

“God Told Me to Kill”: Religion or Delusion?

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I. INTRODUCTION

When Abraham took his knife and prepared to slay Isaac, Abraham was responding to God's order to do so.¹ To pass the supreme test of faith, Abraham was required to unconditionally surrender to God's directive that he sacrifice his only son.²

1. The story of the binding of Isaac, known as the Akedah, is told in *Genesis* 22:1–18. For a retelling of the story in a twentieth century context, see Norval Morris, *Ake Dah*, 52 U. CHI. L. REV. 553 (1985). In Morris's story, however, both the colonial police officer who narrates the story and the examining psychiatrist believe that the father's attempted murder of his son resulted from the accused's mental illness. *Id.* at 587. If tried, the accused would be found not guilty by reason of insanity. *Id.* at 583.

The colonial police officer in Morris's story is named Blair and he serves in the Moulmein District of colonial Burma. Our colleague, Maimon Schwarzschild, informs us that British author George Orwell's real name was Eric Arthur Blair, and that, as a young man, he actually served in the Moulmein District of colonial Burma as an assistant district superintendent in the Indian Imperial Police. 8 THE NEW ENCYCLOPAEDIA BRITANNICA 1019–20 (15th ed. 1998). Morris never openly identifies his narrator as Orwell.

2. Isaac was not killed, and the order to sacrifice him was given only to test the strength of Abraham's belief in God. Human sacrifice is antithetical to Jewish belief. In the book of Deuteronomy, the ancient Israelites were instructed not to act as did the Canaanites, "for every abomination to the LORD, which He hateth, have they done unto their gods; for even their sons and their daughters do they burn in the fire to their gods." *Deuteronomy* 12:31; see also *Deuteronomy* 18:10 (instructing: "There shall not be found among you any one that maketh his son or his daughter to pass through the fire").

Sigmund Freud, however, would have interpreted the Biblical story differently. There was no command to sacrifice Isaac, he would have asserted, because there was no God to issue the command. As a scientist,³ Freud believed that "there is no other source of knowledge of the universe, but the intellectual manipulation of carefully verified observations, in fact, what is called research, and that no knowledge can be obtained from revelation, intuition or inspiration."⁴ Thus, to Freud, religion was illusion⁵—the unjustified fulfillment of emotional wishes not grounded on scientific research or knowledge.⁶ Freud characterized religion as

the universal obsessional neurosis of humanity; like the obsessional neurosis of children, it arose out of the Oedipus complex, out of the relation to the father. . . . If, on the one hand, religion brings with it obsessional restrictions, exactly as an individual obsessional neurosis does, on the other hand it comprises a system of wishful illusions together with a disavowal of reality, such as we find in an isolated form nowhere else but in amentia, in a state of blissful hallucinatory confusion.⁷

But Freud was not present to challenge Abraham's decision to bind Isaac for sacrifice or to question whether Abraham was responding to

3. According to Freud, psychoanalysis contributed to science by extending research to the human mind. SIGMUND FREUD, *A Philosophy of Life, Lecture XXXV, in NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS* 217–18 (W.J.H. Sprott trans., 1933).

4. *Id.* at 217.

5. *Id.* at 239. Karl Marx also agreed that religion is an illusion, a product of the human imagination. Religion is "the sigh of the distressed creature, the soul of a heartless world, as it is also the spirit of a spiritless condition. It is the *opium* of the people." KARL MARX, *ON RELIGION* xx (Saul K. Padover ed. & trans., 1974). Despite their agreement on this issue, Freud questioned whether Marxism, at least as embodied by Russian Bolshevism, was a true social science. Freud noted that the Communists had established a ban upon thought, which is as inexorable as was formerly that of religion. All critical examination of the Marxist theory is forbidden; doubts of its validity are as vindictively punished as heresy once was by the Catholic Church. The works of Marx, as the source of revelation, have taken the place of the Bible and the Koran, although they are no freer from contradictions and obscurities than these earlier holy books.

FREUD, *supra* note 3, at 245–46.

6. FREUD, *supra* note 3, at 218. Freud asserted: "Religion is an attempt to get control over the sensory world, in which we are placed, by means of the wish-world, which we have developed inside us as a result of biological and psychological necessities. But it cannot achieve its end." *Id.* at 229.

7. SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 43 (James Strachey ed. & trans., W.W. Norton & Co. 1961) (1927). Freud also cautioned that if religious belief is equated with knowledge, it "would open the door which gives access to the region of the psychoses, whether individual or group psychoses." FREUD, *supra* note 3, at 218.

illusion or hallucinatory confusion rather than a command from the Almighty. And even if the father of psychiatry had been there, he is not likely to have persuaded the father of monotheism to resist—or even to question—what Abraham perceived as a deific decree.

Unfortunately, Abraham's crucible was not the last. Human sacrifice at the direction of God, or what is perceived—rightly or wrongly—to be God, has occurred throughout history.⁸ Often religious believers sacrificed an individual to appease an omnipotent god so that the whole community would not suffer from some catastrophe, such as disease or loss of fertility.⁹ The life of the victim was not minimized by the act of sacrifice; its importance was elevated by its ability to placate the all-powerful deity and avoid calamity to the group.¹⁰

Human sacrifice, however, is not limited to organized religions that prevail in a given society. Individuals, relying upon their own religious beliefs, sometimes kill. Within the last few years San Diego experienced at least two such examples. On November 14, 1998, twenty-year-old Brandon Wilson slashed nine-year-old Matthew Cecchi's throat in a beach-side restroom. At trial, Wilson admitted the random killing, characterizing the act as a sacrifice to fulfill God's wishes. He claimed that God had ordained him a killer to help exterminate humanity.¹¹

8. See generally LARRY S. MILNER, *HARDNESS OF HEART/HARDNESS OF LIFE: THE STAIN OF HUMAN INFANTICIDE* 319–60 (2000) (discussing human sacrifice in various civilizations).

The Thugs, for example, were a religious organization that existed for several hundred years in India. As worshipers of Kali, the Hindu goddess of destruction, Thugs robbed and murdered their victims. In the nineteenth century, the British engaged in a concerted effort to eliminate the Thugs, capturing 3266 during the period of 1831 to 1837. Of this number, 412 were hanged, and many were imprisoned for life or transported. Thereafter, the religion became extinct. 11 THE NEW ENCYCLOPAEDIA BRITANNICA 741–42 (15th ed. 1998). The British reading public was introduced to the Thug religious practices through a novel published in 1839. The story is narrated by a captive leader of a band of Thugs who tells the story of his life in great detail. PHILIP M. TAYLOR, *CONFESSIONS OF A THUG* (Oxford Univ. Press 1986) (1839).

9. MILNER, *supra* note 8, at 320. The Aztecs, for example, are estimated to have sacrificed between 20,000 and 250,000 individuals in religious rituals to pacify their sun god, Huitzilopochtli. *Id.* at 326.

10. *Id.* at 321.

11. Alex Roth, *9-Year-Old's Killer Receives Death Penalty*, SAN DIEGO UNION-TRIB., Nov. 5, 1999, at B-1. Wilson informed a probation officer that he was not afraid to die by lethal injection but “would prefer to be burned at the stake, something like a Christian martyr.” *Id.* At his trial, Wilson testified that by killing people, he was helping their souls experience a rebirth in heaven. He also testified that God wanted him to recruit others and to teach them how to be killers. Alex Roth, *Jury Rules Child Killer Sane*, SAN DIEGO UNION-TRIB., Sept. 29, 1999, at A-1. At the penalty phase, Wilson testified that he had “no remorse whatsoever” for killing Matthew and would gladly do it again. He asked the jury to give him the death penalty. The jury did so. Alex Roth, *Defender of Killers Like Wilson Has Had Enough*, SAN DIEGO UNION-TRIB., Oct. 31, 1999, at B-1.

Perhaps even more terrifying was the decision of David and Jennifer Mayer not to provide food to their two-year-old son, Zechariah, because they believed that God did not like fat babies. The child starved to death.¹² Although the parents did not consciously decide to kill their child, their religious beliefs led to their conduct that produced the death.¹³

This Article explores how, in assessing the motivation of those who kill because they believe they were directed by God to do so, society distinguishes religious-based decisions from delusional decisions that result from mental disorder. Part II discusses how religion is defined in our society, and Part III considers the extent to which religious conduct, as opposed to religious belief, is protected from governmental intrusion.

Part IV discusses the insanity defense used to exculpate from criminal responsibility persons who suffer from a serious mental disorder affecting their ability to distinguish right from wrong at the time they act. A "deific decree" commanding the defendant to kill has been characterized, not as a religious belief, but as a delusional belief justifying an insanity verdict. But if a "religiousity" defense is not available to exculpate the hyperreligious from criminal liability for acts they believe are morally right, should the mentally disordered be exculpated for their religiously motivated, though illegal, acts? If so, is society able to identify those who belong in the protected group? If a mentally disordered person claims that God ordered him or her to kill, are psychiatrists competent to assess whether the defendant acted from a delusional belief, or whether he or she acted from a religious conviction? In our society in which all sincerely held religious beliefs are entitled to equal treatment, can we appropriately declare a defendant's claimed religious belief to be a false belief, the product of a mentally disordered mind?

To answer these questions, Part V examines the meaning of delusion, especially as that concept is explained in the psychiatric profession's standard diagnostic manual.¹⁴ Psychiatry specifically excludes religious

12. Greg Moran, *Father Gets 25 Years to Life in Son's Death*, SAN DIEGO UNION-TRIB., Jan. 14, 2000, at B-1; see also Greg Moran, *Father to Be Sentenced Tomorrow for 1st-Degree Murder*, SAN DIEGO UNION-TRIB., Jan. 12, 2000, at A-1.

13. At trial, two mental health experts testified that the father "suffers from a psychotic disorder and has 'elaborate and bizarre' delusions about religion and God." Moran, *Father Gets 25 Years to Life in Son's Death*, *supra* note 12, at B-1. The defendant was convicted of first degree murder and sentenced to prison for twenty-five years to life. *Id.*

14. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF

beliefs from the definition of delusion because a religious belief cannot be declared to be a false belief. Because a person's sincerely held belief that God ordered him or her to kill qualifies as a religious belief, it should not be characterized as a delusion. Thus, the insanity defense should not be available to those who kill at God's command.

II. DEFINING RELIGION

A. Religion in the United States: Historical Development

The Pilgrims in 1620,¹⁵ the Puritans in 1630,¹⁶ and other early settlers came to America to escape religious persecution. No wonder then that religious liberty was embraced by our founding fathers. Jefferson identified it as "the most inalienable and sacred of all human rights."¹⁷ Madison declared: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."¹⁸ Through the Establishment Clause and the Free Exercise Clause of the First Amendment, our religious liberty was secured as the very first freedom mentioned in the Bill of Rights.¹⁹

Of course, the ideal of religious liberty was not extended to the Native Americans who lived in our country when the Pilgrims landed or to the African Americans who were imported as slaves. Their pagan beliefs

MENTAL DISORDERS (DSM-IV) (4th ed. 1994) [hereinafter DSM-IV].

15. In 1620, the Pilgrims established the first permanent settlement, Plymouth Colony, in New England. Some of the Pilgrims were members of the English Separatist Church who fled from England to Leyden, the Netherlands, in 1609 to practice their religion without official interference. 9 THE NEW ENCYCLOPAEDIA BRITANNICA 441 (15th ed. 1998). They migrated to America because of economic hardship and because of a desire to establish an identity free of Dutch influence. 29 THE NEW ENCYCLOPAEDIA BRITANNICA 274 (15th ed. 1998).

16. The Puritans, who came to Massachusetts in 1630, were persecuted in England because of their religious beliefs. They sought ecclesiastical reform, but only within the church structure. The Puritans, however, did not practice religious tolerance. 29 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 15, at 274. Individuals "with differing religious views were banished, including Roger Williams from Salem and Anne Hutchinson from Boston. Unrepentant Quakers and Anabaptists were banished, and a few were executed." *Id.*

17. THOMAS JEFFERSON, *Freedom of Religion at the University of Virginia* (Oct. 7, 1822), in THE COMPLETE JEFFERSON 957, 958 (Saul K. Padover ed., 1943).

18. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973). Madison added: "This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men." *Id.*

19. The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

were not deemed worthy of protection.²⁰ Religious liberty was grounded in Christian, especially Protestant, theology.²¹ The primacy of Christianity²² was acknowledged, not just during our country's founding period, but also by the Supreme Court in 1892, declaring us to be "a Christian nation,"²³ and again in 1931, declaring us to be "a Christian people."²⁴

We were a religious country when our country was founded; we continue to be a religious country today. A recent Newsweek poll revealed that eighty-four percent of adult Americans believe that God performs miracles and forty-eight percent report that they personally have experienced or witnessed a miracle.²⁵ In the 2000 presidential election campaign, Democratic candidate and former Vice President Al Gore professed to be a born-again Christian who, when faced with difficult decisions, asks himself, "What would Jesus do?"²⁶ Republican candidate and now President George W. Bush said that Jesus is his favorite political philosopher "because he changed my heart."²⁷ Joseph Lieberman, the first Jewish vice-presidential candidate of a major political party, proposed a greater role for religion in American public life, declaring: "As a people we need to reaffirm our faith and renew the dedication of our nation and ourselves to God and God's purpose."²⁸

We have become a more religiously diverse society. Diversity has resulted from immigration of non-European, non-Christian peoples, such as the Chinese in the mid-1800s and the Indo-Chinese following the

20. See JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 37 (2000). On September 8, 2000, Kevin Gover, Assistant Secretary-Indian Affairs, Department of the Interior, acknowledged that the Bureau of Indian Affairs had, over its 175-year history, engaged in "destructive efforts to annihilate Indian cultures," including the prohibition of Indian religious practices. Kevin Gover, Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000), at <http://www.doi.gov/bia/as-ia/175gover.htm> (last visited Oct. 27, 2001); see also Matt Kelley, *Bureau Regrets Treatment of Indians*, SAN DIEGO UNION-TRIB., Sept. 9, 2000, at A-7.

21. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 4 (2000).

22. See generally *id.* at 4-5 (discussing the primacy of Christianity in the United States).

23. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

24. *United States v. Macintosh*, 283 U.S. 605, 625 (1931).

25. *What Miracles Mean*, NEWSWEEK, May 1, 2000, at 55-56.

26. Richard Pérez-Peña, *Lieberman Seeks Greater Role for Religion in Public Life*, N.Y. TIMES, Aug. 28, 2000, at A14.

27. *Id.*

28. *Id.*

Vietnam War, and from religious experimentation of a free citizenry. By the 1960s, according to the Supreme Court, over 250 religious sects existed in the United States, providing a “richness and variety of spiritual life in our country.”²⁹ During that decade, the Supreme Court renounced Christian primacy, adopting instead a policy of denominational equality—the requirement of equal treatment between and among religions.³⁰ By banning the reading of officially sanctioned prayers³¹ and the Bible³² in public schools, and by invalidating a law prohibiting the teaching of evolution in public schools,³³ the Court assured that all religions were entitled to equivalent, though exalted, status.³⁴

B. Religion and the Supreme Court

Given the importance of religion to Americans, and given the increasing divergence of religious expression in American society, one would anticipate that the Supreme Court would have carefully defined religion as a concept. Such an expectation, however, has been largely unfulfilled. Despite the numerous definitions and definitional approaches

29. *United States v. Seeger*, 380 U.S. 163, 174 (1965). Justice Clark, writing for the Court in *Seeger*, noted:

Some [religions] believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.

Id. at 174–75.

30. See Conkle, *supra* note 21, at 6–8 (discussing Supreme Court cases supplanting Christian dominance with denominational equality). Conkle noted, however, that the shift to religious equality was foreshadowed by earlier decisions. *Id.* at 6 (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)), in which the Court declared that “Neither [the federal government nor a state] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”)

31. *Engel v. Vitale*, 370 U.S. 421, 424 (1962). The offending Regents’ prayer, recited aloud in the presence of a teacher at the start of each day, reads as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Id.* at 422.

32. *Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

33. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968).

34. In *School District v. Schempp*, 374 U.S. at 226, Justice Clark, writing for the Court’s majority, noted:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

proposed by various academics³⁵ and developed in lower court opinions,³⁶ the Supreme Court has avoided an explicit constitutional

35. See, e.g., CATHERINE L. ALBANESE, *AMERICA: RELIGIONS AND RELIGION* 11 (3d ed. 1999) (defining religion as “a system of symbols (creed, code, cultus) by means of which people (a community) orient themselves in the world with reference to both ordinary and extraordinary powers, meanings, and values”); Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579, 597–604 (proposing a content-based definition requiring the belief in extratemporal consequences, i.e., “whether the effects of actions taken pursuant or contrary to the dictates of a person’s beliefs extend in some meaningful way beyond his lifetime,” *id.* at 599); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1534–48, 1553, 1564–65 (1983) (critiquing content-based, i.e., functional, definitions of religion and proposing instead that features common to traditional Eastern and Western religions be identified so that a paradigm of a religious belief system can be developed, and applied to determine, in individual cases, whether a belief system is or is not a religion); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 762, 767–78 (1984) (proposing an analogical approach, similar to that proposed by George Freeman, as a method of determining whether a claimed religion is indeed one); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 173 (1982) (characterizing “religion as a way of perceiving reality . . . in terms of sacred and profane categories”); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978) (proposing that “religion be given an expansive functional definition, embracing whatever is for the individual an ‘ultimate concern’”).

36. For example, in *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring), Judge Arlin Adams utilized an analogical approach to defining religion, comparing whether the claimed religion confronts the same concerns, or serves the same purposes, as traditional religions. Judge Adams identified three useful indicia of traditional religions that help determine whether the beliefs in question qualify as a religion. *Id.* at 207–08. First, religions address fundamental questions of ultimate concern. *Id.* at 208. Second, religions are comprehensive belief systems, claiming an ultimate truth. *Id.* at 209. Third, religions have rituals and structure, such as services, ceremonies, clergy, and other formal, external or surface signs. *Id.* at 209–10. Judge Adams applied his analogical approach when he wrote the majority opinion in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

In *Jacques v. Hilton*, 569 F. Supp. 730, 732–36 (D.N.J. 1983), the court used Judge Adams’ analogical approach to determine that the United Church of Saint Dennis, a prison-based organization, was not a religion. The analogical approach was also used to determine whether another prison-based organization, the Church of the New Song, was a religion. Compare *Therriault v. Silber*, 453 F. Supp. 254, 257–58, 265 (W.D. Tex. 1978) (holding that a belief system was not a religion) with *Remmers v. Brewer*, 361 F. Supp. 537, 541–42 (S.D. Iowa 1973) (holding that a belief system was a religion), *aff’d*, 494 F.2d 1277 (8th Cir. 1974).

Scientology was determined to be a religion, in part, because “[i]ts fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions.” *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969). One court focused on whether the belief system embraced an ultimate, nonintellectual concern. See *Int’l Soc’y for Krishna Consciousness v. Barber*, 650 F.2d 430, 440–43 (2d Cir. 1981) (holding that Krishna Consciousness is a religion entitled to solicit contributions). Another court considered

definition of religion.³⁷ Over the years, however, various cases have forced the Court to distinguish religions from nonreligions. From a narrow definition initially, a broad definition of religion has ultimately evolved.

In 1890, the Court defined religion traditionally, requiring a belief in a deity. “[R]eligion,” wrote Justice Field in *Davis v. Beason*,³⁸ “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.”³⁹ This requirement of theism was construed narrowly to mean a belief in, and worship of, God as practiced in conventional, well-established Christian religions. For example, in a case decided later that year, the Court characterized the Mormon belief in polygamy as a false belief—“a sophistical plea”⁴⁰—and as a “return to barbarism.”⁴¹ It is not a religious belief, wrote the Court, because “[i]t is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.”⁴²

Such a parochial definition of religion would not endure. Religions could not be restricted to those that conformed to “the spirit of Christianity” or even to the belief in a god or gods.⁴³ In 1961, in *Torcaso v. Watkins*, the Court held that a state constitutional provision requiring an applicant for public office to declare a belief in God unconstitutionally infringed upon his freedom of belief and religion and could not, therefore, be enforced against him.⁴⁴ Justice Black, writing for the Court, noted that the Constitution prohibits the states and the

whether the belief system encompassed “fundamental questions of the nature of reality and relationship of human beings to reality.” *Alabama & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1329 (E.D. Tex. 1993) (holding that the Native American Indian movement is a religion and upholding the right of male members of that religion to wear long hair in public schools).

37. Daniel Conkle asserts that the Supreme Court has avoided the issue of definition because “at the turn of the millennium, the definition of religion has become ever more elusive and problematic.” Conkle, *supra* note 21, at 32. Indeed, George Freeman asserts “that the search for the constitutional definition of ‘religion’ is misguided. There simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else.” Freeman, *supra* note 35, at 1565.

38. 133 U.S. 333 (1890), *overruled by* *Romer v. Evans*, 517 U.S. 620 (1996).

39. *Id.* at 342. The Court also distinguished between religions, which are entitled to constitutional protection, and cults, which are not. *Id.*

40. *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

41. *Id.*

42. *Id.*

43. *But see* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 42 (1991) (defining religion as faith in “some greater power than man”).

44. 367 U.S. 488, 496 (1961).

federal government from enacting laws that favor all religions to the disadvantage of individuals who do not believe in any religion or that favor religions based on a belief in God over religions based on different beliefs.⁴⁵ In a footnote, he specifically identified Buddhism, Taoism, Ethical Culture, and Secular Humanism as nonexclusive examples of nontheistic religions.⁴⁶

Within the next ten years, in the context of interpreting a section of the Military Selective Service Act,⁴⁷ the Court decided two cases that confirmed and expanded Justice Black's broad conception of religion. The statute⁴⁸ exempted (and still exempts today) from combatant training and service any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."⁴⁹ "Religious training and belief" was further defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."⁵⁰

In *United States v. Seeger*,⁵¹ the Court held that 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 comes within the statutory definition."⁵² "[T]he statute," observed the Court, "does not distinguish between externally and internally derived beliefs."⁵³ Thus, Seeger, who expressed skepticism about whether God

45. *Id.* at 495. Previously, in *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947), the Supreme Court held that the Establishment Clause prohibits legislation favoring religion over nonreligion, or religious belief over disbelief.

46. *Torcaso*, 367 U.S. at 495 n.11.

47. *See* 50 U.S.C. app. §§ 451–73 (1994). At the time the first case was decided, the statutes were designated as the Universal Military Training and Service Act, Pub. L. No. 51, sec. 1, § 451(a), 65 Stat. 75, 75 (1951). The statutes were redesignated as the Military Selective Service Act of 1967, Pub. L. No. 90-40, sec.1, § 451(a), 81 Stat. 100, 100 (1967).

48. 50 U.S.C. app. § 456(j) (1994).

49. *Id.*

50. Selective Service Act of 1948, Pub. L. No. 759, sec. 7, § 456(j), 62 Stat. 604, 613 (1948) (codified as amended at 50 U.S.C. app. § 456(j) (1958)). In 1967, following the Supreme Court's decision in *United States v. Seeger*, 380 U.S. 163 (1965), Congress amended the statute to eliminate any reference to a Supreme Being but retained the distinction between a religious belief and "political, sociological, or philosophical views, or a merely personal moral code." Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 7, § 456(j), 81 Stat. 100, 104 (1967).

51. 380 U.S. 163 (1965).

52. *Id.* at 176.

53. *Id.* at 186. The Court added that as a practical matter, it would be impossible

exists⁵⁴ but who sincerely believed⁵⁵ in “goodness and virtue for their own sakes,”⁵⁶ was entitled to claim religious objector status. Miraculously, a statutory requirement that the claimant believe in a Supreme Being encompassed those who doubted the existence of a Supreme Being but who held “parallel” beliefs that the Court could construe as religious. To reach this result, the Court did not rely on its recent decisions interpreting the Constitution to require that all religions be treated equally,⁵⁷ but rather, on Congress’s decision to use “Supreme Being” instead of “God” in the statute itself.⁵⁸ The Court noted, however, that such a statutory construction avoids imputing an intent on the part of Congress to qualify some religious beliefs for conscientious objector purposes while excluding others,⁵⁹ a clearly impermissible classification under the Court’s *Torcaso*⁶⁰ decision.

Five years later, *Seeger*’s “ever-broadening understanding of the modern religious community”⁶¹ was confirmed. In *Welsh v. United States*,⁶² the Court reversed the conviction of a person who refused induction into the armed forces as a religious objector. Even though Welsh “characterized his beliefs as having been formed ‘by reading in the fields of history and sociology’”⁶³ and “denied that his objection to war was premised on religious belief,”⁶⁴ the Court found that he qualified for conscientious objector exemption. In an opinion written by Justice Black, the four-judge plurality, applying the *Seeger* definition of religion, found that Welsh’s beliefs were “deeply held moral, ethical, or religious beliefs,”⁶⁵ and not merely “political, sociological, or philosophical views or a merely personal moral code” that would not qualify under the statute.⁶⁶

Justice Harlan concurred in the result.⁶⁷ Although he joined with the *Seeger* majority in what he now characterized as a “remarkable feat of

to make such a distinction. *Id.*

54. *Id.* at 166.

55. *Id.* at 187.

56. *Id.* at 166.

57. *See supra* text accompanying notes 30–34.

58. *Seeger*, 380 U.S. at 165.

59. *Id.* at 176. In concurring, Justice Douglas asserted that if the statute was interpreted more narrowly to qualify those of one religious faith while excluding those of others, the statute would violate the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 188 (Douglas, J., concurring).

60. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *see supra* text accompanying notes 44–46.

61. *Seeger*, 380 U.S. at 180.

62. 398 U.S. 333 (1970).

63. *Id.* at 341.

64. *Id.*

65. *Id.* at 344.

66. *Id.* at 342–43.

67. *Id.* at 344 (Harlan, J., concurring).

judicial surgery to remove . . . the theistic requirement of [the statute],”⁶⁸ he challenged the “lobotomy” performed by the *Welsh* plurality when it interpreted the statutory language to obliterate any distinction between religious and nonreligious beliefs.⁶⁹ Harlan would confront directly the issue of the statute’s constitutionality, rather than judicially construing the statute in a manner that distorts its intended meaning.⁷⁰ In his view, the statute contravened the Establishment Clause by exempting from military service those whose conscientious objection is based on religious beliefs—whether theistic or nontheistic—but not those whose conscientious objection is based on a secular belief.⁷¹

Although the Court has not directly considered the definition of religion in any post-*Welsh* cases, it has attempted to retain the distinction between religious-based and secular-based beliefs. For example, the Court distinguished the decision of the Amish to reject contemporary social values for religious reasons from Thoreau’s decision to withdraw from society and sequester himself at Waldon Pond for philosophical and personal reasons.⁷² Only religious beliefs are entitled to First Amendment protection.⁷³

III. REGULATING THE CONDUCT OF RELIGIOUS BELIEVERS

A. Introduction

Falun Gong, developed in 1992, combines traditional slow-motion Chinese exercises and meditation with elements of Buddhism and Taoism and has attracted millions of adherents.⁷⁴ On July 22, 1999, the Chinese government banned the Falun Gong spiritual movement, declaring it an “evil sect.”⁷⁵ Five years earlier, members of the Aum Shinrikyo

68. *Id.* at 351.

69. *Id.*

70. *Id.* at 354–56.

71. *Id.* at 356.

72. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). George Freeman suggested that the Court erred in selecting Thoreau as the paradigm of the secular believer. Thoreau believed in both a personal and transcendent God. Freeman, *supra* note 35, at 1559–60.

73. *Id.* at 215; *see also* *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) (“Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.”).

74. *4 Falun Gong Leaders Go On Trial in Beijing*, SAN DIEGO UNION-TRIB., Dec. 26, 1999, at A-34.

75. Elisabeth Rosenthal & Erik Eckholm, *Falun Gong Still Going Strong Despite*

religious sect (Sect of Supreme Truth) released nerve gas into the Tokyo subway, killing twelve people and injuring 6000.⁷⁶ In response, Japanese cities used public funds to purchase property owned by the group and refused to allow group members to register as residents.⁷⁷ In March 2000, at least 235 members of the Movement for the Restoration of the Ten Commandments of God committed mass suicide in Kanungu, Uganda.⁷⁸ Similar mass suicides occurred in 1997, when thirty-nine members of the Heaven's Gate sect died in Rancho Santa Fe, California, and in 1978, when 914 followers of the Reverend Jim Jones died in Jonestown, Guyana. A white supremacist organization in East Peoria, Illinois claims religious status today as the World Church of the Creator.⁷⁹

For purposes of this Article, it is not necessary to determine whether any, or all, of these groups are religions. When an individual kills, claiming that God ordered the death, the relevant questions are whether the individual was acting upon a religious belief and whether society may intercede to prevent such activity or to punish it if it occurs. On several occasions, the Supreme Court has discussed the meaning of religious belief and the extent to which an individual's religiously motivated conduct may, consistent with the Free Exercise Clause, be regulated.

B. Defining Religious Belief

Religious beliefs are personal beliefs. Even back in 1890, when the Supreme Court offered its first definition of religion—admittedly, a narrow, theistic definition⁸⁰—it focused on the individual's "views of *his* relations to *his* Creator, and to the obligations they impose of reverence for his being and character."⁸¹ "The first amendment," wrote the Court,

Mass Arrests, SAN DIEGO UNION-TRIB., Oct. 28, 1999, at A-10.

76. Calvin Sims, *Japan Cities Buy Property to Keep Cult Members Out*, SAN DIEGO UNION-TRIB., Sept. 30, 1999, at A-21.

77. *Id.* Individuals who are not registered as residents of a city cannot receive access to social services. *Id.*

78. Gavin Pattison, *Ugandan Cult Stages Mass Suicide in Which 235 Die by Fire*, SAN DIEGO UNION-TRIB., Mar. 19, 2000, at A-2.

79. *Racist Group Gained from Deadly Spree*, SAN DIEGO UNION-TRIB., July 3, 2000, at A-10. As a guide for its religion, the group uses a book entitled "The White Man's Bible." The third of sixteen commandments contained in that book declares that "the inferior colored races are our deadly enemies, and the most dangerous of all is the Jewish race. It is our immediate objective to relentlessly expand the white race and keep shrinking our enemies." Marc Chase, *Superior Above All*, DAILY EGYPTIAN, Feb. 17, 1997, at <http://www.dailyegyptian.com/spring97/021797/above.html> (last visited Nov. 16, 2001).

80. See *supra* text accompanying notes 38–42.

81. *Davis v. Beason*, 133 U.S. 333, 342 (1890) (emphasis added), *overruled by Romer v. Evans*, 517 U.S. 620 (1996).

“was intended to allow *every one* under the jurisdiction of the United States to entertain such notions respecting *his* relations to *his* Maker and the duties they impose as may be approved by *his* judgment and conscience.”⁸² Seven decades later, the Supreme Court confirmed that the purpose of the Free Exercise Clause “is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against *him* in the practice of *his* religion.”⁸³ Although the Court may attempt to distinguish religious beliefs from secular beliefs, as it did in its 1972 decision exempting Amish children from compulsory secondary education, it errs when it attempts to distinguish religious beliefs from personal beliefs.⁸⁴

In *Thomas v. Review Board*,⁸⁵ the Court elaborated on the personal nature of religious belief. Thomas was a member of the Jehovah’s Witnesses who terminated his employment when he was transferred to a department that manufactured parts for weapons. He claimed that his religious principles precluded such work.⁸⁶ The Court held that the state’s denial of unemployment benefits to Thomas violated his First Amendment right to the free exercise of his religion.⁸⁷ Without carefully analyzing whether Thomas’s refusal to work was motivated by religious or nonreligious beliefs, the Court simply accepted Thomas’s statement that his decision was made “because of an honest conviction that such work was forbidden by his religion.”⁸⁸ Chief Justice Burger, writing the opinion for the Court’s eight-justice majority,⁸⁹ declared that courts are not permitted to determine whether a belief is a religious belief by asking whether it is “acceptable, logical, consistent, or comprehensible to others.”⁹⁰ Even if the individual cannot articulate his or her beliefs

82. *Id.* (emphasis added).

83. *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (emphasis added).

84. *See supra* text accompanying notes 72–73 (discussing *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972)); *see also* Austin, *supra* note 43, at 16 (asserting that the Court’s statement in *Yoder* was dictum and that the Court erroneously suggested that religious beliefs are protected only if the individual belongs to an organized church).

85. 450 U.S. 707 (1981).

86. *Id.* at 709–10.

87. *Id.* at 720.

88. *Id.* at 716.

89. *Id.* at 709. The eight-justice majority included Justice Blackmun, who joined in Parts I, II, and III of the Chief Justice’s opinion, and who concurred, without opinion, in the result of Part IV. *Id.* at 720.

90. *Id.* at 714.

with clarity and precision, and even if the individual admits that he or she is “struggling” with his or her beliefs or positions, courts are not permitted to dissect them further and to say they are not religious.⁹¹ Additionally, 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 religious sect.”⁹² Courts do not have the competence, and it is not their function, warned the Chief Justice, to determine which individual “more correctly perceived the commands of their common faith.”⁹³

In a subsequent case, a unanimous Supreme Court, in an opinion that relied upon *Thomas*, held that the Free Exercise Clause protects individuals who are not members of any religious sect, church, or organization but who sincerely believe that they are responding to the command of their religious beliefs.⁹⁴ Justice Stewart once asserted that although he might never succeed in intelligibly defining what is included within hard-core pornography, nevertheless, he knew it when he saw it.⁹⁵ As for religion, however, the Supreme Court forbids such omniscient vision to itself and to its disciples. Government may not desecrate Jewish synagogues as houses of false worship or destroy, in an instant, 1000-year-old statues of Buddha as false idols. In our country, only individuals “know” religion, and they know it when they believe it.

C. Applying the Religious Belief Requirement to Those Commanded by God to Kill

A person’s sincere belief that God spoke and commanded him or her to kill another human being clearly qualifies as a religious belief. A belief that God spoke requires that the person believe in a deity, satisfying even the most conservative conception of religion announced by the Supreme Court in 1890.⁹⁶ It certainly could not be characterized

91. *Id.* at 715.

92. *Id.* at 715–16.

93. *Id.* at 716. The Chief Justice added: “Courts are not arbiters of scriptural interpretation.” *Id.* Eight years later, the Court, relying upon *Thomas*, cautioned: “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.” *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

94. *Frazee v. Ill. Dep’t of Employment Sec.*, 489 U.S. 829, 834 (1989). *Frazee*, who was denied unemployment benefits after refusing to work on Sunday, claimed to be a Christian but was not a member of an established religious sect or church. *Id.* at 831. The Court held that the denial of benefits violated *Frazee*’s religious rights under the Free Exercise Clause. *Id.* at 834–35.

95. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

96. See *supra* text accompanying notes 38–39 (discussing *Davis v. Beason*, 133 U.S. 333, 342 (1890), *overruled by Romer v. Evans*, 517 U.S. 620 (1996)).

as a secular belief that would not qualify today under the "ever-broadening understanding of the modern religious community"⁹⁷ described in the *Seeger* and *Welsh* cases.⁹⁸ Even if other people believe that God would not order the killing of a human being by another human being, the Court in *Thomas* tells us that the person's belief does not have to be acceptable, logical, or even comprehensible to others.⁹⁹ Even if the person was not a member of an organized religious group at the time he or she acquired the belief,¹⁰⁰ or converted from one religion to another or from atheism to belief in God as a result of the perceived communication,¹⁰¹ the Free Exercise Clause protects this sincere, though newly acquired, religious belief.

Religious beliefs are not limited to individuals who believe in one God. Even in the limited statutory construction context of *Seeger*, Justice Douglas, concurring in the Court's decision, noted: "The words 'a Supreme Being' have no narrow technical meaning in the field of religion."¹⁰² He specifically identified Hinduism as a religion that conceives of the Supreme Being "in the forms of several cult Deities"¹⁰³ and Buddhism as a religion that "tolerates a belief in many Gods."¹⁰⁴

Religious beliefs are not limited to individuals who believe that God is good or that all gods are good. If an individual sincerely believes that he or she has received a communication from the Devil or other omnipotent spirit of evil, then such belief satisfies the *Seeger* requirement of occupying a place parallel to that filled by the God of those who adhere to traditional religions.

Although the Court in *Thomas* broadly interpreted the meaning of religious belief, the Chief Justice did suggest that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation,

97. *United States v. Seeger*, 380 U.S. 163, 180 (1965).

98. *See supra* text accompanying notes 51–66 (discussing *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)).

99. *See supra* text accompanying notes 89–90 (discussing *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)).

100. *See supra* text accompanying note 94 (discussing *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989)).

101. In *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144 (1987), the Supreme Court held that the Free Exercise Clause gives no different or less favorable protection to those "who adopt religious beliefs or convert from one faith to another."

102. *Seeger*, 380 U.S. at 189 (Douglas, J., concurring).

103. *Id.*

104. *Id.* at 191.

as not to be entitled to protection under the Free Exercise Clause.”¹⁰⁵ The Court did not elaborate further on this point, stating simply that the matter before the Court, involving a member of the Jehovah’s Witnesses who claimed that his religious beliefs prevented him from producing war materials, was not such a case.

Is a belief that God would speak to a person so bizarre as not to qualify as a religious belief? In the first recorded Biblical communication between God and a human, the Book of Genesis informs us that “the Lord God commanded the man, saying: ‘Of every tree of the garden thou mayest freely eat; but of the tree of knowledge of good and evil, thou shalt not eat of it.’”¹⁰⁶ And after Adam and Eve had eaten the forbidden fruit, God spoke directly to them, informing them of the consequences of their sin.¹⁰⁷ Often the Bible discusses conversations *between* God and mortals. After Cain slew Abel, “the Lord said unto Cain: ‘Where is Abel thy brother?’ And he said: ‘I know not; am I my brother’s keeper?’ And He said: ‘What hast thou done? The voice of thy brother’s blood crieth unto Me from the ground.’”¹⁰⁸ The dialogue between them continues as God describes Cain’s punishment, and Cain responds by saying that the punishment is greater than he can bear.¹⁰⁹ In another example, Abraham engages God in a lengthy negotiation to prevent the destruction of Sodom and Gomorrah so that the righteous will not be swept away with the wicked.¹¹⁰ After Abraham obtains God’s assurance that the city will not be destroyed if Abraham finds only ten righteous men, the passage ends by saying, “And the Lord went His way, as soon as He had left off speaking to Abraham; and Abraham returned unto his place.”¹¹¹

105. *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981). Consider, for example, *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (5th Cir. 1979), in which the plaintiff claimed he was discriminated against because of his religious belief that Kozy Kitten Cat Food “‘is contributing significantly to [his] state of well being . . . [and therefore] to [his] overall work performance’ by increasing his energy.” *Id.* at 1383–84 (alterations in original). The plaintiff’s claim was denied by the Equal Employment Opportunity Commission. *Id.* at 1383. The federal district court, determining that the plaintiff’s claim was frivolous, denied the plaintiff’s motion to proceed against the EEOC in forma pauperis. *Id.* at 1384–85. The court characterized the plaintiff’s belief as “a mere personal preference and, therefore, . . . beyond the parameters of the concept of religion as protected by the constitution.” *Id.* But note that even in this case, the court was, in essence, characterizing the plaintiff’s claim as nonreligious in motivation, but not characterizing it as a bizarre belief.

106. *Genesis* 2:16–17.

107. *Id.* at 3:16–19.

108. *Id.* at 4:9–10.

109. *Id.* at 4:11–13. Cain also expressed concern that he would be killed by whomever found him, to which God responded: “Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold.” *Id.* 4:14–15.

110. *Id.* at 18:20–32.

111. *Id.* at 18:33.

Some people read Biblical stories as allegories or metaphors, others read them as literal truth.¹¹² If, as some people believe, God actually spoke to mere mortals in Biblical times then it is not bizarre to believe that God retains the capacity to speak to, and does speak to, people today.

Is a belief that God would direct a person to kill another so bizarre as not to qualify as a religious belief? Surely Abraham’s belief that God spoke to him and commanded him to sacrifice his only son is understood to be a religious belief.¹¹³ Abraham sincerely believed and acted upon God’s order, although at the last moment—like the cavalry arriving in an old Western movie—God intervened to reverse His deific decree.

The sacrifice of an only son, Jesus Christ, is a core belief of Christianity.¹¹⁴ No one suggests that Pontius Pilate, who ordered the crucifixion of Jesus, was acting at the direction of God. But the act was divinely inspired in order to enable those who believe to be redeemed from their sins. The Gospel according to John explains: “For God so loved the world that He gave His only-begotten Son, so that whoever believes in Him should not perish, but have everlasting life.”¹¹⁵ For this reason, the death of Jesus was required. God did not intervene; there was no cavalry at Calvary.

If God could countenance the death of Jesus, as millions of people believe today, then is a belief that God could order someone to kill another human being a bizarre belief? We doubt it. After all, aren’t the reasons for God’s actions beyond the comprehension of mere mortals?¹¹⁶ A logical analysis of Biblical stories leads to the conclusion that a person’s sincere belief that God ordered him or her to kill qualifies as a religious belief.

Religious beliefs, however, are not logical. “Faith,” remarked social critic H.L. Mencken, is “an illogical belief in the occurrence of the improbable.”¹¹⁷ In *United States v. Ballard*,¹¹⁸ the Supreme Court

112. *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

113. “And He said: ‘Take now thy son, thine only son, whom thou lovest, even Isaac, and get thee into the land of Moriah; and offer him there for a burnt-offering upon one of the mountains which I will tell thee of.’” *Genesis* 22:2.

114. MILNER, *supra* note 8, at 334.

115. *John* 3:16.

116. See, for example, *Exodus* 33:18–23, in which Moses asks to learn the eternal qualities of God, and God responds by informing Moses that he cannot see God’s face and live. God suggests, however, that Moses may know God through God’s achievements, saying that when God passes by, Moses can see God’s back.

117. H.L. Mencken, N.Y. TIMES MAG., Sept. 11, 1955, *reprinted in* THE GREAT

acknowledged that a person's religious views may seem "incredible, if not preposterous, to most people."¹¹⁹ Justice Douglas, writing for the majority, noted, however, that the Constitution does not permit us to conduct heresy trials designed to determine the truth or falsity of those beliefs.¹²⁰ Philosopher-psychologist William James¹²¹ asserted that individual religious experiences give vitality to religion. Among those experiences, he included: "conversations with the unseen, voices and visions."¹²² Justice Jackson, quoting from James as he dissented in *Ballard*,¹²³ asserted that it is "an impossible task . . . to separate fancied [experiences] from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another."¹²⁴

D. Beyond Belief: Defining the Free Exercise of Religion

Religion, wrote Catherine Albanese, is "[m]ore than a form of belief, religion is a matter of practice, an *action system*."¹²⁵ The First Amendment prohibits governmental interference not just with religious belief but with the free exercise of religion. In considering claims that a law prohibits an individual's freedom of religious exercise, the Supreme Court's standard for reviewing the constitutionality of the statute has fluctuated over the years from low level scrutiny to high level and back to low level again.¹²⁶ Despite this vacillation, however, the Court has consistently upheld criminal laws that protect individuals from harmful

QUOTATIONS 488 (George Seldes ed., 1983).

118. 322 U.S. 78 (1944).

119. *Id.* at 87.

120. *Id.* at 86.

121. James was "a leader of the philosophical movement of Pragmatism and of the psychological movement of functionalism." 6 THE NEW ENCYCLOPAEDIA BRITANNICA 487 (15th ed. 1998).

122. WILLIAM JAMES, *Philosophical Conceptions and Practical Results (1898)*, in COLLECTED ESSAYS AND REVIEWS 406, 428 (1920).

123. *Ballard*, 322 U.S. at 92–95 (Jackson, J., dissenting). Justice Jackson did not dissent from the majority's broad construction of religious belief. He agreed with the majority that the truth or falsity of a person's religious beliefs cannot be measured and should be withheld from jury consideration. However, he did not agree with the majority that the case should be remanded to the court of appeals for a consideration of other questions, such as whether, in soliciting funds for their religion, the defendants actually had a good faith belief in the representations that they made. Justice Jackson expressed concern that prosecution "could degenerate into religious persecution" if "less than full belief in a professed credo become[s] actionable fraud if one is soliciting gifts or legacies." *Id.* at 95.

124. *Id.* at 93.

125. ALBANESE, *supra* note 35, at 10.

126. See generally WITTE, *supra* note 20, at 120–25 (discussing standards of review applied by the Supreme Court in Free Exercise Clause cases).

conduct of religious believers. For example, in 1878, the Supreme Court, applying a low level of scrutiny, upheld the constitutionality of a statute criminalizing bigamy and affirmed the criminal conviction of a Mormon who believed polygamy was his religious duty.¹²⁷ Although the Court acknowledged that laws "cannot interfere with mere religious beliefs and opinions, they may with practices."¹²⁸ As an example of appropriate governmental action, the Court cited prohibition of human sacrifice as a part of religious worship.¹²⁹ Thus, despite the defendant's religious belief that it was his duty to practice polygamy and that the penalty for failing or refusing to do so was eternal damnation,¹³⁰ the government could exercise its legitimate power to prohibit such practice.¹³¹ Even though the trial judge, in charging the jury, described the defendant's belief as a delusion that inflicted suffering on pure-minded women and innocent children, the Supreme Court found no appeal to the jurors' passions or prejudices that warranted reversal of the criminal conviction.¹³²

Three years later, the Court explained why bigamy and polygamy are reviled and why society may impose criminal sanctions against those who engage in such practices despite their claims of religious exercise:

They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. . . . [The Free Exercise Clause] was never intended . . . as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.¹³³

Sixty years later, in *Cantwell v. Connecticut*,¹³⁴ the Court, for the first time, applied an intermediate standard of review to a free exercise claim. Freedom of belief, including decisions to join religious organizations

127. *Reynolds v. United States*, 98 U.S. 145, 161, 166, 168 (1878).

128. *Id.* at 166.

129. *Id.* The Court also cited the example of governmental prohibition against a wife's decision to throw herself on her husband's funeral fire. *Id.*

130. *Id.* at 161.

131. *Id.* at 166.

132. *Id.* at 167-68.

133. *Davis v. Beason*, 133 U.S. 333, 341-42 (1890), *overruled by* *Romer v. Evans*, 517 U.S. 620 (1996).

134. 310 U.S. 296 (1940).

and to worship in particular ways, are not subject to government action.¹³⁵ However, the government may regulate other religious conduct through “general and non-discriminatory legislation”¹³⁶ in order to “safeguard the peace, good order and comfort of the community.”¹³⁷ Although the state may not inhibit the free exercise of religion by requiring the licensing of those who peacefully solicit contributions to support their religious views, the state may legitimately further its interest in public safety by enforcing a law prohibiting incitement to riot—even against religious believers.¹³⁸ Religious liberty does not include the right to exhort others to physically attack nonbelievers.¹³⁹

In *Prince v. Massachusetts*,¹⁴⁰ the Court, applying *Cantwell*’s intermediate standard of review, upheld the conviction of a member of the Jehovah’s Witnesses for violating a child labor law when she distributed religious literature in public places with her nine-year-old niece. Society’s interest in protecting the welfare of children outweighs the defendant’s free exercise claim and her parental interest in raising her child.¹⁴¹ As the Court observed: “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.”¹⁴²

In *Sherbert v. Verner*,¹⁴³ the Court applied an even higher standard of review. To pass constitutional muster, a statute that substantially infringes on religious exercise must further a compelling state interest.¹⁴⁴ The denial of unemployment benefits eligibility to a claimant who, based on her religious beliefs, refused to work on Saturdays did not meet this strict scrutiny standard.¹⁴⁵ The statute impermissibly burdened her religious freedom by pressuring her to choose between forfeiting benefits if she followed her religious dictates, and abandoning her religious belief if she accepted work.¹⁴⁶ No compelling state interest could be invoked to justify this Hobson’s choice.

135. *Id.* at 303.

136. *Id.* at 304.

137. *Id.*

138. *Id.* at 304–05.

139. *Id.* at 308.

140. 321 U.S. 158 (1944).

141. *Id.* at 165.

142. *Id.* at 168. The Court also noted that it was in the child’s interest, as well as in the community’s interest, to “be both safeguarded from abuses and given opportunities for growth into [a] free and independent well-developed . . . citizen[.]” *Id.* at 165.

143. 374 U.S. 398 (1963).

144. *Id.* at 406.

145. *Id.* at 406–07.

146. *Id.* at 404.

In four post-*Sherbert* cases, the Supreme Court found that the government's interest was compelling and that the legislation or government action survived strict scrutiny analysis. In the first, the Court upheld a statute limiting conscientious objector status to those who oppose participation in all wars and not just a particular war, citing the government's interests in: (1) procuring manpower for military purposes, and (2) administering the conscription laws fairly.¹⁴⁷ In the second, the Court upheld a statute imposing social security taxes on employers who objected on religious grounds to paying taxes to support public insurance funds, citing the government's interest in assuring the fiscal vitality of the Social Security system through mandatory contributions from employers and employees.¹⁴⁸ In the third, the Court again relied on the government's interest in maintaining a sound tax system to uphold an Internal Revenue Service ruling that payments made to branch churches of the Church of Scientology for auditing and training sessions were not deductible as charitable contributions.¹⁴⁹ In the fourth, the Court upheld an Internal Revenue Service ruling that denied tax-exempt status to private schools that used racially discriminatory admissions standards, citing the government's interest in eliminating racial discrimination in education.¹⁵⁰ Although none of these cases involved a free exercise challenge to a statute that prohibits murder and its application to one who kills for religious reasons, surely the state's police power interest in protecting its citizenry from violence is at least equally, if not more, compelling.

In 1990, the Supreme Court abandoned *Sherbert's* strict scrutiny test,¹⁵¹ returning to a low standard of review reminiscent¹⁵² of the

147. *Gillette v. United States*, 401 U.S. 437, 454–60 (1971).

148. *United States v. Lee*, 455 U.S. 252, 258–60 (1982).

149. *Hernandez v. Comm'r*, 490 U.S. 680, 698–700 (1989).

150. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–96, 604 (1983).

151. *Employment Div. v. Smith*, 494 U.S. 872, 882–87 (1990). The Court noted that the only cases in which the Court's use of the *Sherbert* test had resulted in invalidation of governmental action were ones involving denial of unemployment compensation. *Id.* at 883. The Court suggested that the compelling governmental interest test is uniquely appropriate for unemployment compensation cases because such cases involve a consideration of the particular circumstances for an individual's unemployment—a consideration of whether an individualized exemption is appropriate. Without a compelling reason, the state should not be able to refuse an exemption for cases of religious hardship. *Id.* at 884. Note, however, that the *Smith* case also involved denial of unemployment compensation. *Id.* at 874.

152. *See infra* note 158 (suggesting that the *Smith* test is not identical with the rational basis test used to decide the Mormon polygamy cases in the nineteenth century).

rational basis test used by the Court to resolve the Mormon polygamy cases in the previous century.¹⁵³ In *Employment Division v. Smith*, individuals who worked for a private drug rehabilitation organization were fired from their jobs for ingesting peyote as part of a Native American Church ceremony and were denied unemployment compensation because they were discharged for work-related misconduct.¹⁵⁴ “We have never held,” wrote Justice Scalia for the majority, “that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”¹⁵⁵ The Court suggested that the constitutionally protected free exercise of religion includes worshiping with others in a religious service, using bread and wine for sacramental purposes, proselytizing, refusing to eat certain foods or travel using certain methods of transportation, casting statues for religious purposes or bowing down before them,¹⁵⁶ and raising one’s children in the parent’s religion.¹⁵⁷ Neutral laws of general application—such as the criminal law in the *Smith* case—are constitutional even if their incidental effect is to impose a burden on an individual’s religious practices.¹⁵⁸ Thus, the state may enforce its controlled substance laws against individuals who ingest peyote for sacramental purposes as part of their religious ceremony.¹⁵⁹ Obviously under this test, the state may enforce its criminal laws prohibiting murder against one who kills under a religious belief that God told him or her to do so.¹⁶⁰

153. See *supra* text accompanying notes 127–133.

154. *Smith*, 494 U.S. at 874.

155. *Id.* at 878–79.

156. *Id.* at 877–78.

157. See *id.* at 882.

158. *Id.* at 878. If a law that burdens religious practice is *not* neutral and of general application, the government must justify its use by proving a compelling state interest. Additionally, the law must be narrowly tailored to promote that interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). An ordinance enacted by the City of Hialeah that prohibited the sacrificial killing of animals while permitting secular killings was enacted to suppress the Santeria religion and could not withstand strict scrutiny. *Id.* at 542, 546–47.

Arguably, if laws prohibiting polygamy were enacted in the 1880s in order to prohibit a religious practice of Mormons, they might not qualify as neutral laws of general application under the *Smith* test. Under *Smith*, they would be subject to strict scrutiny.

159. *Smith*, 494 U.S. at 890.

160. Congress responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)). Congress declared that its purpose was “to restore the compelling state interest test as set forth in *Sherbert v. Verner*.” *Id.* § 2000bb(b). Without reconsidering the wisdom of its *Smith* decision, the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held the RFRA unconstitutional as “contradict[ing] vital principles necessary to maintain separation of powers and the federal balance.” *Id.* at 536. Congress

IV. RELIGION AS DELUSION: DEIFIC DECREE AS INSANITY

A. *Defining Insanity as the Inability to Distinguish Good (Right) from Evil (Wrong)*

Our criminal law is premised on this assumption: Because people have the ability—the free will—to choose between socially acceptable and socially unacceptable behavior, they can be held responsible and punished when they engage in socially unacceptable behavior that violates the law. An individual who lacks the ability to make the choice, however, is not blameworthy and is not an appropriate subject for punishment.

As a test of criminal responsibility, the focus on the individual's ability to distinguish good from evil can be traced to the Book of Genesis.¹⁶¹ "And the LORD God commanded the man, saying, 'Of every tree of the garden thou mayest freely eat; but of the tree of the knowledge of good and evil, thou shalt not eat of it; for in the day that thou eatest thereof thou shalt surely die.'"¹⁶² Perhaps the words "knowledge of good and evil" simply meant "knowledge of all things, both good and evil," and were "not intended to depict man's capacity for moral choice."¹⁶³ After all, as one Biblical commentator noted, "Adam would not have been made 'in the image of God' if he did not from the first possess the faculty of distinguishing between good and evil. And if

exceeded its authority under the Enforcement Clause of the Fourteenth Amendment. *Id.* at 536. Although *Smith's* low level scrutiny is restored for free exercise claims involving state and local laws, the RFRA's strict scrutiny test remains the law for free exercise claims involving federal laws. The Supreme Court has yet to decide whether this two-track approach will be allowed to continue. WITTE, *supra* note 20, at 125.

One author examines three cases involving state regulation of religious practices of Asian-Americans and concludes that the *Smith* and *Boerne* decisions allow "the religious practices of religious minorities [to be] suppressed simply because the majority fails to recognize their conduct as religious and deserving of free exercise protections." Eric Pruitt, Comment, *Boerne and Buddhism: Reconsidering Religious Freedom and Religious Pluralism After Boerne v. Flores*, 33 J. MARSHALL L. REV. 689, 705 (2000). To assure that the religious practices of religious minorities receive equal respect with those of the religious majority, he advocates a restoration of *Sherbert's* compelling government interest test. *Id.* at 712.

161. Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1227–28, 1258 (1966).

162. *Genesis* 2:16–17. For a discussion of why God did not carry out the threatened punishment but instead imposed a less severe penalty, see ALAN M. DERSHOWITZ, *THE GENESIS OF JUSTICE* 27–47 (2000).

163. Platt & Diamond, *supra* note 161, at 1228.

he lacked such faculty, his obedience or disobedience to any command whatsoever could have no moral significance.”¹⁶⁴ Clearly, Adam and Eve’s decision to eat from the forbidden tree was morally significant because it resulted in their expulsion from the Garden of Eden.¹⁶⁵

Nevertheless, that same commentator also noted:

Unlike the beast, man has also a spiritual life, which demands the subordination of man’s desires to the law of God. The will of God revealed in His Law is the one eternal and unfailing guide as to what constitutes good and evil—and not man’s instincts, or even his Reason¹⁶⁶

By this analysis, Adam and Eve were banished simply because they disobeyed God’s command, regardless of whether they knew why God commanded them. Because they possessed the capacity to choose whether to obey, their decision to disobey the Divine command was evil in and of itself. By acting contrary to God’s will, they were no longer innocent children; they were no longer indistinguishable from the other living creatures who dwelled in Eden.

The insanity defense developed as a device to exclude from criminal responsibility those individuals who are unable to distinguish good from evil because their severe mental disorder disables them from doing so. Insanity, then, separates the “bad”—criminals who can be punished for their illegal conduct—from the “mad”—insane persons who engage in the same conduct, but who cannot be punished.¹⁶⁷ Just as a young child is absolved from criminal liability if he or she lacks the ability to distinguish good from evil, so too is an insane person.¹⁶⁸ For example, in *Rex v. Arnold*,¹⁶⁹ decided in 1724, more than one-hundred years before *M’Naghten*,¹⁷⁰ an English jury was instructed that if a person “is totally deprived of his understanding and memory, and doth not know

164. THE PENTATEUCH AND HAFTORAHS 10 n.5 (J.H. Hertz ed., 2d ed. 1960). Dr. Hertz was the Chief Rabbi of the British Empire. *Id.* at title page.

165. *Genesis* 3:23–24.

166. THE PENTATEUCH AND HAFTORAHS, *supra* note 164, at 8 n.17.

167. Although persons acquitted of crime by reason of insanity are not criminally responsible and cannot be punished, they may be, and usually are, confined for treatment to prevent repetition of the irresponsible behavior. *See, e.g.*, CAL. PENAL CODE § 1026(a) (West 1985 & Supp. 2001); D.C. CODE ANN. § 24-301(d)(1) (1996). In *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court upheld a statute that required insanity acquittees to be automatically committed to a mental hospital upon the completion of their criminal trial. *Id.* at 366. Insanity acquittees may be retained there until they are no longer insane or a danger to themselves or others. *Id.* at 370.

168. *See generally* Platt & Diamond, *supra* note 161, at 1233–37 (discussing use of the “good and evil” test in English cases involving children and insane persons in the fourteenth through eighteenth centuries); *id.* at 1237–58 (discussing use of “good and evil” test in eighteenth century American cases).

169. *Rex v. Arnold* (C.P. 1724), in 16 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 695, 765 (1812).

170. *Daniel M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843).

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.”¹⁷¹

Though wild beasts no longer roam our civilized Serengeti, the “good and evil” test reigns supreme today as our test of criminal responsibility. It does so, however, dressed in new garb. In 1843, Daniel M’Naghten was accused of murdering Edward Drummond. At trial, Lord Chief Justice Tindal charged the jury:

The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing *a wrong or wicked act*. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was *violating the laws both of God and man*, then he would be entitled to a verdict in his favour¹⁷²

In essence, the charge equated knowledge that the act was wrong with knowledge that the act was evil (wicked). Because the killing of a human being was a violation both of God’s Sixth Commandment¹⁷³ and society’s criminal law, there was no need for the judge to distinguish between them.

The jury found M’Naghten not guilty by reason of insanity.¹⁷⁴ In response, the House of Lords propounded five questions for the judges of the Supreme Court of Judicature designed to formulate a test of insanity to be applied in all future cases involving defendants “afflicted with insane delusion.”¹⁷⁵ Lord Chief Justice Tindal’s answer articulated a “revised” test that recharacterized the “good and evil” test into a “right and wrong” test. This test, known as the *M’Naghten* test even though it was not applied to M’Naghten himself, provides:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁷⁶

171. Rex v. Arnold (C.P. 1724), in 16 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 695, 765 (1812).

172. Daniel M’Naghten’s Case, 8 Eng. Rep. at 719–20 (emphasis added).

173. Exodus 20:13 (“Thou shalt not murder.”).

174. Daniel M’Naghten’s Case, 8 Eng. Rep. at 720.

175. *Id.*

176. *Id.* at 722.

The House of Lords thanked the judges, finding their answers to be “most highly satisfactory”¹⁷⁷ and declaring that they would “be of the greatest use in the administration of justice.”¹⁷⁸ The substitution of the phrase “right and wrong” for “good and evil” was not a revolutionary change, and, arguably, not even a significant one, for in the nineteenth century the phrases were used synonymously and interchangeably both in England and in the United States.¹⁷⁹

The *M’Naghten* test has been severely criticized for its narrow and exclusive focus on the defendant’s cognitive capacity to distinguish right from wrong.¹⁸⁰ The test assumes that the mind is compartmentalized, although most psychiatrists believe that it is an integrated unit.¹⁸¹ In his treatise on insanity, noted nineteenth century psychiatrist Isaac Ray challenged *M’Naghten*’s exclusive focus on cognitive capacity, asserting:

This is virtually saying to a man, “You are allowed to be insane; the disease is a visitation of Providence, and you cannot help it; but have a care how you manifest your insanity; there must be method in your madness. Having once adopted your delusion, all the subsequent steps connected with it must be conformed to the strictest requirements of reason and propriety. If you are caught tripping in your logic; if in the disturbance of your moral and intellectual perceptions you take a step for which a sane man would be punished, insanity will be no bar to your punishment.”¹⁸²

To broaden the test of insanity, some jurisdictions supplemented their *M’Naghten* test by adding an “irresistible impulse” component.¹⁸³ A defendant was not criminally responsible if a mental disorder prevented the defendant from controlling his or her conduct, despite knowledge of the nature and quality of the act and an awareness that it was wrong. In 1962, the American Law Institute (ALI), in its Model Penal Code,

177. *Id.* at 724.

178. *Id.*

179. Platt & Diamond, *supra* note 161, at 1237.

180. *See, e.g.,* *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945). The *M’Naghten* test is not without its defenders. *See, e.g.,* Alan M. Dershowitz, *Psychiatry in the Legal Process: “A Knife that Cuts Both Ways,”* in *THE PATH OF THE LAW FROM 1967*, at 71, 71–72 (Arthur E. Sutherland ed., 1968) (asserting that *M’Naghten* is a legal rule, not a medical model for responsibility); Joseph M. Livermore & Paul E. Meehl, *The Virtues of M’Naghten*, 51 *MINN. L. REV.* 789, 855–56 (1967) (asserting that *M’Naghten* has advantages for law, in identifying those who should be absolved from criminal responsibility because of a major cognitive impairment, and advantages for psychiatry, in distinguishing between those who suffer from psychoses and those who suffer only from neuroses).

181. *See* Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 *YALE L.J.* 761, 775 (1956).

182. I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 49 (Eric T. Carlson, ed., 5th ed., Arno Press, 1976) (1871).

183. *See generally* Barbara A. Weiner, *Mental Disability and the Criminal Law*, in *AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW* 693, 710 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

proposed a reformulated insanity test that combined, and broadened slightly, *M'Naghten's* focus on intellectual capacity and the "irresistible impulse" focus on volitional capacity.¹⁸⁴

The ALI test was favorably received and was adopted in a majority of states and by the courts of appeals in ten of the eleven federal judicial circuits.¹⁸⁵ More radical tests of insanity have been proposed, such as the *Durham* "product" test¹⁸⁶ and the Royal Commission's "justly responsible" test,¹⁸⁷ but they have not been widely accepted.¹⁸⁸ Nevertheless, John Hinckley's attempted assassination of President Reagan on March

184. The ALI test provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

Abraham Goldstein hailed the ALI test as a sensible compromise between the traditional *M'Naghten* and irresistible impulse tests and the more radical-appearing insanity test announced by the United States Court of Appeals for the District of Columbia Circuit in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 93 (1967). Under the *Durham* test, a defendant is "not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham*, 214 F.2d at 874-75. Goldstein declared that the ALI test

is a modernized and much improved rendition of *M'Naghten* and the "control" tests. It substitutes "appreciate" for "know," thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word "conform" instead of "control," while avoiding any reference to the misleading words "irresistible impulse." In addition, it requires only "substantial" incapacity, thereby eliminating the occasional references in the older cases to "complete" or "total" destruction of the normal capacity of the defendant.

GOLDSTEIN, *supra*, at 87.

185. See Weiner, *supra* note 183, at 769-77 tbl.12.5 (listing states that adopted the ALI test). The ALI test was adopted by all of the federal circuit courts of appeals except the first circuit. See MODEL PENAL CODE § 4.01 cmt. at 176 n.34 (1962) (citing cases).

186. *Durham*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); see *supra* note 184. Actually, the "product" test was first accepted, more than eighty years before *Durham*, in a New Hampshire Supreme Court decision. *State v. Jones*, 50 N.H. 369, 370 (1871).

187. ROYAL COMM'N ON CAPITAL PUNISHMENT, 1949-1953 REPORT 116 (1953) ("[A] preferable amendment of the law would be to abrogate the [*M'Naghten*] Rules and to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible.").

188. In *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972) (en banc), the United States Court of Appeals for the District of Columbia Circuit overruled its eighteen-year-old *Durham* decision, and adopted the ALI test instead. Chief Justice Bazelon, who authored the *Durham* opinion, concurred in the *Brawner* decision. He did not favor retaining the *Durham* "product" test but preferred instead to adopt a variant of the "justly responsible" test. *Id.* at 1010, 1032.

30, 1981, and his subsequent successful use of an ALI-based insanity defense, triggered legislative efforts to restrict the insanity test. Several states abandoned their ALI test and returned to the narrowly-focused *M'Naghten* definition.¹⁸⁹ In 1984, Congress enacted a *M'Naghten* variant as the first federal legislation embodying an insanity defense for federal crimes.¹⁹⁰ *M'Naghten* has reascended to a position of dominance as a test for insanity.¹⁹¹

B. The Deific Decree Doctrine

1. Historical Development

Throughout history, religion and mental disorder have been closely linked.¹⁹² In fact, at one time mental disorder was believed to be a condition inflicted by God, perhaps as a deific punishment¹⁹³ for some mortal sin.¹⁹⁴ Euripides, for example, who lived in the fifth century B.C., is credited with saying: “Those whom God wishes to destroy, he first makes mad.”¹⁹⁵ In 1685, in challenging the execution of a mentally disordered person convicted of high treason, England’s Solicitor-General noted: “[A] lunatick during his lunacy, is by an act of God . . .

189. See Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54 (1987) (discussing changes in insanity defense laws in various states during and after the Hinckley trial). For example, California voters approved an initiative restoring the *M'Naghten* test. CAL. PENAL CODE § 25(b) (West 1999) (added by Initiative Measure, approved by the people, June 8, 1982).

190. Under the federal statute, the defendant must prove, by clear and convincing evidence, 18 U.S.C. § 17(b) (1994), that he, “as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” *Id.* § 17(a).

191. One author declared that “*M'Naghten* is the bedrock of American insanity jurisprudence.” Christopher Hawthorne, Comment, “*Deific Decree*”: *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1769 (2000). He noted that other insanity tests, such as the *Durham* test or the ALI test, “add or change elements of *M'Naghten* [and thus] are tied to *M'Naghten* because they must react to it.” *Id.*

192. See *supra* text accompanying notes 161–71 (tracing the evolution of the *M'Naghten* insanity test to Adam and Eve’s original sin).

193. Blackstone asserted, as one reason why a mentally disordered person should not be executed, that “*furiosus solo furore punitur*,” i.e., madness is its own punishment. 4 WILLIAM BLACKSTONE, COMMENTARIES *389. Justice Marshall, writing the opinion of the Court in *Ford v. Wainwright*, 477 U.S. 399, 407–08 (1986), cited and relied in part on the Blackstone quotation. The *Ford* Court ruled that “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.” *Id.* at 410.

194. While people believed that God would and could inflict mental disorder as punishment for wrongdoing, they acknowledged an inability to comprehend why God would inflict such a punishment. See *supra* note 116 and accompanying text.

195. JOHN BARTLETT, FAMILIAR QUOTATIONS 69 (Justin Kaplan ed., 16th ed. 1992).

disabled."¹⁹⁶ More than one hundred years before *M'Naghten*, the court in *Rex v. Arnold*,¹⁹⁷ in applying the wild beast test of insanity, instructed the jury that in evaluating the defendant's mental condition:

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.¹⁹⁸

Although witnesses testified that the defendant believed that the victim of the shooting "bewitched" him¹⁹⁹ and "sent into his chamber devils and imps,"²⁰⁰ no evidence was introduced to suggest that the defendant believed that God commanded that he shoot the victim. Apparently, the words "visitation of God" in the court's instruction referred to the defendant's claim that he acted as a result of mental disorder—a condition that he suffered from involuntarily.

The "deific decree doctrine" regards a criminal defendant's belief that God commanded him or her to kill, not as a religious belief, but rather, as a delusion that qualifies as legal insanity, exculpating the defendant from criminal responsibility. Perhaps, as one author suggests,²⁰¹ the doctrine developed from a literal reading of the *Rex v. Arnold* "visitation of God" language. If God "visits" a person, such visitation can take the form of an oral communication with that person.

Perhaps the doctrine was merely a logical extension of the Judeo-Christian belief that God would not order a person to kill another. After all, God's Sixth Commandment prohibits individuals from committing

196. Sir John Hawles, *Remarks on the Trial of Charles Bateman*, in 11 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 474, 476 (1811). Charles Bateman was tried and convicted of high treason on December 9, 1685, sentenced on December 11, 1685, and executed on December 18, 1685. The Trial of Charles Bateman (Old Bailey 1685), in HOWELL, *supra*, at 467, 474. Justice Frankfurter, dissenting in *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting), quoted from Sir John Hawles' remarks in the trial of Charles Bateman. *Id.* at 18.

197. *Rex v. Arnold* (C.P. 1724), in 16 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 695, 764 (1812).

198. *Id.* at 764. The jury, however, convicted the defendant of maliciously and wilfully shooting at and wounding Lord Onslow. The prisoner was sentenced to death, but at the intercession of Lord Onslow, the execution was stayed, and the prisoner was confined in jail for more than thirty years until his death. *Id.* at 766.

199. *Id.* at 721 (testimony of William Arnold, brother of the defendant); *id.* at 729 (testimony of Eleanor Gittings).

200. *Id.* at 729.

201. Hawthorne, *supra* note 191, at 1783.

murder.²⁰² Thus, one who sincerely believes that he or she is commanded by God to kill another, is experiencing a false belief. A societal belief that a “good” God would not order murder would explain why nineteenth century courts and juries would not exculpate as insane those who claimed to act at the direction of the Devil or other “evil” diety.²⁰³ To that society, religious belief was limited to the One True God.²⁰⁴ Perhaps the doctrine was simply a convenient mechanism for courts, constrained by the narrow cognitive focus of the *M’Naghten* test, to add a volitional component—broadening the insanity test to include at least some individuals (the religiously deluded) who were unable to control their conduct.

Whatever its origin, the deific decree doctrine became established in American criminal jurisprudence as a result of two nineteenth century and one early twentieth century cases. Ironically, the deific decree doctrine was not used successfully to achieve an insanity acquittal in any of the three.

Commonwealth v. Rogers,²⁰⁵ decided by the Supreme Judicial Court of Massachusetts in 1844, is acknowledged as the first American case to cite the *M’Naghten* test.²⁰⁶ Abner Rogers, Jr. was charged with murdering

202. *Exodus* 20:13.

203. In *Diana Sellick’s Case*, (N.Y. Sup. Ct. 1816), in 1 N.Y. CITY-HALL RECORDER 185 (Dennis & Co. 1953) (1817), the defendant, charged with the poisoning death of a child, claimed insanity as a defense because “she was possessed with the devil, and knew not what she did.” *Id.* at 190. In instructing the jury, the judge rejected the defendant’s claim, stating: “Can we reasonably look for any other motive than that laid in the indictment?” *Id.* The jury convicted the defendant, and the judge sentenced her to death. *Id.* at 191.

Although the Thugs did not claim to act at the direct command of their goddess Kali, nevertheless, the persecution of the Thugs and elimination of their religion in the 1800s can be attributed to the prevailing (British) belief that Kali was a false god and that the Thug religion was a false religion. See discussion *supra* note 8.

204. See *supra* text accompanying notes 38–71 (tracing, through Supreme Court decisions, the evolution of a broader concept of religious belief).

205. 48 Mass. (7 Met.) 500 (1844).

206. In the case, Chief Justice Shaw, writing the opinion of the court, articulated the insanity test as follows:

A man is not to be excused from responsibility, if he has 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.

Id. at 501–02. Later in the opinion, Chief Justice Shaw seemingly combined *M’Naghten’s* cognitive test with the irresistible impulse’s lack of control test when he wrote:

If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

the warden of the state prison by stabbing him with a knife.²⁰⁷ Although the defendant did not claim to have acted at the direction of God, Chief Justice Lemuel Shaw, in discussing the type of delusion that could result in a successful insanity defense, wrote:

A common instance is where 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.²⁰⁸

Although the defendant was acquitted by reason of insanity,²⁰⁹ he did not rely upon the deific decree doctrine to achieve that result.

In 1882, Charles Guiteau, on trial for assassinating President James Garfield, relied upon the insanity defense, claiming to have acted under a deific decree delusion.²¹⁰ In instructing the jury, Judge Walter Cox cited Chief Justice Shaw’s example of a deific decree delusion²¹¹ and then added an example of his own:

[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, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.²¹²

Judge Cox, applying the *M’Naghten* test, specifically instructed the jury that if the defendant “was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do,²¹³—then he was not in a responsible condition of mind . . . and ought to be now acquitted.”²¹⁴ Although a deific decree delusion was accepted as an example of legal insanity in an appropriate case, Judge Cox reviewed

Id. at 502.

207. *Id.* at 501.

208. *Id.* at 503.

209. *Id.* at 506.

210. Guiteau’s Case, 10 F. 161, 176 (C.C.D.C. 1882).

211. *Id.* at 170.

212. *Id.* at 172.

213. Earlier in his charge, Judge Cox informed the jury: “If a man insanelly 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.” *Id.* at 182.

214. *Id.* at 186.

testimony introduced in the case before him and strongly suggested that a verdict of insanity was not appropriate for Charles Guiteau. For example, three psychiatrists who examined the defendant testified that he informed them that the idea for the assassination was his own and not the result of a vision, or voice, or command from God.²¹⁵ The defendant's own testimony confirmed that his conception of the facts was not distorted by any deific revelation.²¹⁶ The jury deliberated for just over one hour and returned a guilty verdict.²¹⁷

In 1915, Justice Benjamin Cardozo, writing for the New York Court of Appeals in *People v. Schmidt*,²¹⁸ assured the viability of the deific decree doctrine. Cardozo's influence on American law is so great that one author asserted: "[I]t is . . . safe to say that, if another judge had written the *Schmidt* opinion, deific decree would not exist."²¹⁹ The defendant, Hans Schmidt, confessed to killing a woman by cutting her throat and to dismembering her body.²²⁰ At trial, he claimed insanity as a defense, asserting "that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement."²²¹ The jury, believing his delusion was feigned, convicted him of first degree murder, and he was sentenced to death.²²² On appeal, he recanted his confession and acknowledged that he feigned insanity in order to conceal an illegal abortion that resulted in the victim's death. He had hoped that a successful insanity defense would result in only a brief stay in a mental hospital. Now he sought a new trial that could result, at most, in a manslaughter conviction.²²³ The defendant's appeal, wrote Justice Cardozo, did not qualify as newly discovered evidence that would

215. *Id.* at 179. For example, one psychiatrist testified that in response to a question of whether the defendant claimed to have had any direct revelation from heaven, the defendant answered that he "*did not believe in any such nonsense.*" *Id.*

216. *Id.* at 178. The defendant also wrote two papers shortly after the assassination in which he stated that the act "*was his own conception, and he took the entire responsibility.*" *Id.* at 180.

217. *Id.* at 187. The jury was polled and after each juror announced a finding of "guilty," the defendant stated: "My blood be on the head of that jury; don't you forget it. That is my answer." *Id.* at 188. After a short pause, he added: "God will avenge this outrage." *Id.* at 189.

218. 110 N.E. 945 (N.Y. 1915).

219. Hawthorne, *supra* note 191, at 1784. An historian noted that "Cardozo was widely regarded as a man who embodied virtue, benevolence, and a remarkable kind of purity." Richard Polenberg, *The "Sainly" Cardozo: Character and the Criminal Law*, 71 U. COLO. L. REV. 1311, 1311 (2000). He added: "[C]ontemporaries often spoke about Cardozo in reverential, even worshipful, terms. People compared him to St. Paul, St. Francis of Assisi, and Thomas More." *Id.*

220. *Schmidt*, 110 N.E. at 945.

221. *Id.*

222. *Id.*

223. *Id.*

warrant a new trial.²²⁴

Although Cardozo could have ended his opinion at that point, he chose to address another issue raised by the defendant—that the trial judge erred in narrowly defining the word “wrong” in New York’s insanity statute to mean “contrary to the law of the state.”²²⁵ Most of Cardozo’s opinion focuses on this issue, explaining why the statute should be more broadly interpreted to mean moral wrong not just legal wrong.²²⁶ In his analysis, Justice Cardozo mentioned both Chief Justice Shaw’s and Judge Cox’s examples of a deific decree delusion and then added one of his own:

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.²²⁷

To Cardozo, the deific decree example presented the strongest case for finding the defendant insane. Nothing in the history of the *M’Naghten* test, wrote Cardozo, or in its reason or purpose, justifies holding the defendant criminally responsible—a conclusion that Cardozo termed “abhorrent.”²²⁸ Cardozo even suggested that to avoid convicting such a defendant, the jury might well disregard a judge’s instruction limiting insanity to cases in which the defendant did not even know that his or her act was contrary to law.²²⁹ Cardozo used the deific decree paradigm, not to create an exception to the *M’Naghten* test, but to justify an interpretation of *M’Naghten* that would absolve from criminal responsibility those mentally disordered defendants who believe their criminal act is moral, even if they know the act is illegal. Those defendants do not know their act is wrong.

Cardozo answered a question that the *M’Naghten* judges did not address. In response to questions posed by the House of Lords, the *M’Naghten* judges wrote that a defendant is criminally responsible if he does an act knowing that it was contrary to the law of the land.²³⁰ They also wrote that the jury should be informed that a defendant is criminally

224. *Id.* at 946.

225. *Id.*

226. *Id.* at 946–50.

227. *Id.* at 949.

228. *Id.*

229. *Id.*

230. Daniel M’Naghten’s Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

responsible if he does an act that is contrary to the law of the land and the defendant knows “that the act was one which he ought not to do,”²³¹ that is, that he knew “that he was doing an act that was wrong.”²³² The judges did not, however, say whether a defendant is insane if he or she knows the act is illegal, but who, through mental disorder, believes the act to be moral.

Cardozo’s answer to that question did not apply to the defendant in the case before him. Hans Schmidt was not inspired by an insane delusion that God had appeared to him and ordained a human sacrifice. Rather, Schmidt had attempted to defraud the court with a fabricated defense of insanity and could not avail himself of the trial judge’s erroneous charge. The defendant was not unjustly convicted because, by his own admission, the jury correctly determined that he was sane at the time he acted.²³³

The deific decree doctrine, though firmly established by Cardozo’s loving parent example (with an assist by Judge Cox’s similar example thirty-three years earlier), is rarely claimed,²³⁴ and when claimed, is rarely successful. Apparently, there are few devoted mothers or affectionate fathers who either hear God’s command to sacrifice their children, or who respond obediently if they do. One researcher, reviewing over eighty citations to *Schmidt* between 1915 and 1983, found no references to the deific decree doctrine, or to a semantic equivalent, during that sixty-eight-year period.²³⁵ Nevertheless, since 1983, appellate courts have

231. *Id.* at 723.

232. *Id.*

233. *Schmidt*, 110 N.E. at 950.

234. Although delusions were predominantly religious in content in the mid-nineteenth century, patient records from Bethlem Royal Hospital reveal that delusions were predominantly sexual 100 years later. Franklin S. Klaf & John G. Hamilton, *Schizophrenia—A Hundred Years Ago and Today*, 107 J. MENTAL SCI. 819, 821 tbl.1 (1961). “Three times as many male and female acute schizophrenics had religious preoccupations in the nineteenth century as compared with the twentieth century group.” *Id.* at 823. The authors speculate:

It does not seem strange that a mid-nineteenth century adult, having been trained to flee the fires of Hell since childhood, should hear God’s voice and fear His retribution after developing a schizophrenic illness. Or, to draw an analogy, that may or may not be far-fetched, the mid-twentieth century adult, exposed to our society’s preoccupation with sex, may be expected to develop sexual preoccupations during a schizophrenic illness. We wish to point out that such preoccupations may be culturally determined.

Id. at 824.

235. Hawthorne, *supra* note 191, at 1799. *But see* State v. Di Paolo, 168 A.2d 401 (N.J. 1961). In *Di Paolo*, the defendant claimed that he heard the voice of God directing him to kill his girlfriend, who had refused to marry him. He stabbed her to death. Charged with murder, he claimed insanity based on this deific decree delusion. Expert testimony was in conflict, and the jury rejected the insanity defense, convicting the defendant of murder in the first degree. *Id.* at 403, 407. In its *Di Paolo* opinion, the New Jersey Supreme Court specifically discusses Justice Cardozo’s opinion in *Schmidt*.

considered and applied the deific decree doctrine in at least ten cases.²³⁶ In

Id. at 407–08.

236. See *Ivery v. State*, 686 So. 2d 495 (Ala. Crim. App. 1996); *People v. Coddington*, 2 P.3d 1081 (Cal. 2000), *overruled by Price v. Superior Court*, 25 P.3d 618 (Cal. 2001) (overruled on different grounds); *People v. Serravo*, 823 P.2d 128 (Colo. 1992); *People v. Tally*, 7 P.3d 172 (Colo. Ct. App. 1999); *People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. Ct. 1991); *Laney v. State*, 486 So. 2d 1242 (Miss. 1986); *State v. Blair*, 732 A.2d 448 (N.H. 1999); *Galloway v. State*, 698 P.2d 940 (Okla. Crim. App. 1985); *State v. Cameron*, 674 P.2d 650 (Wash. 1983); *State v. Potter*, 842 P.2d 481 (Wash. Ct. App. 1992).

In *Ivery*, the defendant “believed himself to be the ‘ninja of God,’ and to have been instructed by God to kill people at will and to take their money as the spoils of victory.” *Ivery*, 686 So. 2d at 500. The jury convicted the defendant of murder and sentenced him to death for decapitating a robbery victim with a hatchet. The Alabama Court of Criminal Appeals affirmed the conviction but remanded the case for reconsideration of sentencing. *Id.* at 520.

In *Coddington*, the defendant claimed that God commanded or authorized him to kill. *Coddington*, 2 P.3d at 1111. The jury convicted him of first degree murder for killing two elderly women and for forcible rape and other sexual offenses on two girls under their supervision, and he was sentenced to death. *Id.* at 1103. The California Supreme Court affirmed. *Id.*

In *Serravo*, the defendant believed God told him to stab his wife in order to sever their marriage bond. *Serravo*, 823 P.2d at 131. The jury found the defendant insane. *Id.* at 130. The Colorado Supreme Court did not order a retrial despite error in jury instructions. *Id.* at 140.

In *Tally*, the defendant believed God gave him permission to kill the victim, an employee at a company at which defendant had been fired. *Tally*, 7 P.3d at 174–75. The defendant shot the victim six times with an automatic pistol. *Id.* at 174. The jury convicted the defendant of first degree murder. *Id.* at 175. The Colorado Court of Appeals affirmed. *Id.* at 174.

In *Wilhoite*, the “[d]efendant believed the world was coming to an end; and that God had commanded her to kill her children so that they could find peace in heaven.” *Wilhoite*, 592 N.E.2d at 55. The defendant attempted to push her nine-year-old daughter out the window of her eighth floor apartment. *Id.* at 49. The trial court, sitting without a jury, convicted the defendant of attempted murder. *Id.* The Illinois Appellate Court reversed, holding that the trial court’s decision that the defendant was not insane (under the state’s ALI insanity test) was against the manifest weight of the evidence. *Id.* at 58.

In *Laney*, the defendant claimed that God commanded him to kill two sheriff’s officers who had come to his home to transport him to a mental health clinic for an evaluation. He shot and killed one officer and wounded the other. *Laney*, 486 So. 2d at 1243–45. The jury convicted the defendant of murder. *Id.* at 1243. The Mississippi Supreme Court affirmed. *Id.* at 1247.

In *Blair*, the defendant planned to kill his wife and son in a motel room they had previously visited while on vacation. *Blair*, 732 A.2d at 449. The defendant testified that “he experienced a trance ‘where God revealed to [him] that [he] would be cast into the lake of fire if [he] backed . . . away from it.’” *Id.* The defendant killed his wife and son by bludgeoning them to death with a hammer. *Id.* The jury convicted him of first degree murder. The New Hampshire Supreme Court affirmed. *Id.*

In *Galloway*, the defendant claimed that God directed him to drive demons out of his neighbor. *Galloway*, 698 P.2d at 941. The defendant repeatedly shot, stabbed, and beat

four of the ten, the defendant used the doctrine successfully.²³⁷ In at least seven other cases involving criminal behavior inspired by nondeific decree delusions or nondelusional, but religiously motivated conduct, appellate courts contrasted that behavior with behavior inspired by a deific decree delusion, impliedly accepting the deific decree doctrine.²³⁸

the victim. The jury convicted him of first degree murder. *Id.* The Oklahoma Court of Criminal Appeals reversed the conviction, holding that failure of the defense attorney to introduce evidence of the deific decree delusion denied the defendant effective assistance of counsel. The court found that if such evidence had been presented, a substantial possibility existed that the defendant would have been found insane. *Id.* at 942.

In *Cameron*, the defendant believed God commanded him to kill his stepmother, who was Satan's angel. *Cameron*, 674 P.2d at 653. He stabbed her more than seventy times. *Id.* at 651. The jury convicted him of first degree murder. *Id.* The Washington Supreme Court reversed, holding that the trial court erred in instructing the jury that the word "wrong" in the insanity defense means "contrary to the law." *Id.* at 656.

In *Potter*, the defendant claimed to have acted under a deific command to kill his wife. *Potter*, 842 P.2d at 483. He strangled her. *Id.* at 482. The jury convicted him of second degree murder. The Washington Court of Appeals affirmed. *Id.*

237. See *People v. Serravo*, 823 P.2d 128 (Colo. 1992); *People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. Ct. 1991); *Galloway v. State*, 698 P.2d 940 (Okla. Crim. App. 1985) (reversing conviction in case in which the deific decree issue was raised on appeal to demonstrate incompetence of counsel for failing to raise issue at trial); *State v. Cameron*, 674 P.2d 650 (Wash. 1983).

238. See *People v. Skinner*, 704 P.2d 752 (Cal. 1985); *People v. Galimanis*, 944 P.2d 626 (Colo. Ct. App. 1997); *State v. Wilson*, 700 A.2d 633 (Conn. 1997); *State v. Worlock*, 569 A.2d 1314 (N.J. 1990); *Olivier v. State*, 850 S.W.2d 742 (Tex. Ct. App. 1993); *State v. Rice*, 757 P.2d 889 (Wash. 1988); *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983).

In *Skinner*, the defendant believed that the marriage vow "till death do us part" bestowed on a person a God-given right to kill a spouse who violated, or who was inclined to violate, the marital vows. *Skinner*, 704 P.2d at 754-55. He also believed that because the vows reflected the direct wishes of God, the killing was sanctified by God and was not morally wrongful. *Id.* at 755. The defendant strangled his wife while he was on a day pass from a state hospital. *Id.* at 754. The defendant was convicted of second degree murder. *Id.* The California Supreme Court reversed, holding that the defendant was insane because he could not distinguish right and wrong at the time he acted. *Id.* at 764.

In *Galimanis*, the defendant felt God-like at times and referred to himself as the Devil. *Galimanis*, 944 P.2d at 628. The defendant beat, stabbed, and decapitated a woman and stole her car. *Id.* The jury convicted him of "first-degree murder, motor vehicle theft, and crime of violence." *Id.* at 626. The Colorado Court of Appeals affirmed, rejecting the defendant's contention that a deific decree delusion instruction should have been given. *Id.* at 632. No evidence was introduced at trial that the defendant felt he was under any compulsion from God to kill the victim. *Id.*

In *Wilson*, the defendant had a delusional belief that his son and an acquaintance were systematically destroying his life by poisoning him with methamphetamine and hypnotizing him to control his thoughts. *Wilson*, 700 A.2d at 636. The defendant shot the acquaintance numerous times with a revolver. *Id.* The jury convicted the defendant of murder, and he was sentenced to sixty years' imprisonment. *Id.* The Connecticut Supreme Court, construing the cognitive prong of the ALI insanity test, reversed, holding that the trial judge erred in failing to instruct the jury that the defendant did not appreciate the wrongfulness of his conduct if, at the time he acted, "he did not have the substantial capacity to appreciate that his actions were contrary to societal morality, even though he may have been aware that the conduct in question was criminal." *Id.* at 643.

In all likelihood, deific decree cases have also been resolved at the trial level, either with guilty verdicts that were not appealed or with insanity

In *Worlock*, the defendant, infuriated at two “friends” for stealing his wallet, shot and killed them with twelve shots from a rifle. *Worlock*, 569 A.2d at 1316. The jury convicted the defendant of murder and possession of a weapon for an illegal purpose. *Id.* The New Jersey Supreme Court affirmed, holding that “[b]elief in an idiosyncratic code of morality does not constitute the defense of criminal insanity.” *Id.* at 1324.

In *Olivier*, the defendant, experiencing hallucinations and delusions, believed the world was coming to an end and that she was going to hell. Believing also that her fourteen-month-old infant had turned into Satan and was trying to kill her, the defendant killed her child by choking her and beating her head against a wall. *Olivier*, 850 S.W.2d at 743–44. The jury convicted the defendant of murder and “assessed punishment at twenty (20) years confinement.” *Id.* at 743. The Texas Court of Appeals reversed, concluding that the verdict was against the weight of the evidence. *Id.* at 749. The prosecution had not presented any expert testimony to contradict the testimony of the defendant’s three experts. *Id.*

In *Rice*, the defendant claimed that he had received extraterrestrial communications that urged him to follow certain laid-out paths. *Rice*, 757 P.2d at 897. He also believed he was in a war against evil. *Id.* The defendant used a knife and a steam iron to kill a man, his wife, and their two sons in their home. *Id.* at 892–95. The jury convicted the defendant of four counts of aggravated first degree murder, and he was sentenced to death. *Id.* at 891–92. The Washington Supreme Court affirmed, holding that a deific decree instruction is not appropriate if the defendant’s free will is not subsumed by his belief in the deific decree. The testimony established that the defendant did not feel compelled to follow his urges. *Id.* at 892, 904.

In *Crenshaw*, the defendant, who professed to follow the Moscovite religion, believed that it would not be improper to kill his wife if she committed adultery. *Crenshaw*, 659 P.2d at 491. The defendant stabbed his wife twenty-four times with a knife and decapitated her with an ax. *Id.* at 490. The jury convicted the defendant of first degree murder. *Id.* The Washington Supreme Court affirmed, holding that a person’s religious “beliefs are not equivalent to a deific decree.” *Id.* at 494. The defendant failed to prove that his alleged delusion stemmed from a mental disorder. *Id.* at 495.

For similar cases decided before 1983, see, for example, *State v. Malumphy*, 461 P.2d 677 (Ariz. 1969); *People v. Wood*, 187 N.E.2d 116 (N.Y. 1962). In *Malumphy*, the defendant contemplated suicide but decided to kill someone else so he could be tried for murder and given the death penalty. *Malumphy*, 461 P.2d at 678. He expressed a belief that his conduct was sanctioned by God. *Id.* He shot and killed two co-employees. *Id.* The jury convicted the defendant of two counts of first degree murder, and he was sentenced to death. The Arizona Supreme Court affirmed. *Id.* A concurring justice explained that the evidence in the case did not establish that the “defendant was unable to understand [that] it was wrong for him to kill” the victims. *Id.* at 689–90 (McFarland, J., concurring).

In *Wood*, the defendant believed he was “God’s emissary” and was charged with killing those whom he believed to be degenerates. *Wood*, 187 N.E.2d at 120. The defendant killed two men, using a beer bottle on one (severing his jugular vein with broken glass after knocking him unconscious) and beating the other on the head with a heavy shovel. *Id.* at 118–19. The jury convicted the defendant of two counts of first degree murder. *Id.* at 117. The New York Court of Appeals affirmed, finding that the jury “could reasonably have found that defendant was operating under a standard of morality he had set up for himself and which applied only to him.” *Id.* at 122.

verdicts that were not appealable due to double jeopardy concerns.²³⁹

2. *The Doctrine Denounced and Defended*

The deific decree doctrine, though applied uncritically by courts in the few cases that come before them, has been the subject of severe scholarly criticism. The author of a recent article asserts that the doctrine undermines the *M’Naghten* test of insanity.²⁴⁰ The law presumes that everyone experiences the same reality.²⁴¹ This presumption is only overcome by total cognitive impairment.²⁴² *M’Naghten*, as a measure of criminal responsibility and not mental disorder, provides a simple test to determine whether the presumption is overcome. But the deific decree doctrine, “by inviting jurors to analyze the defendant’s subjective reality within a single narrow area . . . robs *M’Naghten* of the coherence which comes from strictly limiting its field of inquiry.”²⁴³ The added complexity makes *M’Naghten* impossible to apply.²⁴⁴

But perhaps the author misinterprets the purpose of *M’Naghten*. Although *M’Naghten* is a simple test to measure insanity, it is not a test to deny its existence when insanity in fact exists. Although *M’Naghten* is not designed to measure mental disorder, it is, by its own terms, a test that finds insanity only when mental disorder exists. Of necessity, the court examines the defendant’s subjective reality when it decides whether the defendant suffered from a mental disorder, and if so, whether that disorder prevented him from knowing that his or her act was wrong.

Lord Chief Justice Tindal, who presided at the trial of Daniel M’Naghten, and whose opinion to the House of Lords subsequent to that trial included the *M’Naghten* test of insanity, instructed the jurors that if Daniel M’Naghten did not “know that he was doing a wrong or wicked act[,] . . . that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour.”²⁴⁵ To render their verdict, Tindal required the jurors to examine M’Naghten’s subjective reality at the time he acted. Neither Lord Chief Justice Tindal, presiding at Daniel M’Naghten’s trial, nor the judges who developed the *M’Naghten*

239. See *People v. Serravo*, 823 P.2d 128, 140 (Colo. 1992). In *Serravo*, the prosecution appealed the trial court’s ruling on challenged jury instructions after the jury returned an insanity verdict. *Id.* at 129. Although the Colorado Supreme Court found error in the instructions, the court concluded that retrial of the defendant would violate the double jeopardy clauses of federal and state constitutions. *Id.* at 140.

240. Hawthorne, *supra* note 191, at 1768; see generally *id.* at 1762–68.

241. *Id.* at 1761.

242. *Id.* at 1762.

243. *Id.*

244. *Id.* at 1763.

245. *Daniel M’Naghten’s Case*, 8 Eng. Rep. 718, 719–20 (H.L. 1843) (summarizing Lord Chief Justice Tindal’s charge to the jury in the trial of Daniel M’Naghten).

insanity test in response to that trial, intended an insanity verdict to be limited to situations in which the defendant experiences total cognitive impairment. In responding to the questions posed by the House of Lords, Tindal and the *M’Naghten* judges specifically assumed that the questions were intended to deal solely with persons who experienced partial delusions only and who were not in other respects insane.²⁴⁶

At most, the criticism seems inappropriately directed at the deific decree doctrine, rather than at the decision of Justice Cardozo, and the courts that follow his lead, to equate the word “wrong” in the *M’Naghten* test to “moral” wrong instead of “legal” wrong.²⁴⁷ Cardozo merely presented the deific decree as the strongest example to support his “moral” wrong interpretation for all cases, not as an exclusive exception to a general rule favoring the “legal” wrong interpretation for all cases except deific decree cases.

Acceptance of a “moral” wrong interpretation of “wrong,” however, does not so broaden the test of insanity as to make *M’Naghten* unworkable. As the California Supreme Court recently observed:

[M]orality . . . is . . . not simply the individual’s belief in what conduct is or is not good. While it need not reflect the principles of a recognized religion and does not demand belief in a God or other supreme being, it does require a sincerely held belief grounded in generally accepted ethical or moral principles derived from an external source.²⁴⁸

Because the inquiry into the defendant’s sanity considers the defendant’s ability to perceive that his or her act was wrongful, that is, to perceive

246. *Id.* at 722.

247. Although a few courts have construed the word “wrong” to mean “legal wrong,” most have adopted the “moral wrong” interpretation. *See, e.g.*, *People v. Skinner*, 704 P.2d 752, 760–64 (Cal. 1985) (adopting “moral wrong” interpretation, and citing cases from other jurisdictions that adopt the “moral wrong” interpretation); *People v. Serravo*, 823 P.2d 128, 133–40 (Colo. 1992) (adopting “moral wrong” interpretation, and citing cases from some jurisdictions that adopt the “legal wrong” interpretation and cases from other jurisdictions that adopt the “moral wrong” interpretation); *State v. Wilson*, 700 A.2d 633, 636–43 (Conn. 1997) (adopting “moral wrong” in its interpretation of the cognitive prong of the ALI insanity test, and citing cases from other jurisdictions that adopt the “moral wrong” interpretation in construing their *M’Naghten* insanity test); *State v. Worlock*, 569 A.2d 1314, 1320–22 (N.J. 1990) (adopting “moral wrong” interpretation). In *Ivery v. State*, 686 So. 2d 495, 501 (Ala. Crim. App. 1996), the court noted that “an acute minority” of jurisdictions interpret “wrongfulness” to mean both “moral and legal wrongfulness.” *But see* *Laney v. State*, 486 So. 2d 1242, 1246 (Miss. 1986) (adopting, without extensive discussion, the “legal wrong” interpretation).

248. *People v. Coddington*, 2 P.3d 1081, 1144 (Cal. 2000), *overruled by* *Price v. Superior Court*, 25 P.3d 618 (Cal. 2001) (overruled on different grounds).

whether the act would be condemned or condoned by society, courts applying the “moral wrong” standard measure morality by societal standards, not the defendant’s personal standard.²⁴⁹ If the defendant knew that the act was contrary to society’s moral standards, the defendant will not be found insane even if the act was not wrongful according to the defendant’s personal moral code²⁵⁰ or even if the defendant believed, in the words of Cardozo, “that some supposed grievance or injury will be redressed, or some public benefit attained.”²⁵¹ A terrorist, knowing that murder is not acceptable to the society he seeks to influence, can not escape criminal responsibility by proving that his action was motivated by a sincere belief that his political cause justified his conduct.²⁵²

But what if the defendant acts, not merely out of a personal moral code, but out of religious conviction? Can deific decree cases be appropriately distinguished from other cases of religiously inspired action? A Washington Supreme Court justice, dissenting in a deific decree case, questioned whether a defendant should be absolved from criminal responsibility if God directly commands him or her, but be held criminally responsible if he or she merely interprets his or her religious beliefs to require the act.²⁵³ That, however, is exactly what the deific decree doctrine seeks to do. It does so because it assumes the defendant who heard the command is suffering from a delusion that so clouds his or her judgment that he or she believes that committing the crime is the morally correct thing to do. This defendant has a mental disorder that makes him or her unable to distinguish right from wrong—even society’s concept of “wrong.”

In contrast, the defendant who simply responds to deeply held religious beliefs is not delusional. Although his or her religious beliefs may be as strong as those of the defendant who responds to a deific decree, this defendant cannot claim that mental disorder negates the

249. *State v. Worlock*, 569 A.2d at 1321–22; *see also State v. Wilson*, 700 A.2d at 643 (construing the cognitive prong of the ALI insanity test, and holding that the jury should be instructed that a defendant does not appreciate the wrongfulness of his conduct if, at the time he acted, “he did not have the substantial capacity to appreciate that his actions were contrary to societal morality, even though he may have been aware that the conduct in question was criminal”).

250. *See, e.g., People v. Coddington*, 2 P.3d at 1144; *State v. Wilson*, 700 A.2d at 643; *State v. Worlock*, 569 A.2d at 1322.

251. *People v. Schmidt*, 110 N.E. 945, 948 (N.Y. 1915); *see also People v. Serravo*, 823 P.2d at 136 (stating that defendant’s belief “that either personal or public good will result” does not constitute insanity if defendant knows the act is morally wrong).

252. As Justice Cardozo stated: “The anarchist is not at liberty to break the law because he reasons that all government is wrong.” *People v. Schmidt*, 110 N.E. at 950.

253. *State v. Cameron*, 674 P.2d 650, 659 (Wash. 1983) (Dimmick, J., dissenting). Two other justices concurred in Justice Dimmick’s dissent. *Id.*

criminality of his or her behavior. Despite the moral obligation of the person’s religious beliefs, society appropriately holds this defendant legally accountable for actions that it has prohibited. Cardozo gives the example of a devotee of a religious cult that practices polygamy or human sacrifice. Such a person is criminally responsible, Cardozo tells us, not because the belief is false according to society’s majority, but rather, because the belief is not the product of a mental disorder.²⁵⁴

Cardozo cites, and relies in part on, Judge Cox’s charge to the jury in *Guiteau’s Case*, thirty-three years earlier. Judge Cox attempted to distinguish insane delusions from social, political, and religious beliefs. Insane delusions do not result from reasoning and reflection; social, political, and religious beliefs do. He noted that some religious opinions—citing the belief in animal magnetism and spiritualism as examples—are “absurd in the extreme.”²⁵⁵ They may result from poor reasoning, ignorance, fraud, or “perverted moral sentiments.”²⁵⁶ Nevertheless, these opinions are founded on some evidence and are subject to change by other external evidence or sounder reasoning. Such evidence or reasoning, however, will not dispell a delusion.²⁵⁷

People may be inspired to do an act by either a sane religious belief or an insane delusion. Judge Cox noted that many Christians believe “that they themselves 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.”²⁵⁸ If, however, a man sincerely believed he heard God’s voice commanding him to act in a way that was contrary to his previous moral and mental convictions, this belief would be an “imaginary inspiration amounting to an insane delusion.”²⁵⁹ Although Judge Cox clearly distinguishes “sane” religious beliefs from “insane” delusions, his example fails to explain why the deific decree belief is appropriately declared delusional. At best, he suggests that the sudden change in the defendant’s beliefs justifies a

254. *People v. Schmidt*, 110 N.E. at 950; *see supra* text accompanying notes 127–32 (discussing *Reynolds v. United States*, 98 U.S. 145, 166–68 (1878), in which the Supreme Court upheld the constitutionality of a statute prohibiting polygamy and affirmed the criminal conviction of a Mormon who engaged in polygamy).

255. *Guiteau’s Case*, 10 F. 161, 171 (C.C.D.C. 1882).

256. *Id.*

257. *Id.*

258. *Id.* at 177.

259. *Id.*

conclusion that mental disorder is the precipitating cause, not true religious revelation.

Recent cases do not discuss this issue.²⁶⁰ Rather, courts rely upon testimony of psychiatrists and psychologists to establish whether the defendant was experiencing an insane delusion at the time the alleged deific decree was heard.²⁶¹ Often, when these experts conclude that no delusion existed, courts characterize the defendant's belief, not as a true religious belief, but as a personal moral belief or personal moral code.²⁶² And personal moral beliefs, just as political beliefs, do not warrant exculpation.²⁶³

260. In fact, research reveals only one case decided in the last twenty years in which the court attempted to distinguish a defendant's clearly identified religious belief from a deific decree delusional belief. In *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983), the defendant, who professed to follow the Moscovite religion, believed he was under a duty to kill his wife if she committed adultery. *Id.* at 491. He was convicted of first degree murder for stabbing his wife twenty-four times with a knife and decapitating her with an ax. *Id.* at 490. Despite the defendant's history of mental disorder that was serious enough to require hospitalization, *id.* at 491, the Washington Supreme Court affirmed the conviction, finding that the defendant failed to prove that his alleged delusions stemmed from a mental disorder, *id.* at 495. Because the defendant did not claim to have acted in response to a deific command, the court simply equated the defendant's religious beliefs to the beliefs of devotees of religious cults who practice human sacrifice. *Id.* at 494.

261. In nine of the ten cases cited in footnote 236, *supra*, in which appellate courts considered and applied the deific decree doctrine, the courts specifically discussed, and relied upon, testimony of psychiatrists and psychologists to determine whether the defendant was delusional at the time he or she acted. In *Galloway v. State*, 698 P.2d 940 (Okla. Crim. App. 1985), the court specifically held that the defense attorney's failure to introduce expert and lay evidence that the defendant acted in response to a deific decree delusion and was therefore insane denied the defendant effective assistance of counsel. *Id.* at 941-42.

In eight of the nine cases cited in footnote 238, *supra*, in which appellate courts considered criminal behavior inspired by nondeific decree delusions or nondelusional, but religiously motivated conduct, the courts specifically discussed, and relied upon, testimony of psychiatrists and psychologists to determine whether the defendant was delusional at the time he or she acted.

262. See, e.g., *People v. Coddington*, 2 P.3d 1081, 1144 (Cal. 2000), *overruled by* *Price v. Superior Court*, 25 P.3d 618 (Cal. 2001) (overruled on different grounds) (affirming murder conviction of defendant who "had rejected the Judeo-Christian concept of God, had examined other religions, and ultimately evolved his own concept of God as a force running through the universe"); *People v. Serravo*, 823 P.2d 128, 138 (Colo. 1992) (stating that "[a] personal and subjective standard of morality should not be permitted to exonerate a defendant"); *State v. Worlock*, 569 A.2d 1314, 1324 (N.J. 1990) (stating that a "[b]elief in an idiosyncratic code of morality does not constitute the defense of criminal insanity"); *People v. Wood*, 187 N.E.2d 116, 122 (N.Y. 1962) (finding that the jury could reasonably have found that defendant, who believed he was "God's emissary" and was charged with killing those whom he believed to be degenerates, "was operating under a standard of morality he had set up for himself and which applied only to him").

263. See *supra* text accompanying notes 249-52; see also *supra* text accompanying notes 62-66 (discussing *Welsh v. United States*, 398 U.S. 333, 342-44 (1970), in which the Supreme Court distinguished religious beliefs from a personal moral code).

The deific decree doctrine has been criticized as incoherent.²⁶⁴ If a defendant can be found insane for responding to the irresistible command of God, then isn't any defendant who responds to an irresistible command delusion from whatever source, be it the Devil, an extraterrestrial being, or other force, equally insane? If a deific decree is appropriately construed not as a religious belief but as a delusion, then isn't God's moral authority to command a person to take the life of another irrelevant to the question of whether the defendant was insane at the time he or she acted? By this analysis, all command delusions are created equal.

But deific decree delusions may be rightly distinguished from other command delusions, not because God actually has greater moral authority to decide who shall live and who shall die, but because the person who believes in God lacks any basis to refuse God's command. It is not God's unlimited power to inflict punishment for disobedience, however, that distinguishes a deific decree delusion from other command delusions. After all, to the delusional defendant, the perceived power of the Devil, an extraterrestrial being, or other force may seem equally compelling. Under a properly applied *M'Naghten* test, however, the finding of insanity depends upon whether the defendant knew his or her conduct was wrong—a question of cognitive impairment—not upon whether the defendant's free will was overcome by an irresistible impulse or other inability to control his or her behavior—a question of volitional impairment. Under *M'Naghten*, the defendant's fear of God's all-mighty power does not free him or her from adhering to society's laws. Rather, it is the defendant's inability to discern that a righteous and all-knowing God—the source of all truth and moral judgment—has not spoken to him or her and commanded that the defendant kill another.

This distinction—between God as all-powerful and God as the source of all truth—may explain why Chief Justice Shaw declared in *Rogers* that a defendant who acts in response to a deific decree delusion “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.”²⁶⁵ The defendant's belief in God's power to make the moral judgment, not the defendant's belief in God's power to inflict punishment on a disobeying defendant, warrants the insanity finding. As

264. Hawthorne, *supra* note 191, at 1775.

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

Judge Cox instructed the *Guiteau* jury: “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.”²⁶⁶ The defendant, acting under a deific decree, does not know that society will condemn the act as immoral. A delusional defendant who hears a command delusion from some other source can be far less certain that society will condone the act. Cardozo tied deific decree delusions to *M’Naghten’s* cognitive focus by declaring that if a mother “is inspired by an insane delusion that God had appeared to her and ordained the sacrifice [of her infant child,] [i]t seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.”²⁶⁷

Recent cases apply the same analysis. The Supreme Court of Connecticut observed:

[W]e are hard pressed to envision an individual who, because of mental disease or defect, truly believes that a divine power has authorized his actions, but, at the same time, also truly believes that such actions are immoral. An individual laboring under a delusion that causes him to believe in the divine approbation of his conduct is an individual who, in all practicality, is unlikely to be able fully to appreciate the wrongfulness of that conduct.²⁶⁸

The Colorado Supreme Court described a deific decree delusion as one “that virtually destroys the cognitive ability to distinguish the morality or immorality of an act, even though the person may be aware the act is contrary to law.”²⁶⁹

The deific decree doctrine is not an exception to the *M’Naghten* test. The deific decree doctrine is not even a separate doctrine.²⁷⁰ Justice Cardozo never claimed that it was. Neither did Judge Cox nor Chief Justice Shaw. Rather, a deific decree is merely a factual circumstance in which the law is willing to assume that the delusional, but sincerely believing, defendant responded to God’s command because he or she did not know the act was wrong. The law is unwilling to make a similar assumption when a delusional defendant responds to other command hallucinations. In the deific decree situation, the prosecutor may offer

266. *Guiteau’s Case*, 10 F. 161, 182 (C.C.D.C. 1882). Judge Cox also instructed the jury that a defendant who acts under a deific decree is “incapable of seeing that it was a wrong thing to do.” *Id.* at 186.

267. *People v. Schmidt*, 110 N.E. 945, 949 (N.Y. 1915).

268. *State v. Wilson*, 700 A.2d 633, 641 (Conn. 1997) (applying the cognitive prong of the ALI insanity test).

269. *People v. Serravo*, 823 P.2d 128, 136 (Colo. 1992) (applying the *M’Naghten* insanity test); *see also* *State v. Potter*, 842 P.2d 481, 489 (Wash. Ct. App. 1992) (holding that defendant was not entitled to a jury instruction allowing a finding of insanity if defendant, acting under a deific decree, had “cognitive ability” to distinguish right from wrong “but lacked volitional control”).

270. Christopher Hawthorne, a critic of the deific decree doctrine, declares it to be a “pseudo-doctrine.” *See generally* Hawthorne, *supra* note 191, at 1774–79.

evidence to establish that the defendant knew his or her act was wrong. In a nondeific command delusion situation, the defense may offer evidence that the defendant did not know his or her act was wrong. In either situation, the jury decides whether the defendant possessed or lacked such knowledge.

The deific decree doctrine can be subjected to one more criticism—one that to the best of our knowledge has not yet been suggested. The deific decree doctrine assumes that when the defendant heard the voice of God commanding him or her to kill, the defendant was experiencing a delusion—that he or she was not experiencing a true religious revelation. The critics of the deific decree doctrine also make the same assumption. But is that assumption warranted? Part III.C challenged that assumption, using Supreme Court decisions interpreting the meaning of religious belief.²⁷¹ Part V challenges that assumption by examining the psychiatric definition of delusion.

V. DEFINING DELUSION

A. Nineteenth Century Definition

Throughout history, delusional thought has been considered the very essence of insanity.²⁷² And just as our society today defines insanity in much the same way society defined insanity in the mid-nineteenth century,²⁷³ psychiatrists today define delusion in much the same way they defined delusion in the mid-nineteenth century.²⁷⁴ In 1856, only a few years after the *M’Naghten* decision, John Charles Bucknill, M.D.,²⁷⁵

271. See *supra* text accompanying notes 96–124.

272. For example, in the celebrated trial of James Hadfield for shooting at (but missing) King George III, Thomas Erskine, who represented the defendant, asserted: “*Delusion*, . . . where there is no frenzy or raving madness, is the true character of insanity.” *The Trial of James Hadfield* (K.B. 1800), in 27 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1281, 1314 (1820).

273. See *supra* text accompanying notes 172–91 (discussing *M’Naghten* and other tests of insanity, and the reascendance of *M’Naghten* following the trial of John Hinckley).

274. For an excellent discussion of the meaning of delusions and the various ways they are categorized today, see generally ANDREW SIMS, SYMPTOMS IN THE MIND: AN INTRODUCTION TO DESCRIPTIVE PSYCHOPATHOLOGY 101–32 (2d ed. 1995).

275. Dr. Bucknill was “Licentiate of the Royal College of Physicians, Fellow of University College, and Fellow of the Royal Medical and Chirurgical Society, London, and physician to the Devon County Lunatic Asylum.” JOHN CHARLES BUCKNILL, UNSOUNDNESS OF MIND IN RELATION TO CRIMINAL ACTS title page of original edition (1856), reprinted in *INSANITY AND THE LAW—TWO NINETEENTH CENTURY CLASSICS*

wrote *Unsoundness of Mind in Relation to Criminal Acts*, an award-winning essay.²⁷⁶ “In common parlance,” Dr. Bucknill explained, “a delusion is either a deception or an error of opinion.”²⁷⁷ The tricks of a magician delude or deceive their viewers. If a person believes the trick is real, the person could also be viewed as deluded in that he or she is mistaken or has made an error of opinion.²⁷⁸ If popular opinion determines what constitutes a delusion, then “[t]he worship of Buddha, or of Vishnu, and other false religions”²⁷⁹ could be characterized as delusions.

Such conventional understanding of delusion is far too broad for medico-legal purposes. According to Dr. Bucknill, delusions are limited to intellectual errors that immediately affect a person’s judgment.²⁸⁰ They do not include false perceptions of the senses, for sensations do not exist only in the imagination of the individual.²⁸¹ Delusions refer to “an operation of the mind peculiar to insane persons.”²⁸² Dr. Bucknill suggested the following definition: “*A delusion is a belief in the existence of things which have no existence in reality, or an erroneous perception of the nature of things, or of their relation to each other, occasioned by cerebromental disease.*”²⁸³ He acknowledged, however, that “there is no certain method of distinguishing between the erroneous intellectual operations of a diseased mind, and those of the sane but imperfect reasoners who abound in society.”²⁸⁴

Judge Cox, in instructing the *Guiteau* jury twenty-six years later, used similar language to define delusion: “[T]he *insane delusion*, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual.”²⁸⁵ As examples of delusions, Judge Cox mentioned a belief, with no reason to support it, that someone is attempting to kill the person, or that the person possesses great wealth, or

(1981).

276. The King and Queen’s College of Physicians in Ireland awarded Dr. Bucknill the Sugden Prize for his essay. *Id.*

277. *Id.* at 33.

278. *Id.*

279. *Id.* at 34.

280. *Id.* at 33.

281. *Id.* at 34; *see infra* note 345, discussing the distinction between delusions and hallucinations.

282. BUCKNILL, *supra* note 275, at 34.

283. *Id.*

284. *Id.*

285. *Guiteau’s Case*, 10 F. 161, 170 (C.C.D.C. 1882).

that [the person] has invented something which will revolutionize the world, or that [the person] is president of the United States, or . . . God, or Christ, or that [the person] is dead, or . . . immortal, or . . . has a glass arm, or . . . is pursued by enemies, or that [the person] is inspired by God to do something.²⁸⁶

In each of Judge Cox’s examples, except the last, the person’s belief can be proven to be false. But a belief that God spoke and commanded the person to do an act cannot. Because such belief cannot be proven to be false, we question the appropriateness of including the deific decree example as a delusion. Judge Cox’s attempt to characterize a deific decree as a delusion demonstrates the difficulty of distinguishing delusions from rational, but potentially erroneous, ideas. Dr. Bucknill appropriately cautioned that no certain method exists to distinguish between them.²⁸⁷

Judge Cox explained that the “inspired by God” example is “a case of imaginary inspiration amounting to an insane delusion” if the person acts “in reversal of his whole previous moral bent and mental convictions.”²⁸⁸ His analysis is not persuasive.²⁸⁹ If God really did speak to a person and commanded that he or she perform some act, that person is very likely to think and act entirely differently than he or she did before the revelation. This would be true even if the person did not believe in any particular religion or even in God prior to that event. It would also be true even if the person disavowed the religious nature of the belief some time later, claiming that he or she now acknowledges that it was a delusion, and that he or she should be found insane. The insanity defense focuses on the defendant’s knowledge of right and wrong at the time he or she acted unlawfully, not at the time of trial when the defendant seeks to avoid criminal responsibility by claiming that he or she was beguiled by delusion at the time of the act.

Perhaps Judge Cox’s decision to treat a deific decree as a delusion and not as a religious belief was influenced by Dr. Bucknill’s suggested method for diagnosing delusions. Just as a physician considers fever as one symptom of, but not determinative of, pneumonia, so too a physician considers an absurd belief as one symptom of, but not determinative of, insanity. To have diagnostic value, the belief must be considered together

286. *Id.* at 170–71; *see supra* text accompanying notes 255–59 (discussing Judge Cox’s attempt to distinguish insane delusions from social, political, and religious beliefs).

287. *See supra* text accompanying note 284.

288. *Guiteau’s Case*, 10 F. at 177.

289. *See supra* text accompanying note 259.

with other symptoms.²⁹⁰ For example, Dr. Bucknill asserted that a belief in parricide, “when taken in connection with sudden change of habits and disposition; with bodily indisposition, loss of rest, and other indications of nervous disturbance; and followed by the homicide of a beloved parent, that strange opinion is at once recognized as the fantasy of a diseased brain.”²⁹¹

Judge Cox informed the jury that a delusion is a firmly held but false belief that is out of character for the individual. Specifically, Judge Cox told the jury:

There are cases in which a man’s mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an *insane delusion*, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature.²⁹²

A belief in parricide, however, can be distinguished from a belief that God commanded a person to kill. A deific decree qualifies as a religious belief.²⁹³ Although society may wish to characterize the deific decree belief as absurd or false, it cannot, consistent with our Constitution, do so.

B. The DSM

Today, mental disorders are identified and classified in two definitive works. The first, used by psychiatrists throughout the world—but not generally used in the United States—is the *International Classification of Diseases (ICD)*, published by the World Health Organization, and now in its tenth revision.²⁹⁴ Although the *ICD* identifies persistent delusional disorders as mental disorders, and uses the word “delusion” in defining such disorders, it does not define the word “delusion.”²⁹⁵ The

290. BUCKNILL, *supra* note 275, at 34.

291. *Id.* at 34–35.

292. Guiteau’s Case, 10 F. at 166.

293. *See supra* discussion accompanying notes 96–124.

294. WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS: TENTH REVISION (ICD-10) (1992). Currently, in the United States, psychiatrists use the *ICD-9-CM*, which is the ninth revision, clinical modification of the *ICD*. Before *ICD-10* can be implemented in the United States, it must be converted into “American” english and approved by various private and governmental organizations. WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES, NINTH REVISION, CLINICAL MODIFICATION 19 (5th ed. 1998).

295. Andrew Sims, *Delusional Syndromes in ICD-10*, 159 BRIT. J. PSYCHIATRY 46, Nov. 1991, at 47. Sims discusses the various psychiatric diagnoses described in *ICD-10* that list delusions as a symptom. *See also* WORLD HEALTH ORG., THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIOURAL DISORDERS: CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES 97–98 (1992).

second, used by psychiatrists²⁹⁶ in the United States, is the *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, published by the American Psychiatric Association, and now in its fourth edition.²⁹⁷ The *DSM* is often referred to as "the psychiatric profession's diagnostic Bible."²⁹⁸

This "Bible," however, is not infallible. In fact, even the drafters of this manual of mental disorders question the distinction between "mental" disorders and "physical" disorders, calling it "a reductionistic anachronism of mind/body dualism."²⁹⁹ The term "mental disorders" continues to be used, they admit, because no appropriate substitute has been found.³⁰⁰ More importantly, in the fourth edition of the *DSM (DSM-IV)*, the drafters acknowledge: "[A]lthough this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder . . . lacks a consistent operational definition that covers all situations."³⁰¹ Although various concepts have been used to define mental disorder, "none is equivalent to the concept, and different situations call for different definitions."³⁰² The drafters expressed their particular concern that use of *DSM-IV* for forensic purposes poses "significant risks that diagnostic information will be misused or misunderstood."³⁰³ Although "DSM-IV is a categorical classification that divides mental disorders into types based on criteria sets with defining features[,] . . . there is no assumption that each category of mental disorder is a completely discrete entity with

296. Although we refer to psychiatrists in this Article, we note that psychologists also use the *Diagnostic and Statistical Manual of Mental Disorders* as the definitive authority for diagnosing mental disorders.

297. *DSM-IV*, *supra* note 14. The first edition of the *DSM* was published in 1952. Subsequent revisions were published in 1968 (*DSM-II*), 1980 (*DSM-III*), 1987 (*DSM-III-R*), 1994 (*DSM-IV*) and 2000 (*DSM-IV-TR*).

298. *United States v. Harris*, No. S192 Cr. 455, 1994 WL 683429, at *4 (S.D.N.Y. Dec. 6, 1994) (quoting an article in *N.Y. TIMES*, Apr. 19, 1994); *see also* Mancuso v. Consol. Edison Co., 967 F. Supp. 1437, 1454 (S.D.N.Y. 1997) (citing *Harris*, 1994 WL 683429, at *4, and mentioning testimony that the *DSM* is the "standard manual used to make diagnoses by psychologists"); *State v. Hoskins*, 14 P.3d 997, 1019 (Ariz. 2000) (describing *DSM-IV* as "the Bible of psychiatrists and psychologists"); *Ogden v. J.K.M.*, 557 N.W.2d 229, 234 (N.D. 1996) (Sandstrom, J., dissenting) (describing testimony of a psychiatrist characterizing *DSM-IV* as the Bible).

299. *DSM-IV*, *supra* note 14, at xxi.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at xxiii.

absolute boundaries dividing it from other mental disorders or from no mental disorder.”³⁰⁴

DSM-IV has no underlying theoretical basis.³⁰⁵ The diagnoses, other than mental disorders induced by substances or medical conditions, do not carry any implications about the causes of the disorders. A condition may be classified as a disorder without any knowledge of the etiology of the disorder.³⁰⁶ *DSM-IV* simply offers pragmatic descriptions of the conditions it characterizes as mental disorders.³⁰⁷ And how were these descriptions derived? In evaluating proposals to define or modify taxonomy, drafters relied upon “expert opinion, rather than laboratory test, as the ‘gold standard.’”³⁰⁸ Members of the work groups who developed the diagnoses “were instructed that they were to participate as consensus scholars and not as advocates of previously held views.”³⁰⁹ In the effort to achieve consensus, political compromise, rather than rigorous scientific research, was necessary.³¹⁰

Neither is this “Bible” immutable. The drafters of *DSM-IV* acknowledge that the consensus about classification existed at the time the manual was first published and that “[n]ew knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in *DSM-IV*, to the identification of new disorders, and to the removal of some disorders in future classifications.”³¹¹

304. *Id.* at xxii.

305. DAVID MECHANIC, *MENTAL HEALTH AND SOCIAL POLICY* 22 (4th ed. 1999). Although some might view the absence of a theoretical basis as a weakness, the drafters of *DSM-IV* deliberately chose not to identify with any specific theory of mental disorder, thus avoiding conflicts between adherents of various psychiatric schools of thought.

306. *DSM-IV*, *supra* note 14, at xxi.

307. MECHANIC, *supra* note 305, at 22. Allen Frances, M.D., who chaired the Task Force on *DSM-IV* and who co-authored a guidebook to aid clinicians in using *DSM-IV*, wrote:

The DSM “mental disorders” are best understood as descriptive syndromes likely to assist in our increased understanding of the underlying disease, but only in selected cases do they, as currently defined, actually represent such diseases. . . . [I]t is to be hoped fervently that the descriptive system of diagnosis will gradually yield to categorization that is based on a more fundamental understanding of the pathogenesis of mental disorders.

ALLEN FRANCES ET AL., *DSM-IV GUIDEBOOK* 17 (1995).

308. Gretchen L. Haas et al., *Dr. Haas and Associates Reply*, 150 *AM. J. PSYCHIATRY* 995 (1993) (letter to the editor).

309. *DSM-IV*, *supra* note 14, at xv.

310. MECHANIC, *supra* note 305, at 22. In discussing the controversy about how neuroses should be dealt with in *DSM-III*, Robert L. Spitzer, M.D., who chaired the Task Force on Nomenclature and Statistics, and a colleague, reported: “The entire process of achieving a settlement seemed more appropriate to the encounter of political rivals than to the orderly pursuit of scientific knowledge.” Ronald Bayer & Robert L. Spitzer, *Neurosis, Psychodynamics, and DSM-III: A History of the Controversy*, 42 *ARCHIVES GEN. PSYCHIATRY* 187, 195 (1985).

311. *DSM-IV*, *supra* note 14, at xxiii.

A new text revision of the diagnostic manual (*DSM-IV-TR*) was published in 2000.³¹²

Despite its deficiencies and limitations, despite its "work-in-progress" status, the *DSM* is the psychiatric profession's official nomenclature for defining mental disorder in the United States.³¹³ Nothing exists—or is likely to come into existence—to compete with it. *DSM*'s rise to prominence began in 1980 with the publication of the third edition (*DSM-III*). "DSM-III introduced a number of important methodological innovations, including explicit diagnostic criteria, a multiaxial system, and a descriptive approach that attempted to be neutral with respect to theories of etiology."³¹⁴ Explicit diagnostic criteria were constructed and validated through extensive empirical research.³¹⁵ In contrast, *DSM-III-R*, published in 1987, and *DSM-IV*, published in 1994, were far more modest in innovation and in impact. In essence, both merely fine-tuned *DSM-III*, correcting errors and eliminating inconsistencies. Both remain close to *DSM-III* in content and definitions.³¹⁶ In fact, work on *DSM-IV* was undertaken not because a further revision of *DSM* was needed, but because the American Psychiatric Association sought to coordinate coding systems with the tenth edition of the World Health Organization's *ICD (ICD-10)*, which was in the process of development.³¹⁷

C. *The DSM-IV Definition of Delusion and Its Critique*

Appendix C to *DSM-IV* contains a Glossary of Technical Terms.³¹⁸ Of the seventy-four terms in that Glossary, more space is devoted to explaining "delusion" than is devoted to any other term.³¹⁹ The first

312. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION (*DSM-IV-TR*) (4th ed. 2000). Because this Article was written before *DSM-IV-TR* was published, and because *DSM-IV-TR* did not alter the *DSM-IV* definition of "delusion," *id.* at 821–22, or "bizarre delusion," *id.* at 821, as those terms apply to the diagnoses of schizophrenia, *id.* at 297–313, or delusional disorder, *id.* at 323–28, this Article continues to refer to *DSM-IV*.

313. *DSM-IV*, *supra* note 14, at xv.

314. *Id.* at xvii–xviii.

315. *Id.* at xviii.

316. MECHANIC, *supra* note 305, at 21.

317. *Id.*; *see also* *DSM-IV*, *supra* note 14, at xxi (asserting that drafters of *ICD-10* and *DSM-IV* "worked closely to coordinate their efforts, resulting in much mutual influence").

318. *DSM-IV*, *supra* note 14, app. C at 763–71.

319. The Glossary devotes thirty-eight lines to explaining "delusion," *id.* at 765–66, and thirty-five lines to explaining "hallucination," *id.* at 767. The third longest explanation is for "psychotic," which receives only fourteen lines. *Id.* at 770.

sentence is an affirmative statement about what 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 or evidence to the contrary.”³²⁰

The second sentence is a negative statement about what a delusion is not: “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).”³²¹

Taken together, these two sentences constitute the definition of delusion, as they establish the conditions required to diagnose a delusion.

The third sentence discusses a subcategory of false beliefs, one that involves value judgments. For example, a person who asserts: “I am the most brilliant law professor (or psychiatrist) in the world,” is making a value judgment. Such beliefs are declared to be delusions “only when the judgment is so extreme as to defy credibility.”³²² The final sentence of the first paragraph is commentary, cautioning the reader that “[i]t is often difficult to distinguish between a delusion and an overvalued idea.”³²³ An overvalued idea is described as an unreasonable belief or idea, but one the individual does not hold as firmly as the false belief held by the delusional individual.

The second paragraph contains descriptions of twelve common types of delusions, subdivided according to content. Among them are: bizarre delusions, grandiose delusions, persecutory delusions, somatic delusions, thought broadcasting, and thought insertion.³²⁴ Noticeably absent from this list are religious “delusions.” The *DSM-IV* definition of delusion (the first two sentences of the Glossary explanation) is virtually identical³²⁵ to the *DSM-III* definition,³²⁶ published in 1980, and to the

320. *Id.* at 765. Actually, the first “sentence” is actually a sentence fragment, containing no subject or verb.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 765–66.

325. Both *DSM-III* and *DSM-III-R* begin their definitions of delusion with the phrase: “A false personal belief.” The only change made in the *DSM-IV* definition was to eliminate the word “personal.” Manfred Spitzer, M.D., Ph.D., challenged the use of the adjective “personal” as it appeared in *DSM-III-R*. Although the word “implies that the very belief in question is not shared by others and has somehow strange features,” Dr. Spitzer noted that “in the case of shared delusions, the belief may in fact not be held by just one person and thus may not be personal; however, the content in question is likely to be rather idiosyncratic.” Manfred Spitzer, *On Defining Delusions*, 31 *COMPREHENSIVE PSYCHIATRY* 377, 379 (1990) [hereinafter Manfred Spitzer]. Because *DSM-III-R* was being revised at the time Dr. Spitzer’s critique was published, the American Psychiatric Association may have decided to delete the word “personal” in the *DSM-IV* definition in response to Dr. Spitzer’s argument.

326. AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III)* app. B at 356 (3d ed. 1980) [hereinafter *DSM-III*].

DSM-III-R definition,³²⁷ published in 1987.

The DSM definition appears to be a logical refinement of Judge Cox's nineteenth century definition. Instead of "an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual,"³²⁸ as Judge Cox informed the *Guiteau* jury, a delusion is now defined as "[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 or evidence to the contrary."³²⁹

Despite this historical harmony and interprofessional congruency, the definition of delusion is far from settled. One critic declared that delusion "has defied unambiguous definition."³³⁰ A second explained why, despite the facade created by an accepted definition, no acceptable definition exists:

Most attempted definitions begin with "false belief," and this is swiftly amended to an unfounded belief to counter the circumstance where a person's belief turns out to be true. Then caveats accumulate concerning the person's culture and whether the beliefs are shared. Religious beliefs begin to cause problems here and religious delusions begin to create major conflicts. The beleaguered psychopathologist then falls back on the "quality" of the belief—the strength of the conviction in the face of contradictory evidence, the "incorrigibility," the personal commitment, etc. Here, the irrationality seen in "normal" reasoning undermines the specificity of these characteristics for delusions as does the variable conviction and fluctuating insight seen in patients with chronic psychoses who everyone agrees are deluded. Finally we have the add-ons: the distress caused by the belief, its preoccupying quality, and its maladaptiveness generally, again sometimes equally applicable to other beliefs held by non-psychotic fanatics of one sort or another. In the end we are left with a shambles.³³¹

327. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, REVISED (DSM-III-R) app. C at 395 (3d ed. rev. 1987) [hereinafter DSM-III-R].

328. *Guiteau's Case*, 10 F. 161, 170 (C.C.D.C. 1882); see *supra* discussion accompanying notes 285–86.

329. DSM-IV, *supra* note 14, app. C at 765.

330. Edgar Jones, *The Phenomenology of Abnormal Belief: A Philosophical and Psychiatric Inquiry*, 6 PHIL. PSYCHIATRY & PSYCHOL. 1, 1 (1999), available at <http://muse.jhu.edu> (last visited Aug. 9, 2001).

331. Anthony S. David, *On the Impossibility of Defining Delusions*, 6 PHIL. PSYCHIATRY & PSYCHOL. 17, 17–18 (1999) (citations omitted), available at <http://muse.jhu.edu> (last visited Aug. 9, 2001). Dr. David concluded: "Delusions exist in a world of values, assumptions, prejudices, incorrect inferences, superstitions, wishful-thinking, and paranoia (in the non-technical sense). This is what makes delusions

A third critic decried the absence of a scientific approach applied to the definition of delusion, declaring: “Despite their importance in a wide range of psychiatric disorders, understanding of delusions is markedly limited. Virtually every facet of the subject of delusions remains uncharted according to the standards of scientific methodology.”³³² “[W]e remain unclear about precisely what delusions are; and we have as yet no means of identifying them with a laboratory test.”³³³

Perhaps the most detailed and scholarly criticism of the *DSM* definition was written by eminent psychiatrist Manfred Spitzer, M.D. Dr. Spitzer’s article, *On Defining Delusions*,³³⁴ was published in 1990, at a time when *DSM-III-R* was being revised and *DSM-IV* was being developed. He parses the definition, demonstrating that it incorporates unproven factual assumptions, contains internal inconsistencies, and is both vague and ambiguous.

The very first defining feature of a delusion is its falsity. And yet, this criterion is not applicable to some statements that clinicians identify as delusions. Dr. Spitzer specifically mentions religious delusions as examples. He notes that “religious beliefs are neither true nor false, at least in the ‘scientific’ meaning of the words true and false.”³³⁵ Additionally, in many cases, the clinician may be unable to disprove the patient’s claim but still wants to identify the patient’s belief as a delusion.³³⁶ The psychiatrist lacks the resources and expertise to disprove a patient’s claim, for example, that he or she is being followed by the CIA or knows that extraterrestrial beings populate the city. Finally, on rare occasions, delusions may turn out to be true. If a man delusionally believes his spouse is unfaithful, the belief is no less a delusion simply because his delusional jealousy ultimately drives her to an act of infidelity.³³⁷

The *DSM* definition of delusion requires that the “false belief [be] based on incorrect inference about external reality.” Dr. Spitzer notes that, to the extent patients draw incorrect inferences, the phenomenon is properly described as a formal thought disorder and not a disorder of content.³³⁸ Additionally, empirical research has not determined the role

possible and also what makes them impossible to pin down.” *Id.* at 19.

332. Theo C. Manschreck, *Pathogenesis of Delusions*, 18 *PSYCHIATRIC CLINICS N. AM.* 213, 213 (1995). Dr. Manschreck added: “Even phenomenology, certainly biologic underpinnings but also the role of culture and the psychology of delusions are subjects sorely in need of research elaboration.” *Id.*

333. *Id.* at 227.

334. Manfred Spitzer, *supra* note 325.

335. *Id.* at 378–79.

336. *Id.* at 379.

337. *Id.*

338. *Id.* at 379–80.

played by incorrect inferences in delusion formation, if indeed, inferences play any role at all. Thus, this criterion depends upon a theory about the etiology of delusions that is not warranted and violates *DSM's* explicitly stated agenda "to describe psychopathology without reference to psychological etiological theories."³³⁹

The *DSM* definition declares that delusions are "about external reality." But this criterion is inconsistent with what *DSM* says about delusions in describing the symptomatology of schizophrenia. Examples of delusions that are symptoms of schizophrenia include "thought withdrawal," i.e., the belief that the person's thoughts have been taken away by some outside force; "thought insertion," i.e., the belief that alien thoughts have been placed into the person's mind; and "delusions of control," i.e., the belief that the person's body or actions are being manipulated by some outside force.³⁴⁰ And yet, as Dr. Spitzer points out, these so-called delusions describe the individual's subjective experiences, not his or her belief about "external reality."³⁴¹

Finally, Dr. Spitzer asserts that although delusions are regarded as a subset of beliefs, that is, false beliefs, such characterization does not add anything to the definition and, in fact, may be misleading. He notes that delusional patients typically express conviction and certainty about their delusional thoughts, rather than suggest that their thought has been subjected to inquiry and discussion. In other words, delusional patients say that they "*know* that such and such," rather than that they "*think* that such and such." To declare a patient delusional, the psychiatrist must determine that the patient's knowledge claim is merely a belief.

In short, from the subjective point of view, delusions are not beliefs, and from the objective point of view, the notion that delusions are some form of beliefs is true by definition but has no empirical meaning, that is to say, does not properly reconstruct what happens clinically when delusions are diagnosed.³⁴²

339. *Id.* at 380.

340. *Id.* Although Dr. Spitzer quotes directly from *DSM-III-R's* discussion of schizophrenia, *DSM-III-R*, *supra* note 327, at 188, these three phenomena are also specifically identified as delusions in *DSM-IV's* discussion of schizophrenia. *DSM-IV*, *supra* note 14, at 275. Additionally, *DSM-IV's* Glossary definition of "delusion" specifically identifies as common types of delusions: thought insertion, delusions of being controlled, and thought broadcasting, i.e., the belief "that one's thoughts are being broadcast out loud so that they can be perceived by others." *Id.* app. C at 765–66.

341. Manfred Spitzer, *supra* note 325, at 380.

342. *Id.* at 381–82.

D. The Distinction Between Bizarre and Nonbizarre Delusions

A delusion is not a mental disorder per se, it is a symptom of a mental disorder. Other criteria must be satisfied before the delusional individual can be diagnosed with a mental disorder. For example, the *DSM-IV* diagnosis for delusional disorder requires, among other criteria, that the person have nonbizarre delusions of at least one month's duration and that the criteria for schizophrenia have not been met.³⁴³ Nonbizarre delusions are characterized as delusions that involve "situations that occur in real life, such as being followed, poisoned, infected, loved at a distance, or deceived by spouse or lover, or having a disease."³⁴⁴

In contrast, a diagnosis of schizophrenia requires two or more of the following five symptoms during a one-month period: delusions, hallucinations,³⁴⁵ disorganized speech, grossly disorganized or catatonic behavior, or negative symptoms such as affective flattening, alogia, or avolition.³⁴⁶ If, however, the person is experiencing bizarre delusions, only that one symptom is required to meet this diagnostic criterion.³⁴⁷ The *DSM-IV* Glossary defines a delusion as bizarre if it "involves a phenomenon that the person's culture would regard as totally implausible."³⁴⁸ The *DSM-IV* discussion of schizophrenia adds: "Delusions are deemed bizarre if they are clearly implausible and not understandable and do not derive from ordinary life experiences."³⁴⁹ For example, a person is having a bizarre delusion if he or she believes "that a stranger has removed his or her internal organs and has replaced them with someone

343. *DSM-IV*, *supra* note 14, at 301.

344. *Id.*

345. The *DSM-IV* Glossary defines "hallucination" as "[a] sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ. Hallucinations should be distinguished from *illusions*, in which an actual external stimulus is misperceived or misinterpreted." *Id.* app. C at 767. In 1856, Dr. Bucknill used a similar analysis to distinguish delusions from hallucinations. *See supra* text accompanying notes 280–81. Under *DSM-IV*, if a person claims to hear the voice of God telling him to kill, this phenomenon could possibly be considered a hallucination, not a delusion.

346. *DSM-IV*, *supra* note 14, at 285. The *DSM-IV* Glossary defines "flat affect" as "[a]bsence or near absence of any signs of affective expression," *id.* at 763, "alogia" as "[a]n impoverishment in thinking that is inferred from observing speech and language behavior," *id.* at 764, and "avolition" as "[a]n inability to initiate and persist in goal-directed activities," *id.*

347. *Id.* at 285. The "characteristic symptoms" of schizophrenia, including delusions and hallucinations, are identified as Criterion A. *See generally id.* at 274–77 (discussing Criterion A symptoms in greater detail). For a diagnosis of schizophrenia, other criteria have to be satisfied, including "social/occupational dysfunction" (Criterion B), "duration" (Criterion C), and "schizoaffective and mood disorder exclusion" (Criterion D). *Id.* at 285. *See generally id.* at 277–78 (discussing Criteria B and C symptoms in greater detail).

348. *Id.* app. C at 765.

349. *Id.* at 275.

else's organs without leaving any wounds or scars."³⁵⁰

In 1980, when *DSM-III* was published, both bizarre and nonbizarre delusions were listed separately as symptoms of schizophrenia, although each was accorded equal weight as a characteristic symptom of that disorder.³⁵¹ In 1987, however, *DSM-III-R* assigned greater diagnostic significance to bizarre delusions, weighing them more heavily than nonbizarre delusions.³⁵² In 1994, *DSM-IV* merely continued this distinction.

When *DSM-III* was revised, the definition of bizarre delusion was also revised. In *DSM-III*, a "bizarre delusion" was defined as "[a] false belief whose content is patently absurd and has no possible basis in fact."³⁵³ Both *DSM-III-R*³⁵⁴ and *DSM-IV*³⁵⁵ define "bizarre delusion" as a false belief "that involves a phenomenon that the person's culture would regard as totally implausible."

The *DSM-IV Sourcebook*, published as a five-volume companion to *DSM-IV*, provides a comprehensive record of the clinical and research support for the decisions made in drafting *DSM-IV*.³⁵⁶ According to the *DSM-IV Sourcebook*, the change in language from *DSM-III*'s "impossible" to *DSM-III-R*'s and *DSM-IV*'s "implausible" was intended to invoke the concept of "nonunderstandability."³⁵⁷ The change was made in order to clarify the definition so to enhance interrater agreement about whether a

350. *Id.*

351. *DSM-III*, *supra* note 326, at 188. Bizarre delusions were listed first, and "somatic, grandiose, religious, nihilistic, or other delusions without persecutory or jealous content" were listed second, separately identified as a Criterion A symptom of schizophrenia. *Id.* "Delusions with persecutory or jealous content" were listed third, but such delusions qualified as a symptom of schizophrenia only "if accompanied by hallucinations of any type." *Id.*

352. *DSM-III-R*, *supra* note 327, at 194.

353. *DSM-III*, *supra* note 326, app. B at 356. The *DSM-III* Glossary definition gives an example of a bizarre delusion: "A man believed that when his adenoids had been removed in childhood, a box had been inserted into his head, and that wires had been placed in his head so that the voice he heard was that of the governor." *Id.* app. B at 356-57.

354. *DSM-III-R*, *supra* note 327, app. C at 395. Despite the change in Glossary definition, *DSM-III-R* continued to use the same example of a bizarre delusion used in the Glossary definition to *DSM-III*. *Id.*; see example discussed *supra* note 353.

355. *DSM-IV*, *supra* note 14, app. C at 765. Despite no change in Glossary definition from *DSM-III-R*, *DSM-IV* deleted the example of a bizarre delusion used in the *DSM-III-R* Glossary. *Id.*; see discussion *supra* notes 353-54.

356. *DSM-IV*, *supra* note 14, at xx. See generally *DSM-IV SOURCEBOOK* (Thomas A. Widiger et al. eds., 1994).

357. Nancy Andreasen, *Schizophrenia and Other Psychotic Disorders*, in 1 *DSM-IV SOURCEBOOK* 343, 345 (Thomas A. Widiger et al. eds., 1994).

bizarre delusion exists or not.³⁵⁸

The decision to accord additional diagnostic weight to bizarre delusions was controversial; the decision to alter the definition of “bizarre” was not. Nevertheless, the definition change appears to have created more, not less, confusion among clinicians. To some, the change was very significant; to others, the change was hardly noticeable.³⁵⁹ A study of forty-five clinicians and researchers revealed poor interrater reliability in distinguishing bizarre from nonbizarre delusions.³⁶⁰ Although the respondents were easily able to identify simple delusions of persecution or jealousy as nonbizarre, they disagreed significantly about delusions with religious, somatic, or grandiose themes.³⁶¹ But instead of questioning whether the definition of “bizarre delusion” was faulty and in need of revision, the researchers simply suggested “that the current concept of bizarre delusions is not reliable and is therefore given too pivotal a position in the current nosology.”³⁶²

In another study involving 214 mental patients, researchers found considerable confusion about what constitutes an implausible, and therefore, bizarre, delusion.³⁶³ Clinicians find it difficult to make categorical determinations of the plausibility of the patient’s belief when they are confronted with situations involving people of diverse ethnic and cultural belief systems or with issues that blur the distinction between science fiction and physical fact.³⁶⁴ As examples, they cited “a Hispanic patient who reports spirit possession, or a fundamentalist

358. Dodi Goldman et al., *Bizarre Delusions and DSM-III-R Schizophrenia*, 149 AM. J. PSYCHIATRY 494, 498 (1992). Originally, the concept of bizarre delusions relied heavily on the writings of Kurt Schneider, who included delusions of being controlled, thought broadcasting, thought insertion, and thought withdrawal as first-rank symptoms of schizophrenia. Research, however, indicated that Schneiderian symptoms were not pathognomic of schizophrenia, and they were de-emphasized in *DSM-III*. When *DSM-III-R* was written, the drafters relied more heavily upon the writings of Karl Jaspers, and the word “implausible” was substituted for “impossible” to prevent the “blurring” that had occurred in the translation from Schneiderian to Jaspersian concepts. Andreasen, *supra* note 357 at 345; see also Manfred Spitzer, *supra* note 325, at 382–84 (discussing the disagreement between Schneider and Jaspers). Kenneth Kendler, M.D., who developed a definition of bizarre delusions using Jaspersian concepts, suggested that the “definition focuses on whether or not it is possible to understand the development of the delusion in terms of the emotional experiences of the delusional patient. Delusions are considered bizarre if they involve thought processes that are so divorced from normal human experience that the delusions are ‘un-understandable.’” Robert L. Spitzer et al., *The Reliability of Three Definitions of Bizarre Delusions*, 150 AM. J. PSYCHIATRY 880, 881 (1993) [hereinafter Robert L. Spitzer et al.].

359. Michael Flaum et al., *The Reliability of “Bizarre” Delusions*, 32 COMPREHENSIVE PSYCHIATRY 59, 59 (1991).

360. *Id.* at 62.

361. *Id.*

362. *Id.*

363. Goldman et al., *supra* note 358, at 494, 498.

364. *Id.* at 498–99.

Christian professing to be controlled by Jesus, or an anxious city dweller who avoids use of the subway because he is convinced that exposure to the electromagnetic field is giving him cancer."³⁶⁵ These researchers also found that "patients with bizarre delusions were not clinically distinguishable from [patients] without bizarre delusions. [In other words,] a history of bizarre delusions [was not] prognostic of a more severe form of [schizophrenia]."³⁶⁶ These researchers, however, did not propose that the definition of "bizarre delusion" be reexamined. Rather, they simply recommended removing the special emphasis given to bizarre delusions in diagnosing schizophrenia.³⁶⁷

Robert Spitzer, M.D., chaired the DSM-III Task Force on Nomenclature and Statistics, chaired the Work Group to Revise DSM-III in the preparation of *DSM-III-R*, and also served as Special Adviser to the Task Force on DSM-IV. He and his co-researchers were less pessimistic about the interrater reliability of the "totally implausible" standard used to measure bizarre delusions in *DSM-III-R* and *DSM-IV*. In their research, twelve clinicians (eleven psychiatrists and one social worker) rated as bizarre or nonbizarre the delusions presented in 180 vignettes using three different definitions of "bizarre."³⁶⁸ Interrater reliability was described as moderate for the "totally implausible" and the "physically impossible" definitions and poor for the "un-understandable" definition.³⁶⁹ Although the reliability of the "totally implausible" definition was described as "only fair," the researchers expressed their belief that it "is probably comparable to that of other clinical concepts used in the DSM-III-R diagnostic criteria for psychotic disorders."³⁷⁰ Because use of the "physically impossible" definition did not substantially improve reliability, they concluded that the "totally implausible" definition should not be changed in *DSM-IV*.³⁷¹

Ironically, the *DSM-IV Sourcebook* states that the "totally implausible" standard was chosen in *DSM-III-R* and *DSM-IV* to invoke

365. *Id.* at 498.

366. *Id.*

367. *Id.* at 499.

368. Robert L. Spitzer et al., *supra* note 358, at 881.

369. *Id.* Under this proposed definition, "[d]elusions are considered bizarre if they involve thought processes that are so divorced from normal human experience that the delusions are 'un-understandable.'" *Id.*

370. *Id.* at 883.

371. *Id.*

the concept of “nonunderstandability,”³⁷² even though Dr. Spitzer and his co-researchers confirm the poor interrater reliability of that concept.³⁷³ Because the interrater reliability of the “totally implausible” definition is significantly higher than the “un-understandable” definition, apparently the raters invoked some other concept when making their assessments.

The Spitzer study was undoubtedly influential in the discussions about revisions to *DSM-III-R* and in the decision to retain—unchanged—the *DSM-III-R* definition of “bizarre” in *DSM-IV*. Nevertheless, the Spitzer study has been severely criticized. Researchers Ramin Mojtabai, M.D., and Robert A. Nicholson, Ph.D., note three methodological problems that could have artificially elevated reliability.³⁷⁴ First, the individuals chosen to rate the vignettes were the authors themselves and their associates, and thus were more uniform in experience and training than a random sample of practicing psychiatrists. Second, each rater rated each vignette three times, using a different definition each time. Use of different definitions applied to the same facts may have unduly highlighted differences in those definitions, and conversely, repeated use of the same facts may have made it more difficult for raters to mentally shift from one definition to another. Third, all of the vignettes were presented to raters as examples of delusions, and raters were asked to evaluate only whether each was a bizarre or nonbizarre delusion. In clinical practice, the psychiatrist must first make an additional judgment: Was the patient’s idea delusional or not?³⁷⁵

Doctors Mojtabai and Nicholson selected a random sample of 30 of the 180 case vignettes used by Dr. Spitzer and his colleagues and distributed them to a random sample of psychiatrists selected from the American Psychiatric Association Membership Directory.³⁷⁶ The results were similar to those of pre-Spitzer studies: interrater reliability was poor.³⁷⁷ The authors concluded that “[t]he symptom of bizarre delusions does not have adequate reliability.”³⁷⁸ They recommended that “differential weighting of bizarre delusions in diagnosing schizophrenia

372. Andreasen, *supra* note 357, at 345; *see supra* text accompanying notes 357–58.

373. Dr. Spitzer and his colleagues also note: “Unfortunately, no study has examined the *validity* of the concept of bizarre delusions in establishing the boundary between schizophrenia and delusional disorder and whether it should have more diagnostic importance than other types of delusions in the diagnosis of schizophrenia.” Robert L. Spitzer et al., *supra* note 358, at 883.

374. Ramin Mojtabai & Robert A. Nicholson, *Interrater Reliability of Ratings of Delusions and Bizarre Delusions*, 152 AM. J. PSYCHIATRY 1804, 1804 (1995).

375. *Id.*

376. *Id.* at 1805.

377. Interrater reliability was in the .38 to .43 range. *Id.*

378. *Id.* at 1806.

should be eliminated from future editions of DSM."³⁷⁹ However, they made no recommendation to redefine the term "bizarre delusion."

VI. DIVINING DELUSION: DENYING THE DEIFIC DECREE?

A. Religious Beliefs as Delusions: In Theory

Are religious beliefs bizarre delusions, nonbizarre delusions, or neither? The answer appears to be "yes, yes, and yes." According to the *DSM-IV* Glossary of Technical Terms, religious beliefs do not qualify as delusions. The definition of "delusion" specifically excludes any belief that is "an article of religious faith."³⁸⁰ Identical language appears in *DSM-III*³⁸¹ and *DSM-III-R*.³⁸² It is not surprising that the American Psychiatric Association declined to declare any religious belief to be a false belief. After all, our country's hallowed organizational document precludes the establishment of any one religion as the official state religion and declares that we, as individuals, are free to exercise any religion of our own choosing. We have become a culturally pluralistic and religiously diverse society.

DSM-IV's "religious faith" exclusion is part of a larger sentence that excludes from the definition of delusion any belief that is "ordinarily accepted by other members of the person's culture or subculture."³⁸³ Identical language appears in *DSM-III*³⁸⁴ and *DSM-III-R*.³⁸⁵ This sentence was inserted to sensitize clinicians to cultural differences existing between themselves and their patients that must be considered in diagnosing what appear to be symptoms of mental disorder, when, in fact, they are not.³⁸⁶ For example, the explanatory material on schizophrenia cautions: "Ideas that may appear to be delusional in one culture (e.g., sorcery and witchcraft) may be commonly held in another. In some cultures, visual or auditory hallucinations with a religious content may be a normal part of religious experience (e.g., seeing the Virgin Mary or hearing God's voice)."³⁸⁷

379. *Id.*

380. *DSM-IV*, *supra* note 14, app. C at 765.

381. *DSM-III*, *supra* note 326, app. B at 356.

382. *DSM-III-R*, *supra* note 327, app. C at 395.

383. *DSM-IV*, *supra* note 14, app. C at 765.

384. *DSM-III*, *supra* note 326, app. B at 356.

385. *DSM-III-R*, *supra* note 327, app. C at 395.

386. *See DSM-IV*, *supra* note 14, at xxiv–xxv (discussing ethnic and cultural considerations in the preparation of *DSM-IV*).

387. *Id.* at 281.

The introduction to *DSM-IV* mentions that hearing or seeing a deceased relative during bereavement is a religious practice or belief that may be misdiagnosed as a manifestation of mental disorder by the “clinician who is unfamiliar with the nuances of an individual’s cultural frame of reference.”³⁸⁸

If hearing God’s voice is considered a normal religious experience for some people—those of a particular culture—then can this religious experience be denied for others who do not share that cultural background? If seeing or hearing a deceased relative during bereavement is a religious practice or belief for some people, can others who hear the voice of a living God at any time be declared delusional for their religious practice or belief? We think not. Although individuals cannot choose their cultural backgrounds, in our society, they can choose their religious beliefs. If a particular belief cannot be identified as a false belief for some individuals, it cannot be so characterized for others who choose to have the identical belief.

The American Psychiatric Association apparently thinks otherwise. Although it urges clinicians to weigh a person’s ethnic and cultural background in assessing whether strange beliefs or practices that appear to be psychopathological are, in fact, normal, it seems unwilling to consider those same beliefs and practices as normal if they are held by a person of a different background. The *DSM* definition of “delusion” excludes only those beliefs that are “ordinarily accepted by other members of the person’s culture or subculture.”³⁸⁹ No allowance is made for the individual who alters his or her religious beliefs, either after long and careful reflection or suddenly upon a religious revelation. No allowance is made for the individual whose new religious beliefs do not conform to the recognized religions of that person’s culture or whose new religious beliefs have not yet matured into a full-fledged, and perhaps, even officially recognized, religion.³⁹⁰ No allowance is made for the individual whose new religious beliefs cannot be stated with clarity and precision and that are not acceptable, logical, consistent, or comprehensible to others.³⁹¹

Although religious beliefs do not qualify as delusions in *DSM-IV*, other beliefs that appear to be religious in content but that can be

388. *Id.* at xxiv.

389. *Id.* at 765.

390. In contrast, the Supreme Court held that the Free Exercise Clause protects individuals who are not members of any religious sect, church, or organization, but whose religious beliefs are sincerely held. *Frazee v. Ill. Dep’t of Employment Sec.*, 489 U.S. 829, 834 (1989); *see supra* text accompanying note 94.

391. In contrast, the Supreme Court precluded courts from declaring a person’s beliefs nonreligious for these reasons. *Thomas v. Review Bd.*, 450 U.S. 707, 714–15 (1981); *see supra* text accompanying notes 85–93.

characterized as false beliefs do. In other words, the *DSM* distinguishes between “authentic” religious beliefs that are characterized as normal and “nonauthentic” religious beliefs that may be characterized as abnormal, that is, psychopathological. To the extent that *DSM-IV* addresses this issue at all, it is unilluminating; it confuses rather than clarifies. *DSM-IV* provides no criteria to aid clinicians in differentiating religious beliefs from delusions. Even in the context of the *DSM*’s admonition to consider cultural context, that source provides no insight to clinicians on who determines whether the belief is culturally congruent, or the criteria to be used in making the decision, or what aspects or dimensions of the belief are important in the assessment.³⁹²

In describing grandiose delusions, a common subcategory of delusions, *DSM-IV*’s Glossary merely states that they include beliefs of a “special relationship to a deity or famous person.”³⁹³ In discussing delusional disorder, *DSM-IV* states: “Grandiose delusions may have a religious content (e.g., the person believes that he or she has a special message from a deity).”³⁹⁴ If a man believes that all people, including himself, are children of God, his belief would not be characterized as delusional. If he believes he is Christ, his belief would be characterized as a grandiose delusion—even though under either belief, he would be a son of God.

Because bizarre delusions are specifically identified in the diagnostic criteria for delusional disorder, and because the essential feature of delusional disorder is the presence of a nonbizarre delusion,³⁹⁵ one would assume that delusions with religious content would be characterized as nonbizarre delusions. That obvious answer is not so certain. Dr. Robert Spitzer, a true architect of *DSM-III* and its subsequent revisions, observed that “it is not at all clear how the [*DSM*] criteria for bizarre delusions should be applied to common delusions with religious themes, such as communicating with God.”³⁹⁶ *DSM-IV* itself provides no guidance. It merely notes: “Although the determination of whether delusions are bizarre is considered to be especially important in distinguishing

392. Susan Sanderson et al., *Authentic Religious Experience or Insanity?*, 55 J. CLINICAL PSYCHOL. 607, 608–09 (1999).

393. *DSM-IV*, *supra* note 14, app. C at 765.

394. *Id.* at 297.

395. *Id.* at 296.

396. Robert L. Spitzer et al., *supra* note 358, at 880. Although Dr. Spitzer was addressing the *DSM-III-R* criteria for bizarre delusions, the “totally implausible” standard of *DSM-III-R* was not altered in *DSM-IV*.

between Delusional Disorder and Schizophrenia, ‘bizarreness’ may be difficult to judge, especially across different cultures.”³⁹⁷ Clinicians must make these “especially important” diagnostic decisions without the American Psychiatric Association’s wise counsel.

The Introduction to *DSM-IV* begins by asserting: “Our highest priority has been to provide a helpful guide to clinical practice.”³⁹⁸ In defining delusions, in distinguishing bizarre from nonbizarre delusions, and in assisting clinicians to distinguish between religious beliefs and delusional beliefs with religious content, the drafters of *DSM-IV* failed to meet their stated objective.

B. Religious Beliefs as Delusions: In Practice

With the limited direction provided them by *DSM-IV*, how do practitioners actually decide whether a claimed religious belief is authentic or delusional? In a recent study, researchers developed eighteen written vignettes designed to assess clinical judgments of religious authenticity and psychopathology. A core vignette was used for each of six dimensions of religious experience.³⁹⁹ Three variations of each core vignette were written to reflect conventional, less conventional, and unconventional practices. For example, in one core vignette that focused on the dimension of what is communicated, individuals heard the voice of God telling them to: (1) baptize their newborn child—a conventional religious practice, (2) prepare a worship service—a less conventional religious practice, or (3) sacrifice their child—an unconventional religious practice.⁴⁰⁰ The vignettes were tested on sixty-seven mental health practitioners of varying professional backgrounds, experience, and religious affiliation.⁴⁰¹

The results were not surprising. For every vignette tested, the conventional response was rated significantly more religiously authentic and significantly less pathological than the less conventional response. For every vignette tested, the less conventional response was rated significantly more religiously authentic and significantly less pathological than the unconventional response.⁴⁰² According to the researchers: “The essential determining factor in the ratings was not the dimensions of religious experience, but the degree to which religious experience

397. *DSM-IV*, *supra* note 14, at 296.

398. *Id.* at xv.

399. Sanderson et al., *supra* note 392, at 609. The six dimensions were: who the experience affects, relationship to God, what is communicated, medium of communication, identity of the presence, and literal interpretation for self-punishment. *Id.* at 609–10.

400. *Id.* at 609.

401. *Id.*

402. *Id.* at 610, 612.

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.”⁴⁰³ The experience that was rated as least religiously authentic and most pathological of all vignettes was complying with God’s request to sacrifice a child.⁴⁰⁴ Ironically, this experience, at least when performed by Abraham, is often considered the most religiously authentic by Jews, Christians, and Muslims;⁴⁰⁵ it is the supreme test of religious faith.

Clinicians seem to be applying a “Good God” theory to measure the authenticity of a religious belief. If the clinician likes God’s message—God tells you to baptize your newborn child—the belief qualifies as religious; if the clinician does not like the message—God tells you to sacrifice your child—it does not. And yet, when a person confronts a sudden tragedy—the person’s child is killed in an auto accident or a doctor discloses that the person has cancer—a typical response is to say: “It was God’s will.” Authentic religious belief cannot be circumscribed by the “Good God” theory.

Based on their research, the authors asserted that some historic religious practices, and some subcultural practices such as voodoo, would be considered pathological today.⁴⁰⁶ At one time, in Salem, Massachusetts, witches were hunted, and when found, were hanged.⁴⁰⁷ Today, we no longer conduct heresy trials.⁴⁰⁸ Rather, those with “false” beliefs are subjected to trial by diagnosis—psychiatrists diagnose heresy as mental disorder. For those found to be delusional, medication is prescribed to cure them of their unholy thoughts. The litmus test for measuring religious delusion may no longer be the falsity of the belief, but rather, its lack of conformity to prevailing cultural norms.

The authors saw this development, however, not as a denial of *DSM-IV* principles but as an affirmation of them. By using “conventionality” as the basis for determining authenticity of religious belief and

403. *Id.* at 614.

404. *Id.*

405. *See generally* KARL-JOSEF KUSCHEL, ABRAHAM (1995) (discussing Abraham as the common point of reference in the Jewish, Christian, and Muslim religions).

406. Sanderson et al., *supra* note 392, at 614–15.

407. *See generally* CHADWICK HANSEN, WITCHCRAFT AT SALEM (1969); MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS (1949).

408. In *United States v. Ballard*, 322 U.S. 78, 86 (1944), the Supreme Court noted that the Constitution does not permit heresy trials designed to determine the truth or falsity of an individual’s religious beliefs. *See supra* text accompanying notes 118–20.

“unconventionality” as the basis for determining psychopathology, participants were doing what *DSM-IV* prescribes, that is, using cultural norms as the basis for their decisions.⁴⁰⁹ We do not concur in their assessment. *DSM-IV*’s discussion of ethnic and cultural considerations was clearly intended to expand the scope of “normal” thought beyond the ideas of the dominant culture, not to contract it to conforming views of the orthodox. *DSM-IV* alerts clinicians to the possibility that beliefs and practices that appear to be symptomatic of mental disorder may be normal to individuals from cultural backgrounds that differ from the evaluating clinician.⁴¹⁰

C. Redefining Delusion

1. Dr. Manfred Spitzer’s Proposal

In critiquing the *DSM* definition of delusion, Dr. Manfred Spitzer was most troubled by the requirement of falsity, especially as that requirement applies to religious beliefs.⁴¹¹ Because religious beliefs cannot be characterized as true or false, an attempt to distinguish true from false religious beliefs is, in Dr. Spitzer’s judgment, “misguided and unfruitful.”⁴¹² But he was unwilling to either include or exclude all religious beliefs as delusions, characterizing such solutions as “quick and cheap.”⁴¹³ He noted that clinicians throughout the world refer to religious delusions, “and it is unwise and unscientific to sacrifice a well-established clinical distinction for the sake of a definition.”⁴¹⁴

To address the problem, Dr. Spitzer proposed that the definition of delusion be revised to eliminate the requirement of a false belief. Under his definition, “delusion” would be defined “as statements about external reality which are uttered like statements about a mental state, i.e., with subjective certainty and incorrigible by others.”⁴¹⁵ When a person makes a statement about his or her mental state, for example, “I am angry,” or “I feel sad,” that statement about the person’s inner self can be expressed with subjective certainty and incorrigibility, that is, not subject to correction by reason and argument. For statements about the inner self, the strongest evidence of the person’s mind is the person’s own thought,

409. Sanderson et al., *supra* note 392, at 614.

410. *See supra* discussion accompanying notes 383–88.

411. Manfred Spitzer., *supra* note 325, at 378–79; *see supra* text accompanying notes 335–37.

412. Manfred Spitzer, *supra* note 325, at 379.

413. *Id.*

414. *Id.* In response, we ask whether it is scientific to continue a clinical distinction that cannot be defined.

415. *Id.* at 391 (emphasis omitted).

sensation, or feeling. Delusions, however, are about external reality. A person cannot be subjectively certain and incorrigible about the things, events, and persons that make up the external world. Therefore someone who maintains that subjective certainty and incorrigibility about the external world is delusional.⁴¹⁶

Dr. Spitzer admitted that his proposed definition would not solve the problem of distinguishing religious beliefs from religious delusions. However, he expressed the view that his proposal would clarify the issue. If a person claims to have a religious experience, that experience, by Dr. Spitzer's definition, is not a delusion. If, however, the person claims that the experience has "intersubjective validity," that is, the person claims validity without an appropriate willingness to discuss or justify the claim, then that experience may be characterized as a delusion. It is not the falsity of the person's belief that makes it a delusion, but rather, the lack of any justificatory reasons that he or she gives for the belief and an unwillingness to question or reason about anything pertaining to the belief.⁴¹⁷

We question whether Dr. Spitzer's proposal adequately distinguishes authentic religious belief from religious delusion. If a person claims that God spoke to him or her and directed that he or she kill another, how should that experience be interpreted? In one sense, it is a statement about external reality—an event that occurred outside the person. But in another sense, the statement is one that refers to the person's mental state. In essence, the person is expressing the thought: "I feel religiously inspired." And even if this hurdle can be overcome, how does the clinician assess whether the person is claiming that the belief has "intersubjective validity"? What evidence can the person give to satisfy the clinician that he or she is appropriately willing to discuss the experience or to justify that it really occurred? What evidence can the clinician give that the experience did not occur? There is little more that the person can do than to assert a belief that it did occur; and there is little more that the clinician can do than to decide whether the claimed experience occurred or not, that is, to decide whether the clinician believes that the person's belief is true or false.

For purposes of this Article, it is unnecessary to evaluate in greater detail the merits of Dr. Spitzer's proposal. It is sufficient to note that the

416. See generally *id.* at 390–92.

417. Manfred Spitzer, *supra* note 325, at 392.

American Psychiatric Association implicitly rejected the proposal when it promulgated *DSM-IV* a few years after Dr. Spitzer's article was published. Although the Glossary definition of "delusion" requires that the belief be about "external reality" and be expressed with subjective certainty and incorrigibility, that is, "firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary," the definition retains the criterion that the belief be "[a] false belief."⁴¹⁸ Dr. Spitzer's proposal to eliminate this core requirement was far too radical for the American Psychiatric Association.

2. *Our Proposal*

We offer a far more modest proposal, one that retains the false belief requirement in the definition of "delusion" but modifies it to require greater certainty when a person's belief is being assessed for certain, nonclinical purposes. We propose the following definition: *For diagnoses made for forensic purposes only, a delusion is a false belief based on incorrect inference about external reality that is firmly sustained despite either violating the laws of the natural and physical world, or despite incontrovertible proof to the contrary known personally by the examiner. The incontrovertible proof requirement shall not be satisfied by mere statistical evidence that the truth of the belief is extremely unlikely. A sincerely held personal religious belief, as defined broadly in United States Supreme Court decisions, shall not constitute a delusion.*

a. *Distinguishing Clinical from Forensic Evaluations*

According to the American Psychiatric Association, "DSM-IV is a classification of mental disorders that was developed for use in clinical, educational, and research settings."⁴¹⁹ The American Psychiatric Association expressed its strong concern about the use of *DSM-IV* in forensic settings, where diagnostic information useful for clinical purposes could be misused or misunderstood when applied to legal standards.⁴²⁰ For clinical purposes, that is, to diagnose a patient's illness in order to prescribe appropriate treatment, mental disorder

is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one

418. *DSM-IV*, *supra* note 14, app. C at 765.

419. *Id.* at xxiii.

420. *Id.*

or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.⁴²¹

For example, if a man goes to a clinician in great distress because he believes that he is being followed or subjected to ridicule—examples of persecutory delusions given in *DSM-IV*⁴²²—or that a stranger has removed his or her internal organs and has replaced them with someone else’s organs without leaving any wounds or scars—an example of a bizarre delusion given in *DSM-IV*⁴²³—the clinician appropriately focuses on therapy to relieve that distress, not on a careful analysis of whether the patient’s belief is a false belief. The clinician does not test or challenge the patient’s self-reported belief, but rather, accepts it at face value as the source of the distress. The purpose of diagnosis in clinical practice is to discover the source of the patient’s distress or disability so that it can be treated and eliminated.

In a forensic setting, however, when the psychiatrist is called upon to testify in court about the person’s mental condition, the psychiatrist serves as an expert witness, not as a treating physician. In this context, when the person faces a loss of liberty through state-imposed involuntary civil commitment, or punishment for criminal behavior, or incarceration as an insanity acquittee in lieu of criminal punishment, the law appropriately demands that the testifying psychiatrist focus his or her evaluation on the specific criteria that are at issue and limit his or her testimony to the areas of his or her expertise. If the psychiatrist testifies that the person had a delusion and if the definition of “delusion” requires a false belief, the court wants to know how the psychiatrist made the judgment that the person’s belief was indeed false—what evidence did he or she rely upon to make an informed, professional, and scientific judgment. For this reason, in a forensic context, the psychiatrist must engage in a more careful and rigorous analysis of the diagnostic criteria than is required for clinical practice.

b. The Proof of Falsity Requirement

To diagnose delusion for forensic purposes, the examiner, under our proposal, has the obligation of establishing that the examinee’s belief

421. *Id.* at xxi.

422. As examples of common persecutory delusions, *DSM-IV* lists a person’s belief that “he or she is being tormented, followed, tricked, spied on, or subjected to ridicule.” *Id.* at 275.

423. *Id.*

was false. Although *DSM-IV* seemingly imposes a similar obligation on the clinician making a diagnosis for treatment purposes, it does not explain “what constitutes incontrovertible and obvious proof or evidence”⁴²⁴ that the examinee’s belief is false. For forensic purposes, the mere statistical improbability that the belief is true should not satisfy the requirement of “incontrovertible proof” of the falsity of the belief.⁴²⁵ If a man claims that the CIA is spying on him, or that his wife is unfaithful, the examiner’s “hunch” that the belief is false does not substitute for actual proof that what the examinee perceives as truth is simply not so. Obviously, psychiatrists performing forensic examinations are not detectives conducting private investigations of the examinee’s statements to determine the truth or falsity of the expressed belief. Psychiatrists lack both the expertise to do so on their own and the resources to hire investigators to assist them. But if “a false belief” is to be retained as the essential prerequisite to a delusion, and if “incontrovertible proof to the contrary” is required to establish that the belief is false, as it is under both *DSM-IV* and under our proposal, then the requirement must be taken seriously.

For some beliefs, an investigation of their truth may not be necessary. If the belief “violates the laws of the natural and physical world,” then the examiner may rightly conclude that it is a false belief without obtaining further proof. The language we chose for this requirement was taken from Dr. Robert Spitzer and Dr. Michael First, who used that term to operationalize and test the concept of “totally implausible” in the *DSM* definition of “bizarre delusion.”⁴²⁶ Nevertheless, the “totally implausible” language does not clearly convey that meaning. To some examiners, “totally implausible” means “not understandable.” The *DSM-IV Sourcebook* tells us that this is the intended meaning of the term.⁴²⁷ To others it means “patently absurd and having no possible basis in fact.”⁴²⁸ That was the language used in *DSM-III*. Dr. Spitzer’s research revealed that interrater reliability was nearly identical when vignettes were tested using *DSM-III*’s “impossible” definition and *DSM-III-R*’s “implausibility” standard, but that interrater reliability was significantly lower for the

424. *DSM-IV*, *supra* note 14, app. C at 765.

425. See generally Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 85–92 (1999) (asserting that actuarial assessments of enhanced risk of violence, i.e., use of statistical data on the enhanced danger posed by members of a group, should not justify involuntary civil commitment of individuals within that group).

426. Robert L. Spitzer et al., *supra* note 358, at 881. Dr. Spitzer and Dr. First do not clarify how they distinguish between the “natural” world and the “physical” world.

427. Andreasen, *supra* note 357, at 345; see *supra* text accompanying notes 357–58.

428. *DSM-III*, *supra* note 326, app. B at 356.

same vignettes using the "un-understandable" definition.⁴²⁹ As reported above, the change in language from *DSM-III* to *DSM-III-R* was very significant to some clinicians; to others, it was not.⁴³⁰ Some examiners may ascribe different meanings, such as "not believable," "not acceptable," or even "not reasonable," concepts found in ordinary dictionary definitions of "implausible."⁴³¹

We believe that Dr. Spitzer's operational definition is far preferable. It is a standard that is more understandable to examiners. Thus, it better assures that examiners apply the same standard to measure the falsity of the examinee's belief. Additionally, it directs examiners to test the examinee's belief by the laws of physics and chemistry—sciences that are within the examiners' specialized knowledge and expertise.

*c. The Definition of Religion and the Exclusion of
Religion as a Delusion*

When beliefs are analyzed for forensic purposes, our society needs to protect religious beliefs that might be characterized by some examiners as delusional beliefs with religious content or religious ideation. Although the Supreme Court has carefully avoided defining religion,⁴³² it has interpreted religion broadly in cases distinguishing religions from nonreligions, such as *United States v. Seeger*⁴³³ and *Welsh v. United States*,⁴³⁴ and confirmed the personal nature of religious beliefs in *Thomas v. Review Board*.⁴³⁵ Those insights into the modern meaning of religion and religious belief need to be understood and applied by those who are asked to distinguish those concepts from delusions. In assessing the beliefs of others, psychiatrists should not be allowed to simply substitute their own ideas about what is "reasonable" or "acceptable" as a religious belief.

Guidance is needed because psychiatrists and other mental health professionals are far less religious than the general populace. Over ninety percent of Americans profess a belief in God; less than half of

429. Robert L. Spitzer et al., *supra* note 358, at 881.

430. Flaum et al., *supra* note 359, at 59; *see also supra* text accompanying note 359.

431. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1134, 1736 (Philip Babcock Gove ed., 1986) (defining "implausible" as "not plausible" and "plausible" as "worthy of belief: CREDIBLE").

432. *See supra* text accompanying notes 35–37.

433. 380 U.S. 163 (1965); *see supra* text accompanying notes 51–60.

434. 398 U.S. 333 (1970); *see supra* text accompanying notes 61–71.

435. 450 U.S. 707 (1981); *see supra* text accompanying notes 85–94.

mental health professionals profess a similar belief.⁴³⁶ Additionally, although mental health professionals are trained to recognize pathology, most receive little or no training on religious and spiritual issues.⁴³⁷ Americans should not anoint these individuals to serve as high priests with authority to determine what qualifies as a religious belief.

Some might assert that it is not necessary to define a religious belief or to exclude it from the definition of delusion. Our proposed “proof of falsity” requirement, they would contend, assures that religious beliefs are excluded from the definition of delusion. Consider the following three pregnant examples: (1) A man believes he is pregnant; (2) a woman believes she is pregnant, despite conclusive laboratory tests that establish that she is not; (3) a woman, whose name just happens to be Mary, is pregnant and believes that her pregnancy resulted from an immaculate conception with God and that her unborn child is the son of God. Assume that all three individuals hold the belief with the requisite subjective certainty and incorrigibility. How are these situations analyzed under our proposed definition? In the first example, the man’s belief violates the laws of the natural and physical world, and no further investigation is necessary to establish that the belief is a delusion. In the second example, the belief alone (that a woman is pregnant) does not violate natural law, and additional testing is required, and must be conducted, to prove incontrovertibly that she is not pregnant and is delusional. In the third example, incontrovertible proof that the belief is false does not exist, and Mary cannot be found to be delusional. We may doubt her belief, and the likelihood that it is true may be exceedingly small—although many people believe that it did occur once—but we are unable to sustain our burden of establishing that her belief is false. Under our definition, we need not label her belief a religious belief in order to reject the delusional label.

Similarly, if Mary’s son declares that he is *the* Jesus Christ, or *the* Napoleon (a popular claim in the early nineteenth century), or *the* Elvis (a popular claim in the mid-twentieth century), his belief can be

436. David B. Larson et al., *Systematic Analysis of Research on Religious Variables in Four Major Psychiatric Journals, 1978–1982*, 143 *AM. J. PSYCHIATRY* 329, 329–33 (1986) (citing national surveys of the general public reporting that 90 to 96% of those polled professed a belief in God and a survey of American Psychiatric Association membership reporting that only 43% of psychiatrists professed a belief in God); *see also supra* text accompanying note 25 (discussing a recent Newsweek poll reporting that 84% of adult Americans believe God performs miracles).

437. *See* Edward P. Shafranske & H. Newton Malony, *Clinical Psychologists’ Religious and Spiritual Orientations and Their Practice of Psychotherapy*, 27 *PSYCHOTHERAPY* 72, 72, 78 (1990) (indicating that in a study of 1000 clinical psychologists, 85% of those responding reported that instruction on religious and spiritual issues was rarely or never presented in their training).

characterized as a delusion, for it violates the laws of the natural and physical world. An individual named Jesus, or Napoleon, or Elvis, already existed, and the person now claiming to be that individual is not him. But if Mary's son claims to be the Messiah, incontrovertible proof that his belief is false does not exist, and Mary's son cannot be found to be delusional. Again, we may doubt his belief, and the likelihood that it is true may be statistically minute—although many people believe that it did occur once—but we are unable to sustain our burden of establishing that his belief is false. Under our definition, we need not label his belief a religious belief in order to reject the delusional label.

Nevertheless, we propose a specific declaration that a religious belief does not qualify for delusional status. We make this recommendation because some religious beliefs do violate the laws of the natural and physical world, but would not be declared delusional in our society. Consider, for example, the Eucharist in Catholic theology.⁴³⁸ The transubstantiation of bread and wine into the body and blood of Christ is a central rite of worship, one that "makes Mass *the* divine event."⁴³⁹ And yet, if the wine used in that ceremony was subjected to a laboratory test after the Mass ended, by the laws of physics and chemistry, it would still be wine, not blood. And the bread would remain bread, not a body. The specific exclusion of religious beliefs from the definition of delusion assures that they are not mischaracterized as delusions simply because they fail some all-too-worldly scientific test.

d. Rejecting or Reformulating the Deific Decree Defense

But what of those who wish to plead insanity as a defense by claiming that they killed in response to a deific decree? If the person's belief at the time he or she acted is declared to be a religious belief and not a delusional belief, then an insanity defense should not succeed. But the defendant's loss may be more theoretical than actual. As previously discussed, the deific decree doctrine is rarely claimed, and when claimed, is rarely successful.⁴⁴⁰ Brandon Wilson, for example, was convicted of first degree murder and sentenced to death despite overwhelming psychiatric testimony that his claimed religious belief was a delusion.⁴⁴¹

438. See *Matthew* 26:26–28; *Mark* 14:22–24; *Luke* 22:19–20; *I Corinthians* 11:23–25.

439. GARRY WILLS, *PAPAL SIN* 139 (2000). Wills critically discusses how the Eucharist developed to enhance the power of priests. See *id.* at 138–43.

440. See *supra* text accompanying notes 234–35.

441. See *supra* text accompanying note 11.

If insanity is no longer available to those who would assert the deific decree as a defense, are there other defenses that are available or could become available with some modification? Necessity, for example, is a defense when physical forces beyond the defendant's control render the defendant's illegal conduct the lesser of two evils.⁴⁴² But the taking of an innocent human life does not qualify as the lesser of two evils. It does not qualify even if the defendant believes he or she faces a penalty worse than mere death from disobeying God's command. Additionally, while fire, flood, and other natural disasters qualify as "physical" forces beyond the defendant's control, God as God and not merely as the source of those disasters, may not.

Duress, sometimes referred to as coercion or compulsion, is another defense to be considered. But typically, that defense requires that the defendant commit the crime under a threat from another person that the defendant will be harmed if he or she does not commit the crime.⁴⁴³ Again, God as the threatening agent does not seem to qualify. Additionally, the duress defense requires that the defendant's fear of the threat have an objective, reasonable basis, rather than a subjective one.⁴⁴⁴ The defendant's religious-based fear is subjective, not objective.

In a recent article, however, Christopher Slobogin proposes that mental disorder should be recast as a factor relevant to general defenses, such as mens rea, self-defense, and duress, rather than treated as a predicate for the special defense of insanity.⁴⁴⁵ If, as Professor Slobogin proposes, a modern criminal justice system adopts a subjective approach to culpability, then defenses available to mentally disordered defendants would not have to be differentiated from defenses available to all other defendants.⁴⁴⁶ Duress would be available as a defense to a defendant who killed at God's command "[i]f the perceived consequences of disobeying the deity were lethal or similarly significant."⁴⁴⁷ And this would be true, whether the defendant was considered delusional, as the defendant now claims under existing law, or religiously inspired, as would occur under our proposal. The only question is whether society is willing to adopt a subjective approach to culpability.⁴⁴⁸

442. 21 AM. JUR. 2D *Criminal Law* § 158 (1998).

443. *Id.* § 160.

444. *Id.*

445. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1200 (2000).

446. *Id.* at 1207.

447. *Id.* at 1204–05.

448. In his article, Slobogin assumes that society would adopt a subjective approach to culpability but cautions: "[T]his is admittedly a big assumption." *Id.* at 1207.

VII. CONCLUSION

In his essay, *The Future of an Illusion*, Sigmund Freud asserted that so long as “the great mass of the uneducated and oppressed, who have every reason for being enemies of civilization . . . do not discover that people no longer believe in God, all is well.”⁴⁴⁹ But if they make that discovery, the very survival of civilization is jeopardized. As Freud explained:

If the sole reason why you must not kill your neighbour is because God has forbidden it and will severely punish you for it in this or the next life—then, when you learn that there is no God and that you need not fear His punishment, you will certainly kill your neighbour without hesitation, and you can only be prevented from doing so by mundane force. Thus either these dangerous masses must be held down most severely and kept most carefully away from any chance of intellectual awakening, or else the relationship between civilization and religion must undergo a fundamental revision.⁴⁵⁰

We need not agree with Freud’s assessment. After all, our Pledge of Allegiance asserts that we are still “one nation, under God,” and our President still completes his oath of office with the vow, “so help me God.”⁴⁵¹ The birth of Christ, not the birth of Freud or any other scientist, is still a national holiday.⁴⁵² But if Freud can ask the descendants of Abraham to reconsider the concept of God, we as a society can ask the descendants of Freud to reconsider the concept of delusion, at least as we use that concept to assess a person’s religious beliefs. Perhaps we will all benefit from the experience.

449. FREUD, *supra* note 7, at 39.

450. *Id.*

451. These examples suggest that the United States, at least as viewed by a majority of Americans, is a theistic society.

452. This example suggests that the United States, at least as viewed by a majority of Americans, is a Christian society. In a recent survey conducted by the Pew Research Center, 75% of the 2041 Americans polled supported President Bush’s so-called “faith-based initiative”—a proposal to give government money to religious groups to assist them in performing social services. Sumana Chatterjee, *Poll: Federal Funds to Religious Groups Supported*, SAN DIEGO UNION-TRIB., Apr. 11, 2001, at A-2. However, only 38% supported the eligibility of Muslim and Buddhist groups, 29% supported the eligibility of the Nation of Islam, and 26% supported the eligibility of the Church of Scientology. *Id.*; Laura Meckler, *Debate Persists over Plan to Give Money to Religious Organizations*, TRIBUNE (San Luis Obispo County, Cal.), May 7, 2001, at A-4.

