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Unreasonable Revelations: God Told Me to Kill

Linda Ross Meyer*

In 1997, Christopher Turgeon, prophet of the Gatekeepers, and his co-congregant, Blaine Applin, heard the voice of God telling them to kill Dan Jess, a former member of their religious group.¹ Together, Chris and Blaine drove from California to Dan's house in Washington, praying for a sign that they were doing the right thing; they saw seven rainbows.² When Dan answered his door, Blaine shot and killed him.³ Afterwards, Chris and Blaine felt a sense of peace and assurance that they had done the right thing.⁴

Did God really speak? Should Chris and Blaine be guilty of murder? What does the law do when its "reason" is called into question by a religious revelation that claims authority and moral certainty superior to and contrary to law? We seem to be living in a time when this question is a common one. The authority of the law, rule of law, and legal institutions depend on the existence of a shared common sense of reasonable people, reasonable argument, rational basis, reasonable doubt, and reasonable interpretation – i.e., a unifying *nomos* of *reason*. However, in the wake of religious violence, in the assertion of rights to legal exceptions on religious grounds, and in a religiously grounded backlash against science, the press, and university education,⁵ we are experiencing revelation's

* Professor of Law, Quinnipiac University School of Law. I would like to thank Steve Gilles, Neal Feigenson, Stan Krauss, Kevin Barry, Jeffrey Cooper, Austin Voss, Caroline Meckel, Ian Ayres, Trisha Olson, Paul Lombardo, Russ Covey, Bill Edmundson, Neil Kinkopf, Jeff Meyer, and many other colleagues at Quinnipiac and at Georgia State Law School, who gave me excellent comments on earlier versions of this paper. Despite their assistance, it is not divinely inspired (as far as I know).

1. State v. Applin, 67 P.3d 1152, 1153 (Wash. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. Though not framed that way, the antipathy to educational institutions appears to be an inter-religion dispute rather than religion-versus-"secular

challenge to reason and law anew, though not for the first time. The shared normative ground that the law depends upon is at stake.

This Article focuses on one extreme example of the law's response to unreasonable revelations that is starkly presented in a series of unsettling murders: those involving criminal defendants who claim they committed their crime because God told them to do it—known as “deific decree” cases.⁶ This example of the conflict between revelation and reason tests the limits of law's ability to understand and countenance revelation when the stakes are highest. The deific decree cases also present the hardest epistemological problems, because the defendant claims that the experience of God's command is self-authenticating—a position fundamentally at odds with both scientific and legal standards of proof.

Hearing commands from God in this context is characterized by almost all courts and commentators as a sign of mental illness. Yet nearly a third of Americans believe that God speaks directly to them in personal revelation or prayer, some seeing an image and/or hearing an actual voice and words, others experiencing a “thought-insertion” from “outside” themselves.⁷ Moreover, the facts of these cases are similar to stories or examples from the western cultural record in which we rarely dismiss the God-hearing protagonists as insane. To mention only a few: Jesus, Abraham, Joshua, Moses, Joan of Arc, John Brown, and various historical Popes are usually not presumed to be insane, but rather sane, honest, and, for the

humanist.” A Pew Trust study found that college-educated and non-college educated people attend religious services at roughly the same rate. *Chapter 2: Religious Practices and Experiences*, PEW RESEARCH CENTER (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/chapter-2-religious-practices-and-experiences/#private-devotions>. The difference comes in the practices and doctrines of the services they attend. As before and during the Civil War, churches are divided, too, separating into red and blue branches, each accusing the other of heresy. EDWIN GAUSTAD & LEIGH SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA: THE HEART OF THE AMERICAN STORY FROM COLONIAL TIMES TO TODAY* 191 (2002).

6. *Applin*, 67 P.3d. at 1153–54.

7. Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey: Religious Beliefs and Practices*, June 1, 2008, at 53; TANYA MARIE LUHRMANN, *WHEN GOD TALKS BACK: UNDERSTANDING THE AMERICAN EVANGELICAL RELATIONSHIP WITH GOD* 50–51, 211–15, 250–52 (2012).

faithful, true recipients of God's commands. Many of these revered figures have even committed homicides purportedly at God's behest.

This classic criminal law problem of deific decree murder is in many ways parallel to claims of religious free exercise⁸ rights in cases where a defendant refuses to follow laws and social customs for religious reasons. In this area, we usually acknowledge that the law is unable to distinguish the *true* revelation from the *false* and is limited to distinguishing the sincere believer from the insincere.⁹ In many areas where religion is set up as a defense to lesser crimes or legal obligations, the law may blink by using discretionary doctrines to avoid a direct conflict between law and revelation, or by allowing some free exercise exceptions for religious practices that cause little harm.¹⁰ Accommodation becomes more difficult when the stakes are higher, as when law's own norms of equal treatment are challenged. In murder cases, the conflict becomes acute: we cannot avoid or soften the conflict between reason and revelation, and the sincere believer is a serious threat. Though the state could certainly assert a "compelling interest" in refusing to accommodate a homicide,¹¹ if the state were actually persuaded that the homicide was divinely ordered, its compelling interest in preventing it would be open to question. Presuming the believer insane is the law's dodge here—but it is one that would not be acceptable in most free exercise cases

8. See Rabia Belt, *When God Demands Blood: Unusual Minds and the Troubled Juridical Ties of Religion, Madness, and Culpability*, 69 UNIV. MIAMI L. REV. 755, 773–76 (2015) (pointing out that courts take a subjective approach to the definition of religion in free exercise cases).

9. See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965) (adopting a broad understanding of religion in the context of the Universal Military Training and Service Act and emphasizing the importance of adjudicating the sincerity and good faith of conscientious objectors, rather than trying to specify the outer limits of "religious training and belief").

10. See, e.g., Religious Freedom Restoration Act of 1993, codified at 42 U.S.C. § 2000bb-4 (restricted by *City of Boerne v. Flores*, 521 U.S. 507 (1997), to require only the federal government to accommodate religious practices unless it has a compelling interest and narrowly tailored rule); Religious Land Use and Institutionalized Persons Act of 2000, codified at § 2000cc-1 (stating that substantial burdens on religious practices of institutionalized persons must be justified by a compelling interest and regulations narrowly tailored).

11. *Id.*

because of its implication that a sincere belief in revelation is insane.

Most cases and commentators do not take deific decree claims seriously as true revelation, but instead helpfully and carefully parse deific decree murders as various kinds of insanity claims.¹² This Article argues that this is the wrong frame in which to consider these cases. The doctrinal conclusion supported here instead is that assessing someone's claim of "revelation" as insane or not is not within the jurisdiction of law and, therefore, a claim of deific command, absent other evidence of insanity, cannot be grounds for exculpation either as an excuse or as a justification, though the circumstances may be grounds for mercy or mitigation. However, the more important insight is that the chaotic nature of the divine cannot be contained within law, whether the law is the law of a church or of a state.¹³ Rather, the divine exists beyond the bounds of both church and state law.

This conclusion also entails that the legal status of the deific decree defense should have no relevance to the Establishment Clause, for *establishing* a church requires law, and law of any kind resists revelation (a deep irony implicit in any established religious tradition). Moreover, seen from the prism of the deific decree doctrine, much of the rhetoric about how much religion we should or should not have in the public square is not about God at all: it is a dispute *between* legal traditions about *which*

12. For commentary, see Christopher Hawthorne, "Deific Decree": *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755 (2000); see also Belt, *supra* note 8 (highlighting the problem with the distinction between genuine revelation and madness, drawing on Grant Morris and Ansar Haroun, *infra*). However, Belt's primary concern involves expanding insanity exculpations, as she concludes that a deific decree exception "unacceptably privileges certain mentally ill criminal defendants whose delusions fit within an outdated model." *Id.*; Andrew J. Demko, Note, *Abraham's Deific Defense: Problems with Insanity, Faith, and Knowing Right from Wrong*, 80 NOTRE DAME L. REV. 1961 (2005) (struggling more directly with the revelation issue); Stephen Garvey, *Agency and Insanity*, 66 BUFF L. REV. 123 (2018) (likening traditional insanity doctrine, including deific decree, to a loss of a sense of agency); Grant H. Morris & Ansar Haroun, "God Told Me to Kill": *Religion or Delusion?*, 38 SAN DIEGO L. REV. 973 (2001) (taking the "genuine revelation" problem more seriously, but focusing primarily on the parallel problem in psychiatry). For cases, see *infra* note 18.

13. See Robert M. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

laws should govern us. Neither legal nor religious *institutions* can claim an ineffable higher ground; both fall back on appeals to authority, tradition, text, and reason. It should not come as a surprise, then, that God escapes law completely, whether it is the law of a church or of a state.¹⁴ Instead, the question that deific decree cases pose is how much protection should law give the insight, conscience, and experience of the divinely-addressed individual. Considered in this light, the deific decree defense cannot be legalized, as the law cannot pronounce on the existence of the divine, nor discern revelation from rebellion. Revelation is beyond law, and those in its thrall can appeal only to mercy (understood here as law's self-recognition of the limits of law).

Introduction: The Traditional Insanity
Frame and the Deific Decree "Exception"

The classic and most widely-accepted *M'Naghten* test of insanity requires that, before a defendant may be acquitted as insane, he must show that he was "labouring under such a defect of reason . . . as not to know the nature and quality of the act. . . ; or . . . that he did not know he was doing what was wrong."¹⁵ The defendant who knows his act is wrong,¹⁶ but does it anyway because God told him to do it, presents this stark conflict between human law, reason, or custom's claim to define wrong, and divine revelation to the contrary. Nor does the traditional insanity doctrine allow room to argue divine compulsion: *M'Naghten* does not allow volitional defenses, but, in straightforward Kantian fashion, presumes that if you know the law and the facts, you are rational and thereby have the free will

14. "[Aslan is n]ot like a *tame* lion." C.S. LEWIS, *THE LION, THE WITCH, AND THE WARDROBE* 97 (Samizdat 2017) (1950) (emphasis in original).

15. *R. v. M'Naghten*, (1843) 10 Cl. & F 200 (HL). The factors are not dissimilar from Aristotle's *Nicomachean Ethics* III(a): ignorance of one's agency, the thing or person affected, the instrument that brought about the result, the effects of the act, and the quality of the act. See ROBINSON, *infra* note 24 at 25.

16. Courts differ about whether it is only necessary that he know his act to be against the positive law or also that he know the act is against the social customs (nomos, reason) of his community. See discussion *infra pts.* II(A), Conclusion.

to do the right thing.¹⁷ To know is to be free; to be free is to be able to act on your knowledge of right and wrong, regardless of what anyone else tells you—even God.

There are quite a surprising number of murder and attempted murder cases involving claims that a defendant was acting against the law (and/or against social mores) because of a deific decree or divine command, and in all of the reported cases, these defendants purport to be following Christian practices, not those of other faiths.¹⁸ In some cases, these defendants ask to

17. *M’Naghten*, 10 Cl. & F.; see also note 336.

18. See, e.g., *Wilson v. Gaetz*, 608 F.3d 347 (7th Cir. 2010); *Turgeon v. Garcia*, 2007 U.S. Dist. LEXIS 21833 (S.D. Cal. Mar. 26, 2007); *Guiteau’s Case*, 10 F. 161 (S.D.N.Y. 1882); *Archie v. State*, 875 So. 2d 336 (Ala. Ct. Crim. App. 2003); *Ivery v. State*, 686 So. 2d 495 (Ala. Crim. App. 1996); *State v. Malumphy*, 461 P.2d 677 (Ariz. 1969); *People v. Skinner*, 704 P.2d 752 (Cal. 1985); *People v. Coddington*, 2 P.3d 1081 (Cal. 2000), *overruled by* *Price v. Superior Court*, 25 P.3d 618 (Cal. 2001); *People v. Applin*, 2001 Cal. LEXIS 7416 (Cal. Oct. 31, 2001); *People v. Duckett*, 209 Cal. Rptr. 96 (Cal. Ct. App. 1984); *People v. Serravo*, 823 P.2d 128 (Colo. 1992); *People v. Tally*, 7 P.3d 172 (Colo. Ct. App. 2000); *People v. Galimanis*, 944 P.2d 626 (Colo. Ct. App. 1997); *People v. Kando*, 921 N.E.2d 1166 (Ill. Ct. App. Ct. 2009); *People v. Wilhoite*, 592 N.E.2d 48 (Ill. App. Ct. 1991); *People v. Garcia*, 509 N.E.2d 600 (Ill. App. Ct. 1987); *Laney v. State*, 486 So. 2d 1242 (Miss. 1968); *State v. Blair*, 732 A.2d 448 (N.H. 1999); *State v. Singleton*, 48 A.3d 285 (N.J. 2012); *State v. Worlock*, 569 A.2d 1314 (N.J. 1990); *People v. Wood*, 187 N.E.2d 116 (N.Y. 1962); *People v. Schmidt*, 101 N.E. 945 (N.Y. 1915); *Galloway v. State*, 698 P.2d 940 (Okla. Crim. App. 1985); *Olivier v. State*, 850 S.W.2d 742 (Tex. Ct. App. 1993); *State v. Lafferty*, 20 P.3d 342 (Utah 2001); *State v. Applin*, 82 P.3d 243 (Wash. 2004); *State v. Rice*, 757 P.2d 889 (Wash. 1988); *State v. Cameron*, 674 P.2d 650 (Wash. 1983); *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983); *State v. Turgeon*, 2004 Wash. App. LEXIS 1370 (Wash. Ct. App. Mar. 22, 2004); *State v. Potter*, 842 P.2d 481 (Wash. Ct. App. 1992). There are also earlier cases that formed the basis of the novel, *Weiland*, discussed *infra* Section II(D), including ones involving John Yates, William Beadle, and Thomas Goss in 1785, and John Pastano in 1799 in New York. See *infra* Section II(D). A case of “God told me to” (but where deific decree doctrine was not invoked) include a truck driver who killed two in a rear-ender claimed God told him to do it and also begged officers to kill him. Associated Press, *Suspect Says ‘God Told Me to Do it’ After Fatal Crash*, FOX NEWS (Jan. 27, 2017), <http://www.foxnews.com/us/2017/01/27/suspect-says-god-told-me-to-do-it-after-fatal-crash.html>. Andrea Yates killed her children in order to send them to heaven, *Psychiatrist: Yates thought she was defeating Satan*, CNN (March 1, 2002), and Zacarias Moussaoui conspired with 9/11 terrorists as part of a religiously inspired jihad. Richard Serrano, *Life of a Terrorist: Seeking, and Finding, His Jihad*, L.A. TIMES (Apr. 24, 2006), <https://www.latimes.com/archives/la-xpm-2006-apr-24-na-moussaoui24-story.html>. I’m not aware of a case in which a lawyer was bold enough to assert a deific decree defense in an Islamic jihad case (a telling point for the claim made that the defense favors Christianity over other religions) but it is certainly

be acquitted under a special deific decree exception to *M’Naghten* or on the ground that the command of God skewed their understanding of moral wrong.¹⁹ In other cases, the defendants ask to be acquitted under a less well-accepted volitional test of insanity, such as the Model Penal Code’s “lacked substantial capacity” to conform to law, or *Durham*’s “product of mental disease”²⁰ test, or an “irresistible impulse” to commit the crime. Other cases resist the deific decree exception and insist that defendants who know the act to be illegal are guilty, regardless of whether they were commanded by a deity.²¹

within the realm of doctrinal fit. See Belt, *supra* note 8; Hawthorne, *supra* note 12, Gaetz, 608 F.3d 347. The International Criminal Court is struggling with a similar issue in the case of Dominic Ongwen, the kidnapped child-soldier who later directed and performed torture and genocide as a commander in Joseph Kony’s Lord’s Army. Other members of the Lord’s Army have testified that Kony induced the belief in these young soldiers that he was possessed of spirits who would know even of disloyal thoughts. The children were taught to believe that they, too, were possessed of spirits that spoke to them in dreams, allowed visions of the future, and rendered them bulletproof. See Kristof Titeca, *I Testified at the Trial of One of Joseph Kony’s Commanders. Here’s What the Court Didn’t Understand*, WASH. POST (Jan. 17, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/17/i-testified-at-the-icc-trial-of-one-of-joseph-konys-commanders-heres-what-the-law-doesnt-seem-to-understand/?utm_term=.65647f9ad9af. In August 2018, in a strange twist on these cases, James John Todd Kincannon in South Carolina killed his parents’ beagle-mix because God told him to. Megan Cerullo, *Former Republican Politician Said he Killed Parents Dog on Command from God*, N.Y. DAILY NEWS (Aug. 4, 2018, 1:00 PM), <https://www.nydailynews.com/news/crime/ny-news-republican-politician-kills-dog-20180804-story.html>.

19. See, e.g., *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983) (“deific decree” exception); see also *People v. Kando*, 921 N.E.2d 1166, 1191 (Ill. App. Ct. 2009) (skewed understanding of moral wrong); *People v. Skinner*, 704 P.2d 752 (Cal. 1985) (same).

20. *People v. Rice*, 757 P.2d 899, 904 (Wash. 1988) (insufficient evidence that will was “subsumed” by divine command to require deific decree instruction); *State v. Cameron*, 674 P.2d 650 (Wash. 1983) (free will “subsumed” by divine command). However, the Appellate Court later stated in *State v. Potter*, 842 P.2d 481 (Wash. Ct. App. 1992), that this is not a volitional test, but that the command skewed cognitive ability to understand wrong. See also *People v. Garcia*, 509 N.E.2d 600 (Ill. App. Ct. 1987) (“Astros” command deprived defendant of “ability to conform” conduct, using MPC standard), *abrogated by* statute as described in *Wilson v. Gaetz*, 608 F.3d 347, 354 (7th Cir. 2010); cf. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *abrogated by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), *superseded by* 18 U.S.C.A. § 17 (reinstating *M’Naghten* in federal courts).

21. *People v. Serravo*, 823 P.2d 128 (Colo. 1992) (Vollack, J., dissenting).

The deific decree cases are sometimes thought to be a legal anomaly, ginned into modern doctrine by Cardozo *dicta* and the Kadish Criminal Law casebook's wide dissemination of *State v. Crenshaw*.²² But in fact, the uniqueness of the deific decree murder has a long and tangled history that is illuminating. Part I of this Article works to untangle a bit of that history. Part II provides a taxonomy of the problem, not historically or by doctrinal resolutions, but rather by how the cases and judges express the relationship between revelation and law. There are many ways in which the law might, and has, responded to deific decree cases. This Article groups the materials into five types, related to the way in which the law reacts to claims of revelation:

1. Revelation is treated as insanity;
2. Only revelation that goes against the law is treated as insanity (or depravity);
3. Revelation is treated as something that, if true, would supersede law;
4. Revelation is treated as the only ground of truth; and
5. Revelation is treated as beyond the jurisdiction of law.

This Article will give both a legal example of each category and a philosophical analysis that ties the category to more general ideas about reason and revelation. In doing so, the Article will also compare how a few established religious traditions handle the same problem. The goal of this exercise is not solely to improve legal doctrine in deific decree cases, but to point out that both legal and religious institutions struggle with the problem of unreasonable revelations, and in much the same way. What emerges from a close examination of the cases is that the conflict between law and revelation is not necessarily a conflict between (secular) law and (organized) religion, but between ethical communities and individual (divine?) insight. As such, the conflict here has roots in ancient debates about the nature of God, enthusiasm and evangelical movements throughout history, early American debates over styles of religious dialogue, natural law, and populism,²³ as well as roots

22. *Crenshaw*, 659 P.2d 488; *see also* Hawthorne, *supra* note 12.

23. CALEB SMITH, THE ORACLE AND THE CURSE: A POETICS OF JUSTICE FROM

in the ever-renewed conflict between the individual and the community.

I. Origins of the Deific Decree Doctrine

Historian Daniel Robinson points out that the original form of an exculpatory insanity defense was *entheos*, or *having a god within*—which would make deific decree the prototype, not the outlier, of insanity defenses. Throughout the *Illiad*, Homer’s characters, Helen and Achilles, exculpate themselves by claiming to be inhabited at times by divine entities: “The god might speak only to the chosen one, exciting wild and uncoordinated movements; or induce a frenzy as the sign of divine anger; or lead the victim to speak in tongues.”²⁴ Later under Roman law, this *entheos* was *fanaticus* or *dementia*—a divine madness that would come and go (as, perhaps, epilepsy does)—as opposed to *furiosus* or a more general and unremitting madness like that associated with rabies.²⁵

THE REVOLUTION TO THE CIVIL WAR 105 (Harv. Univ. Press 2013).

24. DANIEL N. ROBINSON, *WILD BEASTS AND IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 9 (1996). Stephen Garvey has recently picked up on a variant of this ancient idea, arguing that much of insanity doctrine, including the facts in the *M’Naghten* case itself, should be understood as a loss of one’s *sense* of agency, not a loss of reason, Garvey, *supra* note 12, at 157 (explicitly pointing to the deific decree doctrine as an instance of his new theory as experiencing a sense of a loss of agency to God, though he would extend the doctrine to all command hallucinations); *Id.* at 168.

25. “Categories of mental competence were used to partition defendants in Roman law: *non compos mentis*, *fanaticus*, *ideotus*, *furiosus*.” OXFORD HANDBOOK OF PHILOSOPHY & PSYCHIATRY 20 (K. W. M. Fulford et al. eds., 2013) [hereinafter OXFORD HANDBOOK]. Justinian contrasts *dementia* and *furiosus* rather than *fanaticus* and *furiosus*. See *infra* note 30. See Dorothy May Paschall, *The Vocabulary of Mental Aberration in Roman Comedy and Petronius*, 15 LANGUAGE 4, 57 (1939) (“That the barbaric ceremonial of these [Cybele] cults made a great impression on the Romans however is shown by the word *fanaticus* which, meaning literally a ‘person attached to a temple,’ referred to the devotees of the Oriental religions par excellence. The metaphorical use of the word is rare, and limited to cases in which some notion of religious madness can be found. Cicero uses it twice, both times in connection with *superstitio* In Christian writings, *fanaticus* came to be merely a synonym of *gentilis* or ‘pagan’” (footnotes omitted)). Voltaire’s much later rant about “fanaticus” may or may not illuminate its meaning so much as prefigure the “melancholy madness” attributed to religious enthusiasms in the eighteenth century. See VOLTAIRE, 3 PHILOSOPH. DICTIONARY “Fanaticism” (1764) (stating “[w]e understand by fanaticism at present a religious madness,

In all these ancient texts, insanity was an excuse defense against criminal punishment, even if the affliction was intermittent, as long as the person was completely without understanding at the time of the criminal act.²⁶ In Roman law,

gloomy and cruel. It is a malady of the mind, which is taken in the same way as smallpox. . . . Fanaticism is, in reference to superstition, what delirium is to fever, or rage to anger. He who is involved in ecstasies and visions, who takes dreams for realities, and his own imaginations for prophecies, is a fanatical novice of great hope and promise, and will probably soon advance to the highest form, and kill man for the love of God"); *see also* John F. Sena, "Melancholic Madness and the Puritans," 66 HARV. THEOLOGICAL REV. 293 (1973) ("Melancholia" was attributed to Puritan out-groups). There is also mention of *fanaticus* in *The Empyrean Canopy*, an 1864 treatise on insanity, which diagnoses it as: "seeing visions wild and extravagant, in religious views, excess of enthusiasm, exhibiting strange motions and postures, vehement vociferation in worship, pretending to inspiration, or to have intercourse with superior beings, governed by imaginations rather than judgment and reasonable proof. Fanaticism is not so much a *belief*, as it is a strenuous and angry maintainance [sic] of a belief which has for its foundation no reasonable proof. . . . People in the church and out of it have been very zealous in using the epithet of insanity. Insanity is the plea, used now, in 1864, in church and out of it, for defamation. All of the above terms have been made use of by evil persons, to destroy the influence of truth, and defame character, used as an epithet to obliterate, rob, and destroy." WILLIAM M. PRIOR, *THE EMPYREAN CANOPY* 38–39 (1864). Another reference from 1864 is found in *Denny v. Denny*, a suit for divorce in which the wife's children sought to be appointed guardians *ad litem* and dismiss her suit. 90 Mass. 311, 312–14 (Mass. 1864) ("In *Malin v. Malin* . . . the chancellor says, 'a person incompetent to protect himself, from age or weakness of mind, or from some religious delusion or fanaticism . . . ought to come under the protection of the court.'" (citations omitted)).

26. 1 DIGEST OF JUSTINIAN 59–60 (Charles Henry Monro trans., 1904) (The Divine Marcus and Commodus issued a rescript to Scapula Tertullus in these words: "If you have clearly ascertained that Aelius Priscus is in such a state of insanity [*furor*] that he is permanently out of his mind [*continua mentis alienatione omni intellectu careat*] and so entirely incapable of reasoning, and no suspicion is left that he was simulating insanity [*dementiae*] when he killed his mother, you need not concern yourself with the question of how he should be punished, as his insanity [*furor*] itself is punishment enough. At the same time he must be closely confined, and if you think it advisable, even kept in chains; this need not be done by way of punishment so much as for his own protection and the security of his neighbours. If however, as is very often the case, he has intervals of sounder mind, you must carefully investigate the question whether he may not have committed the crime on one of these occasions, and so have no claim to mercy on the ground of mental infirmity; and, if you should find that anything of his kind is the fact you must refer the case to us, so that we may consider, supposing he committed the act at a moment when he could be held to know what he was doing, whether he ought not to be visited with punishment corresponding to the enormity of his crime. But when we learn by a letter from you that his position in respect of place and treatment is such that he is in the hands of his friends, even if confined to his

insanity was compared to infancy, for a child who lacked basic understanding of right and wrong could not be convicted, as well as to *idiotus*, or a person who did not have sufficient understanding of fact to be responsible.²⁷ Thus, as in contemporary formulations, including *M'Naghten*, knowledge of both law and fact was prerequisite to punishment. Intermittent forms of insanity that resembled spiritual possession, or *demens*, like epilepsy, were not completely legally disabling: not only could one be guilty of a crime if one were momentarily lucid, but one could also competently engage in other legal transactions, like wills or contracts.²⁸ The Latin *dementia*, used for this kind of temporary insanity, was later translated in English sources as lunacy (on the theory that its changes were affected by the moon).²⁹

own house, your proper course will be, in our opinion, to summon the persons who had the charge of him at the time and ascertain how they came to be so remiss, and then pronounce upon the case of each separately, according as you see anything to excuse or aggravate his negligence. The object of providing keepers for lunatics [*dementia*] is to keep them not merely from doing harm to themselves, but from bringing destruction upon others; and if this last-mentioned mischief should come to pass, it may well be set down to the negligence of any who were not sufficiently assiduous in the discharge of their office." *Id.*

27. OXFORD HANDBOOK, *supra* note 25.

28. 5 DIGEST OF JUSTINIAN 277 ("The Emperor Justinian to Julian, Praetorian Prefect[:]"It sometimes happens that the affliction of insane men remains continuous, and with others the attacks of disease are suspended, and lucid intervals occur, and in this latter instance a great difference exists, for some of the lucid intervals are short, and others are of long duration. In former times the question arose whether the authority of the curator continued to exist during the lucid intervals of insanity, when it temporarily ceased, and when the disease returned, it was restored. Hence We, desiring to decide this doubtful point, do hereby decree that, as when insane persons of this kind recover their senses it is uncertain and impossible to determine whether this will endure for a long or for a short period, and as the parties in question frequently remain on the border line of insanity and health, and after they continue for a considerable time in this condition, the lunacy seems in some cases to be removed, We decree that the appointment of the curator shall not be considered as ended, but to exist as long as the insane person lives, for generally a disease of this kind is incurable; and We also decree that, during their perfectly lucid intervals, the curator shall not exercise his authority, and that the demented person, while he is temporarily in possession of his senses, can enter upon an estate and do everything else which sane men are competent to do").

29. GEORGE WHITLEY ABRAHAM, THE LAW AND PRACTICE OF LUNACY IN IRELAND: TOGETHER WITH A COMPENDIUM 31 (1886) (stating "[t]he idea of a periodic insanity recurring at the changes of the moon, or in some way

English law kept this distinction between temporary possession (*demens* or lunacy) and permanent debility (*furiosus*) as well as its legal implications, though early decisions are often laconic and leave these matters to the King's mercy.³⁰ Through 1300, judges referred the insane to the King's mercy without further comment.³¹ In John Brydall's 1700 treatise, he traces

influenced by them, was familiar to the ancients . . . and while the cases of such insanity brought under the observation of actual experience may not be so numerous or so typical as to mark them off into a well-defined class, there can be no question that insanity of at least a seemingly intermittent character is developed or quickened in individual patients at seasons corresponding with the changes of the moon"). While Roman law does not suggest a "command of God" defense, according to Katherine Watson, medieval canon law accepted three, rather than two, versions of insanity, including a volitional component: "[A]s a defect of knowledge (the individual did not know what he was doing); as an instant compulsion (the individual was compelled or forced by some inexplicable necessity); and as a defect of rational capacity (the individual was not capable of reason because of intellectual impairment). All three categories implied, to a greater or lesser extent, a lack of free will . . . [with] no capacity to sin. . . According to canon law 'affliction should not be heaped upon the afflicted.'" KATHERINE WATSON, *FORENSIC MEDICINE IN WESTERN SOCIETY: A HISTORY* 73–74 (Routledge 2010).

30. Apparently other scholars do not think this is so clear, *see* Crotty, *infra* note 33, but it looks as though Justinian uses the terms *furiosus* and *demens* pretty carefully to distinguish total (*furor*) from intermittent (*demens*) loss of understanding, and distinguishes both from infancy and intellectual disability. The distinction certainly makes sense, given that the most common forms of mental illness at the time were likely to be dementia (in the modern sense) or rabidity, both of which would worsen and result in a total deprivation of mind, and epilepsy, which would come and go. Certainly *furiosus* would be descriptive of symptoms of rabidity and *demens* of symptoms of epilepsy. However, dementia was also used later as a generic term, with *furor* and lunacy as more specific terms. *See* ABRAHAM, *supra* note 29, at 26 (stating "[t]he classification adopted by Chief Justice Hale is not very dissimilar Using dementia as one of the equivalents of insanity . . . he divides it into—1. Idiocy . . . 2. Dementia accidentalis vel adventitia, which is (i.) quoad hoc vel illud, or (ii.) total; and again, is (i.) permanent or fixed, when it is called phrenesis, or (ii.) interpolated, and by certain periods or vicissitudes, when it is called lunacy; and finally, is (i.) more dangerous and pernicious, commonly called furor, rabies, mania; or (ii.) less so, such as is deep delirium, stupor. 3. Dementia affectata, namely, drunkenness").

31. *See, e.g.*, 1 THE PUBLICATIONS OF THE SELDEN SOCIETY 66–67 (Trinity Term 1212) (stating "the king is to be consulted about an insane man who is in prison because in his madness he confesses himself a thief, while really he is not guilty"); *id.* at 119 (stating that "Richard of Brent, son of Adam Thurbern, accused of larceny, comes and defends all of it and puts himself upon the country. And the twelve jurors . . . say that they do not suspect him, save of a fowl which he took in his madness at a time when he was lunatic."); FREDERIC WILLIAM MAITLAND ET AL., 5 YEAR BOOKS OF EDWARD II: THE EYE OF KENT

the continuities from Justinian through Bracton, Fleta, and Coke, and divides insanity into intellectual disability from birth (*idiotus*), temporary forms of insanity (*demens* or lunacy—like epilepsy), and permanent forms of insanity developed later in life (*furor*—like rabies).³² Hale and Hawkins continued this line of thought, and Hale is likewise clear that insanity includes being unable to distinguish between right and wrong, whether permanently or temporarily.³³

In 1724, Justice Tracy consulted these authorities in the case of Edward Arnold, instructing the jury to acquit “if the

1313–14, at lxii (1996) (stating that “insane murderers were dealt with pretty much as we deal with them now. A jury, to take an actual instance, finds that one Geoffrey ‘tanquam demens et furiosus occidit predictum J. et non per feloniam,’ and so [is not hanged but] must remain in prison during the King’s pleasure.”); see also SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, 2 HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 490, 503 (Liberty Fund, 1898) (stating that “[h]omicide by felony is frequently contrasted with homicide by misadventure, homicide by self-defence and homicide committed by one who is of unsound mind.”). Abraham also contains a helpful discussion of the terms as they were used in English law texts, with similar distinctions between *demens* and *furiosus*. ABRAHAM, *supra* note 29, at 23–38.

32. JOHN BRYDALL, “NON COMPOS MENTIS, OR, THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATIC PERSONS INQUISITED AND EXPLAINED FOR COMMON BENEFIT 6–7 (1700) (defining *fool natural* as “one that is wholly deprived of his Reason and Understanding from his Birth,” also called by the law an *Idiot*, so that he: “cannot number to Twenty; nor can tell what Age he is of, nor knoweth who is his Father or Mother, nor is able to answer to any such easie [sic] Question; whereby it may plainly appear that he hath not reason to discern what is to his profit or damage, though it be notorious, nor is apt to be informed or instructed by any other”). Brydall also defines *madness* as a permanent condition of insanity, as today might be suffered in Alzheimer’s or rabies, in which “one, that was of good and sound Memory, and by the Visitation of God, through some Sickness, Grief, or other Accident, utterly loseth his Memory, and Understanding; and so falls into some high, or low degree of Fury or Madness.” *Id.* at 52 (referring to this category as *furor men*, signaling a continuity with Roman law’s *furiosus*). Finally, Brydall defines *lunatick* as “one, that hath sometime his Understanding, and sometime not”). *Id.* at 94. He connects this category with the falling-sickness,—*i.e.*, epilepsy—and notes that “[t]he Roman Lawyers do distinguish every where, betwixt him that is *Furiosus*, and him who is *Demens*.” *Id.* at 95. *Furiosus* is one who has lost all understanding, but *Demens* is “not continually.” *Id.*

33. Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105 (1924); 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 CALIF. L. REV. 1227 (1966) (emphasizing the connection between moral maturity and right/wrong insanity tests).

defendant was under the *visitation of God*,³⁴ and could not distinguish between good and evil, and did not know what he did.”³⁵ Arnold was tried for the non-fatal shooting of Lord Onslow, a defender of the Protestant religion, because he believed Onslow was sending imps and voices to worry and tempt him, as well as deprive him of rest.³⁶ Arnold was convicted, but pardoned through Onslow’s intercession.³⁷ Justice Tracy is often credited with articulating the *wild beast test* of insanity—that only someone who acts like a wild beast may be acquitted. It is quite clear that this interpretation is inaccurate—Tracy was merely referring to a line in Bracton and earlier, in Justinian, which talks about the *furiosus* as having as little understanding as a *brutus* or animal.³⁸ Reading the jury

34. Blackstone also used “visitation of God” language in his discussion of arraignments. At common law, a defendant who would not plead either guilty or not guilty was subject to the torture of pressing—*peine forte et dure*. However, Blackstone noted that an exception was made for those who could not speak to enter their plea because they were under a “visitation of God” rather than “mute of malice.” For those who could not speak a plea (either because of mental or physical disability), a jury was empaneled to determine whether their muteness was real or feigned. If feigned, they were convicted; if real, they were tried as though they pled not guilty. The term “visitation by God,” which appears in Blackstone and in Brydall, may appear to suggest that insanity was considered a kind of deific possession akin to deific decree situations. See 4 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 323 (1753) (stating “if [prisoner to be arraigned] says nothing, the court ought *ex officio* to empanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitation Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty”); see also *id.* at 23 (stating “idiots and lunatics are not chargeable for their own acts”). This “visitation of God” language became a kind of legal formula. “By Visitation of God” [*ex Visitation Dei*] was also a formulaic phrase used extensively in coroner’s reports as the cause of death when the cause of death was not accident or was unclear, embarrassing, or could not be determined, well into the nineteenth and twentieth centuries, though the phrase was disapproved by medical societies in the mid-1800s. See SARA M. BUTLER, FORENSIC MEDICINE AND DEATH INVESTIGATION IN MEDIEVAL ENGLAND 221–23 (Routledge 2016).

35. 16 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 695 (T.B. Howell ed. 1816) [hereinafter A COMPLETE COLLECTION]; see also ROBINSON, *supra* note 24, at 129–35.

36. *Id.*

37. *Id.*

38. See BRYDALL, *supra* note 32, at 78–80.

charge as a whole, it is clear that Tracy is just repeating the ancient distinction between *furiosus* and *demens* and incorporating the requirement that the defendant be mature and aware enough to distinguish right from wrong.³⁹

From this brief history, one might conclude that the categories of prophet, visionary, and insanity overlapped completely, and thus the purported prophet was likewise exonerated—any deific decree defense was just another branch of the *demens* possession and/or temporary insanity defense. Where Roman law prevailed, there was little discussion of deific decree experiences as revelation rather than insanity.⁴⁰ But insofar as a Christian spiritual cosmology infused the law, the question of *possessed by whom* complicated the story.⁴¹ While Tracy characterized Arnold as suffering from “a visitation of God,” the *demens* could also be considered “demon-possessed,” and insanity was often considered to be the result of sin.⁴² When medieval and early modern jurists now quoted the famous language in Justinian that *furor* was its own punishment,⁴³ they

39. See Platt & Diamond, *supra* note 33; see also Anthony M. Platt, *The Origins and Development of the “Wild Beast” Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 1 (1965) (arguing convincingly that the *M’Naghten* test was no innovation but was consistent with prior law and practice, whereas the “wild beast” test resulted from distorted understandings of key texts).

40. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 421, 430 (Harv. Univ. Press, 1983) (both the Assizes of Ariano, circa 1115, and the Liber Augustalis, circa 1231, had exemptions from criminal liability for insanity).

41. H.C. ERIK MIDELFORT, *A HISTORY OF MADNESS IN SIXTEENTH-CENTURY GERMANY* 190 (1999) (pointing out that canon law modified Roman law by explicitly recognizing a volitional insanity defense when a defendant “was impelled or forced by some inexplicable necessity,” consonant with the Church’s emphasis on intentionality in defining sin, as well as with its acknowledgment of the possibility of demonic possession). A nineteenth-century English experiment with a similar “irresistible impulse” volitional test was short-lived. Crotty, *supra* note 33, at 119.

42. ROBINSON, *supra* note 24, at 61–66, 71–84, 117–21 (tracing the rise and fall of ideas of “possession” in medieval and early modern insanity law as Roman legal ideas encountered Christian cosmology); see also MIDELFORT, *supra* note 41, at 182–84 (recounting the 1590 trial of Conrad Herman, who killed his wife because he believed her to be a witch, in which the jurists applied the Roman law of insanity, but “were also troubled by the likelihood (as it seemed to them) that [the defendant] was only pretending to be mad and had actually given in to the suggestions of the evil spirit”).

43. See *supra* note 30, translated as “his insanity itself is punishment

heard in it the connotations of *Matthew* in which Jesus casts out demons, and *Hosea* 9:7 (King James): “the days of visitation are come, the days of recompence are come: Israel shall know *it*: the prophet *is* a fool, the spiritual man *is* mad, for the multitude of thine iniquity, and the great hatred.”⁴⁴ Insanity itself was its own punishment, i.e., a divine punishment for sin.

The concern for both Church and nascent State was not whether demonic possession was a real phenomenon (for well into the eighteenth century, if not beyond, the reality of demonic possession was never in doubt), but rather whether the *demens* was a charlatan (in which case confession and punishment for heresy or deception was required), suffering from a visitation of God (in which case care, compassion, and awe were the proper response), suffering a possession by demons (in which case exorcism was required), or had welcomed demons in through sin and was therefore a witch, heretic, or sorcerer (requiring confession and death).⁴⁵ Categories were so contested that in the

enough.” More than one thousand years later, Blackstone quotes the phrase in his own discussion of insanity in English law: “[*F*]uriosus furore solum punitur” [‘madness alone punishes a madman’]. In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.” WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND, ch. 2 (2014) (ebook). Note how the phrase subtly changes in meaning from, “no need to punish someone so afflicted,” to “insanity is punishment.”

44. Anthony Ossa-Richardon, *Possession or Insanity? Two Views from the Victorian Lunatic Asylum*, 74 J. HIST. IDEAS 553 (2013); Alexandra Walsham, *Frantick Hackett: Prophecy, Sorcery, Insanity, and the Elizabethan Puritan Movement*, 41 HIST. J. 27, 59 (1998).

45. NANCY CACIOLA, *DISCERNING SPIRITS: DIVINE AND DEMONIC POSSESSION IN THE MIDDLE AGES* intro. (2003) (stating “[o]n the one hand, a person encompassed by constant supernatural interventions might be defined as a divinely inspired prophet or visionary, a mouthpiece of God. Yet it was equally possible to categorize such an individual as a demoniac possessed of unclean spirits, as a false saint puffed up with pride, or as a victim of demonic delusion”); MIDELFORT, *supra* note 41, at 184–86 (describing case of a “desperate Saxon mother” who took the lives of several of her children to prevent them from starvation, though she had plenty of food. The legal faculty at Wittenberg concluded she was not insane, but suffering from melancholy, which was both a disease caused by “black bile” and a sin of despair. Her mitigated punishment included exhortations from the gospel which “brought a spirit of joy that could drive out the sad suggestions of the evil spirit.”); *id.* at 219 (quoting Paulo Zacchia, papal physician in 1621, “those are properly called demoniacs who are driven into insanity from a melancholy weakness, which the demons then use as if it were an instrument to possess them”); WATSON, *supra* note 29 at 73 (stating “[r]eligious beliefs made the issue of insanity and

1400s, Margery Kempe, a visionary English evangelist, was tried for heresy several times and wrote that she was often suspected of demonic possession, in part *because* of her ability to quote scripture verbatim.⁴⁶ Debates over supernatural visitation raged through the centuries and cut across Catholic and Protestant boundaries, with each side often accusing the other alternately of either superstition or atheism. All sides in these religious disputes sought to develop clearer distinctions among insanity, possession, prophecy, and witchcraft: “Doctors provided medical diagnoses, demonologists held forth on the scope of demonic agency, and inquisitors probed the workings of

diminished capacity more complicated than it had been in the ancient world, and placed a new and unique hardship on insane defendants: they were at risk of being thought to be demonically possessed. Although the insane could not be considered guilty of a crime if they had not knowingly committed the offense, any persons whose ravings led to a suspicion of demonic possession were subject to the strongest penalties. The insanity defence could not therefore be used in witchcraft trials before a growing understanding of melancholia and delusion in the sixteenth and seventeenth centuries began to offer alternative explanations for the phenomena associated with witches”); *see also* Renate Blumenfeld-Kosinski, *The Strange Case of Ermine de Reims (c. 1347–1396): A Medieval Woman between Demons and Saints*, 85 *SPECULUM* 321, 322 (2010) (In the 14th Century: “[d]emons, rather than being agents of evil that tested humans’ endurance and spiritual steadfastness or participants in some learned magical ritual, became increasingly associated with . . . witchcraft. . . . At the same time, the idea of possession became . . . ‘a major hermeneutic challenge’: who was in charge of ‘assigning meanings’ to spiritual phenomena?”); Michael Heyd, *The Reaction to Enthusiasm in the Seventeenth Century: Towards an Integrative Approach*, 53 *J. MOD. HIST.* 258 (1981); Andrew Keitt, *Religious Enthusiasm, the Spanish Inquisition, and the Disenchantment of the World*, 65 *J. HIST. IDEAS* 230 (2004); Anthony Ossa-Richardson, *Possession or Insanity? Two Views from the Victorian Lunatic Asylum*, 74 *J. HIST. IDEAS* 553 (2013) (describing the conflicted position of asylum chaplains in the nineteenth century, some of whom argued that there was no distinction between “lunatics and demoniacs” and that both “maniacs and lunatics” were “demoniacs”—note the linguistic continuity with Roman law here); Olga A. Tsapina, *The Image of the Quaker and Critique of Enthusiasm in Early Modern Russia*, 24 *RUSSIAN HIST.* 251, 252–56 (1997) (Quakers’ position that one could communicate directly with God was dangerous, destabilizing and heretical during Civil War, Interregnum, and Restoration in England); Alexandra Walsham, *Frantick Hackett: Prophecy, Sorcery, Insanity, and the Elizabethan Puritan Movement*, 41 *HIST. J.* 27 (1998) [hereinafter *Frantick Hackett*].

46. MARGERY KEMPE, *THE BOOK OF MARGERY KEMPE* in GENELLE GERTZ, *HERESY TRIALS AND ENGLISH WOMEN WRITERS, 1400–1670*, at 69, 199 n.95 (Cambridge 2012) (stating “she must be either spiritually inspired or demonically possessed to hold such scriptural knowledge”).

God's providential order."⁴⁷

Any tidy distinctions were also complicated by the fact that particular types of mental illness were often attributed to satanic influence. For example, melancholia, or depression, was thought to be caused by "black humors" manipulated by demonic forces.⁴⁸ Hence, suicide—a mortal sin *and* capital crime—was described in English formulaic indictments as "not having the fear of God before [one's] eyes but being moved and seduced by the instigation of the Devil."⁴⁹ Suicides were punished both in this world—by forfeiting all possessions to the Crown⁵⁰—and in the next—by receiving no sacred burial and perhaps losing the opportunity to suffer their way out of Purgatory.

Statutes against sorcery, heresy, and witchcraft crossed between temporal and church authority. While originally ecclesiastical offenders, impenitent heretics were turned over to the civil authorities for punishment and execution.⁵¹ In

47. Keitt, *supra* note 45, at 235; Owen Williams, *Exorcising Madness in Late Elizabethan England: The Seduction of Arthington and the Criminal Culpability of Demoniacs*, 47 J. BRIT. STUD. 30, 43 (2008) (citing RITUALE ROMANUM PAULI V. PONT. MAX. IUSSU EDITUM 249 (Venice 1663); STUART CLARK, THINKING WITH DEMONS: THE IDEA OF WITCHCRAFT IN EARLY MODERN EUROPE (Oxford 1997)) (proposing that the Church was very concerned to distinguish between the insane and the possessed); *id.* (citing D.P. WALKER, UNCLEAN SPIRITS: POSSESSION AND EXORCISM IN FRANCE AND ENGLAND IN THE LATE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (Univ. Pa. Press 2016) (1981)) (proposing that the devil targeted for possession those suffering from mental illnesses); *id.* at 43 (citing WALKER, *supra*, at 36) (supporting his view from Origen, Chrysostom, Jerome, and *Matthew* 4 and 17 that "the devil habitually uses the morbid effects of the moon on the humours, especially black bile, in order to torment demoniacs").

48. See MIDELFORT, *supra* note 41; Sena, *supra* note 25.

49. *Indictment of Aaron Burr*, FOUNDERS ONLINE, Oct. 23, 1804, <https://founders.archives.gov/documents/Hamilton/01-26-02-0001-0281>; see also Terence R. Murphy, "Woful Childe of Parents Rage": *Suicide of Children and Adolescents in Early Modern England, 1507–1710*, 17 SIXTEENTH CENT. J. 259, 264 (1986); Williams, *supra* note 47, at 44.

50. POLLOCK & MAITLAND, *supra* note 31.

51. *Id.* at 570–82. Even in the time of Edward I, jurisdiction was somewhat unclear, with some authorities stating that inquiries about sorcery are within the sheriff's jurisdiction, while others claim "it is for the ecclesiastical court to try such offenders" though the king "as a good marshal of Christianity" might proceed "as he pleases." The first statute against heresy was passed about 1406, and Henry VIII, Elizabeth I, and James I passed others against sorcery. However, Pollack and Maitland argue that executions of heretics, sorcerers, and witches were rare until the Commonwealth, citing evidence that only 15 were executed from the time of Henry VIII until 1644,

sixteenth- and seventeenth-century England, civil and ecclesiastic jurisdictions clashed over how to understand the phenomenon of demonic possession and who had authority to treat (or exorcise) those possessed and punish those responsible for the possession.⁵²

To take one colorful example, in the 1590s, a man named William Hacket roved through London declaring himself to be “Jesus Christ, King of the Earth and Christendom” and calling for the deposition of Queen Elizabeth I and the death of her ministers.⁵³ Hacket developed a large and embarrassing following—especially among disgruntled Puritans—such that he created political turmoil during a time of official, if tentative, *détente* among Catholics, Puritans, and the Church of England.⁵⁴ He was arrested and convicted for treason, hung, drawn, and quartered, despite the fact that he maintained his divine mission

though in the 16 years of Puritan rule, there were 109 “condemned and hung.” *Id.* at 582 n.503 (citing Francis Hutchinson, *An Historical Essay Concerning Witchcraft* (1718)). These numbers apparently do not include the hundreds of Protestants executed for heresy during the Marian period, nor the hundreds of Catholics executed as traitors (rather than heretics) under Tudor rule for adhering to the view that the Pope, not the English monarch, was head of the Church. PETER MARSHALL, *HERETICS AND BELIEVERS: A HISTORY OF THE ENGLISH REFORMATION* (Yale Univ. Press, 2018).

52. Marcus Harmes, *The Archbishop and the Lord Chief Justice: Dispossession and the Clash of Jurisdictions in Jacobean England*, 3 *PRETERNATURE: CRITICAL & HIST. STUDS. PRETERNATURAL* 32 (2014) (discussing cases of witchcraft and demonic possession in which both civil and church authorities claimed, and fought over, jurisdiction to exorcise and to punish); see also *Frantick Hacket*, *supra* note 45, Williams, *supra* note 47, at 38 (providing a provocative connection to 1) Cicero’s list of kinds of insanity — “*Furor, Dementia, Insania, Fatuitas, Stultitia, Lethargia, and Delirium*,”—translated as “violent madness, less violent madness, inconstancy of mind, idiocy, simplicity, radical forgetfulness, and dotage” and 2) to Cosin’s response to the Hacket case by using Cicero’s distinctions to prove Hacket was not suffering from *Furor* or *Dementia*, but rather from *Insania*—a mere wandering mind). Williams also says that Church of England representatives were skeptical of demonic possession and exorcism, as it was associated with both Catholic and Puritan fringe groups. *Id.* From 1400–1612, heresy trials in England also bounced between ecclesiastical and royal courts, and relapsed heretics could be executed by secular authorities (as Joan of Arc was). Heresy itself, of course, depended upon which English monarch was in power, as Protestants and Catholics were alternately orthodox and heterodox. GERTZ, *supra* note 46, at 7–12.

53. *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF ELIZABETH, 1591–1594*, at 75–76 (Mary Anne Everett Green ed. 1867).

54. *Frantick Hacket*, *supra* note 45.

even unto the scaffold, in wandering diatribes against the Queen.⁵⁵ Hacket's compatriot, Arthington, escaped conviction for treason by publishing a tract arguing that Hacket had demonically possessed him.⁵⁶ Hacket's death, Arthington said, had released him from his possessed state.⁵⁷ Historian Owen Williams explains the complications in the politics of Hacket and Arthington's cases arose from overlapping jurisdictions of ecclesiastical and legal authorities, the reluctance of Church of England clergy to acknowledge either possession or exorcism (because of their association with religious fringe groups, both Puritan and Catholic), and their equal reluctance to relinquish any traditional ecclesiastical authority. Later, English lawyers struggled mightily—and unconvincingly—to prove that Hacket was, in fact, sane and no injustice had been committed.

The provenance of an alleged deific decree would have been acutely and centrally important even in seventeenth- and eighteenth-century adjudications. God, the Devil, witchcraft, and mental illness were all at work—and difficult to distinguish. Yet distinguishing between them was of the utmost importance.

II. Revelation and Reason in U.S. Courts

Today, of course, we believe that we think differently. Medicine and science now understand insanity as a form of disease, not a mode of spiritual communication or demonic possession; yet, the problem of separating religious conviction and prayer from disease has not disappeared. Courts still have to decide what to do with defendants who disobey the law because God told them to, and psychiatrists still have to decide where delusion ends and religious belief begins.

55. *Id.*

56. Williams, *supra* note 47.

57. *Id.*

A. Hearing from God Is Always a Symptom of Insanity

*“Insanity is a belief not founded on evidence.”*⁵⁸

At one end of the spectrum is a legal response that automatically counts all sincere claims of revelation as insanity. As law is committed to reason and evidence as its metaphysics of truth, this position is natural to law and often presumed by commentators. As an example, consider the trial of Charles J. Guiteau for the assassination of James A. Garfield.⁵⁹ Guiteau was convinced that he was divinely chosen to do great things, and he expected that a rapid rise to distinction would be a sign of his vocation.⁶⁰ It soon became apparent that academic distinction was not the destined path, and Guiteau left college.⁶¹ Deciding that his greatness would appear in religious life, he joined the Oneida colony where he first worshipped and, later, excoriated its founder, Noyes, and then wrote his own book on theology plagiarized from Noyes.⁶² When Guiteau was expelled from Oneida and was not recognized as a prophet, he turned to law and politics.⁶³ He wrote a speech in favor of Garfield’s candidacy for president, presenting it to a few small audiences.⁶⁴ When Garfield unexpectedly won, Guiteau believed his true vocation had been revealed and that his speech was responsible

58. *Guiteau v. United States*, 10 F. 161, 171 (S.D.N.Y. 1882).

59. *Id.*

60. CANDICE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE AND THE MURDER OF A PRESIDENT* (2011) (emphasizing in detail the biographical parallels of Garfield and Guiteau: both were raised in poverty by single parents, both narrowly escaped death and thought of themselves as “saved” for a divine purpose; Guiteau expected fortune to favor him, but it never did and Garfield, by contrast, had exactly the propitious meteoric rise to fame that Guiteau vainly anticipated; both wrote of their divine mission and “great expectations” with self-confidence; both shared expectations of divine favor; Garfield had many qualities, including emotional intelligence, genuine compassion, integrity, and willingness to work hard, that Guiteau’s sheer narcissism lacked). The biography encourages the reader to ask whether, if Guiteau’s vaunting ambitions had been rewarded with as much alacrity as Garfield’s, would he have been the same, desperate, bitter, selfish creature. Was only one of these men insane?

61. *Id.* at 48.

62. *Id.* at 50–53.

63. *Id.* at 57.

64. *Id.* at 57.

for Garfield's victory.⁶⁵ Guiteau came to D.C. to claim his reward, and he pestered Garfield's cabinet members for ambassadorships.⁶⁶ When that avenue of distinction failed, Guiteau finally became convinced that God was telling him to kill Garfield in order to save the Republican Party and the nation.⁶⁷ On July 2, 1881, he shot Garfield twice from behind at the train station, and Garfield died eleven weeks later of infection.⁶⁸ Guiteau claimed insanity, and he cursed and ranted during much of the trial.⁶⁹ Judge Cox's summing up and instruction to the jury struggled to articulate the proper legal analysis of insanity:

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.⁷⁰

A belief, says Judge Cox, "not founded on evidence," is insane.⁷¹ Judge Cox then strives to distinguish *normal* religious belief from *delusion*, but his jury charge makes it clear that even widely accepted cases of religious inspiration cannot be understood as "sanity" under the law's definition of reason and truth:

A great many Christians believe, not only that events generally are providentially ordered, but that they themselves receive special providential

65. *Id.*

66. MILLARD, *supra* note 60, at 94–96, 106–08.

67. *Id.* at 113–15.

68. *Id.* at 131–32, 228–29.

69. *Id.* at 239–42.

70. *Guiteau*, 10 F. at 166 (emphasis in original).

71. *Id.* at 171.

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. On the other hand, if you were satisfied that a man sincerely, though insanely, believed that, like Saul of Tarsus, on his way to Damascus, he had been smitten to the earth, had seen a great light shining around him, had heard a voice from heaven, warning and commanding him, and that thenceforth, in reversal of his whole previous moral bent and mental convictions, he had acted upon this supposed revelation, you would have before you a case of imaginary inspiration amounting to an insane delusion.⁷²

While Judge Cox struggles to limit religious conviction to modest irrationalities, it is hard to avoid the conclusion in these passages that St. Paul would be considered, under this analysis, legally insane, as was Abraham, who “insist[ed] that the Almighty has appeared to him and commanded him to sacrifice his child.”⁷³ Only religious beliefs that are susceptible to revision in light of reason are, on the logic of this view, undoubtedly sane.

Cox’s instructions to the jury underscored reasons to doubt Guiteau’s claim of divine command, precisely because it was not completely irrational: “And so, in like manner, I say, a man m[a]y reason himself into a conviction of the expediency and patriotic character of political assassination, but to allow him to find shelter from punishment behind that belief, as an insane delusion, would be simply monstrous.”⁷⁴ After weeks of trial, the jury convicted the defendant in less than an hour.⁷⁵

Guiteau’s trial demonstrates one approach to law and revelation: Irrational revelations are *ipso facto* insanity. A similar, but subtler, approach is for law to retreat into a position

72. *Id.* at 177.

73. *Id.* at 172.

74. *Id.* at 175.

75. MILLARD, *supra* note 60, at 241.

of extreme positivism and moral relativism, eliding both religious and ethical beliefs as *subjective* and *unprovable* and, therefore, irrelevant to law. While not explicitly calling religious belief insane, this position denies claims to truth of both religion and ethics and tries to maintain a clear separation between the objective and subjective realms.

In *People v. Serravo*, for example, the Defendant claimed that he should be acquitted on grounds of insanity because, while he knew it was against the law to stab his wife in the back, God had told him to do it.⁷⁶ The doctrinal issue on appeal was whether the *M'Naghten* test should define insanity as being unable to know the illegal from the legal, in which case Serravo was sane, rather than the wrong from the right, in which case he might be considered insane.⁷⁷ The majority upheld the relevance of the right/wrong formulation, but Justice Vollack's dissent argued that "[u]ntil a moral standard becomes law it is an unreliable test for insanity."⁷⁸ Only delusions that affect a person's ability to understand "what society has fixed and established as law"⁷⁹ should be relevant, Vollack argued. The majority "creates an exception by incorporating a subjective standard—a person's religious inclinations and beliefs—into [Colorado's definition of insanity.] In Colorado, neither the General Assembly nor this court has accepted subjective tests to determine criminal responsibility."⁸⁰ Vollack's position, like Cox's, demonstrates law's difficulty in thinking of religious convictions as having any connection with truth. At best, they are unfounded opinions; at worst, they are insane delusions. However, like other instances of subjectivity, for Vollack, religious convictions amount to legal insanity only in cases in which they obscure one's knowledge of the law on the books.

A third approach that also illustrates a kind of presumption of insanity for religion would deny that deific decree cases are different in kind from any other command delusion. While these commentators often favor broadening the legal insanity defense,

76. 823 P.2d 128 (Colo. 1992).

77. *Id.*

78. *Id.* at 147 (quoting *State v. Hamann*, 285 N.W.2d 180, 184 (Iowa 1979)).

79. *Id.*

80. *Id.* at 148.

rather than narrowing it, and do not usually paint morality as fatally subjective, they see no difference between a command from God and a command from dog.⁸¹ Christopher Hawthorne, for example, argued that deific decree was a “pseudo-doctrine,” for if God’s commands were considered to be different than other commands, the law would be establishing religion, and if God’s commands were no different from others, then judges were either sneaking in a volitional element to the insanity defense despite legislative disapproval of “irresistible impulse” formulations, or they were at risk of establishing a cultural defense for all religious and ethical non-conformists, like the infamous Rodney Crenshaw, who killed his allegedly unfaithful wife because of his “Moscovite” beliefs.⁸² Rabia Belt’s analysis is similar, though she argues for broadening, rather than narrowing, the insanity defense and for recognizing that presuppositions about religion affect not only the law but psychiatry as well.⁸³

So, deific decree doctrine seems to exemplify law’s discomfort with revelation. Grant Morris and Ansar Haroun make just this point:

The deific decree doctrine assumes that when the defendant heard the voice of God commanding

81. See Hawthorne, *supra* note 12, at 1759 n.19–20 (comparing “Son of Sam” killer David Berkowitz, who heard commands in the barking of a neighbor’s dog).

82. *Id.* at 1771–75, 1800–09; see also *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983). The “Moscovite religion” Crenshaw purports to follow in this case is unclear. There is a controversial New-Calvinist religious group in Moscow, Idaho near the Washington state border known as “Muscovite” that has strong anti-feminist and anti-divorce rules and has been active since about 1977. There is no apparent evidence that Crenshaw was a member of that sect. However, the Church’s ideology would be somewhat consistent with his assertion at trial that adultery was a capital sin. See Doug Wilson, *The Death Penalty as Our Only Hope*, BLOG & MABLOG: THEOLOGY THAT BITES BACK (Sept. 27, 2017), <https://dougwils.com/books-and-culture/s7-engaging-the-culture/death-penalty-hope.html> (arguing that the death penalty is in principle religiously justified for sodomy and sexual sins); see also Peter J. Jankowski et al., *Religious Beliefs and Domestic Violence Myths*, 10 PSYCHOL. RELIGION & SPIRITUALITY 386 (2018) (analyzing a study of 238 students from a Protestant evangelical seminary that found positive association between New-Calvinist beliefs and domestic violence acceptance).

83. Belt, *supra* note 8.

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?⁸⁴

They warn that preferring atheism to theism may violate the Establishment Clause by treating religious convictions less favorably than non-religious convictions.⁸⁵ So, if law treats alleged commands of God as *ipso facto* delusional, there is no way to avoid denigrating religion, whether the law acquits only those commanded by God, or acquits all those with command hallucinations.

B. God Is Reason (God Is Irrelevant)

*Even the Holy One of the Gospel must first be compared with our ideal of moral perfection before he is recognized as one.*⁸⁶

One obvious way to address the conflict between law and revelation without presuming religion to be a form of insanity is to identify the two: God is reason(able). Aquinas, for example, sought to provide an understanding of God that would enable an articulation of natural law that would necessarily accord with divine law.⁸⁷ William of Ockham, however, thought that placing rational limits on God's power was impious, as well as overestimating human ability to know God through reason.⁸⁸ This

84. Morris & Haroun, *supra* note 12, at 1019; *see also* Demko, *supra* note 12.

85. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

86. IMMANUEL KANT, *RETHINKING THE WESTERN TRADITION: GROUNDWORK FOR THE METAPHYSICS OF MORALS* 25 (Allen W. Wood, ed. & trans., Yale Univ. Press 2002) [hereinafter *GROUNDWORK*].

87. *See* C. STEPHEN EVANS, *FAITH BEYOND REASON: A KIERKEGAARDIAN ACCOUNT* 60 (1998) (stating “[i]t cannot be overemphasised [sic] that the function of reason in Aquinas’ view is to confirm that a purported revelation really is from God”).

88. *See* *William of Ockham (Occam, c. 1280—c. 1349)*, INTERNET ENCYC. PHILOSOPHY 7a, <https://www.iep.utm.edu/ockham/> (“God does not conform to an independently existing standard of goodness; rather, God himself is the

kind of extreme humility can lead to either unbreachable conflict between reason and revelation⁸⁹ or a kind of irrelevance of religion to legal affairs. As Julie Cooper explains:

While Augustinians insist that divine omnipotence entails human impotence, Ockhamists contend that God is so powerful, and so unfathomable, that humans are left no choice but to manage their own affairs, because God is unavailable for consultation. (As Hobbes develops this line of argument, submitting political life to divine direction betrays sinful pride, because it presumes that humans can know God.)⁹⁰

Kant's *Religion with the Limits of Reason Alone* also takes on Aquinas's task of unifying reason and revelation, but tries to accommodate the Ockhamist proviso that knowledge of God is beyond human capacity, while avoiding the *real politik* pessimism that seems to pervade Hobbes. From the doctrine of original sin, to salvation through grace, to the Trinity, Kant systematically reinterprets Christian doctrine philosophically, and Biblical narrative allegorically, to accord with his reason-based ethical theory. Important to Kant's resolution of the conflicts is a kind of humility about religious truth. For example, we need not assert that the Church is wrong about grace being necessary to salvation, we need only say that, if God is actually responsible for our good actions, we never know it and must assume nonetheless that striving to be good is within our power:

Granted that some supernatural cooperation may be necessary to his becoming good, or to his becoming better, yet, whether this cooperation consists merely in the abatement of hindrances or indeed in positive assistance, man must first make himself worthy to receive it, and must *lay hold* of this aid (which is no small matter)—that

standard of goodness”).

89. See *infra* pt. II(C).

90. JULIE E. COOPER, *SECULAR POWERS: HUMILITY IN MODERN POLITICAL THOUGHT* 64 (2013).

is, he must adopt this positive increase of power into his maxim, for only thus can good be imputed to him and he be known as a good man For despite the fall, the injunction that we *ought* to become better men resounds unabatedly in our souls; hence this must be within our power, even though what *we* are able to do is in itself inadequate and though we thereby only render ourselves susceptible of higher, and for us inscrutable assistance.⁹¹

However, Kant's humility about revelation makes revelation irrelevant, as he acknowledges.⁹² For example:

[I]n the end religion will gradually be freed from all empirical determining grounds The leading-string of holy tradition with its appendages of statutes and observances, which in its time did good service, becomes bit by bit dispensable, yea, finally, when man enters upon his adolescence, it becomes a fetter.⁹³

If God is reason, at least so far as we can know, then reason alone is all we really need. If God is reason(able), from the point of view of the deific decree exception, the conflict between reason and revelation is eliminated, because God could never command anything that was not right. Therefore, if one knows the difference between right and wrong according to reason, a command delusion is no excuse, for knowing the difference between right and wrong is the very ground of knowing God: "even the Holy One of the Gospel must first be compared with our ideal of moral perfection before he is recognized as one."⁹⁴

91. KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 40–41 (Greene & Hudson trans., Harper & Row 1960) (1934) [hereinafter RELIGION].

92. Cf. FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 23 (Richard Polt trans., Hackett Pub. Co. 1997) (1889) (stating "[t]he true world—unattainable? In any case, unattained. And if it is unattained, it is also *unknown*. And hence it is not consoling, redeeming or obligating either; to what could something unknown obligate us?").

93. RELIGION, *supra* note 91, at 121.

94. GROUNDWORK, *supra* note 86, at 25.

One sees the effort to eliminate the conflict between reason and revelation in both legal and religious materials. For example, in *Archie v. State*, a “floridly psychotic” Teresa Archie shot her daughter because she thought her daughter was consorting with Satan (she was reading a Stephen King novel), and God told her to do so.⁹⁵ Archie was convicted by a jury on standard *M’Naghten* instructions.⁹⁶ The prosecutor emphasized the testimony of a psychiatrist which stated:

She was in a great deal of anguish and internal anxiety and turmoil. God was telling her in her delusion to kill her daughter, but God also has told her and all of us Thou Shalt Not Kill. So, we are getting conflicting instructions here from God in Teresa’s mind.⁹⁷

Archie testified that she asked for forgiveness both before and after she shot her daughter, and also that she ran to the road shouting “I done your Will Lord.”⁹⁸ The Prosecutor argued that Archie would not have asked for forgiveness if she did not know that she had done wrong.⁹⁹ Essentially, because Archie knew right from wrong, and she knew that God was good, her jury found that she should have concluded that God would not have commanded her to kill her daughter.¹⁰⁰ Her conviction was upheld on appeal, with the appellate judge stating that:

[I]t would appear that the jury could have reasonably questioned whether Archie really believed that God had directed her to commit the act, given the logical assumption that she would not have needed forgiveness, because acting on a directive from God would not constitute a sin or a moral wrong. The jury could have also reasonably questioned whether Archie had asked for

95. 875 So. 2d 336, 341 (Ala. Crim. App. 2003).

96. *Id.* at 346.

97. *Id.* at 342 n.3 (quoting Dr. Dixon).

98. *Id.* at 346 (citation omitted).

99. See generally *id.*

100. *Id.*

forgiveness because she could have been uncertain as to her interpretation of God's will. This is a particularly tragic and troubling case. The record indicates that Archie was unquestionably suffering from a severe mental illness when she killed her daughter However, the law in Alabama is clear. Archie had to prove by clear and convincing evidence that she was unable to appreciate the nature and quality or wrongfulness of her acts. Resolution of any conflicts in the evidence is, of course, for the jury.¹⁰¹

Grant Morris and Ansar Haroun point out that the problem of distinguishing between religion and delusion does not disappear when one treats religious delusion as a medical issue.¹⁰² While the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM") struggles to define religious delusions without presuming that idiosyncratic religious beliefs are insane, in practice psychiatrists are more likely to believe that a religious belief is delusional if the divinity is acting unconventionally. In a study of how psychiatrists determined whether a religious belief was delusional:

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. The vignettes were tested on sixty-seven mental health practitioners of varying professional backgrounds,

101. *Archie*, 875 So. 2d at 343–44.

102. Morris & Haroun, *supra* note 12.

experience, and religious affiliation. 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 . . . Clinicians seem to be applying a “Good God” theory to measure the authenticity of a religious belief.¹⁰³

Religious communities often make the same assumption, accepting personal revelation as genuine only when it stays within the limits of the ethical, but rejecting revelations as insane or insincere when they diverge from the identification of God with reason. Luhrmann reports that, when she asked members of the evangelical Vineyard church about how they determined whether an inner voice came from God, they replied:

[The first test was whether the thought sounded like your own.] The second test was whether it was the kind of thing that God would say or imply. This was often articulated as making sure that what you thought God had said did not contradict God’s word in the Bible. This caution was explicitly expressed in all the written material and nearly every casual conversation on the topic. *Dialogue with God*, for instance, states clearly (and repeatedly) that “if the revelation violates either the letter of the Word or the spirit of the Word, it is to be rejected immediately.” God is a loving God; a revelation that tells you to hurt yourself or someone else, people said, came from something other than God. “You need discernment,” the pastor said. “There’s a letter written from Paul when he says, ‘Don’t put out the fires of the spirit but test everything, and

103. *Id.* at 1038–39.

hold on to what is good.’ We don’t expect that God would want someone to cut themselves, or tell them to jump off a bridge. That is not God.” Notice that this would not apply to Abraham and Isaac or the other points in the Hebrew Bible when God acts, as the biblical scholar Jack Miles puts it when writing about the Book of Job, like a fiend. When people talked about making sure that what you heard did not contradict the Bible, they really meant that it should be in keeping with the understanding of God’s character as taught within this church: unconditionally loving, eternally forgiving. The God at the Vineyard was not a fiend.¹⁰⁴

Not all religious traditions, nor all legal cases, however, identify reason and God, as the next section makes clear.

C. God Trumps Reason

Now divine Testimony or Revelation requires these following Credentials:

1. That the propositions or doctrines revealed by not inconsistent with reason; for intelligent creatures can never be bound to believe real inconsistencies. Therefore we are sure the popish doctrine of transubstantiation is not a matter of divine revelation, because it is contrary to all our senses and our reason, even in their proper exercises.

God can dictate nothing but what is worthy of himself, and agreeable to his own nature and divine perfections. Now many of these perfections are discoverable by the light of reason, and whatever is inconsistent with these perfections, cannot be a divine revelation.

But let it be noted, that in matters of *practice* toward our *fellow-creatures*, God may command us to act in a manner contrary to what reason would direct

104. LUHRMANN, *supra* note 7, at 64–65 (footnote omitted).

antecedent to that command. *So Abraham was commanded to offer up his son a sacrifice: the Israelites were ordered to borrow of the Egyptians without paying them, and to plunder and slay the inhabitants of Canaan: because God has a sovereign right to all things, and can with equity dispossess his creatures of life, and every thing which he has given them, and especially such sinful creatures as mankind; and he can appoint whom he pleases to be the instruments of this just dispossession or deprivation. So that these divine commands are not really inconsistent with right reason; for whatsoever is so, cannot be believed where that inconsistency appears.*¹⁰⁵

The assumption that God will always do what humans imagine to be good and/or in accordance with positive law is neither a necessary feature of all belief systems nor of all religious narratives. Presuming that religion will dovetail with law may, therefore, be yet another kind of Establishment Clause violation. As I pointed out at the beginning, even in Christianity, the most mainstream of United States religions, there are many stories of God commanding death and destruction that we would certainly find unlawful, unethical, and unreasonable.¹⁰⁶ Does God's command trump law, even when it seems wrong?

Arguably, the original deific decree doctrine assumed just that. Chief Justice Shaw, in *Commonwealth v. Rogers*, undertook to explain the doctrine of insanity in a case involving a prisoner who had killed a prison warden whom the prisoner believed was going to kill him.¹⁰⁷ Shaw explains in his jury charge that 'partial insanity' may operate in one of two modes:

105. ISAAC WATTS, LOGIC; OR, THE RIGHT USE OF REASON, IN THE ENQUIRY AFTER TRUTH; WITH A VARIETY OF RULES TO GUARD AGAINST ERROR IN THE AFFAIRS OF RELIGION AND HUMAN LIFE, AS WELL AS IN THE SCIENCES 235 (1724) (emphasis added).

106. See *Numbers* 21:2-3; *Deuteronomy* 20:17; *Joshua* 6:17, 21 (commanding the extermination of Jericho's inhabitants and those of other Canaanite cities). Job and Abraham/Isaac are other examples—though these have happier endings.

107. 48 Mass. (7 Met.) 500 (1844).

Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, *if it were true, would excuse his act*: As where the belief is, that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self defence. 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. [Or] 2. . . . [T]hat the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence . . . towards friend or foe indiscriminately . . . overborne memory and reason . . . not of a mind capable of choosing . . . result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.¹⁰⁸

Shaw states that a command of God, if true, “supersedes all human laws, and the laws of nature” and, therefore, like a reasonable belief that one is being attacked, a deific decree “if it were true” would justify the crime.¹⁰⁹ This account of insanity does not assume that hearing God is itself insanity, or that God would never order a criminal act. Rather, like Ockham, Calvin, or the Isaac Watts quotation at the beginning of this section, Shaw asserts the possibility of a God who might demand murder. Contrary to Kant, God determines good, not the other way around.¹¹⁰

So, on this model, if the divine command were real, the slayer would be justified. If the slayer is sincere but reasonably

108. *Id.* at 503 (emphasis added).

109. *Id.*

110. Drawing on Aquinas and Ockham’s dispute, there is a vast literature in theology on the virtues of ascribing to a “divine command theory” of ethics, or a natural law theory of ethics. See, e.g., Wes Morriston, *What if God Commanded Something Terrible?: A Worry for Divine-Command Meta-Ethics*, 45 RELIGIOUS STUD. 249 (2009); Jean Porter, *Divine Commands, Natural Law, and the Authority of God*, 34 J. SOC’Y CHRISTIAN ETHICS 3 (2014).

mistaken about the divine command, the slayer is excused. Presumably, if the slayer is sincere but mistaken and did not follow proper protocols for discernment (see below), the slayer's sentence might be mitigated because of his good faith, but unreasonable, mistake of fact. The question of insanity is barely relevant, except to demonstrate that his mistake was sincere and/or not a product of negligent discernment.

Shaw's account was most likely relying on the language of Hale,¹¹¹ and on the acquittal of James Hadfield in England in 1800.¹¹² Hadfield had attacked his own child and then tried to kill George III because of his belief that heaven had commanded that he kill himself and his child in order to save the world.¹¹³ Because suicide was against divine law, Hadfield attacked the king as a way to ensure his own death. Hadfield had previously suffered from multiple gruesome head and neck injuries from his military service with the Duke of York—providing the jury with graphic and rare physical evidence of his mental illness. Robinson reports that:

Hadfield fostered the conclusion that actions arising from morbid delusion should be judged according to what the law would require or permit *were the contents of the delusion true*. If, indeed, James Hadfield had been commanded by God to rid the world of himself but not by taking his own life, and if he sought to obey this [command by seeking to have the King's defenders kill him], no English court would have found him guilty of a crime.¹¹⁴

111. Hale is also the source of Cardozo's hypothetical about a woman killing her child. See ROBINSON, *supra* note 24, at 120; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 29 (1800).

112. A COMPLETE COLLECTION, *supra* note 35, at 1281; see also ROBINSON, *supra* note 24, at 141–54.

113. A COMPLETE COLLECTION, *supra* note 35.

114. ROBINSON, *supra* note 24, at 141–54; see also Garvey, *supra* note 12, at 153 (arguing that this mode of analyzing insanity as delusion presents judges and juries with the impossible task of applying legal rules—like necessity or self-defense—to a crazy subjective world).

Shaw's position in *Rogers* imagines the possibility of law and reason superseded by religious command. If so, then the deific decree exception should apply even when there is no sign of insanity. Of course, presuming that a deific decree would trump the positive law would seem to be yet another clear violation of the Establishment Clause, as it substitutes a religious command for state law. Jurisdictions that have adopted the right/wrong *M'Naghten* test have faced this problem, though most reach for some way to avoid it, either by adding a volitional component or by moving toward the legal/illegal version of the instruction.¹¹⁵

For example, in *State v. Turgeon*, the case described in the introduction, Christopher Turgeon and Blaine Applin were members of a Bible ministry called Gatekeepers.¹¹⁶ Turgeon seemed in every respect sane, and "claims that he is able to predict events and that he regularly receive[d] messages from God."¹¹⁷ In 1996, Turgeon received a message that "it was time to declare war against the government" and the Gatekeepers began robbing and defrauding businesses that they perceived to be sinful, and exacting judgment on those who left their group.¹¹⁸ According to Turgeon's testimony, one of these former members, Dan Jess, threatened to expose Turgeon as a false prophet and stop his plan to kill abortion doctors, so God told Turgeon to kill Dan.¹¹⁹ Turgeon's instruction was confirmed by Applin's own conversations with God, so Turgeon and Applin drove from California to Washington to shoot Dan.¹²⁰ They allegedly gave God a final chance to dissuade them, if He caused an unplanned stop on the way.¹²¹ Instead, Turgeon and Applin saw seven rainbows, which they interpreted as a confirmation of their mission.¹²² Applin, who believed he was God's "chosen vessel," shot Dan as he answered his door.¹²³

115. See, e.g., *People v. Serravo*, 823 P.2d 128 (Colo. 1992); *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983).

116. No. 49535-6-I, 2004 WL 555278 (Wash. Ct. App. Mar. 22, 2004).

117. *Id.* at *1.

118. *Id.*

119. *Id.* at *1, *4.

120. *Id.* at *1.

121. *Id.*

122. *Turgeon*, 2004 WL 555278, at *1.

123. *State v. Applin*, 67 P.3d 1152, 1156 (2003).

Two reasons this case is so disturbing are that, first, divine revelation is the only sign of unusual cognition in this case (at least, as the facts are stated by the appellate court), and, second, the two murderers, per their testimony, seemed to be following traditional religious doctrines for evaluating their divine communications, known as doctrines of “discernment.” According to these doctrines, signs that you have discerned God’s will correctly include: being filled with hope and passion after being given an instruction (this is a sign of God’s approval); coincidence with revelations to others (this is a sign of God’s confirmation); asking God to close doors in order to make it clear if you are on the wrong path, but no obstacles appear; and feeling at peace with your actions.¹²⁴ According to the testimony in this

124. For more detailed discussion, see *infra* pt. II(C)(1)(a). Catholic, Protestant, and evangelical groups all give roughly similar advice. See Mark Bentz, *Ignatian Discernment of Spirits*, <https://12473.sites.ecatholic.com/documents/2017/1/Discernment%20of%20Spirits%20Talk.pdf> (last visited Apr. 17, 2019); Daniel D. Meyer, *Sailing by the Light: How Do I Know Which Way to Go?* (1997) (on file with author) (advising that people look to: (1) scripture; (2) contemplation; (3) respected peers; and (4) providential circumstances). *But see* LUHRMANN, *supra* note 7, at 64, 70, 143 (finding a lot of hesitation and disagreement, even among those who believe they communicate with God directly and regularly: “[A] revelation that tells you to hurt yourself or someone else, people said, came from something other than God.” “For all the practice, hearing God’s voice remains a complicated discrimination task for these congregants.” “I think the safest position to be in is that God doesn’t speak to people outside the Bible,” he told me. “I mean people say, ‘God’s telling me to go shoot an abortion doctor.’ It’s craziness. Maybe it’s a spiritual experience; maybe it’s a lot of caffeine”). See also Simon Dein & Christopher C.H. Cook, *God Put a Thought Into My Mind: The Charismatic Christian Experience of Receiving Communications from God*, 18 MENTAL HEALTH, RELIGION & CULTURE 97, 106–08 (2015) (noting that the mode of communication is also understood by most evangelicals to differ—God puts thoughts in one’s mind, which may be ignored (“in all instances, agency is maintained”), or at times communicates out loud but without inciting fear or compulsion, whereas schizophrenia involves hearing voices that issue commands; that in his study communications from God were usually thoughts concerned with present, mundane matters, provided reassurance, and people sought to confirm these communications through scripture, or through the interrupting or alien nature of the thought or feeling. Vicar of an evangelical church in England taught these discernment practices: (1) congregant should consider whether the purported communication was consistent with God’s “revealed character and will” rather than from their own “minds and imaginations” or from “the enemy.” (“Divine communication will never contradict scripture.”) (2) prophecy is “necessarily incomplete” until Jesus returns, so it is “not always authoritative, and needs to be tested,” (3) congregants should discuss prophecies pertaining to “birth, marriage and death” with vicar before sharing

case, Turgeon and Applin did all of these things: they deliberated and checked their messages with each other; they prayed and contemplated; and they gave God a chance to stop them.¹²⁵

Under the deific decree doctrine as Shaw states it, Turgeon and Applin would be innocent, whether or not they were insane, as long as they non-negligently and sincerely thought they were following a deific decree that, if true, would exonerate them. The jury, however, convicted them.¹²⁶ The trial court's instructions, which were challenged on appeal, had required the Defendants to show that their "free will" was destroyed by the deific decree—importing a volitional test into the *M'Naghten* instruction.¹²⁷ The Appellate Court upheld the conviction, but it did so by manipulating its way to a determination that the trial court's addition of the instructional requirement of no free will was not really a volitional transformation of the right/wrong doctrine, but could instead be understood as requiring only the destruction of "defendant's free will to *distinguish* right from wrong."¹²⁸ Yet, if the usual *M'Naghten* instruction had been given—that Defendant should be acquitted if he did not know right from wrong—then the case presents the real consequences of accepting, as Shaw did, that a command of God could overturn the law. Turgeon and Applin should be acquitted, if indeed God commanded them or if their belief that God did so was non-negligent and in good faith, or their sentence should be mitigated if their belief was sincere but negligent. The insanity

them, so he could pray for confirmation, since "these are often wrong and could do considerable harm to those involved"); Rodney Stark, *A Taxonomy of Religious Experience*, 5 J. SCI. STUDY RELIGION 97 (1965) (discussing taxonomy of religious experiences ranging from confirmatory feelings of awe or reverence or conviction, responsive experiences of divine presence or attention, ecstatic experiences of the above along with states of bodily excitement, like shaking, to revelational experiences of visions and signs, which are the rarest); Rodney Stark, *A Theory of Revelations*, 38 J. SCI. STUDY RELIGION 287 (1999) (suggesting revelatory experiences occur most often within (1) supportive cultural traditions, (2) mundane experiences can be interpreted as divine communication, (3) most revelational experiences confirm rather than upturn the existing religious culture, (4) validation of the revelation requires social support, and (5) revelation occurs most often during times of crisis).

125. *Turgeon*, 2004 WL 555278; *Applin*, 67 P.3d 1152.

126. *Turgeon*, 2004 WL 555278, at *1; *Applin*, 67 P.3d at 1153.

127. *Turgeon*, 2004 WL 555278, at *1; *Applin*, 67 P.3d at 1154.

128. *Turgeon*, 2004 WL 555278, at *1 (emphasis added).

doctrine is irrelevant.

Take, for example, the 1999 New Hampshire case of Mr. Blair, who believed that God had commanded him to bring his wife and child to a certain motel room and kill them there.¹²⁹ Blair did not claim to be insane, rather the contrary; Blair argued that God had revealed he would be thrown into a lake of fire if he did not kill his wife and son.¹³⁰ At trial, he testified: “in my opinion, I’m sane. I acted under the command of God. I do not suffer delusions or hallucinations . . . I was very rational . . . I understood what I did.”¹³¹ If Shaw’s position is taken to its logical conclusion, Blair should have been able to invoke deific decree exoneration *without* claiming insanity.

Judge Cardozo had foreseen the concern that deific decree exonerations would shade off into a kind of cultural excuse¹³² or free-exercise defense,¹³³ in the oft-cited case of *People v. Schmidt*.¹³⁴ *Schmidt* was the first United States case to give the matter an extended discussion, albeit in dicta. Schmidt had been arrested for the murder of Anna Aumuller, whose dismembered body was found in the Hudson River.¹³⁵ At trial, Schmidt confessed to killing her, but claimed that he had murdered her because “he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement.”¹³⁶ Two physicians “accepting as true his statement that he was overpowered by this delusion, expressed the opinion that he was insane,” while others opined that his “delusion was feigned, and his insanity a sham.”¹³⁷ The jury, agreeing with the latter, convicted him of first-degree murder.¹³⁸

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

130. *Id.* at 449.

131. *Id.* at 450.

132. For a discussion of the “cultural defense,” see SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 349–350 (10th ed. 2017).

133. See Hawthorne, *supra* note 12, at 1768 (stating “[t]he logical modernization of deific decree would then be to extend it to include cultural defenses of all types”).

134. 216 N.Y. 324 (1915).

135. *Id.* at 327.

136. *Id.*

137. *Id.*

138. *Id.* at 325.

In a motion for a new trial, the Defendant confessed that his insanity plea was indeed a sham, and that Anna had died of an illegal abortion.¹³⁹ Still, he argued, he was not guilty of her death, but only guilty of trying to dispose of her body to protect those who helped her procure that abortion.¹⁴⁰ Additionally, the Defendant requested a new trial on the ground that the jury instructions regarding his insanity claim were faulty.¹⁴¹ New York, like most jurisdictions then and now, followed the *M'Naghten* test of insanity.¹⁴² Before a defendant could be acquitted, he must show that he was “laboring under such a defect of reason as: (1) not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong.”¹⁴³ As in the *Turgeon* case, the defendant argued that wrong should be defined as “morally wrong,” not “contrary to the law of the state,” as the trial judge had instructed.¹⁴⁴

Cardozo opined in dicta on the insanity instruction issue, even though he acknowledged that the Defendant had waived his insanity defense on appeal by conceding it was a sham.¹⁴⁵ Cardozo agreed with the Defendant that, in common law, wrong was understood as “evil” or “moral wrong,” a deed “against the laws of God and nature.”¹⁴⁶ Cardozo clarified that putting the jury charge in terms of whether the Defendant knew the act was “contrary to the law of the land” was misleading, because ignorance of the law is no excuse.¹⁴⁷ Instead, the question is “whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong” and “that act was at the same time contrary to the law of the land.”¹⁴⁸ Cardozo also noted that *M'Naghten* itself held that those who, “under the influence of insane delusion,” believe themselves to be “redressing or revenging some supposed grievance or injury, or of producing some public benefit,” though knowing they are

139. *Id.* at 342.

140. *Schmidt*, 216 N.Y. 324.

141. *Id.* at 324.

142. *Id.* at 334–36.

143. *Id.* at 329.

144. *Id.* at 329–30.

145. *Id.*

146. *Schmidt*, 216 N.Y. at 333–34.

147. *Id.* at 333.

148. *Id.*

acting “contrary to law” are not excused, because, as Shaw pointed out, “a delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring moral distinctions as a delusion that God himself has issued a command. The one delusion is consistent with knowledge that the act is a moral wrong, the other is not.”¹⁴⁹ Cardozo then quoted Chief Justice Shaw’s language in *Commonwealth v. Rogers*: “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.”¹⁵⁰

However, crucially, unlike Shaw, Cardozo goes on to make clear that personal cultural or religious variations are not sufficient by themselves to exonerate:

Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong. It is not enough, to relieve from criminal liability, that the prisoner is morally depraved It is not enough that he has views of right and wrong at variance with those that find expression in the law. *The variance must have its origin in some disease of the mind* The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human

149. *Id.* at 334–35. *See, e.g.*, *State v. Worlock*, 569 A.2d 1314 (N.J. 1990) (holding no need for deific decree instruction where defendant merely held the “idiosyncratic” moral belief that it was right for him to kill his friend to retrieve his stolen wallet); *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983) (noting that defendant claimed his Moscovite beliefs justified him in killing his wife, if he believed her unfaithful. Court held that adherence to a religious code was not the same as a direct command from God and could not exonerate him). *But see* *People v. Skinner*, 704 P.2d 752 (Cal. 1985) (noting defendant who thought God required him to kill his wife because his marriage vows said “till death do us part” was entitled to a right/wrong *M’Naghten* instruction).

150. *Id.* at 336 (citing *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500 (1844)).

sacrifice as a duty is not thereby relieved from responsibility before the law In such cases the belief, however false according to our own standards, is not the product of disease.¹⁵¹

In other words, religious *law* does not “supersede all human laws.”¹⁵² But that begs the question of whether a personal appearance by God would do so. Cardozo seems to assume that such a personal appearance would necessarily “have its origin in some disease of the mind.”¹⁵³

Cardozo thus distinguished direct divine command from idiosyncratic religious or moral beliefs, even if he ducked Shaw’s conclusion that a genuine deific decree would justify murder, by presuming that experiencing a direct divine command would be a delusion. Other courts have followed Cardozo in setting to one side cases in which defendants proffer cultural differences or alternative religious doctrines as their justification for murder¹⁵⁴—these cases are considered to be different from a true visitation by God; but why?

The troubling case of *State v. Singleton* struggles to find an answer.¹⁵⁵ In that case, the Defendant tried to bring his mental

151. *Id.* at 340 (emphasis added).

152. *Rogers*, 48 Mass. at 503.

153. *Schmidt*, 704 P.2d at 784 n.16. The decision also does not settle what would count as a “disease of the mind.” *Id.* If revelations themselves are considered delusions, then there is no other evidence of mental illness. If something more is required, as Russ Covey has demonstrated, the “product of disease” requirement of *M’Naghten* is not much clarified, since a momentary delusion or a personality disorder may be considered a mental disease. *Id.*; Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 B.U. L. REV. 1597 (2011). As a result, Covey suggests that insanity doctrine be understood as a safety valve of the law, allowing juries the scope to have compassion for those whose minds are unusual. Covey, *supra*. While Covey’s view is enticing, it does not solve the labeling problem: for a religious killing to be exonerated through this form of jury “safety valve,” it would still have to be called insanity. *Id.* at 1631–32.

154. *See, e.g., Worlock*, 569 A.2d at 1324 (defendant’s belief that “might makes right” was a general moral belief and not a divine command); *Crenshaw*, 659 P.2d at 494 (Crenshaw’s “Moscovite” belief tenet that he had a duty to kill an unfaithful wife was “not the same as acting under a deific command,” and his awareness that not just the positive law of Washington State, but the general “social standard of moral wrong” prohibited his act defeated his insanity defense.).

155. 48 A.3d 285 (N.J. 2012).

illness under control through group study of the Old Testament. He “became obsessed” with study and “came to believe that God communicate[d] with him, although he d[id] not claim to hear a distinct voice speaking or commanding him. Rather, he receive[d] messages or communications from God while asleep.”¹⁵⁶ He felt “a general obligation to kill sinners who did not comport themselves in accordance with his beliefs about God’s expectations, once he explained those expectations to them,” and told various members of his family several different times that he was being told to kill them for their sins.¹⁵⁷ When his girlfriend pressured him to take a job and work for money, which he believed was the root of all evil, he became progressively enraged with her.¹⁵⁸ He shot and stabbed her when she refused to give him her car keys so he could leave the scene.¹⁵⁹ After his arrest, he was asked if anyone else was involved in her killing, and he answered: “No, the devil, god and the devil (inaudible) inside of me, outside of me, all over the place, all over the place.”¹⁶⁰ The jury, given a *M’Naghten* style instruction, convicted Singleton, and on appeal Singleton argued that the jury should have received a separate deific decree instruction.¹⁶¹ The New Jersey Supreme Court denied the appeal.¹⁶²

Despite testimony by both family members and a psychiatrist that Singleton believed God was telling him directly to kill specific people, a majority of the Supreme Court characterized this case as one in which the Defendant “formed a general belief that he ought to kill sinners” rather than “was acting pursuant to a delusional command at the time of the killing” which “deprived defendant of his ability to appreciate society’s disapproval of his action.”¹⁶³

The majority opinion provoked both a concurrence arguing for the abolition of any “deific decree” instruction, and a

156. *Id.* at 163–64.

157. *Id.* at 163, 168.

158. *Id.* at 163.

159. *Id.* at 165.

160. *Id.* at 168.

161. *Singleton*, 48 A.3d at 171–82.

162. *Id.* at 187.

163. *Id.* at 184–86.

dissent.¹⁶⁴ Justice Hoens, joined by Justice Albin in dissent, pointed out that the majority was unreasonable to expect a divine visitation to come only as “a booming voice from heaven . . . found only in the cinema.”¹⁶⁵ Moreover, Hoens clarified the difference between “reliance on a moral code that is on its face rational but unacceptable to our legal system,” and deific decree doctrine:

The reason that the deific command qualifies as a defense to murder is that it is the one corner of insanity in which legal and moral wrong do not coincide One who acts in accordance with a sincerely held belief that he has been directed by God to carry out a murder may well appreciate that the crime is legally wrong, but will nonetheless act on the directive because he equally believes that it is a moral imperative.¹⁶⁶

Both the majority and the dissent in *Singleton*, then, implicitly accept Shaw’s premise that a command of God to do a specific act, if true, would be right according to *our society’s own* understanding of right and wrong, even though counter to a general moral rule or law.¹⁶⁷ The deific decree rule is importantly limited to a specific command to do *an act*, not the establishment of a new rule.¹⁶⁸ Though the courts never explain why they make this distinction in relation to deific decree doctrine, the law elsewhere recognizes a justification for exceptional, singular, lesser-evil cases of *necessity*. Perhaps these judges accept the view that the law is entitled to assume that God knows best in some unlooked-for case in which infinite knowledge only could determine that murder was the necessary lesser evil in some cosmic chain of events (e.g., killing Hitler as a child). On the other hand, maybe they believe that the self-authenticating nature of revelation can only be singular, as the event of command is singular. Alternatively, it is possible that

164. *Id.* at 188–203 (Patterson, J., concurring) (Hoens, J., dissenting).

165. *Id.* at 200 (Hoens, J., dissenting).

166. *Id.* at 199 (Hoens, J., dissenting).

167. *See generally Singleton*, 48 A.3d 285.

168. *Id.*

these cases demonstrate retention of a religiously positivist understanding of moral truth—that the command of a god is the final ground and test of ethical truth, and that this command, grounded in the will of a supernatural being, is necessarily not a rule but a personal willing of ‘thou shalt.’¹⁶⁹ “Why is this right? Because God said so.”¹⁷⁰

Acknowledging that it is possible for law and God to diverge, however, does not just create a problem in criminal insanity law, it creates a problem for religious law. As religious traditions of discernment show, and as the brief tour of history above notes, revelation destabilizes all law—religious or secular. The religious traditions that have been around longest have all developed ways of insulating themselves from revelation or sifting it carefully through a rule of recognition—indeed that is the only way to avoid schism and dissolution.

1. Religious Traditions of Discernment

Unlike many early Protestants, who maintained the possibility of divine revelation contra law,¹⁷¹ many other

169. Cf. Philippe Nonet, *What is Positive Law?*, 100 YALE L.J. 667 (1990).

170. See also divine command theories of ethics, *supra* note 106.

171. See *Frantick Hackett*, *supra* note 45, at 46–47, 49, 50–52, 59–61 (discussing the dispute among Protestant clergy like William Perkins in 1587 over whether purportedly new prophets could be genuine. According to Walsham, Perkins discounted those “who upheld heretical doctrine or lived vicious lives” and who were “rash, unruly, and obstinate or ‘babbling and talkative’ rather than ‘silent with wisdom,’” who “spoke strangely and opaquely, or whose utterances engendered not God’s glory but ‘foolish feare’ and ‘disquietnesse’ in the church and commonwealth.” Hackett, however, who became popular enough to warrant execution, was all of those things. Walsham points out that in sixteenth century England, prophecy, witchcraft, and insanity were equally likely to be diagnosed, with much disagreement about how to judge between them. While “Calvinist theology clearly did more to inhibit than encourage the appearance of popular prophets,” Walsham argues, “this should not blind us to the fact that it created a climate in which the idea that rational people might communicate with God and glimpse the unseen could not be dismissed a priori as ridiculous. As yet each particular case had to be seriously investigated and separately assessed—hence the profound uncertainty of the puritan leaders.” Walsham argues that this uncertainty in general resulted in acceptance of visionaries who did not “threaten[] the integrity of the institutional church,” and denunciation as lunatics, charlatans, or demoniacs of visionaries who did. Hackett, a promiscuous brawler and “illiterate puritan messiah in Cheapside” who

religions acknowledged the chaotic nature of revelation (i.e., that God is not always reasonable), but then worked out clear institutional ways to cabin wayward prophecy and visions.

Mormon doctrine, while acknowledging ongoing personal divine revelation, invests the bishop and church leaders with the right to discern the true prophet from the false:

[A]nd unto the bishop of the church, and unto such as God shall appoint and ordain to watch over the church and to be elders unto the church, are to have it given unto them to discern all those gifts lest there shall be any among you professing and yet be not of God.¹⁷²

Jewish doctrine also places firm controls on prophecy and miracle. It holds that a prophet can only be recognized once all the Jewish people on Earth are gathered in the same land, for God would not speak except to all the people together.¹⁷³ No

threatened the Queen's life was the perfect target of Anglican clerics who wished to discredit all Calvinist and Presbyterian dissenters as "violent incendiaries." The puritan leaders, on the other hand, characterized Hackett as insane. However, most of the time, it "was not evangelical Calvinists but their conformist counterparts who began that great cosmological shift towards a world in which miracles had ceased and divine providence no longer intervened unpredictably." "One consequence of this gradual 'disenchantment of the world' was the repudiation of divine communication as part of legitimate piety and its secularization or 'somatization' as a medical syndrome By the 1750s, all manifestations of charismatic Protestantism were being stigmatized as species of madness." Calvinists, by contrast, even had a divine explanation for insanity: "it was only when the deity withdrew his protective presence from sinners that they were invaded by Satan and driven out of their wits," and insanity was a kind of divine punishment for sin or faithlessness "inflicted by the devil acting as the Lord's executioner").

172. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, DOCTRINES AND COVENANTS, § 46, ¶27, <https://www.lds.org/scriptures/dc-testament/dc/46?lang=eng>.

173. *Ani Maamin 06*, ORTHODOX UNION (Aug. 30, 2006), <https://www.ou.org/g/judaism-101/glossary/ani-maamin-6/>; MAIMONIDES, FOUNDATIONS OF TORAH, ch. 8 (trans. Simon Glazer, 1924) (ebook) ("Moses our Master was not believed in by Israel because he delivered tokens, for whosoever bases his belief contingent upon tokens retains suspicion in his heart, for it is possible that the token was delivered by means of enchantment and witchcraft Consequently they to whom he was sent are the witnesses by whom the truth of his prophecy is established, wherefor he needed no other token to deliver to them, as they and he witnessed it together Therefore, if a prophet arose

Jewish prophets have officially existed since the death of Haggi, Zechariah, and Malachi around 300 BCE, before the diaspora. In Jewish tradition, individual revelation is fallible and suspect, and cannot bind or provide the foundations of a People's faith.¹⁷⁴

Catholic traditions of canonization and miracle-discernment play a similar role, and the many examples this long tradition provides warrant a more extensive review of both the black letter Catholic law of discernment and some of the cases in which it was applied. As becomes apparent, canon law and Catholic doctrine replay the same difficulties with deific decree analysis as the secular courts do above. This parallel is revealing; it demonstrates that what is at stake here is not so much a concern with an *establishment* of religion, as with the proper extent of community control of individual conscience. As so eloquently framed by the juris-genitive and juris-pathic distinction in Robert Cover's famous article, *Nomos and Narrative*, while *nomos*, or faith, is juris-genitive and authority-creating, the institutionalization of that *nomos* always requires some juris-pathic suppression of lawless revelation as heresy.¹⁷⁵

a. The Catholic Example: Rules for Discernment

While even the early Church condemned false prophets,¹⁷⁶ Nancy Caciola pegs the beginning of the Catholic juridical process for evaluating miracles and apparitions to the Fourth Lateran Council of 1215 under Pope Innocent III: "Henceforth, no individual's supernatural powers or visions could be accepted as divine in origin without rigorous investigation."¹⁷⁷ Further rules regarding miracles were developed through later centuries by Jean Gerson (1363-1429),¹⁷⁸ Saint Ignatius of Loyola

and performed great tokens and miracles, and thereby seeks to deny the prophecy of Moses our Master, we must not hearken unto him.").

174. *Id.*

175. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

176. See, e.g., *Deuteronomy* 13:4 (warning of false prophets).

177. CACIOLA, *supra* note 45, at 14.

178. Caciola argues that the increasing anxiety of the church around the time of the Great Schism (1378-1417) resulted in assertion of greater control over heresy, to the detriment of laity and especially of spiritual women, and Gerson et al. placed more emphasis on non-corporeal, non-emotional, doctrinal

(1548),¹⁷⁹ and Benedict XIV in his *Canonization of Saints*.¹⁸⁰

Gerson, writing in the period of Joan of Arc, puts forward a coin metaphor for judging the true revelation from the false. In discerning the true from the false spiritual coin, we must look, he says, to “weight, flexibility, resistance, form, and color.”¹⁸¹ Weight is determined by humility; the person who takes pride in being worthy of visions “merits being the sport of illusions.”¹⁸² Flexibility is determined by discretion; immoderate or exaggerated fasting or weeping is a sign of vanity or mental illness, not spirituality.¹⁸³ Resistance is determined by patience; those who immediately believe in a vision have not been sufficiently reflective.¹⁸⁴ Form is determined by truth; a vision that is not in accordance with scripture and “good customs and the true faith,” or prophecies that do not come to pass, or a divine command “counter to good habits” “without the very clear intervention of an order or dispensation of God” is false.¹⁸⁵ Color is determined by the experience of non-carnal love associated

markers of true prophecy: “[They singled out the laity and women as especially unlikely candidates for divine inspiration . . . [and] directly blamed the prophecies of laywomen (notably Brigit of Sweden and Catherine of Siena) for the outbreak of the schism itself. . . [which] set the stage for the elaboration of the witch stereotype by the succeeding generation of thinkers.” *Id.* at 16–17; see also GERTZ, *supra* note 46, at 7–12, 50 (reporting that “[a]t the Council of Constance in 1415, the chancellor of the University of Paris, Jean Gerson, cautioned any confessor of a holy woman (they were at the time considering Bridget of Sweden for sainthood) to ‘resist her, upbraid her harshly, scorn her’ for her pride rather than ‘praise’ her for exceptional living”). Gerson later famously wrote in support of the authenticity of Jean D’Arc’s visions and mission in 1429. Daniel Hobbins, *Jean Gerson’s Authentic Tract on Joan of Arc: Super Facto Puellae et Credulitate sibi Praestanda (14 May 1429)*, 67 *MEDIEVAL STUDS.* 99 (2005) (arguing Gerson was the actual author of this work).

179. *Rules for the Same Effect with Greater Discernment of Spirits*, ST. IGNATIUS LOYOLA, <http://www.sacred-texts.com/chr/seil/seil79.htm> (last visited Apr. 17, 2019).

180. Fernando Vidal, *Miracles, Science and Testimony in Post-Tridentine Saint-Making*, 20 *SCI. CONTEXT* 481 (2007).

181. W.P. BARRETT, *THE TRIAL OF JEANNE D’ARC* 518 (Coley Taylor & Ruth H. Kerr, trans., Gotham House, Inc. 1932) (providing excerpts in translation of Gerson’s treatise).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 521.

with the vision.¹⁸⁶

Saint Ignatius of Loyola, founder of the Jesuits, wrote in 1548 what has become the classic treatise on spiritual discernment, which gives guidance to oneself for sifting true revelation from other mental experiences.¹⁸⁷ Loyola's spiritual advice suggests that the divine voice will always move one away from sin and away from despair and toward publicity, while evil spirits will move one toward selfish pleasures, secret desires, and despair.¹⁸⁸ These experiences of elation and depression come and go, and when one is experiencing the elation of divine consolation, one should recognize it as grace, not merit, and remain humble.¹⁸⁹ When one is experiencing desolation, one should not make rash decisions, but be patient and keep to one's good actions, trusting that consolation will return and holding to the memory of prior consolation.¹⁹⁰ By extension, in evaluating the genuineness of others' spiritual experience, looking to their actions and humility, rather than their emotive moments of elation or depression, is key to discernment.¹⁹¹

Benedict XIV's 1740 treatise reserves beatification and canonization for those confessors whose writings are neither contrary to sound doctrine nor good morals, who have a reputation for sanctity, whose lives exhibit heroic virtue, and who have been proven to do two to four miracles.¹⁹² Notably, the miraculous alone will not suffice, for its provenance is always equivocal.¹⁹³ As Saint Thomas Aquinas wrote, a trance or "[a]bstraction can occur from three causes. First, from a bodily

186. *Id.*

187. ST. IGNATIUS OF LOYOLA, RULES FOR THE SAME EFFECT WITH GREATER DISCERNMENT OF SPIRITS, <http://www.sacred-texts.com/chr/seil/seil79.htm> (last visited Apr. 17, 2019).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Camillo Beccari, *Beatification and Canonization*, CATHOLIC ENCYC. www.newadvent.org/cathen/02364b.htm (last visited Apr. 17, 2019).

193. See, e.g., CACIOLA, *supra* at 45, at 18 (an anonymous clerical commentator's defense of Franciscan John of Rupescissa quoting "[h]e predicted many future events as if through a prophetic spirit, and many people doubted whether he was deceiving, or telling lies, or was speaking with a python or an evil spirit. However, this man lived a holy life, sober and honest, and was a cleric learned in scripture and in the texts of the sacred canon").

cause, as is clear from those who through some infirmity are out of their minds. Second, through the power of demons, as is seen in those who are possessed. Third, from the divine power. It is in this sense that we speak of ecstasy, when one is elevated to a supernatural level by the divine spirit, with abstraction from the senses.”¹⁹⁴

The Church’s skepticism about religious experience—trances, visions, and emotional ecstasies—continues through the centuries. In the modern period, after an outbreak of Marian visions,¹⁹⁵ Pope Paul VI disseminated *Norms Regarding the Manner of Proceeding in the Discernment of Presumed Apparitions or Revelations*, made public only in 2012.¹⁹⁶ This 1978 document included both positive and negative criteria for determining the “authenticity and supernatural character” of an alleged miracle or prophecy.¹⁹⁷ These include: (1) “[m]oral certitude, or at least great probability of the existence of the fact, acquired by means of a serious investigation;” (2) “[p]ersonal qualities” of those who witnessed the miracle, including “psychological equilibrium, honesty and rectitude of moral life, sincerity and habitual docility toward Ecclesiastical Authority, the capacity to return to a normal regimen of a life of faith;” and (3) “[h]ealthy devotion and abundant and constant spiritual fruit (for example, spirit of prayer, conversion, testimonies of charity, etc.)”¹⁹⁸

Negative criteria include: (1) “[m]anifest error concerning the fact;” (2) “[d]octrinal errors attributed to God himself, or to

194. *Id.* at 33 (citation omitted).

195. See Frederick M. Jelly, *Discerning the Miraculous: Norms for Judging Apparitions and Private Revelations*, 44 MARIAN STUDS. 41, 43 (1993) (making the point that miracles are, in Catholic tradition, far less important than charity and church doctrine, and that even among “mystical phenomena,” corporeal visions rank lower than imaginative (dreams) and intellectual ones (“a simple intuitive understanding of a supernatural mystery”). Such visions “do not make any substantial addition to the deposit of faith and morals necessary for salvation,” *id.* at 44, compared to other “supernatural” gifts like “acts of faith, hope, love; the infused virtues given by God; prayer, worship, the spiritual and corporal works of mercy; transubstantiation,” *id.* at 44–45.

196. *Norms Regarding the Manner of Proceeding in the Discernment of Presumed Apparitions or Revelations*, SACRED CONGREGATION DOCTRINE FAITH, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cf_aith_doc_19780225_norme-apparizioni_en.html (last visited Apr. 17, 2019).

197. *Id.*

198. *Id.*

the Blessed Virgin Mary, or to some saint in their manifestations, taking into account however the possibility that the subject might have added, even unconsciously, purely human elements or some error of the natural order to an authentic supernatural revelation;" (3) "[e]vidence of a search for profit or gain strictly connected to the fact;" (4) "[g]ravelly immoral acts committed by the subject or his or her followers when the fact occurred or in connection with it;" (5) "[p]sychological disorder or psychopathic tendencies in the subject, that with certainty influenced on the presumed supernatural fact, or psychosis, collective hysteria or other things of this kind."¹⁹⁹

Decision on these factors was strictly confined to a hierarchical decision-making process resembling trial and appellate bodies (the bishop-commissioned Ordinary in the first instance, relying on expert theologians, canonists, psychologists, and doctors, with appeal of sorts to the Sacred Congregation, which retained original jurisdiction in serious cases). The bishop in charge can come to one of three conclusions: (1) the apparition is true and worthy of belief (but belief is not required), (2) it is not true, or (3) it is uncertain. The Pope does not make pronouncements about the authenticity of apparitions:

[t]o prevent confusing such a judgment with the exercise of his infallible teaching authority in matters of faith and morals (i.e., matters which must be believed and observed by all the faithful for the sake of salvation). The charism of infallibility has not been given for the purpose of judging apparitions and private revelations.²⁰⁰

While the Vatican seems to keep no official online lists of its cases of Saints or miracles, other investigators set the count of the beatified at 371, and the sanctified at 307, as of 2009.²⁰¹

199. *Id.*

200. Jelly, *supra* note 195, at 46; Junno Arocho Esteves, *How the Church Determines a True Marian Apparition*, CRUX (Apr. 19, 2017), <https://cruxnow.com/vatican/2017/04/19/church-determines-true-marian-apparition/>.

201. ROBERT J. BARRO ET AL., ECONOMICS OF SAINTHOOD (A PRELIMINARY

According to another online amateur scholar, twenty-two Marian apparitions have been investigated and received episcopal approval by the Catholic Church. Nine have been approved since 1900.²⁰²

b. The Catholic Example: Two Cases of Revelation

i. Joan of Arc – 1431, 1455

The two trials of Joan of Arc present paradigmatic cases: the first for heresy and, twenty years later, the second for rehabilitation. Joan's story remains unaccountable. A quiet, pious farm girl living an unremarkable life suddenly begins bossing around nobles, bishops, and kings, riding war horses, directing battles, second-guessing generals, and wielding lances.²⁰³ She convinces an arch-bishop and two sets of canon lawyers and prelates of her divine mission and sincere faith.²⁰⁴ Her key prophecies—the raising of the siege of Orleans, the crowning of the Dauphin at Reims, the fall of Paris to the French, the end of English rule in France, and the return of the Duke of Orleans—all come to pass (though the last three only after her execution), despite the fact that when she makes these predictions, Henry VI is claiming both England and France, the key cities are under English control, and the penniless Dauphin's own mother has denied his legitimacy.²⁰⁵ The record of Joan's trial, transcribed by notaries in the pay of her enemies, shows her standing up to day after day of intense interrogation in a roomful of well-educated and subtle churchmen, without counsel, presumably without sleep (since she was celled with

INVESTIGATION) (February 2010), https://scholar.harvard.edu/files/barro/files/saints_paper_020910.pdf.

202. MIRACLE HUNTER, <http://www.miraclehunter.com/> (last visited Apr. 17, 2019). Approval of miracles is more common, especially healings. According to the seven rules promulgated by Pope Benedict XIV, (1) the disease must be serious; (2) the diagnosis must be certified; (3) it must be organic; (4) no known therapy can explain the healing; (5) the healing must be instant and unexpected; (6) the healing must be complete; and (7) the healing must be definitive. Vidal, *supra* note 180.

203. W.S. SCOTT, *THE TRIAL OF JOAN OF ARC* (1956).

204. *Id.*

205. *Id.*

three English male guards), with patience, wisdom, and remarkable consistency.

In her trial for heresy, the procurators probed Joan's story for signs that the voices she claimed to be guided by were false or demonic.²⁰⁶ Their questions, often odd and unaccountable by contemporary lights, are clearly guided by an effort at discernment, as laid out by Gerson, above.

Regarding pride: Did she think herself special for hearing her voices? Did she believe herself to be in a state of grace? Did she encourage others to worship her, or her relics? Did she hope to gain treasure for herself? Did she humbly consult with priests or clerics about her voices before acting? Here, there were many probing questions about instances where women wanted to lay hands on her, her disposal of her personal effects, gifts made to her by the Dauphin, as well as whether she would submit to the Church's determination as to the validity of her voices.²⁰⁷ Her answers left no impression of her wanting to be worshipped herself; rather, she claimed that her voices could be heard by all, if they merely listened. While she refused to be bound by the determination of the partisan body trying her, she did agree to be judged by the Pope (a fact later suppressed by Bishop Cauchon).²⁰⁸ Her response to the trap set by the procurator's

206. *Id.*

207. *Id.*

208. *Id.* at 16–19, 126; RÉGINE PÉROUD, *THE RETRIAL OF JOAN OF ARC: THE EVIDENCE AT THE TRIAL FOR HER REHABILITATION* 252–53 (J.M. Cohen trans. 1955). The notary of the original trial, Guillame Manchon, was a key witness at the rehabilitation trial, and gave testimony that the final Latin version of the trial record, and of the accusations, contained a number of inaccuracies, and he presented his original French notes at the second trial. *Id.* He also testified that the version of the official accusation that he had signed had contained his corrections, but the corrected version was never sent. *Id.* The Orleans manuscript is considered by W.S. Scott to be a copy of Manchon's original notes and differs in key respects from the remaining manuscript copies of the official Latin version. SCOTT, *supra* note 203, at 16–19. The other major evidentiary dispute is exactly what Joan eventually admitted to when faced with the threat of execution. Several witnesses claim that the short abjuration read to her and signed by her was mostly about agreeing not to bear arms and to resume women's dress, and there is some dispute about whether she ever rejected her voices. The abjuration document officially circulated after her execution was much longer and included many other more serious admissions of heresy and witchcraft. See PÉROUD, *supra*, at 258–61 (discussing this dispute). The text read to her at her abjuration, and her later comments in her prison cell that demonstrated relapse, were not

question regarding being in a state of grace became famous for its wisdom: “if I am not, may God put me there; if I am, may He keep me there,” though the content of her answer was not original, but echoed a common prayer.²⁰⁹

Regarding instability: Did she show emotional instability or mental illness? Did she live a chaste and moderate life? Did her jumping out of a tower at Tours demonstrate despair or suicidal impulses? Here, in light of her obvious common sense and solemn Catholic responses, as well as her well-documented virginity (tested before she came to the Dauphin by a group of noblewomen²¹⁰), the strained claims that she had practiced witchcraft or prostitution or was suicidal rang particularly hollow.

Regarding patience: Did she immediately believe that these voices and visions came from God? She was asked to describe her visions and voices in detail for signs that they were demonic.²¹¹ She claimed they came with the church bells and that she did not trust them at first, but came to believe their counsel was good,²¹² as they enjoined her to behave and to go to church often. In other words, she herself tested these voices by the criteria of works.

Regarding truth: Did her predictions come true? Here, it was pointed out that, at the time of her trial, many of these predictions, especially about battles to be won at Paris and the return of the Duke of Orleans, had not come to pass. Did she have some spiritual “sign” that her revelations were legitimate? Much questioning concerned how she proved to the Dauphin that she had come from God. She often refused to answer this question, as her sign, she said, was for him only, and that only

contemporaneously recorded by any notary but reported by witnesses. *Id.* Scott’s source has her briefly rejecting the validity of her voices, but reaffirming them the next day (as she dons men’s dress), and blaming herself for doubting. SCOTT, *supra* note 203, at 169–70. If she was sexually assaulted while in a dress, as witnesses at her rehabilitation claimed she asserted, she may well have thought it her punishment for disobeying her voices. But the rehabilitation trial witnesses deny that she ever disavowed the divinity of her voices. PERNOD, *supra*, at 206–07, 209–11, 215.

209. Katharine Lualdi, “Joan, Are You in a State of Grace?": *Joan of Arc and Late Medieval Catechesis*, 32 J. WESTERN SOC’Y FRENCH HIST. 1, 8 (2004).

210. SCOTT, *supra* note 203, at 12.

211. *Id.* at 67, 73, 78–79, 80, 85–86, 88, 90, 105, 120–21, 146–47.

212. *Id.* at 120.

he could confirm it.²¹³ After this question was repeated again and again, she gave the judges a kind of parable, saying that the sign was an angel offering a golden crown—a metaphoric description of herself.²¹⁴ Later, Charles said that the real sign was that she knew the contents of the prayer he had privately offered a few days before, and that she had recognized him despite his hiding behind others when she first arrived.²¹⁵ It is clear that Joan’s interrogators at both trials were looking for some divine sign that was intersubjective—seen or confirmed by someone other than her.

Did her life accord with Scripture and good morals? Much was made here of her failure to dress as a woman—an easily proved and obvious deviation from the customs and rules of the Church at the time.²¹⁶ When she finally consented, however, to wear a dress in her cell, she was either denied other clothes, or she was sexually assaulted,²¹⁷ and she reclaimed her soldier’s attire.²¹⁸ This relapse in dress then became an easily provable legal basis on which to show that her submission to the Church was insincere and to justify the Church’s decision to abandon her to English secular justice—and to the stake (only relapsed heretics could be executed).²¹⁹

The final sermon preached to her demonstrates the irreconcilable conflict between the intersubjectivity of law and reason (even canon law), and the subjective, personal experience of revelation. The core of Joan’s heresy, according to her accusers, was that she trusted her own uneducated judgment about the divinity of her voices.²²⁰ She rejected the Court’s judgment that her visions and voices were either false or demonic, and she refused to submit to the hierarchy of the

213. *Id.* at 69, 77, 80, 88, 101–02, 107.

214. *Id.* at 15.

215. *Id.* at 15–16. Her loyalty to Charles was also demonstrated at her public recantation, when she interrupted the harangue against her heresy only when it touched Charles, and she then protested that her king was a good Catholic. PernoUD, *supra* note 208.

216. SCOTT, *supra* note 203, at 134–35.

217. PernoUD, *supra* note 208, at 209–10.

218. SCOTT, *supra* note 203, at 14.

219. POLLOCK & MAITLAND, *supra* note 31, at 571–83 (also known as “obstinate” or “obdurate” heresy).

220. SCOTT, *supra* note 203, at 160.

church:

[I]f such apparitions [in the likeness of angels or saints] appear to you, do not believe them, but reject and cast out such follies and imaginations, in agreement with the statements and opinions of the University of Paris and the other doctors, who are conversant with and understand God's law and the Holy Scriptures; to whom it seems that one should give no credence to such apparitions and other novelties, unless they are justified in Holy Scripture or by some other sign as being miraculous. In these you have believed most lightly, without having recourse to God in devout prayer, in order that you might be made certain in the matter; nor have you had recourse to any prelate or other wise and learned churchman, who would have been able to inform you of the truth; which, considering your condition and the simplicity of your knowledge, you ought to have done.²²¹

Joan, then, was condemned and burned for her faith in her self-authenticating personal revelations and for her refusal to accept religious law in their stead.

ii. The Rosary Messages – 1988

In the modern period, Father Jelly explains how the Church's 1978 criteria were applied by a visitation committee investigating a purported vision by a small congregation of charismatic Catholics in Lubbock Texas in 1988, known as the "Rosary Messages."²²² The events began when ten parishioners smelled roses and felt the presence of Mary while saying the

221. *Id.*

222. See, e.g., Lisa Belkin, *Lubbock Journal; Reports of Miracle Draw Throngs*, N.Y. TIMES (Aug. 17, 1988), <https://www.nytimes.com/1988/08/17/us/lubbock-journal-reports-of-miracles-draw-throngs.html>; Jelly, *supra* note 195, at 41.

rosary.²²³ Some of the congregants began to receive messages, experience healings, and see visions, and an increasing number of the faithful and curious (around 12,000) began to join them to experience wonders during the praying of the rosary, culminating in a vision of Jesus at sunset.

When the episcopal committee examined these messages and healings, it concluded that, while they were generally “within the boundaries of sound Roman Catholic teaching and Christian tradition,” some messages “did betray an angry God in language that was strident and affected and caused us to question their claim to divine inspiration.”²²⁴ The committee concluded that “[the messages and healings] were not of miraculous origin but were inner locutions of the recipients, derived from their spiritual reading, the preaching they had heard, and from their own meditation or contemplative prayer.”²²⁵ As for those seeing visions, they “must be warned against the harmful effects of gazing at the sun, as well as against an other-worldly attitude suggesting that they abandon their sources of economic support.”²²⁶ The committee cautioned that “the piety engendered be not individualistic, but rather that it lead to real community and social concern.”²²⁷ Jelly concludes:

We cannot build our faith on the sand of alleged apparitions and private revelations, regardless of how well-intentioned the individuals involved might be. If we believe that our salvation depends on what is found in private revelation, or if we place—with vain credulity or naivete—our confidence in private revelations, we are mistaken and are not building our faith on a solid foundation, namely, the Word of God, Scripture, tradition, and the teaching of the Church.²²⁸

223. *Id.*

224. Jelly, *supra* note 195, at 49.

225. *Id.*

226. *Id.* at 51.

227. *Id.*

228. *Id.* at 54.

Here, of course, is the crux of the problem: reason is accessible to all; revelation is individualistic. As in the Jewish tradition, the Catholic tradition looks askance on private, personal access to God's will that is not accessible to all the people at once. Like reason, and like law, revelation in these traditions is only acceptable if intersubjective, capable of testing, mediated by fair process, in accordance with established law and custom, and generally accessible and applicable to all equally. If it is not, then, under church law, it is not to be considered likely true revelation. In this way, one might say that religions with a long history have a law of revelation that turns revelation into law, very like Kant's *Religion Within the Limits of Reason Alone*.²²⁹ Personal experience of God's will may be a helpful personal devotional crutch, but can never overturn ethical doctrine. Any deific command that violates ethical duties cannot be legitimate.

Some have argued that the established church's role in disciplining heresy and revelation should enable a kind of jurisdictional federalism between church and state. Steven Smith, for example, has argued that the First Amendment religion clauses could be read to protect only religious institutions, not personal conscience. Thus, he argues, individual deviation from secular law, as opposed to a church law's deviation from secular law, would be well-within the secular law's jurisdiction.²³⁰ Though Smith does not address the deific decree cases, one might extend his argument about jurisdictional separation to claim that personal revelations unsupported by religious institutions should not be protected by the religion clauses of the First Amendment at all, and the deific decree excuse should be a non-starter, because even under church *law*, murder could never be justified. Hence, deific decrees unblest by church doctrine should not be a defense, not because secular law trumps religion, but because religious institutions have already ruled out such a defense as contrary to church doctrine. While it may be tempting to recognize or resurrect a jurisdictional federalism of church and state *law*,

229. See generally RELIGION, *supra* note 91.

230. Steven D. Smith, *Freedom of Religion or Freedom of the Church*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249 (Austin Sarat ed., 2012).

Smith's approach displaces the conflict between reason and revelation, but does not eliminate it. Secular courts will still have to decide what counts as a church, an exercise fraught with establishment clause difficulties, especially because it is often the prophet that creates a church in the first place. The problem of revelation's radical undermining of law is not, therefore, a problem of church versus state, for revelation undermines all law, whether church law or state law. As Jean of Arc's accusers argued, there can be no self-authenticating prophet recognized from within the institution of a pre-existing church, for a self-authenticating prophet creates a new church by that very act. As Benedict XIV's treatise implies, no *Catholic* saint can be sanctified by miracle alone. A deific decree defense that would rely on a pre-existing "church" for its authentication would chase its tail.

2. Revelation and Genius

Writing within a decade or so of Cardozo's opinion in *Schmidt*, playwright George Bernard Shaw, *contra* Cardozo, sees the irrational revelation and unlikely prophet not as insane, or as particularly religious, but as centrally important to the individual conscience and entrepreneurial spirit. In his play about Joan of Arc, *Saint Joan*, Shaw characterizes Joan of Arc as a proto-Protestant martyr who embodies the spirit of individualism.²³¹ His paean to Joan might be read from this side of the Atlantic as a celebration of the anti-hierarchical and democratic nature of American political and spiritual life²³²—a celebration that echoes, perhaps, Emerson's transcendentalism, presages the American evangelical movement, the American

231. GEORGE BERNARD SHAW, *SAINT JOAN* (1924).

232. Amanda Porterfield, *A History of Ambivalence: How Religion and U.S. Law Have Developed Together*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS* 21 (Austin Sarat, ed., 2012) (also suggesting that personal revelation has a peculiarly American character: "religious expression has been channeled into grooves shaped by the law's more predominant emphasis on protection of private property and individual rights. Religion in the United States has become more commercial and more individualistic relative to the law's privileging of property and persons, and relative to the ambivalent relationship between property and persons that have characterized American law").

fascination with superheroes and celebrities, and the individual specialism that has been both our bane and our blessing.

Shaw writes:

Joan's voices and visions have played many tricks with her reputation. They have been held to prove that she was mad, that she was a liar and impostor, that she was a sorceress (she was burned for this), and finally that she was a saint. They do not prove any of these things; but the variety of the conclusions reached shew how little our matter-of-fact historians know about other people's minds, or even about their own. There are people in the world whose imagination is so vivid that when they have an idea it comes to them as an audible voice, sometimes uttered by a visual figure. Criminal lunatic asylums are occupied largely by murderers who have obeyed voices. Thus a woman may hear voices telling her that she must cut her husband's throat and strangle her child as they lie asleep; and she may feel obliged to do what she is told. By a medico-legal superstition it is held in our courts that criminals whose temptations present themselves under these illusions are not responsible for their actions, and must be treated as insane. But the seers of visions and the hearers of revelations are not always criminals. The inspirations and intuitions and unconsciously reasoned conclusions of genius sometimes assume similar illusions. Socrates, Luther, Swedenborg, Blake saw visions and heard voices just as Saint Francis and Saint Joan did [T]here are forces at work which use individuals for purposes far transcending the purpose of keeping these individuals alive and prosperous and respectable and safe and happy in the middle station of life Our Churches must admit that no official organization of mortal men . . . can keep pace with

the private judgment of persons of genius.²³³

The destabilizing voice of the unlikely prophet, and the American embrace of both the “private judgment of persons of genius” and Protestant evangelical movements, from the time of Nathaniel Hawthorne to the California Gatekeepers, are at the heart of Cardozo’s concern that the deific decree cases not allow cultural or personal moral peculiarities to excuse murder.²³⁴ However, George Bernard Shaw reminds us that madness is also divine inspiration, which has been understood as the most authentic and trustworthy expression of truth—a truth beyond the boundaries of common human law and everyday understanding—since at least Plato’s *Phaedrus*.²³⁵

3. Revelation and Revolution

Revelation has also been associated with revolution, when a claim of divine justice is made that requires violence. The American parallel to Joan of Arc is Nat Turner. Nat Turner led an insurrection in Virginia in August of 1831 in which twenty to forty enslaved African Americans killed fifty-five white people, most of them women and children, before they were scattered and captured by armed local militia members.²³⁶ The attacks set off a widespread panic throughout the white South, resulting in retaliatory murders and further restrictions on enslaved people.

Thomas Gray, a white lawyer, interviewed Turner in prison to ask him why he did this.²³⁷ Turner calmly and clearly explained that he had a mission from God.²³⁸ The signs of his special mission included that: he was born with “certain marks”²³⁹ on his head that his parents interpreted as meaning

233. SHAW, *supra* note 231.

234. *Id.*

235. ROBINSON, *supra* note 24, at 24.

236. Scot A. French, *The Confessions of Nat Turner (1831)*, ENCYC. VA., https://www.encyclopediavirginia.org/_The_Confessions_of_Nat_Turner_1831 (last visited Apr. 17, 2019).

237. *Id.*

238. THE CONFESSIONS OF NAT TURNER: WITH RELATED DOCUMENTS (Kenneth S. Greenburg, ed. 2017) [hereinafter CONFESSIONS].

239. *Id.* at 42 (giving a helpful caution regarding reading this document—Gray clearly interjects his voice at some points in Turner’s narrative, but the

he was “intended for some great purpose;” as a child he had knowledge of things that had happened before he was born; he was often told as a child that he “had too much sense to be raised, and, if I was, I would never be of any service to any one as a slave;”²⁴⁰ and he was precocious, learning to read without being taught, and curious about everything, especially science and religion.²⁴¹ He became a natural leader at a young age, and he often read the Bible, prayed, and fasted, becoming known as a preacher and a healer.²⁴² He began to have visions of “white spirits and black spirits engaged in battle” and of the “lights of the Saviour’s hands, stretched forth from east to west, even as they were extended on the cross on Calvary for the redemption of sinners.”²⁴³ He prayed “to be informed of a certainty of the meaning thereof.”²⁴⁴ In apparent answer to these prayers, he discovered “drops of blood on the corn” and “found on the leaves in the woods hieroglyphic characters and numbers, with the forms of men in different attitudes, portrayed in blood, and representing the figures I had seen before in the heavens.”²⁴⁵ From this, he concluded, “the great day of judgment was at hand.”²⁴⁶ This conclusion was further confirmed by a miraculous healing he performed on a white man, and by a solar eclipse.²⁴⁷ Convinced he was called to “fight against the Serpent” and help Christ ensure that “the first should be last and the last should be first,” he began to plan how he would “slay [his] enemies with their own weapons.”²⁴⁸ He planned with six of his closest friends to start this divine violence at his own master’s house and “until [they] had armed and equipped [them]selves, and gathered sufficient force, neither age nor sex was to be spared.”²⁴⁹ The

religious imagery and language is likely to be Turner’s, given the very prosaic voice of Gray’s introduction).

240. *Id.* at 43 (repeating this phrase twice in the narrative, and again, would seem to be in Turner’s voice, rather than Gray’s).

241. *Id.*

242. *Id.*

243. *Id.* at 44.

244. CONFESIONS, *supra* note 238.

245. *Id.*

246. *Id.* at 45.

247. *Id.* at 45–46.

248. CONFESIONS, *supra* note 238, at 46.

249. *Id.*

band visited the wrath of God on eleven farms that night, including a household of ten white school children, who were all cut down or shot.²⁵⁰ They spared neither women who asked for quarter, nor infants.²⁵¹

Like Joan of Arc, Turner did not show signs of insanity in the rest of his life, but was extremely bright and a trusted and hard worker.²⁵² Even in Turner's prison cell, Thomas Gray seems surprised to encounter Turner's "intelligence" and "calm, deliberate composure:"

It has been said he was ignorant and cowardly, and that his object was to murder and rob for the purpose of obtaining money to make his escape. It is notorious, that he was never known to have a dollar in his life; to swear an oath, or drink a drop of spirits. As to his ignorance, he certainly never had the advantages of an education, but he can read and write, (it was taught him by his parents,) and for natural intelligence and quickness of apprehension, is surpassed by few men I have ever seen. As to his being a coward, his reason as given for not resisting Mr. Phipps, shews [sic] the decision of his character He is a complete fanatic, or plays his part most admirably. On other subjects he possesses an uncommon share of intelligence, with a mind capable of attaining any thing; but warped and perverted by the influence of early impressions.²⁵³

Like Joan, Turner was unrepentant, convinced of his divine mission even in defeat.²⁵⁴ Like Joan's, Turner's prophetic visions of "white spirits and black spirits engaged in battle" were

250. *Id.* at 49.

251. *Id.* at 46 ("it was quickly agreed we should commence at home . . . and until we had armed and equipped ourselves, and gathered sufficient force, neither age nor sex was to be spared, (which was invariably adhered to)").

252. *Id.* at 1, 9, 46, 52–53.

253. *Id.* at 52.

254. *Id.*

fulfilled a few decades after his death, with the Civil War.²⁵⁵ Like the Catholic Church, the South reacted by cracking down on heresy: African American enslaved people were no longer to learn to read (even the Scriptures) nor preach, nor form congregations, but could attend church only with their white masters, and those considered potential revolutionaries were killed in the cruelest of ways.²⁵⁶

D. It's All God Anyway (Law is Irrelevant)

*“You say that I am guilty. Impious and rash!
Thus to usurp the prerogatives of your Maker!
To set up your bounded views and halted reason,
as the measure of truth!”²⁵⁷*

From one extreme of this taxonomy, at which law cannot take revelation seriously, we arrive at the other extreme, where revelation gives no weight to law, be it secular or religious. From the standpoint of revelation alone, laws are foolish, religious doctrines of discernment irrelevant, for even the devil is merely an instrument of the divine.²⁵⁸

There is an extreme arrogance in such self-authenticating, individual claims of revelation that seems to run through American culture, undercutting all forms of law. Inspired, or fascinated, by several egregious cases of murder-by-divine-decree in 1780s America, in which devout men, after quiet contemplation with their Bibles, slaughtered their families to purify their souls,²⁵⁹ Charles Brockden Brown wrote the first

255. *Id.* at 44.

256. CONFESSIONS, *supra* note 238, at 20 (Greenburg introduction).

257. CHARLES BROCKDEN BROWN, WIELAND: OR, THE TRANSFORMATION, AN AMERICAN TALE 205 (Invisible College Press 2001) (1857).

258. Compare Calvinist reaction, with *Frantick Hackett*, *supra* note 45.

259. William Beadle & James Yates, *An Account of a Murder Committed by Mr. J—Y—upon his Family, in December. A.D. 1781.*, N.Y. WKLY. MAG., July 27, 1796, at 20, 28. Other cases are recounted in Marsh, *The Great Sin of Striving with God* (1783) and Stephen Mix Mitchell, *A Narrative of the Life of William Beadle* (1783). Stan Krauss found earlier cases in which suspected witches were killed: Thomas Goss (1785) murdered his family because he thought his wife was a witch and God would protect him. Goss refused a legislative pardon. In 1799, in New York, John Pastano received a legislative

American novel in 1793.²⁶⁰ *Wieland: or, The Transformation, An American Tale*, explores the implications of deific decree murder at precisely this point where all forms of discernment fail and revelation is completely self-authenticating.²⁶¹

Clara, who narrates the novel in a somewhat unreliable epistolary fashion, lives a perfect Jane Austen life of conversation and education with her brother Wieland, sister-in-law Catherine, and Wieland's rationalist friend Pleyel (for whom Clara secretly carries a torch).²⁶² This idyll is interrupted when the mysterious Carwin shows up at their door—an extraordinarily fascinating and highly intellectual vagrant.²⁶³ Soon afterwards, the intellectual quartet begins hearing voices.²⁶⁴ Clara is haunted by voices of burglars in the closet.²⁶⁵ Wieland hears his wife Catherine's voice under circumstances that make that impossible.²⁶⁶ Pleyel believes he overhears Clara seducing Carwin.²⁶⁷ Off-stage, Wieland comes to believe from his experience of these impossible voices that he can at last speak directly to God.²⁶⁸ To prove his singular devotion to God, God demands that Wieland sacrifice his wife and children.²⁶⁹ Later in the novel, Wieland kills them, believing that God has commanded this, and that his act is innocent.²⁷⁰

Carwin turns out to be a ventriloquist who has caused much of the group's confusion and anxiety, including the break-up of the romance of Clara and Pleyel.²⁷¹ Carwin does not, however, acknowledge responsibility for Wieland's God-voices that decree his murders.

pardon after killing his family. See also ROBINSON, *supra* note 24. Midelfort recounts a similar notorious case in Wurttemberg, in 1590, in which a master dyer "murdered his wife and attacked his four children in their beds," after accusing his wife of witchcraft. MIDELFORT, *supra* note 41, at 183.

260. BROWN, *supra* note 257.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. BROWN, *supra* note 257.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

All along, the actions of the humans seem trivially wrong at worst, yet result in horrific consequences they are unable to imagine or fend. As John Matteson's introduction points out, the power of human understanding and effective action is undermined throughout. Coincidence and fate seem to magnify the consequences of Carwin's random acts of ventriloquism, which are motivated merely by caprice, jealousy, and expedience, threading them along like beads into a sinister plotline that seems the product of demonic malice, not mischief.

The provenance of Wieland's "voice of God" is never completely settled, leaving it undecided whether it was Carwin (who perhaps continues to deceive Clara and others), a fraud by Clara as an untrustworthy narrator, God, a demon, or a form of insanity.²⁷² The book also fails to settle whether Wieland himself can be held responsible for his homicides. Clara ends the novel with an anodyne conclusion that: "If Wieland had framed juster notions of moral duty, and of the divine attributes; or if I had been gifted with ordinary equanimity or foresight, the double-tongued deceiver would have been baffled and repelled."²⁷³ Yet, given Wieland's character as the admirer of Cicero, as the grave and "indefatigable student"²⁷⁴ of the history of religious opinions who deemed it "indispensable to examine the ground of his belief, to settle the relation between motives and actions, the criterion of merit, and the kinds and properties of evidence"²⁷⁵ with a mind "enriched by science,"²⁷⁶ in which "moral necessity, and Calvinistic inspiration, were the props on

272. Wieland's uncle, Thomas Cambridge says: "Carwin, perhaps, or heaven, or insanity, prompted the murderer; but Carwin is unknown." BROWN, *supra* note 257, at 188. The framing story of Clara and Wieland's father, who died in a mysterious white flame after being convinced that he had forfeited heavenly favor by refusing a divine commandment, both keeps open the possibility of an inherited madness, and of a genuine divine or demonic visitation: "Was this the penalty of disobedience? This the stroke of a vindictive and invisible hand? Is it a fresh proof that the divine Ruler interferes in human affairs, meditates an end, selects, and commissions his agents, and enforces by unequivocal sanctions, submission to his will? Or, was it merely the irregular expansion of the fluid that imparts warmth to our heart and our blood, caused by the fatigue of the preceding day, or flowing, by established laws, from the condition of his thoughts?" *Id.* at 27.

273. *Id.* at 282.

274. *Id.* at 32.

275. *Id.*

276. *Id.*

which my brother thought proper to repose,”²⁷⁷ Clara’s indictment rings hollow. The book makes it difficult to believe that the murders occurred because Wieland had not adequately studied “moral duty” or the “divine attributes.”²⁷⁸

Another possibility is that the group’s very isolation and insularity creates the tragedy. Wieland is very much like his own religion-obsessed father, who:

[A]llied himself with no sect, because he perfectly agreed with none. Social worship is that by which they are all distinguished; but this article found no place in his creed. He rigidly interpreted that precept which enjoins us, when we worship, to retire into solitude, and shut out every species of society. According to him devotion was not only a silent office, but must be performed alone His system was embraced not, accurately speaking, because it was the best, but because it had been expressly prescribed to him.²⁷⁹

Clara tells us that Wieland’s studies likewise were solitary, and no community of believers or church institution, other than that provided by the small family group, filtered or discussed his conclusions.²⁸⁰ Indeed, he never speaks of his conviction that God is communicating directly to him until after he has acted on His command.

Wieland’s confession reads like a passage of scripture, or a Jonathan Edwards sermon, using the archaic second person “thous” and “thines” rather than the more informal language he uses in the rest of the novel. The intense first-person focus, moreover, confirms a kind of inspired insular solipsism.²⁸¹

277. *Id.* at 34.

278. BROWN, *supra* note 257, at 282.

279. *Id.* at 18.

280. *Id.*

281. BROWN, *supra* note 257, at 161 (“It is needless to say that God is the object of my supreme passion A voice spake like that which I had before heard—Thou hast done well; but all is not done—the sacrifice is incomplete—thy children must be offered—they must perish with their mother!”).

If my judges are unable to discern the purity of my intentions, or to credit the statement of them, which I have just made; if they see not that my deed was enjoined by heaven; that obedience was the test of perfect virtue, and the extinction of selfishness and error, they must pronounce me a murderer.

They refuse to credit my tale; they impute my acts to the influence of daemons; they account me an example of the highest wickedness of which human nature is capable; they doom me to death and infamy. Have I power to escape this evil? If I have, be sure I will exert it. I will not accept evil at their hand, when I am entitled to good; I will suffer only when I cannot elude suffering.

You say that I am guilty. Impious and rash! Thus to usurp the prerogatives of your Maker! To set up your bounded views and halted reason, as the measure of truth!

Thou, Omnipotent and Holy! Thou knowest that my actions were conformable to thy will. I know not what is crime; what actions are evil in their ultimate and comprehensive tendency or what are good. Thy knowledge, as thy power, is unlimited. I have taken thee for my guide, and cannot err. To the arms of thy protection, I entrust my safety. In the awards of thy justice, I confide for my recompense.

Come death when it will, I am safe. Let calumny and abhorrence pursue me among men; I shall not be defrauded of my dues. The peace of virtue, and the glory of obedience, will be my portion hereafter.²⁸²

282. *Id.* at 204–05. Wieland's confession is very similar in substance, style and tone to that of John Yates, at least as recounted by a reporter for the New York Weekly Magazine in 1796. *See* Beadle & Yates, *supra* note 259. The Yates news account also seems eerily similar to the facts of a familicide that occurred in 1755, so it may be itself somewhat fictionalized. *See* NEIL WEBSDALE, *FAMILICIDAL HEARTS: THE EMOTIONAL STYLES OF 211 KILLERS* (2010) (recounting the 1755 family murder by John Myrack in Pennsylvania in which the mode of killing was very similar (hitting two childrens' skulls against a

Clara and her uncle later debate the sincerity and sanity of Weiland's confession. Her uncle believes Weiland is insane, but Clara demurs: "none but a command from heaven could have swayed his will; and nothing but unerring proof of divine approbation could sustain his mind in its present elevation."²⁸³

Wieland later breaks loose from confinement and confronts Clara directly, confusing her more still, and even threatening to kill her:

Once it was the scope of my labours to destroy thee, but I was prompted to the deed by heaven; such, at least, was my belief. Thinkest thou that thy death was sought to gratify malevolence? No. I am pure from all stain. I believed that my God was my mover!

Neither thee nor myself have I cause to injure. I have done my duty, and surely there is merit in having sacrificed to that, all that is dear to the heart of man. If a devil has deceived me, he came in the habit of an angel. If I erred, it was not my judgment that deceived me, but my senses. In thy sight, being of being! I am still pure. Still will I look for my reward in thy justice!²⁸⁴

Clara remains uncertain:

Perhaps this was merely a transition of his former madness into a new shape. Perhaps he had

rock, killing a nursing infant, and burning his wife's face so as to be unrecognizable)). Websdale also discusses murders by James Purrington, in 1780 in Maine, who killed his family with an axe and a razor, and that of John Beadle, in Connecticut in 1782, which was preceded by a "last supper" of oysters for his "flock," after which he chloroformed his family members and methodically cut their throats. Websdale also recounts Yates' murder, but relies on the same source as above. The Beadle, Yates, and Purrington murders were all committed by fathers who were allegedly loving and upright, all were connected with religious commands or beliefs, and Websdale suggests that they were all committed by "deists" who were outside of established churches. Nothing is known about the motivation for the Myrack murders. Beadle apparently believed in predestination. *Id.*

283. BROWN, *supra* note 257, at 210.

284. *Id.* at 260.

not yet awakened to the memory of the horrors which he had perpetrated. Infatuated wretch that I was! To set myself up as a model by which to judge of my heroic brother! My reason taught me that his conclusions were right; but conscious of the impotence of reason over my own conduct; conscious of my cowardly rashness and my criminal despair, I doubted whether any one could be steadfast and wise.²⁸⁵

Then, Wieland twists the narrative again: “Clara,’ he continued, advancing closer to me. ‘thy death must come. This minister is evil, but he from whom his commission was received is God. Submit then with all thy wonted resignation to a decree that cannot be reversed or resisted.”²⁸⁶

Here is the turning point that Brown makes clear to us: *for Wieland, it no longer matters whether the voice he hears is divine or demonic—for even evil is controlled by God. Wieland is still, ultimately, a divine agent, because God is all. Law, good and evil, have all disappeared.*²⁸⁷ Wieland’s Calvinist predestination (mentioned earlier) takes its final turn. If all individual action is directed by a grander, unknown narrative, then there is no responsibility, and no place for adjudication or for human law. There is only resignation to an inevitable destiny that allows murder or nurture, seemingly at random.

Just as Wieland is about to strangle Clara, he is rebuked aloud by another mysterious voice and told that he is insane.²⁸⁸ Brown is intentionally obscure about whether this voice is Carwin’s ventriloquism, whether Clara imagines the voice, or

285. *Id.*

286. *Id.* at 261.

287. *Id.* For an eerie recent parallel, see Lyndsay Winkley, *Woman Waving Handgun, Carrying Baby, Threatens to Blow Up Church During Easter Service*, SAN DIEGO UNION-TRIBUNE (Apr. 22, 2019), <https://www.officer.com/command-hq/technology/security-surveillance/news/21077241/woman-waving-gun-carrying-baby-threatens-to-blow-up-church-during-easter-service> (“Conkey posted her last video hours before . . . In it, she claims that Jesus and Satan are one and that she was sent to reveal the truth to the masses. ‘If God decides to blow your minds by appearing as someone very unexpected and doing very unexpected things and saying crazy, crazy stuff, maybe you should listen,’ she said”).

288. *Id.*

whether God himself speaks (“a voice, louder than human organs could produce”²⁸⁹), but the voice stops Wieland from killing Clara.²⁹⁰ Believing that he is insane and not guided by God is the one outcome Wieland cannot bear; the one outcome that denies him status as a divine agent.²⁹¹ Wieland, in his despair at the senselessness of his actions, stabs himself.²⁹²

By this point, Clara has lost any sense of the point of having discernment and does not care where the voice came from: “Be it so: I care not from what source these disasters have flowed; it suffices that they have swallowed up our hopes and our existence. What his agency began, his agency conducted to a close Such is his tale, concerning the truth of which I care not.”²⁹³ Note that her language changes here to the same kind of biblical sing-song used by Wieland in his confession, and one wonders, not for the first time, about Clara’s own sanity. With the loss of a reliable narrator, the reader now has no firm grasp on reality and is flung, along with the characters, into a fractured surreal.

Wieland was written after the American religious Great Awakening had solidified the position of new evangelical faiths, all of which placed a great deal of emphasis on personal conversion narratives and religious experiences.²⁹⁴ In the novel, Wieland explicitly mentions the Moravians and their leader Zinzendorf as objects of his study.²⁹⁵ The Moravians were a “close-knit communitarian body . . . pacifistic, intensely devout.”²⁹⁶ Clara’s narration also connects Wieland’s contemplations with doctrines of Calvinism, which in this period was intensely focused on the doctrine of predestination and election. In short, Moravians were quietists; Calvinists were

289. BROWN, *supra* note 257, at 265.

290. *Id.*

291. *Cf.* SHAW, *supra* note 231, at act VI (Saint Joan recantation scene).

292. BROWN, *supra* note 257, at 265.

293. *Id.* at 216.

294. GAUSTAD & SCHMIDT, *supra* note 5, at 108 (2002); *see also* SHAI LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* (2005).

295. BROWN, *supra* note 257, at 19.

296. GAUSTAD & SCHMIDT, *supra* note 5; *see also* David Zimmerman, *Charles Brockden Brown and the Conundrum of Complicity*, 88 *AM. LITERATURE* 665 (2016).

fatalists. Neither sect had much truck with human agency or law.

Wieland's author, Charles Brockden Brown, was himself a son of Quakers, a small sect of pacifists who valued individual spiritual experience, but denied Calvinist doctrines of predestination and original sin.²⁹⁷ It is hard not to read the novel as an indictment of Calvinism's doctrines of predestination and divine vengeance, which seem to goad *Wieland* to murder. Perhaps the foreign-born Carwin, whose disembodied voices sow such confusion, is a figure of Catholicism, another target of Quaker dissenters; and yet, such a reading over-simplifies. Fate plays a devious role in the story, rolling coincidence into tragedy, emphasizing, rather than disproving, the Calvinist doctrine that humans, no matter how good or innocent, are powerless to change their destiny. It is also hard not to read the novel as a lesson about the fragility of individual intuition, the uncertainty of experiencing divine communication, and the dangerous insularity of the small congregation—all of which must have been key features of Brown's own Quaker home-life. Brown may also have had in mind the witch trials of the century before, so evocative of the difficulty in determining whether inspiration is divine, demonic, or invented—a problem that was still a danger in the Yates and Beadle murders in his own day, and, as the cases above bear out, in our own.

One might also be tempted to read the novel as advocating an age of reason, in a narrative argument against revelation. For contemporaries Jefferson and Adams, and many others in the founding age, the emphasis was on moral actions and virtue, not on religious experience or theological doctrines. They believed that science, nature, reason, and God were all aligned (as did Kant), and, like Brown's own Quaker family, rejected Calvinism's idea of the elect and the God-fated evil-doer.²⁹⁸ Thomas Paine took this empiricism even farther, rejecting all creed and clergy, prefiguring the secular individualism later apparent in Emerson's Transcendentalism: "My own mind is my own church."²⁹⁹

297. GAUSTAD & SCHMIDT, *supra* note 5, at 132–38.

298. *Id.*

299. Thomas Paine, *Age of Reason*, pt. 1, § 1, THOMAS PAINE, <http://www.ushistory.org/paine/reason/reason1.htm> (last visited Apr. 18,

However, Brown's novel seems an indictment of a cult of reason as well: Pleyel's strictly scientific disposition does not prevent him from being led astray by voices, nor allow him to predict and prevent the murders, and the richly symbolic bust of Cicero, around which the little intellectual community gathered, lies smashed by the novel's end. Throughout, the novel points to the difficulty that any of us have discerning truth, condemned as we are always to the first-person viewpoint. Despite Enlightenment emphasis on universal truths, strong American individualism invites an intuitionism that emphasizes miracle and individual experience over science and history. *Wieland* rides this solipsistic reality divide in a kind of post-modernism that has recommended the novel to contemporary critics.³⁰⁰ However, even post-modernism is indicted here. *Wieland*'s violent destruction of idols is uncomfortably close to Walter Benjamin's concept of myth- and law-destroying "divine violence," which purges false human versions (idols) of law, justice, and sovereignty in order to eliminate the injustice they perpetuate by virtue of their apparent-but-false justice.³⁰¹ *Wieland*, then, is also a figure of the dark side of revelation as revolution.

The cacophony of religious voices that Brown explores does not end with him. The next generation and the Second Great Awakening coincided with a time when the protestant denominations divided over slavery, with the southern schisms declaring slavery to be Bible-based and deriding their northern counterparts as political and influenced by foreign interpretive doctrines rather than the Biblical text.³⁰² As religion historians Gaustad and Schmidt put it, "[l]ike a rag doll, the Bible was tossed back and forth, now quoted to support slavery, now to

2019).

300. See, e.g., Christine Hedlin, "Was there not Reason to Doubt?": *Wieland and its Secular Age*, 48 *J. AM. STUDS.* 735 (2014).

301. See JAMES R. MARTEL, *DIVINE VIOLENCE: WALTER BENJAMIN AND THE ESCHATOLOGY OF SOVEREIGNTY* 51–52 (2011).

302. GAUSTAD & SCHMIDT, *supra* note 5, at 189–96. Methodists split in 1844, *Abolition and the Splintering of the Church*, PBS: THIS FAR BY FAITH, https://www.pbs.org/thisfarbyfaith/journey_2/p_5.html, Baptists in 1845, *Baptist Church*, OHIO HISTORY CENT., http://www.ohiohistorycentral.org/w/Baptist_Church; Presbyterians in 1857, 7 *The Schism of 1861*, AM. PRESBYTERIAN CHURCH, <http://www.americanpresbyterianchurch.org/apc-history/presbyterian-history/the-schism-of-1861/>.

attack it.”³⁰³

In Caleb Smith’s analysis of the rhetorics of rule of law and religious resistance in the context of American slavery, he draws attention to a related intra-evangelical controversy: There was concern in nineteenth-century protestant abolitionist churches that fiery, judgmental religious rhetoric may have inspired deific decree murderers and ignited other violent acts.³⁰⁴ Some establishment ministers in the first half of the 1800s, like Lyman Beecher, argued for a calmer and more reasoned approach to preaching.³⁰⁵ According to Smith, these moderate preachers advocated a more law-based form of discernment that emphasized: (1) historical models (church doctrine, common law, Biblical interpretation, and church authority); (2) emotional intensity but not enthusiasm or evil speaking; (3) whether acts of love or violence are encouraged; (4) whether good works are emphasized rather than just feeling good; and (5) humility about one’s interpretive conclusions from divine inspiration.³⁰⁶ While Smith is concerned about the church establishment’s silencing of passionate abolitionist preaching, and its efforts to rechannel religious calls for the violent overthrow of slavery into

303. GAUSTAD & SCHMIDT, *supra* note 5, at 191.

304. SMITH, *supra* note 23, at 129.

305. *See generally* Letter from Dr. Beecher to Mr. Beman (Dec. 15, 1827), in LETTERS OF THE REV. DR. BEECHER AND REV. MR. NETTLETON, ON THE “NEW MEASURES” IN CONDUCTING REVIVALS OF RELIGION 80 (1828); CATHERINE BREKUS, STRANGERS AND PILGRIMS: FEMALE PREACHING IN AMERICA 1740-1845 (1998) (makes the case for Smith’s take, above); CHARLES CHAUNCEY ET AL., ENTHUSIASM DESCRIBED AND CAUTIONED AGAINST (1742); BENJAMIN DOOLITTLE, AN ENQUIRY INTO ENTHUSIASM (1743); Elijah Hedding, *Self Government*, in SERMONS ON MISCELLANEOUS SUBJECTS 13 (2d ed., 1859); SMITH, *supra* note 23, at 240–41 (referencing to Chamberlayne’s pamphlet); Elijah Hedding, The Substance of an Address Delivered to the Oneida Annual Conference of Ministers of the Methodist Episcopal Church (August 31 1838). For more references about the intra-evangelical debate over the Great Awakenings I and II see ANN TAVES FITS, TRANCES, AND VISIONS: EXPERIENCING RELIGION AND EXPLAINING EXPERIENCE FROM WESLEY TO JAMES (1999). Smith’s take on this literature is that “[t]he creation of true religion, and of its distinctive styles of public address, involved two related but different kinds of suppression: At one level, the silencing of the unlettered, the undisciplined, and the lowly; at another level, the authorizing self-regulation of those who spoke the truth.” SMITH, *supra* note 23, at 132.

306. SMITH, *supra* note 23, at 129 (cautioning that “Christian imperatives of humility and piety were used to stigmatize the feverish public performances of women who lacked the formal education of ministers”).

incremental compromises and non-violent demonstrations,³⁰⁷ the themes of Beecher's concern replay and rehearse the crack-down on evangelical practices also apparent in the Catholic tradition, above. The recursion to established traditions and hierarchies protected against a "divine violence" that may command both fanatical murders and radical, revolutionary calls for justice.

Both the brutal and the revolutionary forms of revelation are peculiarly American. As historians of religion point out, the United States has always been a protestant nation in the sense of being prone to schism and generally committed to rebellion against established religious institutions and professional religious mediators—always seeking direct, personal, and individual religious experiences in a kind of smorgasbord of religious democracy focused on the individual's sovereign choice to accept a particular brand of faith.³⁰⁸ As one popular book promises, in just twenty-one days, you too can be a prophet.³⁰⁹ Amanda Porterfield argues that American law's combination of religious protectionism and deregulation pursuant to the First Amendment promoted just such consumer-driven, "personalized forms of spirituality."³¹⁰ *Wieland* is indeed an American tale of individual revelation—against social convention, against established churches, and against the law. The Defendant who kills pursuant to a special mission from God may be a peculiarly American trope: The world that fails to see my personal divine vision is suffering from delusion, not me. I alone can see all the world's truths as fake news.

307. *Id.* at 182–84 (insinuating that Harriet Beecher Stowe's brother's failure to support John Brown's violent tactics was pusillanimous because he limited his abolitionist goals to promoting civil disobedience in the North and lobbying southern legislators to protect slave-family relations).

308. See Demko, *supra* note 12 (emphasizing the choice to follow a particular religion should be considered rational, not insane, and pointing to the importance of a particular person's acceptance, *e.g.*, of Christ as your personal savior); see also Porterfield, *supra* note 232.

309. See JAMES W. GOLL, *THE LIFESTYLE OF A WATCHMAN: A 21-DAY JOURNEY TO BECOMING A GUARDIAN IN PRAYER* (2017).

310. Porterfield, *supra* note 232.

E. Reason is Finite, God is Infinite, Humans are Ignorant

Where does this fractured, solipsistic reality leave us? Soren Kierkegaard,³¹¹ in *Fear and Trembling*, tries to grasp the self-authenticating revelation in the context of God's command to Abraham to sacrifice Isaac. As in the taxonomy offered earlier, Kierkegaard contrasts the Kantian God of Reason and a God who commands the unreasonable. The first, while infinitely demanding, is much easier for humans to conceive. The human who follows a God of reason, which Kierkegaard calls a "knight of the infinite," is willing to do his duty and to uphold a universal law.³¹² The knight of the infinite may suffer for his adherence to principle, but all reasonable beings must honor him for it. The knight of the infinite has a duty to deliberate with other reasonable beings, to consider the evidence, to follow precedent and principles of discernment, but once convinced by rational argument, the knight of the infinite needs only to follow reason, whatever the sacrifice. These sacrifices are tragic, but they are undeniably for the right.

However, Kierkegaard points out that religion requires a knight of faith, not a knight of the infinite.³¹³ Abraham is commanded by God to sacrifice his beloved son Isaac.³¹⁴ There is no reason given for this commandment. It is not demanded by a universal ethical principle, but is forbidden by ethics, for ethics considers it an unjustified murder of the most heinous sort, as well as the breach of a prior contract between Abraham and God.³¹⁵ Abraham does not doubt or complain of this command—he consults no one, he deliberates with no one, he consults no principles of discernment, he knows no rational debate is of use. God has commanded it, and it must be done. Abraham's love for God and absolute obedience to him must come before the law,

311. This account of Kierkegaard is drawn from a discussion in my prior article: Linda R. Meyer, *I Would Kill for You: Law and Sacrifice in 'To Kill a Mockingbird,'* in REIMAGINING TO KILL A MOCKINGBIRD (Umpfrey & Sarat, eds., 2011).

312. SØREN KIERKEGAARD, *Fear and Trembling*, (1843) <https://www.sorenkierkegaard.nl/artikelen/Engels/101.%20Fear%20and%20Trembling%20book%20Kierkegaard.pdf>.

313. *Id.*

314. *Id.*

315. *Id.*

reason, sanity, and comprehension.

Like Wieland, Abraham has no guarantee that the request is divine rather than demonic; he must recognize the command of itself. He must do without Kant, who asserts that we only recognize God because he is good. However, what if Abraham is mistaken? He has nothing but his own faith to reassure him that it is God and not some demon that instructs him. If he is mistaken:

[W]hat can save him? He suffers all the pain of the tragic hero, he brings to naught his joy in the world, he renounces everything . . . and perhaps at the same instant debars himself from the sublime joy which to him was so precious that he would purchase it at any price. Him the beholder cannot understand nor let his eye rest confidently upon him.³¹⁶

Yet, the marvel for Kierkegaard is not that Abraham proceeds to follow the command, but that he believes firmly that in doing so, all will be well—not in some other life, but in this life.³¹⁷ This faith in miracle, in the impossible and the absurd, is what Kierkegaard admires in Abraham, but cannot achieve himself.³¹⁸

At the moment when the knight made the act of resignation, he was convinced, humanly speaking, of the impossibility. This was the result reached by the understanding, and he had sufficient energy to think it This is quite as clear to the knight of faith, so the only thing that can save him is the absurd, and this he grasps by faith. So he recognizes the impossibility, and that very instant he believes the absurd.³¹⁹

316. SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE BOOK ON ADLER* 51 (Walter Lowrie, trans., Knopf 1994).

317. *Id.*

318. *Id.*

319. KIERKEGAARD, *supra* note 316, at 31.

Kierkegaard thus recognizes the absurdity that seems so much a part of revelation's rebellion against reason, but he stops short of accusing Abraham of insanity. Here, Kierkegaard is defeated; he can only acknowledge human finitude and the inability of humans to grasp the divine and to befriend God.

Conclusions

The exploration of the deific decree puzzle has taken us to the heights of sainthood and the depths of American individualism's pathologies of exceptionalism. It has been a wild ride. The Article concludes below with four comparatively modest suggestions about handling cases of deific decree. First, law, and perhaps religion, should exercise a jurisdictional humility in making judgments about revelation. Second, secular law can learn from religious practices of discernment to look more broadly at the life and practices of a defendant asserting a deific decree experience. Third, the distinction between direct divine command and religious or secular law that is present in the deific decree cases is an important one, emphasizing that most disputes we characterize as disputes between religion and law are intra-legal, not true disputes between law and revelation. Fourth, law should not recognize a deific decree defense beyond *M'Naghten*, not because it would establish a church (for deific decree murders purport to establish no law, religious or secular), but because law has no jurisdiction to evaluate revelation.

Humility

The deific decree cases do not have the happy ending of the Abraham and Isaac story. God does not stop these murders at the last minute, and even though many of these defendants testify to feeling a kind of contentment or consolation after their crimes rather than suffering guilt (as does Wieland), we strongly suspect that feeling is false. We may be wrong about that assessment, and it may be that their confidence in the divinity of their actions turns out to be justified in some other world. However, the probabilities seem slim, even assuming the premises of a religious afterlife, if God turns out not to be a moral

monster, or if, as Aquinas would have it, we believe that reason gives us at least some insight into the divine as well as into the temporal. Perhaps that is why Isaac Watts, in his treatise on logic for religious children, concludes that divine revelation “belongs only to a few Favourites of Heaven . . . and not to the Bulk of Mankind.”³²⁰ For the Bulk of us, perhaps, humility and adherence to reason are the safer course.

The first conclusion this Article draws is that humans have both a religious and legal duty of humility—to presume that we are not the chosen one and that we should not be quick to treat ourselves as an exception to the human rule of right and wrong. There are many reasons for a rule of reluctance to believe in one’s cosmic importance—we know that we are prone to grandiosity, and such over-estimation of our own exceptionalism is all-too-unexceptional.³²¹ We are all quick to believe that we are special and even magical,³²² and one of the attractions of religion is that it gives us that reassurance. Underneath all, perhaps, is the so very human longing for eros, the desire to be loved deeply and passionately as a unique and irreplaceable person, and a longing for a personal destiny that gives life meaning. Nevertheless, while we know eros can lead to some of the worst crimes in pursuit of the beloved (as Weiland’s passionate desire to win divine favor evinces), eros is in itself no excuse. Humility counsels caution in believing that we are God’s chosen instrument.

I was moved by the response of the reporter who, in 1796, recounted the confession of John Yates. In December 1781, Yates spent a quiet night with friends and family, studying the Bible and singing hymns.³²³ He was affectionate to his wife and children, and talked about how he looked forward to returning his brother’s visit soon in his new sleigh.³²⁴ Only a few hours later, Yates recounted being visited by two spirits, and he was

320. WATTS, *supra* note 105, at 182.

321. See accounts of the Dunning-Kruger effect and “Jerusalem Syndrome.” See also NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2001) (explaining how agency bias causes us to overestimate our power to control events).

322. I am still waiting for that letter from Hogwarts.

323. Beadle & Yates, *supra* note 259.

324. *Id.*

told to “destroy his idols.”³²⁵ He burned his Bible, took an axe to his brand-new sleigh and horses, and hunted down and killed his wife and children, even as they begged for mercy.³²⁶ He refused to repent ever afterwards, and though “he expressed much sorrow for the loss of his dear family,” he insisted that he had done the deeds “in obedience to thy commands” and “for thy glory.”³²⁷ The reporter, at a loss for explanation, concludes:

But what avail our conjectures, perhaps it is best that some things are concealed from us, and the only use we can now make of our knowledge of his affair, is to be humble under a scene of human frailty to renew our petition, “Lead us not into temptation.”³²⁸

A similar comment appears in the sentencing of Nat Turner. After the judge reminds him of his guilt for the deaths of “helpless women,” “infant children,” and of the “bosom associates” he misled to their destruction: “Borne down by this load of guilt, your only justification is, that you were led away by fanaticism. If this be true, from my soul I pity you; and while you have my sympathies, I am nevertheless called upon to pass the sentence of the court.”³²⁹

So, let’s say we have a religious and legal duty to be humble about our exceptional character and an obligation to presume, not lightly defeasible, that we are part of “the Bulk of Mankind” subject to Kant’s kingdom of ends. A defendant claiming to kill by deific decree, then, should have an impossibly high burden of proof.

Taking Religious Law Seriously

Law could also borrow some of the other lessons learned by the churches in their long tradition of confronting the problem

325. *Id.*

326. *Id.*

327. Beadle & Yates, *supra* note 259, at 20, 28.

328. *Id.*

329. CONFESIONS, *supra* note 238, at 54–55.

of revelation versus insanity. For example, Catholic practice looks to the general mental health and reliability of the purported visionary as an important test of the miraculous. The history of mental illness and other delusions of the defendant should be relevant, and we should not pinpoint our determination of insanity so specifically to the final act of killing that this general background is not considered. As in the case of Guiteau, whom Judge Cox instructed could not escape conviction if his mental state in general was clear and rational,³³⁰ Mr. Turgeon should be convicted, but Mr. Singleton and Mrs. Archie, who suffered long from many forms of delusions and dislocations, should be acquitted as insane. While the deific decree should not be, on its own, evidence of insanity, the many other instances of delusion should and can inform the question of when the law may decide to treat a sincerely held religious belief as an instance of insanity.

All faith traditions also emphasize the need to compare the vision or prophecy with good deeds and good works. Even if God is not bound by human law or ethical practice, God is usually and probably, insofar as humans can know, aligned with ethical practice. Even the evangelical traditions that most support contemporary personal divine revelation are likely to attribute a deific decree to murder to be the product of confusion, self-delusion, narcissism, or insanity rather than a genuine revelation. If one can speak of evidentiary burdens in a revelatory context, the burden of proof of divine authority for murder is so heavy that one's personal conviction may never alone be sufficient, Abraham, Nat Turner, and Joan of Arc notwithstanding. In G.B. Shaw's tongue-in-cheek ending to his play *Saint Joan*, after her rehabilitation and sainthood, Jane suggests she may come back to life. Immediately, all her supporters find flimsy excuses to desert her. For while we may be perfectly happy to declare Joan a saint *post mortem*, we would not want to resurrect her to disrupt our politics, churches, legal

330. *Guiteau v. United States*, 10 F. 161 (S.D.N.Y. 1882); see also MIDELFORT, *supra* note 41, at 191 (noting that according to the 1472 treatise *De Maleficiis*, by Italian jurist Angelus Aretinus, when insanity was intermittent, "a previous condition of madness shifted the burden of proof to the accuser, who had to prove that the offense occurred during a lucid interval").

institutions, and lives.³³¹

All faith traditions also impose some obligation of expert intersubjectivity—whether the check on revelation be another parishioner, a pastor, or an official papal committee of inquiry. The presumption of intersubjectivity is itself an ethical imperative based on a faith tradition that God cares for all people, not just one. Therefore, the revelations God makes to you privately should not be substantially at variance with the revelations (S)he has already made through tradition, history, and divine texts available to all. The irony is, of course, that the Bible is full of instances in which God picks out one person to communicate with in private. Prophets are destabilizing, usually tasked with being the bearers of bad news that strikes at the heart of a religious tradition. Perhaps it is the deepest irony that it is only with the greatest trepidation that any faith tradition acknowledges as divine a person's private vision that changes the course of traditional religio-ethical practice or allows breach of an ethical rule. While Turgeon did check his revelation with his co-defendant, the isolation and idiosyncratic nature of their church enhances the danger of solipsism and delusion, as in *Wieland*. Even an ecclesiastical court, then, would likely condemn Turgeon's act and deny it a divine origin.

God v. Law

The deific decree cases thus illuminate for us the difference between religious *law* and direct experience of the divine. The deific decree cases always distinguish between defendants who assert that church law or moral doctrine requires them to kill, and defendants who assert a direct prophetic vision—a direct command from God to kill. In the case of cultural or religious doctrinal conflict, at least in the context of murder, no deific decree defense has been recognized. The courts have recognized implicitly that those who disagree with law's reason are asserting a version of a cultural defense and must convince their fellow citizens that the law is wrong, not ask for exceptions from the courts. The deific decree doctrine, if it exists, extends only to one acting under the direct, personal command of God to

331. SHAW, *supra* note 231.

commit a specific crime. This distinction between religious law and deific command, though not well-explained in the cases, is consistent with Justice Scalia's view of the free exercise clause in *Employment Division v. Smith*, for to exalt religious law over secular law in judgments would be to establish a religion, not to be humble before the possibility of the divine.³³²

The corollary is that, as churches become institutions, they must, like courts, refer back to reason, consistency, text, and authority, sound doctrine, and good morals, and cannot tolerate new revelation without schism. A church can never acknowledge a truth based on revelation alone, if that revelation contradicts the established church tradition—sound doctrines and good morals—on which the institution itself depends for its identity. Hence, any argument by a church that its law has a divine warrant ignores the fact that, where prophets differ or are silent or are ambivalent, prophecy must itself be sifted through religious law in order to be recognized by the institution as legitimate. The rules of recognition within religious law, therefore, always place authority somewhere other than in a new revelation itself. For example, even though the Bible is commonly understood by Christian churches as revealed truth, it also serves as an authoritative, highly interpreted, text that becomes a rule for those churches to use in recognizing, or not, new revelations. The new revelation cannot self-authenticate—

332. See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause guarantees that religious activities are not discriminated against by law, not that they are entitled to exemptions from "neutral generally applicable law."). Hence, I do not think Stephen Smith's view, *supra* note 230, that free exercise belongs only to churches and not to individual conscience, is valid. At least in the context of the criminal law, to substitute church law for secular law directly in a criminal case where the community is the plaintiff would entail an establishment of religious law in place of the People's law. To refuse to prosecute, or to pardon someone so convicted, on the other hand, is to recognize law's limits, and could be a means of accommodating religious persons, among others. To exempt an individual from a generally applicable law requiring some other action, like paying taxes or reporting (rather than forbidding a crime) might be understood as an exercise of prosecutorial discretion, and therefore not amount to an establishment of religion. *Demko*, *supra* note 12, at 1970–77, would likely disagree that decrees and rules can be distinguished, and Judge Posner, in *Wilson v. Gaetz*, 608 F.3d 347, 354–55 (7th Cir. 2010), would likely disagree that treating deific decrees differently than cultural defenses would not be an Establishment Clause violation.

a second coming could only be authenticated by the first. Understood in light of the deific decree doctrine's distinction between *doctrine* and *decree*, disputes about abortion, gay marriage, and other divisive issues of our time are primarily inter-religious and intra-legal doctrinal disputes about *which* set of religious or moral laws should be taken up by secular law to govern our conduct, subject to all the usual practices of reasoning, precedent, evidence, tradition, and text-based argumentation (though the core texts differ). The positions in these disputes are not arguments from a self-revealing, self-authenticating revelation. They are not disputes directly between the secular law and God; and if they were, law would not be capable of discerning the beyond-the-law in any event. The best law can do is, like Pontius Pilot, wash its hands and walk away.³³³

Deific Decree in Secular Courts

Looking at established religious traditions for guidance, then, cannot avoid the legal dilemmas created by deific decree tests: We cannot treat revelations as insanity, for that would be to prefer atheism to religion. We cannot presume that revelation will accord with law, for this prefers certain natural law or traditional religious views over others. We cannot use a religious test for determining the validity of a revelatory experience, for the same reason (though noting the helpfulness of religious law analogies would not, it seems to me, be forbidden). We cannot presume that a deific decree would supersede law, unless we would anchor all law in a self-authenticating divine will beyond reason. Instead, we must say, as we usually do in the context of free exercise doctrine, that we cannot know whether divinity is or is not and, therefore, also cannot know whether revelation is or not—such questions are beyond the jurisdiction of law. We should, therefore, acquit only when a person exhibits insanity in other contexts and over time.

This conclusion would rule out judging insanity in deific decree cases by a more inclusive volitional test, as other writers

333. See MARTEL, *supra* note 301, at 51.

have suggested.³³⁴ A person who sincerely claims that God has commanded them to do an act should not be treated as insane under any standard by virtue of that command in itself. A related argument that would not require treating deific decree experiences as *ipso facto* insane is to accord a duress-like excuse to those who commit crimes because they are sincerely terrified of eternal divine retribution, as long as we accorded similarly sincere fears of danger from secular threats equal treatment.³³⁵ A duress defense in this context, however, would have the same evidentiary and causation problems that attend volitional insanity defenses, unless it is restricted to divine threats of serious bodily injury, like being thrown for eternity into a lake of fire.³³⁶ A third possibility, recently argued for by Stephen Garvey, is to exonerate deific decree cases along with other cases in which a defendant loses his sense of his own agency—as do persons suffering from alien hand syndrome—though I suspect the proof problems would rival those in volitional insanity defenses.³³⁷ Assuming, as is likely, that courts continue to adhere to the cognitive *M’Naghten* standard, however, our rule might be that knowledge of generally accepted principles of right and wrong, against a background of a rational, organized life, would be enough to discount claims of insanity and to convict the person who claims to be God’s avenging agent on earth. Where there is no indication that someone suffers from *general* disorders of thought, by itself, a conviction that “God told me to kill” should not be a defense.³³⁸

I would not limit *M’Naghten* to require only knowledge of the positive law as disproof of insanity, rather than the traditional test of knowledge of right and wrong. Our very presumption that ignorance of the law is no excuse

334. See Belt, *supra* note 8.

335. See Morris & Haroun, *supra* note 12, at 1048 (necessity and duress—can an otherworldly threat of hell count?); see, e.g., State v. Blair, 732 A.2d 448 (N.H. 1999) (where the defendant killed family to avoid eternal lake of fire).

336. See United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), *superseded by* 18 U.S.C. § 17 (reinstating *M’Naghten* in federal courts); United States v. Lyons, 731 F.2d 243 (5th Cir. 1984) (en banc).

337. See Garvey, *supra* note 12.

338. See Morris & Haroun, *supra* note 12, at 1047 (stating “[i]f 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”).

acknowledges that we know law through ethics, not through statute books. Moreover, if we invoke such extreme skepticism about moral objectivity, and treat ethics as just as much beyond legal jurisdiction as religious truth, we undermine legal reason itself and commit ourselves to another kind of command-based will to power that may or may not accord with right. Positive law, if it does not have a significant link to the most commonly accepted principles of ethics, is nothing more than a gunman writ large, as H.L.A. Hart put it.³³⁹ A purely positivistic view of law would require, for example, acquittal of soldiers commanded to kill by their legally-constituted superiors, just as deific decree doctrine would exonerate those commanded to kill by their God.³⁴⁰ Positive law in its extreme form is just as self-authenticating as deific decrees and just as resistant to correction by conventional, reason-based, or nomos-based ideas of right and wrong. The only difference is that a willful God is replaced by a willful legislature.³⁴¹ The deep irony with positions that look to positive-law formulations of *M'Naghten* in order to eliminate the relevance of a defendant's subjective understanding of right and wrong is that the same solipsistic idea of a deific decree that unseats both legal and religious institutions is also present in positive law as the self-authenticating sovereign will that dissolves law into exception and authoritarianism.³⁴²

Finally, law can admit this possibility: that if we define insanity solely under *M'Naghten*, we may perhaps one day crucify a true prophet. Many believe it would not be the first time. But if we have the bad fortune to convict a prophet, then at least we do so out of humility, as in John's portrayal of the reluctant Pontius Pilate, rather than out of derision.³⁴³ From the

339. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958).

340. This observation is compatible with most "mixed" theories of positive law (in which the rule of recognition often includes some ethical rules or materials, or in which the positive law is generally derived from ethical principles) as well as with most theories of natural or customary law.

341. See Nonet, *supra* note 169.

342. Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., U. Chi. Press 2005); MARTEL, *supra* note 301, at 24, 26–27.

343. The need for humility in judging crime is also a reason that I would rule out life-without-parole and the death penalty. See LINDA R. MEYER, *SENTENCING IN TIME* (2017); LINDA R. MEYER, *THE JUSTICE OF MERCY* (2010).

standpoint of a convicted true prophet, imprisonment or even execution would be immaterial, of course,³⁴⁴ and a martyrdom may convince even human reason, in time, that justice requires a radically new vision of right and wrong, or even a bloody civil war. As John Brown put it:

Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I submit; so let it be done!³⁴⁵

Where lawfulness ends, mercy and discretion may still have a place. Law does recognize its own limitations in providing for the pardon power, for jury nullification,³⁴⁶ for sentencing discretion, and for prosecutorial discretion. These are the practices we often use when law-as-reason runs out, and they often mark moments of law's origins, law's humility, or law's compassion, where we cannot know, do not know, or cannot judge. These places of the silence of law³⁴⁷ are where divinity may, or may not, be lurking.

344. Demko, *supra* note 12 (stating “[t]he true believer will accept his fate as ordained by God”).

345. *John Brown's Last Speech*, HIST. WEAPON, <https://historyisaweapon.com/defcon1/johnbrown.html> (last visited Apr. 18, 2019).

346. See, e.g., *Pando v. Fernandez*, 499 N.Y.S.2d 950 (App. Div. 1986) (reinstating a contract suit despite the trial court's determination that the plaintiff's promised “saintly intervention” in helping the defendant choose winning lottery numbers was a consideration impossible to prove. The Appellate Court held that the contract required only the plaintiff's best efforts to contact the saint, and so the matter was for the jury to determine).

347. See MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* (2007); MEYER, *THE JUSTICE OF MERCY* (2010).