bizarre delusion actually is.[172] This confusion increases if the tested delusion has a religious theme or if the people experiencing the delusion have diverse ethnic or cultural beliefs.[173] In a telling example, clinicians in one research experiment classified vignettes that included the voice of God commanding individuals to baptize their newborn child, prepare a worship service, or sacrifice their child.[174] The researchers concluded that the "essential determining factor in the ratings was not the dimensions of religious experience, but the degree to which religious experience deviated from conventional religious beliefs and practices. The more unconventional the experience, the less religiously authentic and less mentally healthy it was deemed to be."[175] The least religiously authentic and most pathological vignette was God's command to sacrifice the child—a story common to the world's largest monotheistic religions.[176]

Despite the biomedical framework of *DSM-IV* and *DSM-5*, they both include cultural criteria without explaining how a predominant cultural belief could affect or override a biological explanation for mental illness. Thus, for a person receiving a deific command to kill, a clinician could either follow the religious exception for delusion and not find a mental illness or characterize the deific decree as a bizarre delusion, despite its correlation with known religious stories, and diagnose the person as schizophrenic. Either way, the *DSM* does not provide a simple route for the clinician faced with such a problem. As the *DSM* presumes

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170. AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 2 (2013), *available at* http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf. *See also* Carl E. Fisher et al., *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 U. MIAMI L. REV. 685, 703 n.54, 733 (2015).

171. *Id.* at 3.

172. *See, e.g.*, Michael Flaum et al., *The Reliability of "Bizarre" Delusions*, 32 COMPREHENSIVE PSYCHIATRY 59, 59, 62 (1991) (discussing the unreliability of bizarre delusions and the significant amount of disagreement on what are examples of bizarre delusions); Dodi Goldman et al., *Bizarre Delusions and DSM-III-R Schizophrenia*, 149 AM. J. PSYCHIATRY 494, 498 (1992) (noting that many investigators find it difficult to reach an agreement on what classifies as bizarre delusions); Robert J. Spitzer et al., *The Reliability of Three Definitions of Bizarre Delusions*, 150 AM. J. PSYCHIATRY 880, 881 (1993) (finding moderate to poor understandings of bizarre delusions among raters).

173. *See* Goldman et al., *supra* note 172, at 498.

174. *See* Susan Sanderson et al., *Authentic Religious Experience or Insanity?*, 55 J. CLINICAL PSYCHOL., 607, 609–10 (1999).

175. *Id.* at 614.

176. *Id.*

that delusions fit within a falsifiable framework,[177] religion *qua* religion must receive an explicit carve-out or perpetually risk falling within the realm of insanity. At the same time, since religion is not considered a characteristic of a delusion, the clinician must make a determination of what is considered religious in order to fit deific decree back into a mental illness schema. A plausible explanation as to why the *DSM* is so shaky on cultural context is that psychiatrists' attention to the problem of culture was not internally derived. Instead, outside critiques spurred psychiatrists to make changes to the *DSM* in order to reflect their "sensitivity" to the impact of culture upon diagnosis.[178] It is an open question of how substantive these changes actually were; the treatment of deific decree suggests not very.

Moreover, the *DSM* assumes a close fit between a person's culture and religion—religious beliefs are an outgrowth of a person's culture. Arguably, a "culture" caveat for the *DSM* is most needed for non-majoritarian cultures and religions, not for majoritarian ones. For example, it is unlikely that a mainstream Catholic belief such as transubstantiation would strike most psychiatrists as a bizarre delusion. However, the *DSM* only grants deference to religious—and cultural—beliefs that are "ordinary" (e.g., the ones least likely to need explanation and protection).

IV. Insanity Defense Generally

The "moral basis for the insanity defense is," in Stephen Morse's words, "that there is no just punishment without desert and no desert without responsibility."[179] To hold "some crazy persons responsible for their criminal behavior" would be unfair.[180]

Over the twentieth century, the legal system expanded its definition of insanity through statutes and court decisions.[181] Though the insanity

177. Morris and Haroun suggest that deific decrees can be reconciled through the clinician's proving that the belief is false. Morris & Haroun, *supra* note 47, at 1047. This argument belies the fact that all religious beliefs resist empirical proofs. In addition, Moran's work on the *M'Naghten* case illustrates the potential pitfalls in proving beliefs, especially in politically loaded situations. *See generally* Moran, *supra* 46.

178. Some of the most powerful outside critiques came from gay rights activists angered over the *DSM*'s classification of homosexuality as a disease. *See Facts About Homosexuality and Mental Health*, Psychol. U.C. Davis, http://psychology.ucdavis.edu/faculty_sites/rainbow/html/facts_mental_health.html (last visited Apr. 12, 2015) ("In 1973, the weight of empirical data, coupled with changing social norms and the development of a politically active gay community in the United States, led the Board of Directors of the American Psychiatric Association to remove *homosexuality* from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).").

179. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 779, 783 (1985).

180. *Id.* at 781.

181. *See generally* Cynthia G. Hawkins-Leon, *"Literature As Law": The History of the*

defense was not successful in the majority of cases, overall, the court system displayed a willingness to examine and retool its idea of insanity in accordance with increased information about mental health.[182] Until the 1960s, *M'Naghten* still predominated as the rule for most jurisdictions.[183] As *M'Naghten* does not clearly explain the definition for "wrongness," courts have adopted varying interpretations. Professor Herbert Fingarette summarized three models for "wrongness": first, "wrongful" may be perceived as encompassing legal norms, connoting wrong to be "contrary to law"; second, wrong may be defined as subject to societal condemnation or against public morality; and, finally, "wrongful" may be interpreted as contrary to one's own conscience.[184] English law clearly defines "wrong" as "legal wrong."[185] American law is unclear about its definition of what "wrong" means, and courts take varying approaches.[186] Both case law and statutory history indicate that particular jurisdictions have adopted all three models of "wrongfulness" in varying forms.[187] Some courts have interpreted *M'Naghten* as focusing on legal wrong, so that a defendant is sane if she knew the offense was illegal.[188] Other courts believe that *M'Naghten* is about moral wrong.[189] For those courts, a defendant who receives a deific command to kill would be found legally insane, even if she knew that killing was legally wrong.[190] The Washington Supreme Court has limited this "moral wrong" approach to belief in deific decrees only, or "that God ordered the crime committed."[191]

Over time, the right-wrong test received accompaniments such as the "irresistible impulse" test, or criteria that included tests of voluntariness. Under the "irresistible impulse" test,

> One is not guilty by reason of insanity if, "by reason of the duress of

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Insanity Plea and a Fictional Application Within the Law & Literature Canon, 72 TEMP. L. REV. 381, 389–430 (1999).

182. *See generally* Fradella, *supra* note 37 (discussing a few cases where the insanity defense was not successful and explaining that the defense, in general, is unsuccessful).

183. *See* Hawkins-Leon, *supra* note 181, at 418–27.

184. HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 153–54 (1972).

185. *See* Sheri L. Bienstock, *Mothers Who Kill Their Children and Postpartum Psychosis*, 32 SW. U. L. REV. 451, 475 (2003).

186. *See* Bageshree Ranade, Note, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1378 (1998).

187. *See id.*

188. *See id.* at 1401–02.

189. *See id.*

190. *See id.*

191. *See* Jeanine Girgenti, Note, *Bridging the Gap Between Law and Psychology: The Deific Decree*, 3 RUTGERS J.L. & RELIGION 10 para.15 (2001) (citing MELTON ET AL., *supra* note 17, at 199) ("To deal with the dangers of interpreting the word 'wrong' as a 'moral wrong,' the Washington Supreme Court further limited this approach by holding that it only applies where a defendant feels his or her act is justified as a result of a belief in the deific decree.").

> such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*."[192]

Unlike the *M'Naghten* test, which focuses on cognitive capacity, the "irresistible impulse" test emphasizes volition and whether the defendant can control her actions.

The *Durham* rule or product test, introduced by Judge Bazelon of the D.C. Circuit in the 1954 case of *Durham v. United States*, does not hold a defendant "criminally responsible if his unlawful act was the product of mental disease or defect."[193] This test encouraged the use of evidence from psychiatry and a fuller description of the defendant's personality.[194] But the *Durham* rule was criticized for its vagueness and overreliance on psychiatric testimony,[195] and it was overruled in 1972 by *United States v. Brawner*.[196]

Michigan was the first state to introduce the possibility of a "guilty but mentally ill" verdict in lieu of not guilty by reason of insanity in 1975.[197] Currently, thirteen states have adopted this alternative.[198] Defendants who are found guilty but mentally ill, or insane, are committed to psychiatric institutions post-verdict or sent to a psychiatric institution until they are declared mentally fit to serve out the rest of their sentences in prison. Critics of this alternative argue that defendants usually do not receive psychiatric treatment and are treated the same as defendants convicted under regular guilty verdicts; "the defendant will

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192. Ranade, *supra* note 186, at 1378 (citing ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE (1967); Parsons v. State, 2 So. 854, 866 (Ala. 1887)).

193. Durham v. United States, 214 F.2d 862, 874–75 (1954).

194. *See id.* at 875–76.

195. Girgenti, *supra* note 191 (stating that the *Durham* test was criticized for its lack of guidance); Ranade, *supra* note 186, at 1378 (arguing that all tests for "wrongfulness" are ambiguous).

196. United States v. Brawner, 471 F.2d 969, 981–83 (1972) (providing a rationale for adopting the ALI approach and overruling *Durham*).

197. *See* Linda C. Fentiman, *"Guilty But Mentally Ill": The Real Verdict is Guilty*, 26 B.C. L. REV. 601, 614 (1985).

198. "Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Montana, New Mexico, Pennsylvania, South Carolina, South Dakota, and Utah" have adopted the guilty but mentally ill verdict. Bella Feinstein, Note, *Saving the Deific Decree Exception to the Insanity Defense in Illinois*, 46 J. MARSHALL L. REV. 561, 567 n.33 (citing ALASKA STAT. ANN. § 12.47.040 (West 2004); DEL. CODE ANN. tit. 11, § 401(b) (West 2005); GA. CODE ANN. 17-7-131 (West 2005); 720 ILL. COMP. STAT. ANN. 5/6-2 (West 2004); IND. CODE ANN. § 35-36-2-3 (West 2004); KY. REV. STAT. ANN. § 504.120 (West 2004); MICH. COMP. LAWS ANN. § 768.36 (West 2005); MONT. CODE ANN. § 46-14-103 (2005); N.M. STAT. ANN. § 31-9-3 (West 2005); 18 PA. STAT. ANN. § 314 (West 2005); S.C. CODE ANN. § 17-24-20 (2004); S.D. CODIFIED LAWS § 23A-26-14 (2004); UTAH CODE ANN. § 77-16a-102 (West 2005)).

not be released earlier, and will receive no more psychiatric treatment in prison, than a prisoner convicted without any finding of mental illness."[199]

In 1962, the American Legal Institute ("ALI"), through the Model Penal Code ("MPC"), developed a test based on *Brawner* that expanded *M'Naghten* and the "irresistible impulse" test.[200] "Under the ALI test, an individual is not responsible for her criminal conduct if, because of mental disease or defect, she either lacked 'substantial capacity' to appreciate the 'criminality' (or . . . the 'wrongfulness') of her conduct, *or* she failed to 'conform' her conduct 'to the requirements of law.' "[201] The ALI test, unlike *M'Naghten*, allowed a defendant who only suffered a substantial, as opposed to a total, lack of mental impairment to successfully plead not guilty by reason of insanity.[202] Moreover, the ALI test encompassed mental impairment that was not purely cognitive.[203]

In 1982, John Hinckley was found not guilty by reason of insanity in the attempted murder of President Ronald Reagan.[204] The factfinders for the Hinckley trial used the ALI test.[205] Outrage over the verdict provided the catalyst for states and Congress to reaffirm the *M'Naghten* test.[206] In 1984, Congress passed the Insanity Defense Reform Act and the Comprehensive Crime Control Act; both narrowed the insanity

199. *See* Wilson v. Gaetz, 608 F.3d 347, 352–53 (7th Cir. 2010) (citing AM. BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.10, at 394 (1989); Fradella, *supra* note 37, at 30–31; Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL'Y 1, 37–40 (2005); Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169, 1186–87 (1997); Lynn W. Blunt & Harley V. Stock, *Guilty but Mentally Ill: An Alternative Verdict*, 3 BEHAV. SCI. & L. 49, 63–64 (1985); Maura Caffrey, Comment, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV. 399, 418–20 (2005)).

200. *See* Carol A. Rolf, *From* M'Naghten *to* Yates*—Transformation of the Insanity Defense in the United States—Is It Still Viable?*, RIVIER C. ONLINE ACADEMIC J. (2006), https://www.rivier.edu/journal/ROAJ-2006-Spring/J41-ROLF.pdf; *see also* Barbara A. Weiner, *Mental Disability and the Criminal Law*, *in* THE MENTALLY DISABLED AND THE LAW 769–77 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

201. Denno, *supra* note 18, at 12 (citing Model Penal Code § 4.01 (1985)) (emphasis added).

202. *See id.* at 12–13.

203. *See id.* at 12.

204. *See This Day in History*, HISTORY, http://www.history.com/this-day-in-history/hinckley-not-guilty-by-reason-of-insanity (last visited Apr. 4, 2015).

205. *See From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html (last visited Apr. 6, 2015).

206. *See id.*; Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (requiring a defendant to prove by clear and convincing evidence that at the time of the commission of the offense the defendant "was unable to appreciate the nature and quality or the wrongfulness of his acts"); *see also* Morris & Haroun, *supra* note 47, at 1002 n.189 (citing Lisa Callahan et al., *Insanity Defense*

defense.[207] New requirements included shifting the burden of proof for proving insanity as a defense, raising the evidentiary standard for insanity from a preponderance of evidence to clear and convincing evidence, and reducing expert psychiatric testimony.[208]

The Supreme Court allows states to make their own insanity standards.[209] Currently, the federal courts and a majority of states still use the strict *M'Naghten*-type rule for insanity defense.[210] A minority of states utilize the ALI/MPC test.[211] No states use the irresistible impulse test alone.[212] New Hampshire is the only state that follows the *Durham* test.[213] Four states—Idaho, Kansas, Montana, Utah—do not permit the insanity defense at all.[214]

The public outrage over Hinckley's not guilty by reason of insanity verdict, even in the face of Hinckley's obvious mental impairment, illuminates the loaded political nature of insanity defenses within the criminal justice system. Though the state is allowed to confine the legally insane, and civil confinement can last longer than criminal punishment, legal insanity undercuts the normative function of most criminal trials, in which people who violate socially acceptable behavior are

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Reform in the United States—Post-Hinckley, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54 (1987)).

207. *See* 18 U.S.C. § 17; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027 (codified as amended in 18 U.S.C. § 4241 and scattered sections).

208. *See* 18 U.S.C. § 17; 18 U.S.C. § 4241.

209. Clark v. Arizona, 548 U.S. 735, 747 (2006) (finding an Arizona insanity test that differed from *M'Naghten* to be constitutional).

210. For a summary of states utilizing the strict *M'Naghten*-type rule for insanity defense, see Feinstein, *supra* note 198, at 563 n.11 (citing ALA. CODE § 13A-3-1 (1975); ALASKA STAT. ANN. § 12.47.010(a) (West 1962); ARIZ. REV. STAT. ANN. § 13-502(a) (1956); CAL. PENAL CODE § 25(b) (West 1999); COLO. REV. STAT. ANN. §§ 16-8-101, 16-8-101.5 (West 1986 & Supp. 1999); FLA. STAT. ANN. § 775.027 (West 2000); GA. CODE ANN. §§ 16-3-2, 16-3-3, 16-3-28 (West 1988); IND. CODE ANN. § 35-41-3-6 (West 1998); IOWA CODE ANN. § 701.4 (West 1993); LA. REV. STAT. ANN. § 14:14 (1993); MINN. STAT. ANN. § 611.026 (West 1987); MONT. CODE ANN. § 546-14-101 (1991); N.J. STAT. ANN. § 2C:4-1 (West 1995); N.Y. PENAL LAW § 40.15 (McKinney 1998); OHIO REV. CODE ANN. § 2901.01(A)(14) (West 1996); OKLA. STAT. ANN. tit. 22, § 1161 (West 1998); 18 PA. CONS. STAT. ANN. § 315 (West 1998); S.C. CODE ANN. § 17-24-10(a) (1985); S.D. CODIFIED LAWS § 22-1-2(20) (1983); TEX. PENAL CODE ANN. § 8.01 (West 1973); WASH. REV. CODE ANN. § 9A.12.010 (West 1988); State v. Hotz, 795 N.W.2d 645, 653 (Neb. 2011); Finger v. State, 27 P.3d 66, 76 (Nev. 2001), *cert. denied*, 534 U.S. 1127 (2002); Laney v. State, 486 So. 2d 1242, 1245 (Miss. 1986); State v. Hartley, 565 P.2d 658, 660 (N.M. 1977); State v. Helms, 201 S.E.2d 850, 854 (N.C. 1974); Reid v. Taylor, No. 00-cv-00859, 2002 WL 31107536, at *13 (W.D. Va. Sept. 23, 2002)).

211. *See AAPL Practical Guideline for Forensic Psychiatric Evaluation for Defendants Raising the Insanity Defense*, 42 J. AM. ACAD. PSYCHIATRY & L., no. 4, 2014, at S6, S8 (Supp. 2014).

212. *See id.* at S8.

213. *See id.* at S5; *see also* Rolf, *supra* note 200.

214. *See* Marc W. Pearce, *Insanity in the State of Idaho*, AM. PSYCHOL. ASS'N (Feb. 2013), http://www.apa.org/monitor/2013/02/jn.aspx.

publicly excoriated and punished for their violation.[215] Initially, mental health experts were able to keep the insane within the rubric of moral transgression; yet, over time, this normative element has dropped out of the foreground of determining insanity in criminal trials as mental illness is now biomedically determined.

Despite the common social assumption that criminal defendants often use the insanity defense to "get away" with their crimes,[216] the opposite is actually the case. Only approximately one percent of criminal defendants in felony cases raise insanity as a defense.[217] Of those who do raise the insanity defense, only 15–25% successfully receive a not guilty by reason of insanity verdict.[218]

V. The Reemergence of Deific Decree: 1983 to Present

A. *Modern Jurisprudence*

When *State v. Crenshaw* was decided in 1983, the question presented to the Supreme Court of Washington was the same question that Judge Cardozo faced in *People v. Schmidt*: the meaning of "wrong" in the *M'Naghten* "right-wrong" test.[219] Additionally, Crenshaw argued that the jury instructions concerning insanity were in error.[220] The court disagreed with Crenshaw's argument and refused to grant a new trial.[221]

Crenshaw presented the first opportunity for the Supreme Court of Washington to define "wrong," according to Washington state law. The court noted: "it is society's morals, and not the individual's morals, that are the standard for moral wrong."[222] However, the court resisted an extensive engagement with the question of what constituted societal versus individual wrong, stating, "the law is, for the most part, an expression of collective morality," so the interpretation of morality usually does not matter.[223] The court believed that the defendant knew that his

215. *See, e.g.*, Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 Vand. L. Rev. 1383, 1418 (2003).

216. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. Rev. 599, 609–11 (1990) (discussing the sensationalism of the insanity defense after *M'Naghten* and Hinckley's acquittal).

217. *See* James L. Knoll, IV & Phillip J. Resnick, *Insanity Defense Evaluations—Basic Procedure and Best Practices*, Psychiatric Times, Dec. 2008, at 35, 35.

218. *Id.*

219. *See* State v. Crenshaw, 659 P.2d 488, 490 (Wash. 1983); *supra* note 124 and accompanying text.

220. *See Crenshaw*, 659 P.2d at 491.

221. *Id.*

222. *Id.* at 493.

223. *See id.* at 494. The dissent argued that the "majority eliminated the *moral* right and wrong test by concluding that 'moral' wrong and 'legal' wrong are synonymous." *Id.* at 499. For the dissent, while this may sometimes be the case, it is for the trier of fact to determine and not for the courts to determine as a matter of law. *Id.*

acts were illegal and morally wrong from society's viewpoint.[224] Thus, his personal belief that it was his duty to kill his wife was not enough to exculpate him from criminal responsibility.[225]

Unlike the Supreme Court cases on religion, here, the court did not engage the question of whether the defendant sincerely believed that God told him to kill or whether his was a religious belief. Previously, deific decree was framed as a way to make sense of cases in which a supposedly sane person commits murder and then blames the murder on God; that is, when a seemingly insane act appears out of nowhere. Here, deific decree was only seen to make sense when there was a previous history of mental illness. By alluding to social morality, the court did not engage in an analysis of how social morality is learned or the assumption that social morality is a unifying term, instead of a fractured one.

The court emphasized that under *M'Naghten*, the insanity defense was strictly limited to people who had lost complete contact with reality: Crenshaw's bid for insanity was unsuccessful because, even if he was delusional, "his delusion was only partial, for it related only to his perceptions of his wife's infidelity. His behavior toward others . . . was normal."[226] The court refused to consider Crenshaw's Moscovite beliefs with respect to the insanity defense because his beliefs were not insane delusions: "Some notion of morality, unrelated to mental illness, which disagrees with the law and mores of our society is not an insane delusion."[227] When the court mentioned Crenshaw's Moscovite beliefs, it did not go into detail about what those beliefs were, other than repeating Crenshaw's argument that Moscovites believed it their duty to kill unfaithful wives.[228] Moreover, the court characterized Crenshaw's thoughts as "beliefs" in order to draw a distinction between beliefs and insane delusions.[229] These beliefs occupy a middle ground between personal beliefs, which are held by Robert Crenshaw alone, and societal beliefs, which are held by virtually everyone—including non-Moscovites. The court held that because Crenshaw's belief that he should kill his wife was a belief instead of a delusion, he should have been able to reason out that he should not heed it.[230] Thus, the court construed *M'Naghten* so that anyone who might possibly be deterred from the

224. *Id.*

225. *Id.* at 494.

226. *See id.*

227. *Id.* at 495. The court also noted that Crenshaw's belief that his wife was unfaithful was not an insane delusion, and evidence of prior commitments to mental institutions is not proof that one is legally insane. *Id.*

228. *Id.* at 494.

229. *See id.*

230. *Id.* at 494–95.

commission of a crime should be included within the criminal law and punished.

The court also rejected Crenshaw's argument that he suffered from a deific decree delusion.[231] Citing *Schmidt*, the *Crenshaw* court stated that it considered deific decree a "narrow exception to the societal standard of moral wrong" that "has been drawn for instances wherein a party performs a criminal act, knowing it is morally and legally wrong, but believing, because of a mental defect, that the act is ordained by God."[232] This exception was unavailable to Crenshaw because Crenshaw argued only that he followed the Moscovite faith and that Moscovites believe it their duty to kill an unfaithful wife. This is not the same as acting under a deific command. Instead, it is akin to "'the devotee of a religious cult that enjoins . . . human sacrifice as a duty [and] is *not* thereby relieved from responsibility before the law.'"[233] Crenshaw's personal Moscovite beliefs thus were not equivalent to a deific decree and did not relieve him from responsibility for his acts.

The problem is that although *Crenshaw* cites to *Schmidt*, Judge Cardozo in *Schmidt* actually used deific decree as the preeminent example of the need for an insanity plea, not as a narrow exception.[234] Also, in *Schmidt*, Judge Cardozo noted that cults were unable to utilize the law in the same manner as others because he did not believe them to be recognized religions.[235] By comparing the Moscovite faith to a cult and citing to *Schmidt*, it seems as if the court was implying it was not a recognized religion.

In the Colorado case of *People v. Serravo*, the defendant stabbed his wife and then went to the grocery store.[236] The defendant was found not guilty by reason of insanity. The state appealed the verdict by arguing that the standard for insanity in the jury instructions could have led the jury to return an insanity verdict based on a purely subjective moral standard, rather than a legal standard. The jury instructions stated:

> As used in the context of the statutory definition of insanity as a criminal defense, the phrase "incapable of distinguishing right from wrong" includes within its meaning the case where a person appreci-

231. *See id.*

232. *Id.* at 501.

233. *Id.* at 494 (quoting People v. Schmidt, 110 N.E. 945 (N.Y. 1915)).

234. *See supra* note 127 and accompanying text.

235. *See Schmidt*, 216 N.Y. 324 ("The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law. In such cases the belief, however false according to our own standards, is not the product of disease. Cases will doubtless arise where criminals will take shelter behind a professed belief that their crime was ordained by God. . . . We can safely leave such fabrications to the common sense of juries.") (internal citations omitted).

236. People v. Serravo, 823 P.2d 128, 130 (Colo. 1992).

> ates that his conduct is criminal, but, because of a mental disease or defect, believes it to be morally right.[237]

The Colorado Supreme Court held that "'incapable of distinguishing right from wrong' refers to a cognitive inability to distinguish right from wrong under existing societal standards of morality rather than, as implied by the trial court's instruction, under a purely subjective and personal standard of morality."[238] However, defendant may be considered insane where "the defendant's cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act," thus characterizing the deific decree delusion as an "integral factor in assessing a person's cognitive ability to distinguish right from wrong with respect to the act charged as a crime."[239]

The Colorado Appellate Court, in *People v. Tally*, followed *Serravo* as precedent and stated that when an individual acts "under the delusion that God is compelling the act, the so-called deific decree delusion, 'is not so much an exception to the right-wrong test measured by the existing societal standards of morality as it is an integral factor in assessing a person's cognitive ability to distinguish right from wrong.'"[240] In *Tally*, even though the jury did not receive a specific deific decree instruction,[241] the general insanity instruction was sufficient.[242]

Though most of the deific decree cases of the post-1983 era involved defendants with a history of mental illness, in *State v. Turgeon*, the defendant had no such history.[243] Christopher Turgeon argued that "he [was] able to predict events and that he regularly receive[d]

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237. *Id.* at 132.

238. *Id.* at 130.

239. *Id.* at 130, 142.

240. People v. Tally, 7 P.3d 172, 184 (Colo. App. 1999) (citing *Serravo*, 823 P.2d at 139). Washington also followed suit in considering the deific decree as an integral part of a general insanity defense, not an exception. *See, e.g.*, State v. Roberts, No. 29791-4-II, 122 Wash. App. 1040, at *4–5 (July 27, 2004) (finding that defense counsel's failure to ask for a specific deific decree instruction did not amount to ineffective assistance of counsel because the information on deific decree was presented to a jury and the jury received a general instruction on insanity).

241. *See Tally*, 7 P.3d at 184. The defendant proposed the following instruction: "If Mr. Tally committed the act under a delusion caused by mental disease or defect, that God had given him permission to commit the act, he must be judged insane." *Id.*

242. *See id.* The instruction given was: "INCAPABLE OF DISTINGUISHING RIGHT FROM WRONG refers to cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is criminal." *Id.*

243. State v. Turgeon, No. 49535-6-I, 120 Wash. App. 1050 (Mar. 22, 2004). Strikingly, *Turgeon* is an unpublished case, and thus counsel in subsequent cases cannot cite to it as precedent. Usually cases are unpublished if they are considered routine. However, in this case, the court itself acknowledged the novelty of Turgeon's position. *See infra* note 253 and accompanying text.

messages from God. Because of this, he . . . devoted his life to teaching, prophesying, and confronting others with their sins."[244] Turgeon led a group called the Gatekeepers that robbed and defrauded businesses that it considered sinful.[245] During a Gatekeepers meeting, Turgeon and Blaine Applin, another Gatekeeper member, alleged that God told them that Dan Jess, a former member of the group that had argued against Turgeon, "must be killed."[246] Thereafter, Turgeon and Applin drove from California to Washington where Jess lived.[247] On the way, Turgeon claimed that he "asked God to make them take an unscheduled stop if killing Jess was not God's will."[248] Instead, the two men claimed that they "saw seven rainbows, leading them to believe that God [had] blessed their mission."[249] When Turgeon and Applin arrived at Jess's house, Applin shot Jess, and then the two men drove away.[250] Both men confessed to the murder but argued that they should be found not guilty be reason of insanity because God had ordered them to murder Jess.[251] Neither man was successful in their insanity defense, and both were convicted of first-degree murder.[252]

In Turgeon's unsuccessful appeal, the Washington Court of Appeals stated, "it is awkward to apply the insanity defense for someone like Turgeon. Turgeon is not like the defendants in *Crenshaw*, *Cameron*, or *Rice*, and the traditional insanity defense is likely inapplicable to Turgeon because he is not insane in the traditional sense; he does not suffer from mental disease."[253] Though *Turgeon* resembles the original scenarios of deific decree, where the acts were isolated, here, the claim of deific decree was deemed implausible. Given that the defendant had no history of mental illness, it is probable that he was presumed to be lying. If there was a defendant with a history of mental illness, deific decree would be understood as an expression of that mental illness. The question remains: is there any scenario in which an otherwise sane person could actually believe that they heard a deific command, and if so, how could the court verify the claim?

The court based its rejection of Turgeon's appeal on the argument that even if Turgeon did receive a command from God indicating an element of mental disorder, his otherwise rational behavior demon-

244. *Turgeon*, 120 Wash. App. at *1.
245. *Id.* at *1.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at *3.

strated that his free will was not destroyed by the deific decree and thus he did not reach the level of legal insanity.[254] Thus, God was not a strong enough moral force to cause total destruction to Turgeon's faculties, even though it was clear that he was relying on God to justify the murder. If the court was trying to say that it did not believe Turgeon, it did not have a mechanism to do so. A mental illness diagnosis allows the court to indicate that a defendant's beliefs are incorrect. Here, where Turgeon did not have a history of mental illness and where his views on God were unacceptable to the court, the court had it both ways—classifying Turgeon as partially mentally ill, partially irrational, and wholly responsible for the murder of Dan Jess.

B. *Deific Decree's Failure*

1. Bad Gods

While the deific decree doctrine offers another alternative to some people with certain delusions, others are not so lucky. Those who hear the commandments of non-omnipotent deities, such as spirits,[255] devils,[256] Satan,[257] or Jesus,[258] may not be able to convincingly fit their delusions within the narrow confines of a command by an omnipotent unified deity. A deific decree defendant is legally understood to be acting under the dictates of a good divine commander; thus, he believes that what he is doing is morally right, even if it is legally wrong. Under a volitional theory of insanity, these defendants are powerless to act otherwise. For those who labor under *other* delusions, legally, they are understood as having the *choice* to decline to act according to the dictates of the delusion because Satan or another non-omnipotent deity does not force them to choose between the morals of their religion and the legal requirements of their society. This distinction between God delusions and other delusions, though, does not track psychiatric understandings of "delusion." The *DSM-5* does not recognize divine commands and does not privilege religious commands in general.[259] Instead, religious commands are classified as part of an array of delusions that a person may experience.[260]

On the other hand, deific decree can render often common religious

254. *See id.*

255. People v. Garcia, 509 N.E.2d 600, 603 (Ill. App. Ct. 1987).

256. People v. Duckett, 209 Cal. Rptr. 96, 98–99, 104 (Cal. Ct. App. 1984).

257. Andrea Yates is a famous example. *See Andrea Yates Case: Yates Found Not Guilty By Reason of Insanity*, CNN (Dec. 21, 2007, 11:03 AM), http://www.cnn.com/2007/US/law/12/11/court.archive.yates8/index.html?_s=PM:US.

258. People v. Kando, 921 N.E.2d 1166, 1170 (Ill. App. Ct. 2009).

259. *See* DSM-5, *supra* note 158.

260. *See id.* at 87.

beliefs as insanity.[261] For example, Deanna Laney killed two of her children and tried to kill the third one in 2003.[262] Laney said that God told her that the Apocalypse was coming and that killing her children was the final test.[263] Laney also told investigators that God promised that she would be reunited with her children in heaven and play an important part in the Second Coming.[264] These were not the first communications that Laney claimed she received from God.[265] She attended a Pentacostal church run by her brother-in-law that frequently referred to the Apocalypse and personal communications with God.[266] No one at Laney's church remarked that these other messages were unusual.[267] Yet all five psychiatrists at her trial diagnosed her as mentally ill, and she was found not guilty by reason of insanity.[268] In another case, Teresa Archie killed her daughter and said that she "had to do the Lord's will" because her daughter was worshipping Satan.[269] Archie referred to *Deuteronomy* 13:6 and 7–8, which tells the devout to kill those who serve other gods.[270] Archie was also found not guilty by reason of insanity.[271]

A recent Seventh Circuit court opinion, *Wilson v. Gaetz*, warned of possible Establishment Clause issues with deific decrees.[272] In that case, Wilson believed that Catholics were conspiring against him by planting

261. A 2014 Gallup poll revealed that, when asked about their views on the Bible, about 28% of respondents believed that "the Bible is the actual word of God and is to be taken literally, word for word"; other descriptive options included "inspired" but not the literal word of God and "ancient book of fables, legends, history, and moral precepts." Lydia Saad, *Three in Four in U.S. Still See the Bible as Word of God*, GALLUP (June 4, 2014), http://www.gallup.com/poll/170834/three-four-bible-word-god.aspx. Other less scholarly and systematic surveys have reported much higher figures. For example, the Rasmussen polling firm found that 63% of respondents answered "yes" to the question, "Is the Bible literally true and the word of God?" *63% Believe Bible Literally True*, RASMUSSEN REP. (Apr. 23, 2005), http://legacy.rasmussenreports.com/2005/Bible.htm.

262. *See* Caleb Mason, *Faith, Harm, And Neutrality: Some Complexities of Free Exercise Law*, 44 DUQ. L. REV. 225, 258 (2006).

263. *See id.* at 259.

264. *See id.* at 259, 260.

265. *See id.* at 259.

266. *See id.* at 258.

267. *See id.*

268. *See id.* at 260.

269. Archie v. Alabama, 875 So. 2d 336, 337, 343 (Ala. Crim. App. 2003).

270. *See* Mason, *supra* note 262, at 226. The text in question reads, "If thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods, which thou hast not known . . . Thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him: But thou shalt surely kill him; thine hand shall be first upon him to put him to death." *Id.* (quoting *Deuteronomy* 13:6, 8–9).

271. *See* Archie, 875 So. 2d at 344.

272. Wilson v. Gaetz, 608 F.3d 347, 354 (7th Cir. 2010). The Seventh Circuit opinion concerned a petition for writ of habeas corpus due to ineffective assistance of counsel that was denied by the court. *Id.* at 358. It summarized the facts from the lower court in its opinion.

cameras in his house in order "to frame him for molesting his adopted teenage daughter."[273] Wilson thought that his daughter was a part of the conspiracy and kicked her out of the house;[274] he also divorced his wife, believing that she not only was a part of the conspiracy, but that she had affairs with Catholics.[275] Wilson had tried to take steps to thwart the Catholic conspirators, including buying toy and real guns, wearing a bulletproof vest, installing locks, and nailing his back porch door shut.[276] Wilson experienced these delusions over the course of fifteen years.[277] Ultimately, Wilson was put on trial for killing his boss, Jerome Fischer, whom Wilson believed was one of the key conspirators.[278] Wilson thought that Fischer was planting the cameras in his home and suspected Fischer of keeping him from his home in order to allow the Catholics to plant more cameras.[279] When Fischer told Wilson that he had to attend a company meeting, Wilson told Fischer that he did not want to go to the meeting because of the Catholic conspiracy.[280] Fischer replied that he would be fired if he did not attend.[281] The next day, Wilson shot Fischer when Fischer came to his house to pick him up for the meeting.[282]

Despite the "religious slant" of Wilson's delusions, he could not utilize the deific decree doctrine because he did not claim to receive a direct command from God.[283] "But to distinguish between 'deific' and all other delusions and confine the insanity defense to the former would present serious questions under the First Amendment's establishment clause."[284] However, no court, including the *Wilson* court, has directly addressed whether the deific decree doctrine violates the Establishment Clause.[285]

To go further, the deific decree not only expresses a religious preference, it expresses a particular *type* of religious preference in which direct divine commands from an omnipotent God are recognized legally

273. *Id.* at 348.
274. *Id.*
275. *Id.*
276. *See id.*
277. *See id.* at 349.
278. *See id.*
279. *See id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 354.
284. *Id.*
285. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). Under the three-part *Lemon* test, a law does not violate the Establishment Clause when it (1) serves a secular purpose; (2) does not have the primary effect of advancing or inhibiting religion; and (3) does not promote "excessive government entanglement with religion." *Id.*; *see also* Feinstein, *supra* note 198, at 574. A violation of any prong could result in an Establishment Clause violation.

apart from any other type of hallucination. The focus is not on the fact of the hallucination or delusion and that the defendant was compelled by the delusion; rather, it selects a particular type of compulsion for special treatment. Moreover, though psychiatrists would analyze the defendants' mental states, it is up to the legal system to determine whether defendants' delusions were divine. This is an entanglement of the legal system into religion. Thus, the doctrine would likely fail under the *Lemon* test.

2. Bad Mothers and Bad Husbands

Finally, the pattern of cases involving deific decree raises gender concerns. While in general these criminal defendants kill those who they know, the cases fall into two main categories: women who kill their children and men who kill their wives or girlfriends. Within the former group, the case of Teresa Archie is exceptional.[286] In most cases of purported deific decrees, women believe that their acts are protective of their children, and that the children's deaths will allow them to ascend to Heaven and to God's protection.[287] We can often understand these cases as ones not about deific decree but about the consequences of postpartum psychosis. Postpartum psychosis, the most severe postpartum mood disorder, which affects approximately 0.2% of childbearing women, is "typified by hallucinations that command [the mother] to kill her child and/or delusions that her child is possessed by the devil or by evil forces."[288] The disorder, though, is often not discussed by the mother or by others around her due to shame or ignorance.[289] Moreover, postpartum psychosis can persist and reappear periodically throughout the woman's life. For women who suffer postpartum psychosis in *M'Naghten* jurisdictions, it would be difficult for them to receive a finding of not guilty by reason of insanity because postpartum psychosis is episodic, and the mother knows that it is wrong to kill her child. Moreover, the mother would have to fit into a narrow subset of postpartum psychotic women who experienced a specific-command delusion in order to qualify for deific decree.

The men who kill their wives or girlfriends do not have such a straightforward psychiatric explanation. These men include Robert Pasqual Serravo, who stabbed his wife and claimed it was God's will;[290] Jesse Skinner, who strangled his wife and claimed that it was God's

286. *See* Archie v. Alabama, 875 So. 2d 336 (Ala. Crim. App. 2003). *See also supra* notes 269–71 and accompanying text.

287. For example, Laney killing her children with the belief that her children would go to heaven and be reunited with her. *See* Mason, *supra* note 262, at 259, 260.

288. Bienstock, *supra* note 185, at 457–59.

289. *See id.* at 460.

290. *See* State v. Serravo, 823 P.2d 128, 131 (Colo. 1992).

wish;[291] and Robert Blair, who killed his wife and son with a hammer and claimed God would have cast him into a lake of fire if he refused.[292] For some of these men, their delusions were a manifestation of a mental disorder, such as schizophrenia. For others, their actions may have been the sane maneuvers of a domestic violence perpetrator who was attempting to use the deific decree doctrine to his advantage.

VI. Conclusion

Currently, deific decree is used as an attempt to broaden an insanity defense regime that is distressingly narrow and does not reflect the modern understanding that people with severe mental illness or psychosis are often not totally incapacitated.[293] And, despite popular conception to the contrary, insanity defenses are unlikely to succeed.[294] Meanwhile, hundreds of thousands of people with diagnosed mental disorders languish in jail cells instead of receiving treatment.[295]

This article charts a doctrine that becomes increasingly incoherent as time goes on. As the mental health field developed, it carved out a niche for itself within criminal law, created a biomedical framework to map out human behavior, and confusingly tried to incorporate cultural factors within its analysis. The Supreme Court, through constant engagement with the First Amendment, broadened its definition of religion to include more than Christianity, and deferred into perpetuity questions, like what is a religion, what role should it have in society, and how should the law define and assess religious belief. Criminal law, thrown back upon an insanity doctrine developed in England in the mid-1800s, attempts to categorize wrongs based on societal and individual definitions, but sidesteps the problem of religion when it occupies both fields.

291. *See* People v. Skinner, 704 P.2d 752, 754–55 (Cal. 1985).

292. *See* State v. Blair, 732 A.2d 448, 449 (N.H. 1999).

293. Ranade, *supra* note 186, at 1397.

294. *See* Knoll & Resnick, *supra* note 217.

295. "'On any given day, at least 284,000 schizophrenic and manic depressive individuals are incarcerated, and 547,800 are on probation . . . . [W]e have unfortunately come to accept incarceration and homelessness as part of life for the most vulnerable population among us.'" Bard, *supra* note 199, at 2 (quoting *The Impact of Mentally Ill Offenders on the Criminal Justice System: Hearing Before the Subcomm. on Crime*, 106th Cong. 26–27 (2000) (statement of Rep. Ted Strickland)).