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Deific Decree: The Short, Happy Life of a Pseudo-Doctrine

Christopher Hawthorne

"DEIFIC DECREE": THE SHORT, HAPPY LIFE OF A PSEUDO-DOCTRINE

And [God] said, Take now thy son, thine only son Isaac, whom thou lovest, and get thee into the land Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of.[1]

The wrongs of aggrieved suitors are only the algebraic symbols from which the court is to work out the formula of justice.[2]

I. INTRODUCTION

Why is "deific decree"[3] so odd? This exception to the *M'Naghten* test for criminal insanity[4] is a strange amalgam of law and theology. Under the deific decree exception, a defendant who can prove an insane delusion that God spoke to him and commanded his criminal act, is not guilty by reason of insanity.[5] Such a narrow

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1. *Genesis* 22:2 (King James).

2. BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 76 (1903).

3. Deific decree is the name given by the court in *State v. Crenshaw*, 659 P.2d 488, 494 (Wash. 1983), to a doctrine first articulated in *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915). As this Comment will argue, the deific decree doctrine has much older roots, and those roots are the primary source of the current confusion. *See infra* notes 144-186 and accompanying text.

4. The *M'Naghten* test is the one most often used to determine whether a defendant is legally insane. The relevant language states that, to be found insane, the defendant must prove:

> that, at the time of the committing of the act, the [defendant] was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

5. *See Crenshaw*, 659 P.2d at 494. This is deific decree in its "pure" state.

exception is rarely invoked,[6] and when it is pleaded, it almost never meets with success.[7]

Nevertheless, deific decree has inspired extensive discussion by several state appellate and supreme courts during the last two decades,[8] as well as its own section in legal casebooks.[9] Why so much debate over this peculiar species of auditory hallucination?[10] Two reasons:

First, deific decree is seen, correctly or incorrectly, as one of the only volitional exceptions[11] to the cognitive *M'Naghten* test.[12] For a

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For one variation, see *People v. Serravo*, 823 P.2d 128, 139 (Colo. 1992) (holding that "the 'deific-decree' delusion is not so much an exception to the right-wrong test . . . as it is an integral factor in assessing a person's cognitive ability to distinguish right from wrong with respect to the act charged as a crime").

6. Based on a review of appellate-level opinions, in cases in which it was formally invoked. A defendant's insanity is often established pre-trial; in such a case, there may be no record of what the defendant's symptoms were. This is consistent with the general rule of insanity defenses: rarely invoked, seldom successful. *Cf.* Andrew Blum, *Debunking Myths of the Insanity Plea*, NAT'L L.J., Apr. 20, 1992, at 9 (demonstrating that, despite the insanity plea's reputation as a criminal's ticket to freedom, juries rarely acquit on the basis of insanity).

7. *See, e.g.*, *Schmidt*, 110 N.E. at 950; *Crenshaw*, 659 P.2d at 494. There are a number of other cases, but it is significant that the two cases which define the doctrine reject its application in the same breath.

8. *See, e.g.*, Ivery v. State, 686 So. 2d 495 (Ala. 1996); People v. Serravo, 823 P.2d 128 (Colo. 1992); State v. Wilson, 700 A.2d 633 (Conn. 1997); State v. Worlock, 569 A.2d 1314 (N.J. 1990); 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).

9. Law students will be familiar with deific decree from its discussion in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 937-43 (6th ed. 1995).

10. While it is not impossible to imagine "God" issuing a command by means of pictures, text, or other visual hallucinations, the deific decree almost always comes as the "voice of God." This fits within clinical definitions of insanity. Auditory hallucinations are among the eleven "first-rank symptoms" of schizophrenia proposed by Kurt Schneider in his textbook. *See* KURT SCHNEIDER, CLINICAL PSYCHOPATHOLOGY 17 (M.W. Hamilton trans., 1959).

11. *See Crenshaw*, 659 P.2d at 494 ("[I]t would be unrealistic to hold [defendant] responsible for the crime, since [defendant's] *free will* has been subsumed by [defendant's] belief in the deific decree." (emphasis added)). "Free will" is, as its phrasing suggests, an emphatically volitional concept, and only in a purely "volitional" test could "free will" be a great enough factor to override a person's knowledge of right and wrong.

judge who finds cognitive tests unjust, this exception is almost irresistible because it allows the jurist to discuss volitional defenses without straying outside a cognitive framework.

There is, however, a second, equally compelling reason, which starts with an assumption diametrically opposed to the first reason: that deific decree is a *cognitive* exception to a cognitive doctrine. Seen this way, deific decree's purpose is to shed light on one of the most stubborn ambiguities of the *M'Naghten* doctrine: What does the phrase "knowledge of wrongfulness" mean?[13] Does it mean "wrong" under the law? Under the law of God? Under the law of personal morality? The morality of society? Since deific decree, as originally defined by the Washington Supreme Court, is an exception to a societal standard of right and wrong,[14] it presupposes such a standard and therefore has a place in its discussion.[15]

This may explain why deific decree still survives, but it does not answer the original question, which is why deific decree seems so odd—odd in the way an optical illusion seems odd. Its oddity is the subject of this Comment, and it provides a cautionary tale of what happens when a judge makes doctrine without the benefit of facts, or conversely, with the truly unique "benefit" of having made up the facts himself.

Thus, deific decree is interesting only in part because of what it says about legal insanity. It is also interesting because of what it says about the nature and pitfalls of dicta, about the power of judicial rhetoric, and about the drawbacks of pragmatic or politically influenced jurisprudence. Therefore, Part II of this Comment explains the

12. *See* M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

13. *See id.* The debate over knowledge of wrongfulness is ongoing. *See* Bageshree V. Ranade, Note, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377 (1998).

14. *See Crenshaw*, 659 P.2d at 494; *see also* People v. Serravo, 823 P.2d 128, 139 (Colo. 1992) (rejecting deific decree as an exception but retaining it as a factor in assessing a defendant's ability to distinguish right from wrong).

15. *See, e.g.*, State v. Anderson, 723 P.2d 464, 466-67 (Wash. 1986) (in which defendant argued that the Washington NGI (not guilty by reason of insanity) statute, WASH. REV. CODE § 9A.12.010 (1988), was unconstitutionally overbroad and a violation of the Establishment Clause of the Washington Constitution, WASH. CONST. art. I, § 11, because of the holding in *State v. Cameron*, 674 P.2d 650 (Wash. 1983), and that therefore he could resort to hypotheticals to prove the constitutional violation).

two ways in which deific decree is strange or inconsistent and why these inconsistencies are significant. Part III briefly outlines the importance of fact in common law and why the law imposes factual constraints on judges. Part IV discusses the various insanity doctrines, with an emphasis on *M'Naghten*. Part V traces the peculiar history of deific decree: its origins in the confluence of the ecclesiastical and secular courts of England; Judge Benjamin Cardozo's use of it as an emotionally charged hypothetical in *People v. Schmidt*, and its metamorphosis into a genuine pseudo-doctrine in the Washington Supreme Court. Part VI examines deific decree today and asks whether it has any practical use.

II. TWO TYPES OF ODDITY AND WHAT THEY MEAN

At first glance, deific decree appears to rest on a common sense statement: namely, that persons who hear the voice of God are mentally ill. As an observation, this makes sense. Legal exceptions, however, are not bald statements. By implication, an exception both interprets the rule it purports to limit, and, at the same time, excludes other possible exceptions. When we examine these two implications, deific decree begins to look incoherent. This incoherence manifests itself in two ways: first, in deific decree's irrational narrowness, and second, in its excessively literal-minded construction of the *M'Naghten* test. These oddities are in turn the product of a judicial history which, upon close inspection, is fairly curious itself.

A. Narrowness: An Exception Limited to God

Deific decree makes sense on the most basic of levels. A person who genuinely feels compelled by God to murder is probably insane by any definition—psychiatric, legal, or common sense. When the layperson thinks of an insane defendant, the deific decree defendant could be a template: a person with advanced paranoid-type schizophrenia, suffering from auditory hallucinations which cause the person to act in a severely antisocial manner.[16] If it is believable that

16. *See, e.g.*, AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 287 (4th ed. 1994) [hereinafter DSM IV]. "The essential feature of the Paranoid Type of Schizophrenia is the presence of prominent delusions or auditory hallucinations in the context of a relative preservation of cognitive functioning and affect. . . . [D]elusions are

the person is *genuinely* schizophrenic, *genuinely* hears voices which tell him to do things, and *genuinely* believes that he must obey those voices, it is also believable that such a person would murder because the voice of God told him to.

On the same basic level, however, this exception makes less sense than meets the eye. If all of the above criteria are in place—paranoid schizophrenia, auditory hallucinations, compulsive behavior—do we really care *which* voice is commanding the defendant? For instance, in *State v. Cameron*,[17] the defendant was found not guilty by reason of insanity, based on his delusion that God had spoken to him. He also believed at various times that he was being persecuted by the Ayatollah Khomeini and Yasser Arafat.[18] When it comes to auditory hallucinations, is the voice of God really more compelling than the voice of a middle-eastern religious leader?[19]

Once we concede that the defendant has been compelled to act, the source of the compulsion becomes irrelevant.[20] If we believe that

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typically persecutory or grandiose, or both, but delusions with other themes (e.g., jealousy, religiosity, or somatization) may also occur." *Id.* This particular combination of symptoms wreaks havoc with cognitive definitions of insanity, since the "schizophrenic, paranoid-type" will likely understand the nature and quality of his acts and even understand that he is doing what is wrong, while still feeling justified because of his firm belief in the reality of his delusions.

17. 674 P.2d 650 (Wash. 1983).

18. *See id.* at 653.

19. For instance, David Berkowitz, the infamous "Son of Sam" killer, claimed to receive messages from the barking of his neighbor's dog. *See* DAVID ABRAHAMSEN, CONFESSIONS OF THE SON OF SAM 116 (1985); Angie Cannon, *Crime Stories of the Century*, U.S. NEWS & WORLD REP., Dec. 6, 1999, at 50. While a dog's voice—to our minds—lacks the grandeur of deific decree, it is no less (or more) convincing as a command hallucination.

20. Professor Irving Gottesman, a leading scholar on the subject of schizophrenia, claims that experts generally accept that the content of hallucinations is not particularly helpful in diagnosing mental illness. Hallucinatory "content" is usually either culturally encoded or intensely personal to the schizophrenic person. *See* Telephone Interview with Irving Gottesman, Professor of Psychology, University of Virginia (Jan. 23, 1999). Naturally, when when we speak of a delusional "voice," we are not speaking of the *true* voice of the personage: that is, there is no question that Gary Cameron was not commanded by the real God, any more than David Berkowitz was commanded by a dog from the Bronx, bent on creating mayhem by proxy. The "voices" these men heard were in fact inaccessible parts of their own psyches, to which they assigned voices of authority, probably well after the fact. Therefore, assigning

defendants can be compelled by auditory hallunications, the interests of justice require that we consider "command hallucinations" in general, not just "deific command hallucinations."

B. Extrapolating from the Artifice of "Right and Wrong"

The *M'Naghten* test is a "cognitive"[21] test. It deals with what the defendant "knows." To be judged insane under *M'Naghten*, the defendant must either not *know* what he is doing, or if he *knows* what he is doing, he must not *know* that it is wrong.[22] Despite its acknowledged inadequacies,[23] a significant plurality of United States jurisdictions have enacted some form of the *M'Naghten* test.[24]

It would be a mistake, however, to assume that *M'Naghten* accurately describes the insane defendant's state of mind. When Daniel M'Naghten concluded that the Tories were planning to murder him, it strains common sense to think that he made a further conceptual leap to the idea that he was morally justified in killing the prime minister.[25] Clearly, the most important phrase in the

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an identity to the delusion is a way of rationalizing the compulsion which, by its very nature, cannot have an identity. Deific decree, however, takes this post-hoc identity very seriously, ignoring the fact that the measure of authority given the voice is just another aspect of the defendant's psyche. *See id.*

21. "Cognitive. The mental process of comprehension, judgment, memory and reasoning, as opposed to emotional and volitional processes." BLACK'S LAW DICTIONARY 259 (6th ed. 1990).

22. *See* M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

23. *See, e.g.*, People v. Schmidt, 110 N.E. 945 (N.Y. 1915). "The [*M'Naghten*] definition of insanity established by the [New York] statute . . . has been often and harshly criticized. [S]ome states reject it altogether." *Id.* at 949 (citations omitted).

24. The following jurisdictions have M'Naghten-type insanity statutes: 18 U.S.C. § 17 (1994); ALA. CODE § 13A-3-1 (1975); ALASKA STAT. § 12.47.010 (Michie 1962); ARIZ. REV. STAT. ANN. § 13-502 (West 1956); CAL. PENAL CODE § 25 (West 1999); COLO. REV. STAT. § 16-8-101, 16-8-101.5 (1986 & Supp. 1999); GA. CODE ANN. §§ 16-3-2, 16-3-3, 16-3-28 (1988); IND. CODE § 35-41-3-6 (1998); IOWA CODE § 701.4 (1993); LA. REV. STAT. ANN. § 14:14 (West 1993); ME. REV. STAT. ANN. tit. 17-A, § 39 (West 1983); MICH. STAT. ANN. § 28.788(1) (Law. Co-op. 1990); MINN. STAT. § 611.026 (1987); MISS. CODE ANN. § 9-3-97 (1994); N.J. STAT. ANN. § 2C:4-1 (West 1995); N.Y. PENAL LAW § 40.15 (McKinney 1998); OHIO REV. CODE ANN. § 2901.01(A)(14) (West 1996); OKLA. STAT. tit. 22, § 1161 (1998); 18 PA. CONS. STAT. § 315 (1998); S.C. CODE ANN. § 17-24-10 (Law. Co-op. 1985); TENN. CODE ANN. § 39-11-501 (1997); WASH REV. CODE § 9A.12.010 (1988).

25. *See* RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY

M'Naghten test is the least controversial: that the defendant must be suffering "from disease of the mind,"[26] or, in psychiatric terms, a "psychotic . . . disturbance."[27]

The right/wrong distinction, however, is not just makeweight. Ability to distinguish right from wrong is probably the oldest test for insanity.[28] Right and wrong, however, is a distinction which has little resonance in psychiatric definitions of mental illness. The definition of "delusion" in the standard guide to mental disorders, *The Diagnostic and Statistical Manual of Mental Disorders* (*DSM IV*), neither mentions nor implicates moral discernment.[29] A psychiatrist might examine Robert Pasqual Serravo's belief that God had told him to build a multi-million dollar sports complex[30] as a misinterpretation of perceptions or experience—that is, as an explanation of the reality in which Serravo was living. The law, on the other hand, presumes that Serravo lives in the same reality as us—it only wants to know if Serravo knew it was wrong to stab his wife.[31] This is not surprising: the law is not trying to understand Serravo; it is trying to judge him. On the other hand, *M'Naghten* purports to test whether Serravo knows right from wrong but refuses to consider Serravo's reality—a reality which could go a long way in explaining Serravo's understanding. How can such a test be justified?

C. Deific Decree in Light of M'Naghten*'s Social Policy*

The best response to the above question is the most straightforward: the law presumes that everyone sees the same reality.[32]

DEFENSE OF DANIEL MCNAUGHTAN 90 (1981).

26. *M'Naghten*, 8 Eng. Rep. at 722.

27. DSM IV, *supra* note 16, at 278.

28. *See generally* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequest Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227 (1966) (tracing the origin and development of right/wrong tests for insanity in the United States and Great Britain).

29. "Delusions . . . are erroneous beliefs that usually involve a misinterpretation of perceptions or experiences." DSM IV, *supra* note 16, at 275.

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

31. *See id.*

32. *See generally* Allison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993) (noting how the above statement glides over the common sense reality that "reality" and "common sense" are both in part culturally determined). *See also*

Overcoming that presumption is difficult—and, considering *M'Naghten*'s origins,[33] we may fairly assume that it is intended to be difficult. Only total cognitive impairment or total moral impairment with regard to the criminal act will overcome the presumption. This sub-part looks at three ways of justifying this legal presumption. First, one can argue that *M'Naghten* observes a rigid line between legal and psychiatric categories.[34] Since, in current psychiatric terms, its presumption is questionable, *M'Naghten* must preserve its coherence by ruthlessly refusing to allow psychiatric reasoning into its elements. Second, one can argue that *M'Naghten* is simply a pragmatic test.[35] By posing a simple, objective question to the jury, it allows the jury to follow its own natural reasoning processes. The jury may consider the defendant's subjective reality, but the law will not sanction the reality, nor will it provide guidelines. Third, one can say that *M'Naghten*'s presumption, because it is so difficult to overcome, is an expression of society's disapproval of or anger at crime in general—even when crime is committed by the genuinely insane person. More particularly, it evinces disapproval of and rage at sham insanity defenses.

Accepting these policy justifications as valid, it is clear the deific decree does not consistently advance any of them. First, deific decree violates the bright line between psychiatry and law by inviting jurors to analyze the defendant's subjective reality within a single narrow area. In doing this, it robs *M'Naghten* of the coherence which comes from strictly limiting its field of inquiry. Second,

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id. at 445. Accepting this idea, however, would violate *M'Naghten*'s presumption of objectivity.

33. *See infra* notes 229-32 and accompanying text.

34. "[*M'Naghten*] . . . does not state a test of psychosis or mental illness. Rather, it lists conditions under which those who are mentally diseased will be relieved from criminal responsibility." Joseph M. Livermore & Paul E. Meehl, *The Virtues of* M'Naghten, 51 MINN. L. REV. 789, 800 (1967).

35. Pragmatism, as a philosophy, can be briefly summed up in a phrase: "To develop a thought's meaning, we need therefore only determine what conduit it is fitted to produce; that conduct is for us its sole significance." WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 399 (Bruce Kuklick ed., Library of America 1st ed. 1990) (1902). Cardozo puts it this way: "[T]he juristic philosophy of the law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. . . . The final principle of selection for judges, as for legislators, is one of fitness to an end." BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102-03 (1921).

deific decree blunts the pragmatic force of *M'Naghten* by pretending to offer the jury guidance where *M'Naghten* itself offers none. Finally, while deific decree may once have had special significance in a heavily Christian society, in a pluralistic society it resembles a highly controversial "cultural defense."[36] While cultural defenses may be a good idea, they are inimical to *M'Naghten*, which assumes that all people see the same reality. Therefore, in its present form, deific decree actually undermines the policies of *M'Naghten*.

The first justification—the bright line between law and psychiatry—is mentioned by Cardozo in *People v. Schmidt*.[37] While acknowledging the "views of alienists,"[38] which disfavor *M'Naghten*, Cardozo points out that such views can have little or no weight in evaluating New York's statutory *M'Naghten* rule; instead, one must evaluate the rule on its own terms.[39] This is the classic argument for *M'Naghten*: that it tests, not mental disease, but criminal responsibility.[40] Since the only probative factor in criminal responsibility is moral reasoning, "the law has no choice but to define responsibility in terms of it."[41] We can redefine the rationale as this: a simplified version of the human mind is our most useful model, legally speaking. It is particularly useful when we apply a simplified definition of insanity, such as ability to distinguish right from wrong. If we attempt to complicate the model of the human mind, we will be unable to apply a rule such as *M'Naghten*, because we are adding variables for which the simplified rule has no category.

But this is precisely what deific decree does. By giving special status to religious delusions, deific decree says one of two things: first, that the religiously delusive person does not inhabit the same reality as all other persons; or alternatively, that the religiously delusive person has an extra part to his simplified mind, which all other persons do not have. If we take either one of these assumptions

36. A "cultural defense" is one in which the actions of a defendant "[are] judged against behavioral standards that are reasonable for a person of that culture in the context of this culture." Renteln, *supra* note 32, at 440.

37. 110 N.E. 945 (N.Y. 1915).

38. *Id.* at 949.

39. *See id.*

40. *See* Livermore & Meehl, *supra* note 34, at 816.

41. *Id.*

as true, then *M'Naghten*'s model of the mind loses coherence and, by extension, validity.

On the other hand, perhaps *M'Naghten*'s major virtue is not coherence, but only simplicity. If the rule is simple but not entirely coherent, it should be judged, not by its content, but by its results. Cardozo is also comfortable with this test. All laws, he points out, must one day "justify their existence as means adapted to an end."[42]

Evaluated in this light, *M'Naghten*, if not a conceptual success, is at least a partial pragmatic success. In one of the few empirical studies of different insanity instructions, Professor Rita J. Simon assembled one hundred experimental jury panels.[43] Each panel heard testimony on one of two fact patterns. One was a close, complex case, the other was clear-cut, in that the defendant had done something morally wrong.[44] Each panel heard one of three sets of jury instructions: a *M'Naghten* instruction, a *Durham*[45] instruction, and a simple instruction to find the defendant guilty or not guilty by reason of insanity.[46] In the clear-cut case, there was no statistical difference between the jury panels' decisions.[47] In the close case, the *M'Naghten* panels returned no acquittals. The *Durham* panels and the panels with no instructions acquitted about twenty percent of the time.[48]

This tells us the following: *M'Naghten* is a stricter test than the other two tests in a close case—but the difference is not dramatic. And in a clear-cut case, there is practically no difference. This could suggest that juries make up their minds based on criteria outside their instructions. It could also mean that *M'Naghten*, while it limits the number of successful insanity pleas, does not do so on any rational basis. Under this model, *M'Naghten* guides the jury to a general area of inquiry—moral reasoning—and sets the conceptual bar high enough to know that the defense should be used sparingly. The

42. Cardozo, *supra* note 35, at 98.

43. *See* RITA JAMES SIMON, THE JURY AND THE DEFENSE OF INSANITY 58 (1967).

44. *See id.* at 45-46, 70-74.

45. *See infra* notes 99-110 and accompanying text.

46. SIMON, *supra* note 43, at 36-37.

47. *See id.* at 72.

48. *See id.*

jury applies common sense within this generously bounded area, using a few simple tools, and generally produces the right result.

A positive rationale for the above model would go as follows: Insanity is irreducibly complex and fact-bound. So is "common sense." Respecting both of these mysterious processes, we depend the jury's innate sense of justice to produce a good result, with minimal guidance. A more cynical explanation would be to say that *M'Naghten* essentially offers no guidance, and results in a kind of jury nullification which is, paradoxically, fair and efficient. It should be noted again that this model does not require us to parse *M'Naghten* by its language. The mechanism of decision is in the minds of the jury members, not in the rule.

Under this justification, deific decree is notably unhelpful. If the price for granting free rein to the jury's common sense is strict simplicity of rule, deific decree needlessly complicates this by treating the rule literally. This goes against the above pragmatic policies in one of two ways. First, it confuses the jury by telling the jury that it must parse right and wrong, not as common-sense categories but as Judeo-Christian categories. This artificially skews what we hope are common-sense results. Alternatively, it tells the jury that common sense reigns in all areas of legal insanity except those where the defendant has been religiously inspired. Again, this produces lopsided results overall, and devalues the presumption at the heart of this justification—that untrammeled common sense produces fair results. This, by extension, devalues *M'Naghten*.

Finally, using a kind of expressivist[49] analysis, *M'Naghten*'s moral categories may be a proxy for societal analysis of the crime underlying the insanity defense, or prophylactic disapproval of bad-faith insanity defenses. An expressivist justification for *M'Naghten* would remind the jury that the defendant has in fact committed a criminal act. The justice system has to account for the act by moral condemnation, except in the rare case where the insanity defense has enough countervailing moral force to relieve the defendant of

49. "Under the expressive view, the signification of punishment is moral condemnation. By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong." Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996).

responsibility. The "meaning" of *M'Naghten* is that restoring social equilibrium by condemnation is a higher social good than examining the mechanism of insanity. A strict, morality-based insanity test is the best expression of this social meaning.

A darker version of this expressive rationale is Michael Perlin's "societal rage" theory.[50] According to Perlin, the insane criminal awakens our own feelings of moralized aggression.[51] By punishing criminals, we punish our own desires to transgress social boundaries by holding up the criminal as an example of what would happen if we went too far.[52] We then purge ourselves of these personified antisocial feelings by constructing a symbolic social pageant—the court of judgment—and then imprisoning those who personify transgression.[53] When a person is found not guilty by reason of insanity, an entire structure is suddenly challenged: the structure whose sole purpose is to convince us that it is *good* to obey social strictures.[54] This would explain the "river of fury" that afflicts the public when a prominent defendant is declared not guilty by reason of insanity.[55] Seen this way, *M'Naghten* is not a test, looking at the insane person to decide his guilt, but rather a safety valve, looking at the public to see how many successful insanity defenses it can bear.[56]

Whether we look at *M'Naghten* as a conduit for societal disapproval or a safety valve for social rage, deific decree again confound's *M'Naghten*'s intent. Deific decree redefines the "meaning" of *M'Naghten* to suggest that crimes inspired by religious delusions

50. *See* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997).

51. *See id.* at 1388.

52. *See id.*

53. *See id.* at 1387.

54. *See id.* at 1388-89.

55. *Id.* at 1395 (discussing public outrage after John Hinckley's acquittal by reason of insanity for the attempted murder of Ronald Reagan).

56. The history of the *M'Naghten* doctrine supports this. *M'Naghten* was decided in an atmosphere of public outrage and intense political pressure. *See* Richard Moran, *The Modern Foundation for the Insanity Defense: The Cases of James Hadfield (1800) and Daniel McNaughtan (1843)*, *in* 477 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE: THE INSANITY DEFENSE 31, 39-40 (Richard D. Lambert & Alan W. Heston eds., 1983) [hereinafter *Hadfield & McNaughtan*].

are less deserving of condemnation than those inspired by "ordinary" delusions.

Thus, deific decree may once have had the salutary effect of rebalancing social disapproval or anger in nineteenth and early twentieth century America. This comports with Joseph Westermeyer's conclusions about delusions in the context of different cultures.[57] Westermeyer concludes that delusional content is "not only culture bound, but also perhaps bound to particular historical periods."[58]

Seen this way, deific decree cannot possibly fulfill its original expressive purpose. Cultural indicators have changed far too much. Westermeyer cites a 1961 study by F.S. Klaf and J.G. Hamilton which compares patients' delusional content in the nineteenth century at Bedlam Royal Hospital, London, with present-day delusional content.[59] They found that nineteenth century delusional themes were primarily religious, while mid-twentieth century delusional themes were primarily sexual.[60]

Irving Gottesman also has observed the radically changed content of delusions since the turn of the century.[61] Although an "obsession with great sources of power" is common to paranoid schizophrenics, the source of that "power" has changed. Until a few decades ago, God or Jesus was the likely source. Now, with new technologies cropping up, and global communications commonplace, the president, the CIA, or radio or television may now be the focus of such delusions.[62]

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57. *See* Joseph Westermeyer, *Some Cross-Cultural Aspects of Delusions*, *in* DELUSIONAL BELIEFS 212 (Thomas F. Oltmanns & Brendan A. Maher eds., 1988).

58. *Id.* at 214.

59. *See* F.S. Klaf & J.G. Hamilton, *Schizophrenia—A Hundred Years Ago and Today*, 107 J. MENTAL SCI. 819 (1961).

60. *See id.* Westermeyer also quotes a Zürich study which finds a similar drop-off in religious/magical delusions from 1912 to 1973. *See* S. Steinbrunner & C. Scharfetter, *Changes in Delusional Psychosis—A Historical Transcultural Comparison*, 222 ARCHIV FÜR PSYCHIATRIE UND NERVENKRANKHEITEN 47 (1976).

61. *See* Joe Sharkey, *Paranoia is Universal. Its Symptoms are Not*, N.Y. TIMES, Aug. 2, 1998, § 4, at 4 (quoting Irving Gottesman, Professor of Psychology at the University of Virginia).

62. *See id.*

Similarly, with the influx of new immigrant groups, the source of a defendant's "insanity" may be bound up with cultural values from the mother country.[63] Renteln cites *People v. Kimura*, where a Japanese American mother attempted *oyako-shinju,* or parent-child suicide, in order to eradicate a perceived family shame.[64] Her lawyers, with some success, pleaded temporary insanity.[65] What success they did achieve was widely assumed to be the result of cultural factors.[66]

The logical modernization of deific decree would then be to extend it to include cultural defenses of all types. This would really be the only acceptable solution, since any other would implicitly devalue all other religions which do not believe in a monotheistic God who "speaks" to humans. This, however, goes against the central precept of *M'Naghten*—that every person presumptively sees the same reality. If all reality is heavily shaded by cultural factors, common sense is similarly culture-bound, and the simple, unitary assumptions of *M'Naghten* become hopelessly fragmented. Thus, the expressivist justifications for deific decree turn around and diminish, not only *M'Naghten*, but deific decree itself.

If we look at deific decree in light of any of these justifications, we see that, far from advancing the *M'Naghten* rule, they undermine it. The only other possibility is to turn around and try to justify *M'Naghten* in light of deific decree. This, however, demands that we treat the categories of *M'Naghten* as real, descriptive mental health categories. This is not just mistaken—it is dangerous. Allowing the formal conceit of *M'Naghten* to serve as a description of mental health categories can calcify into an unquestioning belief that *M'Naghten* does describe reality—and then we will really not know where fiction ends and reality begins.

III. INTERLUDE: FOUR TESTS FOR INSANITY

Three points must be made about modern American tests for legal insanity.[67] First, not a great deal has changed since *M'Naghten.*

63. *See* Renteln, supra note 32.
64. *See id.* at 463.
65. *See id.*
66. *See id.*
67. This section does not pretend to be a complete, or even an incomplete,

Although both the *Durham*[68] and Model Penal Code (MPC)[69] tests add or change elements of *M'Naghten*, both are tied to *M'Naghten* because they must react to it. In other words, any test which changes or rejects *M'Naghten* must prove that it is better and more efficient, or the jurisdiction will default to *M'Naghten*. Second, not a great deal has changed about the context of insanity jusrisprudence. Insanity remains one of the most politicized subjects in criminal law. A familiar trend is this: judges liberalize insanity doctrine over a period of years, only to see their work pruned back following a well-publicized insanity acquittal.[70] Third, in such a murky area as insanity law, it is not unusual for judges to "create" insanity doctrine by a talismanic reliance on the words of a particular doctrine or example. As we shall see below, all of these trends contribute to the creation of deific decree.

A. The M'Naghten *Test*

The *M'Naghten* test has been described as having "the rigidity of an army cot and the flexibility of a Procrustean bed," as well as "bad psychiatry and bad law."[71] Yet *M'Naghten* is the bedrock of American insanity jurisprudence.[72] Perhaps this is because it came from such an authoritative source: the Queen's Bench, sitting en banc, saying emphatically what the law of insanity was.[73]

The facts surrounding *M'Naghten*, however, tell a different story, one which illustrates two of the above themes. First, the *M'Naghten* questions were posed in an atmosphere of political outrage over Daniel M'Naghten's acquittal.[74] The judges were called

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history of the insanity defense. However, the general trends described in this section specifically bear upon the creation of the deific decree doctrine.

68. *See infra* notes 99-110 and accompanying text.

69. *See infra* notes 111-19 and accompanying text.

70. *See infra* notes 118-19 and accompanying text.

71. Perlin, *supra* note 50, at 1382 (quoting Jodi English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 47 (1988); Robert Sadoff, *Insanity: Evolution of a Medicolegal Concept* 20 (Sept. 1986) (paper presented at College Night, the College of the Physicians of Philadelphia)).

72. *See supra* note 24.

73. *See* THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 35 (1985).

74. *See id.* at 30.

before Parliament in lieu of stricter *legislation* regarding the insanity defense.[75] In a very real sense, the judges were sitting as legislators. Thus, *M'Naghten* illustrates the second theme discussed above—judicial decision-making under political pressure.

Second, although the questions were phrased in the abstract, they were carefully tailored to reflect the facts of *M'Naghten*,[76] particularly those concerning "partial delusions" and delusions "in respect of one or more particular subjects."[77] Despite this, the *M'Naghten* questions, particularly Question Number Three,[78] have been applied to facts never contemplated in the original case.

This volatile situation—judges sitting as legislators in a time of public outrage—is practically a recipe for trouble, as Justice Maule recognized in his opinion, written separately from the other judges. "I feel great difficulty in answering the questions put by your Lordships on this occasion," he wrote, "because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms."[79]

His fears were well-founded. *M'Naghten* is one of the most decontextualized opinions in the history of law. First, it was written *after* Daniel M'Naghten was already acquitted.[80] Second, the questions were phrased abstractly, allowing the judges to pretend that they were not re-ruling on M'Naghten's case. And third, the all-important Question Number Three,[81] which now is the *M'Naghten* test, was answered in conjunction with Question Two, which limited itself to "insane delusion[s] respecting one or more particular subjects."[82] Therefore, its scope should arguably have been limited to just this area.[83]

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75. *See id.* at 31.

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

77. *Id.* at 722.

78. "3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?" *Id.* at 720. The answer to this question is the basis for the *M'Naghten* test. *See id.* at 722.

79. *Id.* at 720.

80. *See id.*

81. *See id.* at 720. The capitalizations are in *M'Naghten*.

82. *Id.*

83. *See* WAYNE L. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 311

It has been argued convincingly that both the "twenty pence" test[84] and the wild beast test[85] were originally meant simply as illustrations of mental states, yet ended up as the *definitions* of those same mental states.[86] Thus, *M'Naghten* illustrates the third theme discussed above—the expansion of elements of insanity doctrine far beyond their contexts. This is not unusual.

Since its inception, the decontextualized *M'Naghten* test has been condensed into two elements: "(1) . . . that the accused have suffered a defect of reason, from a disease of the mind; *and* (2) . . . that consequently at the time of the act he did not know (a) the nature and quality of the act, *or* (b) that the act was wrong."[87] This in turn has been further abstracted as the "Right-Wrong" test.[88]

B. The Irresistible Impulse Test

The unfortunately-named irresistible impulse test is the one true volitional test in insanity jurisprudence.[89] Not surprisingly, it has not been widely accepted.[90] Simply put, it requires "a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct."[91] There is no mention of knowledge, nor of right and wrong.

Irresistible impulse is most thoroughly explained in *Parsons v. State*[92] and was partly endorsed in *Commonwealth v. Cooper*.[93]

(2d ed. 1986).

84. Describing an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc." MAEDER, *supra* note 73, at 6 (citing Rex v. Hawkins, 1 PLEAS OF THE CROWN 2 (1716)).

85. *See infra* note 235.

86. *See* MAEDER, *supra* note 73, at 6.

87. LAFAVE & SCOTT, *supra* note 83, at 311.

88. *Id.* at 310.

89. *See id.* at 320. "Unfortunately named" because the test has often been criticized on the basis of the name alone. *See id.* at 322 (reviewing criticism of irresistible impulse). The language of irresistible impulse, however, is not as general as the label. *See infra* notes 91-93 and accompanying text.

90. *See* LAFAVE & SCOTT, *supra* note 83, at 320 & n.95.

91. *Id.* at 320.

92. 2 So. 854 (Ala. 1887).

93. 106 N.E. 545 (Mass. 1914). "[I]f the jury find that . . . the defendant was overborne by some irresistible and uncontrollable impulse springing from mental defectiveness or disease to do the act which he knows to be wrong, he is not legally responsible." *Id.* at 547.

Cardozo refers to both opinions in *People v. Schmidt*, and flatly rejects them, saying, "That is not the test with us."[94] This is hardly surprising, in light of the fact that the idea of insanity as a loss of control was espoused by Dr. Isaac Ray.[95] *M'Naghten*'s strict right/wrong dichotomy was in part a reaction to Ray's progressive theories, which figured heavily at Daniel M'Naghten's trial.[96]

Irresistible impulse has been criticized both for being too narrow[97] and for being too permissive.[98] Most of these arguments are moot, since irresistible impulse is all but extinct.

C. *The* Durham *Test*

One test, however, which did enjoy a brief currency as the alternative to *M'Naghten*, is the *Durham*[99] or product test, which simply states that "an accused [is] not criminally responsible if his unlawful act [is] the product of mental disease or defect."[100] The product test was foreshadowed by the 1871 case of *State v. Jones*,[101] in which New Hampshire became the first American jurisdiction to repudiate *M'Naghten*.[102] The product test arises from the acceptance of the reality that any attempt to impose a structure on the components of insanity is either doomed to fail or must be restricted to the facts of a single case.[103] Therefore, the question posed to the jury or judge should be as unrestricted as possible, allowing the case to be tried completely on its facts.[104]

The New Hampshire product test was not adopted by any other jurisdiction until Judge Bazelon, of the United States Court of Appeals for the District of Columbia Circuit, decided, in *Durham v.*

94. People v. Schmidt, 110 N.E. 945, 949 (N.Y. 1915).
95. *See* LAFAVE & SCOTT, *supra* note 83, at 320 & n.96 (citing ISAAC RAY, THE MEDICAL JURISPRUDENCE OF INSANITY 263 (1838)).
96. *See* Ranade, *supra* note 13, at 1379.
97. *See* LAFAVE & SCOTT, *supra* note 83, at 321-22 (citing claims that "irresistible" is too restrictive a modifier).
98. *See id.* at 322 (citing claims that a defense of "impulse" circumvents the deterrence function of criminal law).
99. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
100. LAFAVE & SCOTT, *supra* note 83, at 323.
101. 50 N.H. 369 (1871).
102. *See id.* at 387-88.
103. *See id.* at 392-93.
104. *See id.* at 393.

United States,[105] that the "existing tests of criminal responsibility are obsolete and should be superseded."[106]

Bazelon formulated a new test, modeled on the New Hampshire test:[107] "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."[108] This test, Bazelon hoped, would put the burden of defining insanity on the psychiatric experts during trial so that doctrine could evolve along with advances in scientific knowledge.[109] Like the New Hampshire test, *Durham* was not widely adopted and was superseded in the District of Columbia Circuit by the Model Penal Code test in 1972.[110]

D. The Model Penal Code Test

The Model Penal Code (MPC), or "substantial capacity" test for insanity attempted to strike a balance between the *M'Naghten* and irresistible impulse tests.[111] It reads:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[112]

At first glance, this looks like the ideal insanity test, with something to please everyone. It substitutes "substantially appreciate" for "know," thereby softening the harshness of *M'Naghten*, yet it can still be termed a right/wrong test because of its alternative use of the word "wrongfulness."[113] It contains a quasi-volitional component in

105. 214 F.2d 862 (D.C. Cir. 1954).
106. *Id.* at 864.
107. *See id.* at 874.
108. *Id.* at 874-75.
109. *See id.* at 242.
110. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (adopting the Model Penal Code test for insanity).
111. *See* LAFAVE & SCOTT, *supra* note 83, at 329.
112. MODEL PENAL CODE § 4.01 (1985).
113. *See* LAFAVE & SCOTT, *supra* note 83, at 330.

its "unable to conform" language, yet it tempers that component with paragraph two, which pointedly excludes the "psychopathic personality."[114] Though the *Durham*[115] test may appeal more to psychiatrists, the MPC test is more realistic, given that the jury, not the psychiatrist, is the ultimate user of the test. A layperson will always respond to the moral element in an insanity test.[116] Taking out the moral element and having a psychiatrist decide the definition of insanity may produce the incongruous result of having the jury decide insanity based on no rule at all.

Other United States courts of appeals soon adopted the test.[117] In 1984, however, everything changed when John Hinckley attempted to assassinate President Ronald Reagan and was found not guilty by reason of insanity in federal court.[118] In a scenario strangely reminiscent of *M'Naghten*, public outrage over the verdict prompted Congress to enact a federal insanity statute closely patterned on *M'Naghten*.[119] Thus, the MPC test's fate illustrates the second theme of this section—politicization of the insanity defense.

The foregoing history demonstrates above all the robustness of *M'Naghten*. Other tests, though demonstrably more rational, have met with criticism or outright hostility. *M'Naghten*, on the other hand, provokes a sort of weary resignation: for all its deficiencies, it offers the comforting artifice of simplicity and morality.

Deific decree is an exception carved out of such an artifice. Since there can be no coherent exception to a fiction, deific decree really should not exist at all. That it does exist is a testament to a peculiar process of jurisprudence called pseudo-doctrine.

IV. PSEUDO-DOCTRINE DEFINED

The confusion inherent in deific decree is the product of a strange judicial mutation which we can only term a

114. *Id.*

115. *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

116. *See* SIMON, *supra* note 43, at 72.

117. *See* LAFAVE & SCOTT, *supra* note 83, at 330 n.65 (citing ten circuits which adopted a form of the Model Penal Code test).

118. *See* Perlin, *supra* note 50, at 1395.

119. *See* Comprehensive Crime Control Act, Pub. L. No. 98-473, Title II, § 402(a), 98 Stat. 2057 (codified at 18 U.S.C. § 20 (1999)); renumbered Pub. L. No. 99-646, § 34(a), 100 Stat. 3599 (codified at 18 U.S.C. § 17 (1999)).

pseudo-doctrine.[120] Consider how deific decree began. In *People v. Schmidt*,[121] the defendant admitted that his deific decree defense was completely fabricated; yet the deciding judge went on with the analysis of this same defense, judged as if it were true. He illustrated the defense, not with the facts of the case, but with a hypothetical anecdote.[122]

Both before and after *Schmidt*, the classic situation in which deific decree arises closely resembles the facts of *Schmidt*: the defendant pleads deific decree, the judge disbelieves him, whereupon the judge goes on to analyze the defense as if it were true, hypothesizing a fact pattern where it might be successful. It is not uncommon to see a defense which is difficult to prove; but, in order to have a life beyond theory, there must be real-life fact patterns which actually fit *this* defense.

Even in the absence of applicable facts, a doctrine might survive because it explains something which has no better explanation. In other words, it is inert but coherent, waiting for the day when it will be useful.

Deific decree, by contrast, is internally incoherent. Either it is a disease of the defendant's moral choosing mechanism, in which case it is irrelevant that the defendant is clinically delusive; or it is an irresistible command delusion, in which case it is irrelevant that the commanding voice has any genuine moral authority.

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120. Since there is no formal definition of "pseudo-doctrine," this Comment will use the one proposed by Professor Samuel Pillsbury of Loyola Law School: Pseudo-doctrine occurs when one or more judges create rules based, wholly or partially, on non-facts. Pseudo-doctrine is not to be understood as the opposite of doctrine, since there is also no clear agreement on what doctrine means. For instance, Roscoe Pound defines doctrine as "[s]ystematic fittings together of rules, principles, and conceptions with respect to particular situations or types of case or fields of the legal order." Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 485 (1933). This sounds like the definition in *Black's Law Dictionary*—"A rule, principle, theory, or tenet of the law," BLACK'S LAW DICTIONARY 481 (6th ed. 1990)—until Pound goes on to say that "[doctrines], [a]s a rule . . . have no formal authority," and places them below "Conceptions" in his hierarchy of authority. Pound, *supra*, at 482-86.

121. 110 N.E. 945 (N.Y. 1915) (Cardozo, J.).

122. *See id.* at 949.

Further, while deific decree began as a cognitive exception to the cognitive *M'Naghten* doctrine,[123] it has since transformed into a volitional exception to a cognitive test,[124] and then finally into a "factor" to be considered[125] among others. Though all of these versions have their isolated advantages over the other versions, none is wholly consistent.

A. Definition: Deific Decree

In contemporary terms, deific decree describes a subcategory of auditory hallucination, a classic symptom of paranoid schizophrenia.[126] A mentally ill person suffers from a "command hallucination." She[127] hears a voice which directs her to do certain things, and she feels compelled to do them. In some cases, she will be utterly unable to resist carrying out the commands, which may come in any number of "voices": for instance, the man who sold her a house,[128] the CIA,[129] or various political figures and celebrities.[130] The deific decree doctrine, however, refers only to auditory hallucinations which speak in the voice of God.

B. Definition: Doctrine

Black's Law Dictionary defines doctrine as, "[a] rule, principle, theory, or tenet of the law."[131] It is widely accepted, however, that there is more to it than that. Rules arise from distinguishing fact situations from other fact situations; what makes a legal rule a rule is that it applies to at least two different fact situations.[132] On the other

123. *See id.* at 947-48.

124. *See* State v. Crenshaw, 659 P.2d 488, 494 (Wash. 1983).

125. *See* People v. Serravo, 823 P.2d 128, 139 (Colo. 1992).

126. DSM IV calls it "Schizophrenia, Paranoid-type." *See supra* note 16 and accompanying text.

127. In keeping with Cardozo's language in *Schmidt*, 110 N.E. at 949, the protagonist of the deific decree doctrine is a woman.

128. *See* IRVING I. GOTTESMAN, SCHIZOPHRENIA GENESIS: THE ORIGINS OF MADNESS 25 (1991) (describing a 33-year-old white male diagnosed schizophrenic; the voice told him to change his sewer system, which he did).

129. *See id.* at 47.

130. *See id.* at 48.

131. BLACK'S LAW DICTIONARY 481 (6th ed. 1990).

132. Karl N. Llewellyn calls this the "One Single Right Answer" stabilizing factor in jurisprudence. Although there is really no "one single right answer,"

hand, legislatures make rules all the time with no specific facts before them. Why bother with facts at all?

C. *Why Facts Are Important*

If Frederick Banting discovers insulin by mistake, we do no condemn him—we give him the Nobel Prize.[133] We do not speculate about the innocent diabetic dogs who might have died because Banting made certain calculations in the laboratory.[134] We accept that the scientific method involves trial and error.

A judge, however, gets only one chance to get it right. If the judge wishes to experiment, the judge's subjects are not diabetic dogs, but human beings. Judicial experiments can and do lead to guilty persons' freedom and innocent persons' deaths. Applying the *Banting* model: even if the "insulin" defense turns out to be a brilliant legal doctrine and lasts, unchanged, for five hundred years, it would simply not be worth the thousands of litigants who would fall victim to various failed "diabetic dog" defenses.

To ensure that something like the "diabetic dog" defense never happens, the judicial system has a basic limiting factor: facts. A judge may not simply adopt a theory because it is intellectually attractive, or even because it is brilliant. The judge may not use the theory until she reviews a set of facts which *fit* the theory. Applying the theory to the facts of the case, a rule is born. The rule may be applied to other, subsequent facts, but only if the facts bear a family resemblance to the facts of the rule-making. This ensures that the rules of law are tied to reality. It also reassures citizens—all of whom are potential defendants—that they will not be faced with a different set of rules every time they go to court.

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the attempt to find one is a good thing, because without it, we would have as many right answers as cases. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24-25 (1960).

133. *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD AND KINDRED PUZZLES OF THE LAW xii (1996). The discussion of Banting's possibly mistaken discovery of insulin takes place in the context of Katz's discussion of "The Misappropriation of Glory."

134. Banting used diabetic dogs in his laboratory experiments. At a crucial point in his research, he concluded that some dogs had improved their condition when in fact they had not. This led, indirectly, to the discovery of insulin as a treatment for diabetes. *See id.* at 217.

Of course, if the facts of the next case are dramatically different, an entirely different rule may apply. But this simply places the facts of the next case in a different lineage. The principles still apply; the next case simply looks back to a different predecessor case.

Roscoe Pound defines it this way: Rules are "precepts attaching a definite, detailed legal consequence to a definite, detailed state of facts."[135] When one wants to change a Rule, one must resort to Principles[136] applied to the Rule and a new set of facts.

Even if one does not subscribe to Pound's terminology, it is a canon of law that all judicial decisions must begin with a set of facts. This idea is repeated in a variety of contexts: for instance, the well-known prohibition against advisory opinions in federal courts.[137] The Court in *Flast v. Cohen* invokes another reason to prohibit judicial rule-making without a concrete set of facts: it violates the separation of powers.[138] When a judge makes law without a fact pattern, the judge is engaging in a legislative function without legislative accountability.[139]

Finally, in addition to reducing uncertainty and honoring the separation of powers, society ties common law to facts in order not to grant too much power to any single judge. This is what Karl Llewellyn calls the "Frozen Record From Below."[140] As he puts it, "[t]he fact material which the appellate judicial tribunal has official liberty to consider in making its decision is largely walled in."[141] The trial court has decided it beforehand.[142] Therefore, not only do we not allow judges to decide law without facts, we do not even allow the same judge to decide fact and make law. The appellate judge has the "frozen" record from below. The trial level judge has the "frozen" law from above.

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135. Pound, *supra* note 120, at 482. The capitalizations are Pound's.

136. Principles are "authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense." *Id.* at 483.

137. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96-97 (1968) (explaining the "case or controversy" requirement in federal courts).

138. *See id.* at 96.

139. *See id.*

140. LLEWELLYN, *supra* note 132, at 28.

141. *Id.*

142. *See id.*

All of these judicial strictures fade away when a judge hypothesizes in the context of rule-making. All at once, the judge is not only potentially violating the separation of powers by making law without facts; but also, by making up the facts themselves, the appellate judge is violating her specific judicial office. The violation is only "potential" because the hypothesis does not violate any judicial rules unless there is a second essential agent: *another* judge who takes this judicial plaything, treats it as law, and applies it to a new set of facts. At that point, the making of a pseudo-doctrine is complete.

V. THE STRANGE HISTORY OF DEIFIC DECREE

A. The Roots of Incoherence

Deific decree seems out of place in twentieth century jurisprudence. On the other hand, it was right at home in the jurisprudence and theology of medieval Europe. This part of the Comment briefly traces the history of distinguishing religious hallucinations from "natural" hallucinations, a distinction which had its roots in a time when law and religion were closely allied, and, more specifically, when the question of "demonic possession" was one which might still be raised in a court of law.

The idea of deific decree survived this period of legal history as a useful hypothetical, divorced from its religious/legal roots and floating to and fro in the essentially naturalistic doctrines which were current in the centuries before and after *M'Naghten*. That it now survives, plausibly, as a volitional exception to a cognitive doctrine does not in any way detract from its theistic origins.

To arrive at a tentative explanation of how deific decree survived until its revitalization in *People v. Schmidt*,[143] we must trace the relation of "God" and "madness" in pre-*M'Naghten* Europe.[144] One possible explanation is that it is a version of the "possession/witchcraft" distinction used by ecclesiastical courts before and during witch-hunts of the late Middle Ages. A second and related

143. 110 N.E. 945 (1915).

144. The author of this Comment does not claim either the scholarship or the expertise to conduct a full-scale examination of the history of insanity. A few representative cases will have to serve as an outline for some future, more exhaustive work.

explanation is that it survives as a doctrine of mercy, related to the time when the person who "was under the visitation of God"[145] was presumed insane and could not be held accountable for criminal actions.

There were two primary ways of looking at insanity in medieval England. The first was not even a theory. Insanity was not an affirmative defense to a charge of murder; instead, the defendant had to be convicted on the evidence.[146] Only then could the defendant's relatives go before the king and plead for the defendant's life. The king could then grant a pardon on the basis of insanity.

Even here, religion played a part. The king was God's representative on earth, having been put on the throne by Him. Therefore, the king's pardon was itself a kind of deific decree. It was also squarely within church doctrine. The insane person might have sinned in the worst possible way, but sinners deserved mercy, and none more than those who were touched by the hand of God, and therefore *non compos mentis*.

The second view of insanity was based on equating the insane with children.[147] While adults were freely able to choose good over evil, children and the insane were constrained in their choices: "All men have freedom but it is restrained in children, in fools, and in the witless who do not have reason whereby they can choose the good from the evil."[148] Note that this language can be construed as either cognitive[149] or volitional.[150] Under either definition, however, the insane were shown mercy.

Some sinners, however, never received mercy from the church: namely, witches and other consorts of Satan. In medieval Europe, the crime of *maleficia*, or black magic, could be prosecuted in either secular or ecclesiastical courts.[151] However, as the crime of

145. Rex v. Arnold, 16 Howell's State Trials 695, 765 (1724).

146. *See* MAEDER, *supra* note 73, at 5; *see also Schmidt*, 110 N.E. at 946.

147. *See* Platt & Diamond, *supra* note 28, at 1232-33.

148. *Id.* at 1233 (quoting MICHEL, AYENBIT OF INWIT, OR REMORSE OF CONSCIENCE 86 (Morris ed. 1866)(1340)).

149. "[W]ho do not have reason. . . ." *Id.* (quoting MICHEL, AYENBIT OF INWIT, OR REMORSE OF CONSCIENCE 86 (Morris ed. 1866) (1340)).

150. "[F]reedom . . . is restrained . . . ." *Id.* (quoting MICHEL, AYENBIT OF INWIT, OR REMORSE OF CONSCIENCE 86 (Morris ed. 1866) (1340)).

151. *See* DANIEL N. ROBINSON, WILD BEASTS AND IDLE HUMOURS: THE

witchcraft became progressively associated with heresy, it was pursued more and more in the secular courts with the active assistance of the clergy.[152] A secular court needed doctrinal guidance. In the fifteenth century, that guidance was largely provided by the *Malleus Maleficarum*, a handbook on trying witches, written by two Dominicans, Kramer and Sprenger.[153] The authors made no principled distinction between insane and cunning behavior, believing both to be the devil's work.[154] In practice, however, the church recognized a difference between possession and witchcraft: "To be possessed by demons was to be a victim. To be a witch was to be a willing participant."[155] This is in keeping with the church's essentially volitional view of criminal liability.[156] When the functions of the ecclesiastic and secular courts merged in the Middle Ages, the volitional theories of the church became part of the common law.[157]

Paradoxically, despite its legal hard-line on what we would now call insanity, the church had a record of *treating* the mentally ill with humanity.[158] Bethlem Hospital, in London, was remarkably kind and enlightened, and their former inmates were treated with so much compassion that vagrants would wear forgeries of armbands which identified the wearer as a released inmate of Bethlem.[159] Contrast the period from the Renaissance to the nineteenth century, a time in which "medical jurisprudence" was on the rise: patients were whipped, chained, left unwashed, and ill-fed, and Bethlem Hospital became so chaotic and cruel that its then-nickname, "Bedlam" became a synonym for total confusion.[160]

The confluence of these two trends—the possession/witchcraft distinction and the tendency of the church to view the mentally ill as unable to help themselves, is evident in Judge Tracey's instructions

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INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT 84 (1996).

152. *See id.* at 85.

153. *See* HENRY KRAMER & JACOB SPRENGER, *MALLEUS MALEFICARUM* (Rev. Montague Summers trans., 1928) (1486).

154. *See id.* at 218.

155. ROBINSON, *supra* note 151, at 81.

156. *See id.* at 66.

157. *See id.* at 109.

158. *See* GOTTESMAN, *supra* note 128, at 10.

159. *See id.*

160. *Id.* at 10-11.

in *Rex v. Arnold.*[161] Arnold, with no apparent motive other than his own delusion that his intended victim was "an enemy of God and country," had attempted to murder Lord Onslow.[162] A parade of witnesses, including Arnold's brothers and sisters, took the stand in his defense.[163] His sister testified that she had "never heard him speak six sensible words together"[164] and described his persecution complex regarding Lord Onslow.[165]

The judge's instructions to the jury included the then-prevailing wild beast test.[166] It also included the following language: "If [Arnold] was under the visitation of God, and could not distinguish between good and evil . . . he could not be guilty of any offence against any law whatsoever."[167] What is remarkable, for our purposes, is that Arnold was not pleading deific decree. "Under the visitation of God" was used as a general term for delusional behavior.

The case of *Rex v. Hadfield*[168] provided the next opportunity to review the legal status of delusions. James Hadfield attempted to shoot George III at a theatre in Drury Lane, missing entirely.[169] Two days earlier, he had attacked his eight-month-old son, believing that "heaven" wanted both him and the baby dead. As a result, he believed, all of mankind would be redeemed.[170] There was overwhelming evidence that his condition was the result of a brain injury: Hadfield had been nearly decapitated at the Battle of Flanders, and his brain was permanently exposed.[171]

Thomas Erskine, regarded as the greatest trial lawyer in England, defended Hadfield.[172] Advising him was Dr.

161. *See Arnold*, 16 Howell's State Trials at 765.
162. *See* ROBINSON, *supra* note 151, at 130.
163. *See id.* at 131-33.
164. *Arnold*, 16 Howell's State Trials at 725.
165. *See id.*
166. *See infra* note 235 and accompanying text.
167. *Arnold*, 16 Howell's State Trials at 765.
168. 27 Howell's State Trials 1281 (1800).
169. *See* ROBINSON, *supra* note 151, at 142.
170. *See id.* at 148.
171. *See Hadfield*, 27 Howell's State Trials at 1320; *see also* ROBINSON, *supra* note 151, at 147.
172. *See* ROBINSON, *supra* note 151, at 142.

Alexander Crichton, author of *An Inquiry into the Nature and Origins of Mental Derangement.*[173]

After an exhaustive review of the various tests for insanity, and in particular the wild beast test,[174] Erskine put forth a new test for insanity. It was tailored to persons like Hadfield, who alternated between normal and abnormal spells. To satisfy the wild beast test, Erskine suggested, "the defendant must be effectively an *idiot.*"[175] Instead, "*[d]elusion*, . . . where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, be acquitted."[176] Erskine was not just making delusion sufficient for a finding of insanity; he was making it necessary.[177]

Therefore, the mindset behind deific decree has two possible religious/legal origins. First, it may have survived as a literalization of the phrase from *Rex v. Arnold*[178] that a person "under the visitation of God . . . could not distinguish between good and evil."[179] Or it may just have survived as a general sense of compassion toward the religiously-inspired insane person.

It is interesting that, if Hadfield had committed his crime in Washington State in the 1980s, he would have been acquitted on the defense of deific decree.[180] His delusions were overwhelmingly religious; he was acquitted and committed to a mental hospital for life.[181] Contrast this with *Bellingham's Case*,[182] where the defendant's delusion was that the Crown owed him money and would not

173. *See id.* at 142-44 (citing ALEXANDER CRICHTON, AN INQUIRY INTO THE NATURE AND ORIGINS OF MENTAL DERANGEMENT, COMPREHENDING A CONCISE SYSTEM OF PHYSIOLOGY AND PATHOLOGY OF THE HUMAN MIND, AND HISTORY OF THE PASSIONS AND THEIR EFFECTS (1798)).

174. *See infra* note 235 and accompanying text.

175. *Hadfield*, 27 Howell's State Trials at 1314; *see also* ROBINSON, *supra* note 151, at 145.

176. *Hadfield*, 27 Howell's State Trials at 1314; *see also* ROBINSON, *supra* note 151, at 146.

177. *See* ROBINSON, *supra* note 151, at 146.

178. 16 Howell's State Trials 695 (1724).

179. *Id.* at 765.

180. *See infra* notes 271-326 and accompanying text.

181. *See* ROBINSON, *supra* note 151, at 149.

182. 1 COLLINSON ON LUNACY 636 (1812).

pay up.[183] Once again, we come full circle to the distinction between "deific" and "other" delusions. Bellingham and *M'Naghten* both had "secular" delusions. Bellingham was convicted.[184] *M'Naghten* was acquitted and set off a storm of controversy.[185] In 1915, when *Schmidt*[186] was decided, these concerns were still very much alive.

B. People v. Schmidt

Whatever Benjamin Cardozo's aims were in writing the *Schmidt* opinion, it is safe to say that creating pseudo-doctrine was not one of them. On the other hand, it is also safe to say that, if another judge had written the *Schmidt* opinion, deific decree would not exist. It is the traits that we may think of as quintessentially "Cardozian"—the oracular style, the rhetorical flourishes, the seemingly preordained conclusions—which gave the opinion its persuasive force. Where another judge would have written forgettable dicta, in Cardozo's hands these same dicta became memorable. This memorability, however, had unforeseen and unfortunate consequences.

1. Cardozo and the oracular style

"There is an accuracy that defeats itself by the over-emphasis of details."[187] This was Cardozo's own pronouncement on judicial opinion-writing, and he took his own advice very seriously. Cardozo's writing is regarded as some of the most elliptical in American law.[188]

Cardozo's famously indirect style had a purpose, however. Judge Richard Posner describes Cardozo as a "shy pragmatist"[189] who used a "'professionally' smooth, legal insider's style"[190] to

183. *See id.*
184. *See id.* at 674.
185. *See* ROBINSON, *supra* note 151, at 170-71.
186. People v. Schmidt, 110 N.E. 945 (N.Y. 1915).
187. BENJAMIN CARDOZO, *Law and Literature*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 341 (1947).
188. This is one of the kinder adjectives used to describe Cardozo's style: "frustrating" and "elusive" are two of the less generous modifiers. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 9-19 (1990) (reviewing scholarly criticism of Cardozo's style).
189. Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423 (1995).
190. *Id.*

disguise a pragmatic ideology.[191] Cardozo's style gave him a unique advantage, since it allowed him to promulgate innovative or even controversial theories of law, while appearing to take incremental, formalist steps.[192] This "insider's style," delivered with utter confidence, made Cardozo's opinions unassailable, at least until the reader unpacked the rhetoric.

Similarly, Cardozo's talent for aphorism prompted the citing judge to adopt a metonymic approach to Cardozo's opinions, using a single phrase—"danger invites rescue,"[193] for instance—to stand for a whole opinion.

Finally, Cardozo extended his skillful use of rhetoric, not just into his statements of law, but also into his statements of facts. This use of the statement of facts as a persuasive device is not unique to Cardozo, but he was a particularly accomplished practitioner.[194]

Nowhere is this more apparent than in Cardozo's brief and abstract statement of facts in *Palsgraf v. Long Island Railroad Co.*:[195]

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small

191. *See id.*; *see also supra* note 35.

192. *See generally* Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993) (arguing that Cardozo was able to change the doctrine of promissory estoppel by means of his indirect style).

193. Wagner v. International Ry. Co., 133 N.E. 437, 437 (N.Y. 1921).

194. *See, e.g.*, Karl L. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637-38 (1962) (discussing Cardozo's use of the statement of facts in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), to subtly prejudice the reader against Lady Duff-Gordon, and leading the reader to "the conclusion that the case has to come out one way").

195. 162 N.E. 99 (N.Y. 1928).

> size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.[196]

Here, Cardozo is in no danger of overemphasizing details. We could read *Palsgraf* a hundred times and never know the following facts: that the explosion was so severe that it ripped a huge hole in the platform and could be heard several blocks away;[197] that the scales were as tall as Helen Palsgraf and that the glass in the scales shattered and fell on her;[198] that the crowd on the platform panicked and that the ensuing stampede, not the explosion, may have knocked over the scales;[199] and that the "injury" for which Mrs. Palsgraf sued was a severe stutter which developed several days after the accident.[200] Cardozo also refused to discuss the probable distance between Mrs. Palsgraf and the explosion—more than ten feet but probably less than thirty feet.[201] Leave out the actual location of the train platform—East New York[202]—and the reader may feel transported into a strange, featureless world, full of uncertain terror. The statement of facts creates an anxiety in the reader which demands the reassurance of authority—a reassurance which Cardozo was happy to provide in the remainder of the opinion.

"To philosophize is to generalize, but to generalize is to omit."[203] It is not a stretch to say that *Palsgraf* created a philosophy

196. *Id.* at 99.

197. *See* POSNER, CARDOZO: A STUDY IN REPUTATION, *supra* note 188, at 34 (citing *Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES, Aug. 25, 1924, at 1).

198. *See id.*

199. *See* William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 3 n.9 (1953) (quoting SCOTT & SIMPSON, CASES ON CIVIL PROCEDURE 903 (1950)).

200. *See* POSNER, CARDOZO: A STUDY IN REPUTATION, *supra* note 188, at 35.

201. *See* Prosser, *supra* note 199, at 3 n.10.

202. *See id.* at 2 n.5.

203. CARDOZO, *supra* note 187, at 341. Cardozo claims here to be quoting Oliver Wendell Holmes from memory. He provides no citation.

of proximate cause.[204] Cardozo's phrases, "the eye of ordinary vigilance,"[205] and "negligence in the air,"[206] are talismans of tort law. Posner describes this style as "gnomic."[207] Certainly, Cardozo speaks in *Palsgraf* with an Olympian authority which suggests that his opinion is the last word on the subject: "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct,"[208] he extravagantly intones, rejecting a more expansive definition of duty and foreseeability.

Posner suggests that this is the reason Cardozo left his statement of facts so abstract and general.[209] An opinion with a more specific set of facts could have been limited to fact patterns "in which the *type* of injury that occurs is unforeseeable."[210] Instead, Cardozo wanted to write a short primer on negligence. Specific facts would have gotten in the way.[211] The abstraction of facts, the aphoristic phrasing, the tremendous rhetorical confidence with which Cardozo makes his argument—all this has the effect of blurring law, fact, policy, and philosophy until the entire opinion seems like a statement of truth.

2. The oracular style in *People v. Schmidt*

A similar dynamic was at work in *People v. Schmidt*.[212] Schmidt was one of Cardozo's first cases after he took his seat on the New York State Court of Appeals.[213] From Cardozo's subsequent

204. Prosser calls it "the most celebrated of all tort cases." Prosser, *supra* note 199, at 1.

205. *Palsgraf*, 162 N.E. at 99.

206. *Id.*

207. POSNER, CARDOZO: A STUDY IN REPUTATION, *supra* note 188, at 44.

208. *Palsgraf*, 162 N.E. at 100.

209. *See* POSNER, CARDOZO: A STUDY IN REPUTATION, *supra* note 188, at 42-43.

210. *Id.* at 43.

211. There is outside evidence for this view. Prosser tells how Cardozo heard the facts of *Palsgraf* as a hypothetical in a debate over the *Restatement of the Law of Torts* long before he heard the same facts as a judge. *See* Prosser, *supra* note 199, at 4.

212. 110 N.E. 945 (N.Y. 1915).

213. *See* RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 52 (1997).

statements about the *Schmidt* opinion, it is apparent that he had an agenda beyond a simple decision of the case.[214] As in *Palsgraf*, Cardozo wanted to make law for all time; specifically, he wanted to establish the nature of "right" and "wrong" as defined in the *M'Naghten* doctrine.[215]

Cardozo, however, had another agenda. The second agenda dealt with Hans Schmidt's other plea: that he ought to be granted a new trial because his insanity plea at the first trial was a sham.[216] Schmidt termed his change of heart "newly discovered evidence" for the sake of his appeal.[217]

Cardozo was not in an enviable position. The facts on which he hoped to base his analysis of insanity were, in fact, made up.[218] There was no reason for Cardozo to examine the jury instructions, since they were used to interpret testimony that Schmidt admitted was false. The judgment would have to be based on the "newly discovered evidence" argument.

However, Cardozo was not about to let an opportunity pass to explore such an important question of law as the right/wrong standard of *M'Naghten*. What he did was an earlier, less oracular version of what he did in *Palgraf*. First, he edited the facts of the case to emphasize the bad faith aspects of Schmidt's insanity defense. Second, he quickly disposed of Schmidt's claim for a new trial on the basis of "newly discovered evidence." Then, in a remarkable rhetorical trope, he made it seem as if he *had* to reach Schmidt's next argument, though he had just disposed of the case in the previous paragraph. Following this, he supported his view of "right" and "wrong" in legal insanity jurisprudence with an extensive historical analysis, concluding that the weight of history favored an expansive reading of "wrong" to include moral, as well as legal, wrong. Finally, he barely mentioned the "facts" of Schmidt's initial confession in his discussion of insanity.

All these strategies conspire to produce an opinion very typical of Cardozo. His style and rhetoric convince subliminally, so that it is

214. *See id.* at 80-81.
215. *See Schmidt*, 110 N.E. at 949.
216. *See id.* at 945.
217. *Id.*
218. *See id.*

difficult to imagine the case coming out any other way. The effect of this rhetoric of inevitability is also typical of Cardozo. In the writings of a lesser jurist, it is easy to separate facts, holding, *ratio decidendi* and dicta. Cardozo, by contrast, often seems to be *all holding.* Even his fact patterns are quotable, and even his hypotheticals appear to have the weight of legal rules.

3. The statement of facts

The true story of Hans Schmidt is a mystery, and the world will never be certain whether he actually murdered Anna Aumuller in a delusive rage, or simply chopped up her body to conceal her death from a failed abortion. A balanced version of Schmidt's story would tell the tale of a weak, foolish, neurotic priest, who made a horrendous mistake under extreme duress and tried to conceal it.[219]

This is not the story Cardozo wanted to tell, however. In his two-paragraph statement of facts, Cardozo wanted to tell the story of a man who lied. Here is the first paragraph of the opinion:

> In September, 1913, the dismembered body of Anna Aumuller was found in the Hudson [R]iver. Suspicion pointed to the defendant. He was arrested, and confessed that he had killed the woman by cutting her throat with a knife. He repeated this confession again and again. He attempted, however, to escape the penalty for murder by the plea that he was insane. He told the physicians who examined him that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. He confessed to a life of unspeakable excesses and hideous crimes, broken, he said, by spells of religious ecstacy and exaltation. In one of these moments, believing himself, he tells us, in the visible presence of God, he committed this fearful crime. Two physicians of experience, accepting as true his statement that he was overpowered by this delusion, expressed the opinion that he was insane. Other physicians of experience held the view that his delusion was feigned, and his

219. *See* POLENBERG, *supra* note 213, at 64-71.

> insanity a sham. The jury accepted this latter view, and by their verdict found him guilty of murder in the first degree.[220]

The first paragraph recounts what Schmidt said before the trial—but with his word choices, Cardozo foreshadows what the defendant would reveal after the trial. The repetition of qualifiers—"[h]e told," "[h]e confessed," "he tells us," and "he said"—clues the reader that there is more than meets the eye. Then there is the muted note of disapproval: Schmidt "repeated [h]is confession again and again"—something which will seem particularly egregious in the second paragraph when the reader will discover that this makes Schmidt not only a liar, but a persistent liar. Even Schmidt's insanity plea comes off badly: Schmidt "attempted, however, to escape the penalty for murder by the plea that he was insane." Hans Schmidt, by the end of this paragraph, sounds not insane, but merely disreputable.

In the second paragraph, the foreshadowings of the first paragraph bear fruit. Hans Schmidt is not really insane. He really is a liar. And his lies conceal a sordid truth.

Schmidt claims that Anna Aumuller died, not because God told him to kill her, but from a failed abortion. Additional facts bear out Schmidt's second story. Anna Aumuller was a cleaning woman at St. Boniface's Church. Hans Schmidt was a priest at the same church. In April, 1913, she discovered she was pregnant by Schmidt. He promised to leave the priesthood and marry Anna, but by late August he had still not kept his promise. The head priest at St. Boniface forced Anna to leave when he discovered that she was pregnant.

On September 1, 1913, Anna tried to perform an abortion on herself. When Schmidt found her, she was in severe pain and asked him to find someone to complete the operation. The subsequent abortion was a horrible failure and Anna died from blood loss. When Anna's doctor refused to sign a death certificate, Schmidt and the abortionist, Ernest Muret, devised two strategies. First, they would cut up Anna's body and sink the pieces in the Hudson River. Second, if the pieces were found, Schmidt would pretend to be insane in order to protect Muret and his assistant. This made sense to

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

Schmidt. Abortion was a serious crime in 1912, punishable as first degree manslaughter with a prison sentence of twenty years. However, if Schmidt feigned insanity, said Muret, he would be acquitted and back at large within a few years. Schmidt agreed to both devices.

Even Cardozo agreed that Schmidt's second story, "with all its incongruous features, . . . supplies a plausible explanation of some of the mysteries of this tragedy."[221] This, however, would not help Hans Schmidt, who had forgotten that one of the first concerns of a tribunal is to protect its own authority.

In the third paragraph, Cardozo states, "It would be strange if any system of law were thus to invite contempt of its authority."[222] Not only is Schmidt disreputable, not only is he a persistent liar, but when is found out, he is brazen enough to demand justice from the system he has just tried to defraud. By the third paragraph, it seems not only inevitable but right that Hans Schmidt be denied a new trial.

If it were not for Cardozo's masterful insinuation in his statement of facts, the reader might reverse the proposition: a tribunal should not condition justice on whether or not a defendant shows respect for its authority. Put this way, whether Hans Schmidt deserves a new trial is a far closer question than Cardozo's rhetoric would suggest.

This may, however, have been an impermissible question. Hans Schmidt's trial was well-publicized, sensational, and sordid. He was convicted. One does not need to imagine the public outcry which would have ensued if Schmidt had received a new trial—one only needs to look at the aftermath of the trials of John Hinckley or Daniel M'Naghten. The New York legislature might have abolished the insanity plea altogether, and Cardozo would never have been able to offer his now widely accepted view of *M'Naghten*'s right/wrong element.

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221. *Id.* at 946. Since Schmidt was pleading insanity, the defense did not emphasize cause of death at trial. *See* POLENBERG, *supra* note 213, at 68. However, two pathologists later examined Anna Aumuller's body and concluded that she had died of a uterine hemorrhage. *See id.*

222. *Schmidt*, 110 N.E. at 946.

4. The great dictum

Needless to say, Schmidt was unable to present the "newly discovered evidence" of his fraudulent insanity to another jury.[223] Cardozo could have ended the opinion at this point. However, he chose to continue with Schmidt's next argument: that the trial judge incorrectly instructed the jury as to the test for Schmidt's insanity.[224] In another masterful bit of rhetoric, Cardozo makes this seem inevitable by placing the impetus on Schmidt: "The defendant, however, shifts his ground . . . ."[225] After this segue, Cardozo goes on to discuss the question of right and wrong under *M'Naghten*.

New York was and still is a *M'Naghten* jurisdiction. After giving the jury an insanity instruction which closely paralleled the *M'Naghten* test, the judge, following the advice of the district attorney, instructed the jury that the word "wrong" in the *M'Naghten* test meant, "'wrong according to the law of the State of New York.'"[226] Schmidt claimed that this instruction entitled him to a new trial.[227] The confusion over the meaning of the word "wrong," while not dispositive, is the main issue in *Schmidt*.[228]

The confusion was not manufactured by the New York trial court. It was inherent in the original *M'Naghten*[229] decision, which was made by an assembly of common-law judges in the House of Lords. The assembly had been called because of public outrage over the acquittal of Daniel M'Naghten by reason of insanity. M'Naghten had shot and killed Edward Drummond, the private secretary of Robert Peel, thinking that Drummond was Peel himself. At his arrest, he told the police that "the Tories in my city follow and persecute me wherever I go . . . in fact, they wish to murder me."[230] The

223. *See id.* at 945-46. "There is no power in any court to grant a new trial upon that ground. . . . The defense now offered by the defendant was not 'discovered since the trial.' It was known to him, on his own showing, from the beginning." *Id.* at 946.

224. *See id.*

225. *Id.*

226. *Id.*

227. *See id.*

228. *See id.* at 946-50.

229. M'Naghten's Case, 8 Eng. Rep. 718 (1843).

230. MORAN, *supra* note 25, at 90 (giving a detailed account of the *M'Naghten* trial and the facts surrounding it).

M'Naghten verdict's unpopularity led to the special session of the House of Lords, in which the English judiciary was asked to clarify the law of insanity.[231] Out of this assembly came what is known as the *M'Naghten* test.[232]

The trial court judge in Schmidt's case instructed the jury that "wrong" meant contrary to the law of New York State.[233] In other words, if Schmidt knew that murder was illegal, he could not be found insane as a matter of law. Schmidt argued that this was error. Cardozo agreed.[234]

The *M'Naghten* assembly was at pains to make a crucial distinction: that defendant's knowledge of right and wrong was specific to the act with which defendant was charged. This was in sharp contrast to the "wild beast test"[235] of the seventeenth and eighteenth centuries, which required the defendant to experience a total departure from reason in order to be exonerated—not simply a cognitive breakdown with regard to the prohibited act but a generalized loss of reasoning power. The *M'Naghten* court was well aware of this deficiency in the wild beast test and took pains to distinguish it from their "new" *M'Naghten* test:

> The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong . . . . If the accused was conscious that *the act* was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.[236]

The *M'Naghten* judges were concerned that a generalized definition of "loss of reason" coupled with a definition of "wrong" which

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231. *See id.* at 125.

232. *M'Naghten*, 8 Eng. Rep. at 722. For the text of the test, see *supra* note 4.

233. *Schmidt*, 110 N.E. at 946.

234. *See id.*

235. "The defendant was not excused unless he was totally deprived of his reason, understanding and memory, and did not know what he was doing any more than a wild beast." Rex v. Arnold, 16 Howell's State Trials 695, 764 (1724). The wild beast test was still in use when *Rex v. Hadfield* was decided in 1800. *See* Rex v. Hadfield, 27 Howell's State Trials 1286 (1800).

236. *M'Naghten*, 8 Eng. Rep. at 722-23 (emphasis added).

was confined to legal wrong, could be turned on its head. A person could be acquitted on the grounds of insanity because he did not know the entire law of England.[237] Therefore, they pointedly confined the test to defendant's knowledge of right and wrong as to the act charged.[238] However, the assembly's language causes still more confusion: a defendant who knows that his act is immoral is punishable; so is a defendant who knows his act is both immoral and illegal.[239] But the assembly never addresses the defendant who knows his act is illegal but delusionally believes that it is moral.

Cardozo patches over this hole in the doctrine by assuming that the *M'Naghten* assembly was already working from a default assumption of *moral* wrong, laid down in *Bellingham's Case*: "It must be proved beyond all doubt that at the time [defendant] committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature."[240] Immorality is primary; illegality is secondary. The first includes the second. Under this reasoning, the *M'Naghten* assembly's real innovation was to even include legal wrong in the definition of "wrong." By doing so, they expanded the definition of right and wrong, to explicitly include social wrong, at the same time as they shrank it temporally, to include only the act which defendant had committed.

In reality, courts rarely saw moral and legal wrong as conflicting, a fact which Cardozo acknowledges.[241] In *Schmidt*, however, the judge's narrow instructions, coupled with Hans Schmidt's feigned insanity, put the two definitions at odds.

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237. *See id.* at 723 ("If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction . . . .").

238. *See id.*

239. *See id.*

240. *Schmidt*, 110 N.E. at 947 (quoting Bellingham's Case, 1 COLLINSON ON LUNACY 636 (1812)).

241. *See id.* at 948 ("But the truth, we think, is that the conflict [between moral and legal right] is more apparent than real . . . . The real point of the inquiry was whether a defendant, who knew that the act was wrong, was excused because he had an insane belief that either personal or public good would be promoted by the deed. There was no thought of any conflict between the commands of law and morals.").

Cardozo thought that the word "wrong" should mean "moral wrong," or at least not something as narrow as "legal wrong."[242] It is here that Cardozo's deific decree "exception" comes into play. Cardozo wants to show how deficient the trial judge's instructions were.[243] To do so, he applied the definition to a hypothetical:

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.[244]

Consider the sentence leading up to it: "The interpretation placed upon the statute by the trial judge may be tested by its consequences."[245] This sentence, and the one that follows the hypothetical—"If the definition . . . is right, it would be the duty of a jury to hold her responsible for a crime"[246]—suggest that Cardozo, far from carving out an exception, was simply exploring the limits of the legal/moral and right/wrong dichotomies inherent in a cognitive rule. Nowhere in these passages does he refer to Schmidt, or the facts of his case.

Cardozo's hypothetical has clear antecedents. For instance, he cites *Commonwealth v. Rogers*,[247] where Judge Lemuel Shaw speaks of the

> common instance . . . where [the defendant] fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature.[248]

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242. *See id.* at 946-47, 949.
243. *See id.* at 949.
244. *Id.*
245. *Id.*
246. *Id.*
247. 48 Mass. 500 (1844).
248. *Id.* at 503.

Shaw, however, cites no authority for this "common instance." *Guiteau's Case*,[249] which elsewhere quotes *Rogers* approvingly,[250] adds an illustration of "[a]nother man, whom you know to be an affectionate father, [who] insists that the Almighty has appeared to him and commanded him to sacrifice his child."[251] Again, however, the judge cites no authority for his illustration. Cardozo could hardly have been unaware that he was citing hypotheses to support his own hypothesis.

However, if we accept the idea that Cardozo *was* creating an exception, there is no language in the opinion that he intended that it be limited to auditory hallucinations about God. Rather, it is apparent that he meant it to stand for *all* cases in which the mentally disturbed defendant was unable to distinguish legal from moral wrong. In a later address to the Medical Society of the State of New York, Cardozo offered evidence of what he thought *Schmidt* stood for:

> We held that the word "wrong" in the statutory definition had reference in such circumstances to the moral quality of the act, and not merely to the legal prohibition. Any other reading would charge a mother with the crime of murder if she were to slay a dearly loved child in the belief that a divine command had summoned to the gruesome act.[252]

The above passage may suggest that Cardozo was creating a wide exception or no exception, but the use of a "divine command" illustration does not require that any subsequent use be restricted to the facts of the illustration.[253]

Where Cardozo *did* want to exclude certain kinds of conduct from the definition of insanity, he was exceedingly clear. He was at great pains to point out various common forms of antisocial behavior

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249. 10 F. 161 (D.D.C. 1882). Guiteau was charged with the assassination of President James A. Garfield. *See id.* at 161. During his trial, he claimed that his act was inspired by God and pled insanity. *See id.* at 179-81. The jury rejected the defense and found him guilty. *See id.* at 187.

250. *See id.* at 170.

251. *Id.* at 172.

252. Benjamin Cardozo, *Law and Literature*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 386 (Margaret E. Hall ed. 1947).

253. *See infra* notes 336-41 and accompanying text (arguing that another rationale for Cardozo using a "divine command" would be that such symptoms of insanity were far more common in 1915).

which did *not* involve a genuinely delusional mistake about right and wrong: "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 sacrifice as a duty is not thereby relieved from responsibility before the law."[254] Cardozo, like the judges in *Rex v. Hadfield*,[255] *M'Naghten's Case*,[256] and *Guiteau's Case*,[257] was working in a politically charged atmosphere, in which the insanity defense was seen as a cover for alleged political conspiracy.[258] In all three cases, there was ample outside pressure to distinguish the instant case—a politically tinged assassination or attempt—from other cases in which the alleged madman could not have had a political motivation.[259] Always present was the popular fear that left-wing political groups would commit terrible crimes, plead insanity, and never be punished.[260] Nonetheless, this still does not logically narrow the exception to nothing but "deific commands."

Nor was Cardozo creating a volitional exception. In fact, he distinguishes his cognitive analysis from an earlier volition analysis in a Massachusetts case, *Commonwealth v. Cooper*,[261] where the

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

255. 27 Howell's State Trials 1281 (1800). Hadfield attempted to shoot George III at the theater and was tried for treason. *See id.* at 1286.

256. 8 Eng. Rep. 718 (1843). M'Naghten was in contact with chartist and socialist groups in Glasgow, and his criminal acts were widely thought to be politically motivated. *See* MORAN, *supra* note 25, at 41-59.

257. 10 F. 161 (D.D.C. 1882). Guiteau shot and killed President James Garfield on July 2, 1881. His defense that "the Almighty had commanded him to do the act" was also rejected by the jury. *Id.* at 186.

258. Beginning with the Haymarket bombing on May 3, 1886, anarchists became progressively more feared in the American popular imagination. *See* GEORGE WOODCOCK, ANARCHISM: A HISTORY OF LIBERTARIAN IDEAS AND MOVEMENTS 463 (1962). In 1901, Leon Czolgosz, a self-proclaimed anarchist, assassinated President William McKinley. *See id.* at 464. In 1903, foreign anarchists were banned from the United States. *See id.* at 464-65. In 1921, Sacco and Vanzetti were convicted of armed robbery. *See id.* at 467. The crazed, bomb-wielding anarchist was a staple of popular imagination. Cardozo's remarks about anarchists, and his pains to distinguish them from genuinely delusive persons, must be seen in this political context. *See Schmidt*, 110 N.E. at 950.

259. *See Hadfield & McNaughtan*, *supra* note 56, at 31.

260. *See* Letter from Queen Victoria to Prime Minister Robert Peel, *in* THE LETTERS OF QUEEN VICTORIA 581 (A.C. Benson ed., 1907).

261. 106 N.E. 545 (Mass. 1914).

court said "that an offender is not responsible if he was 'so mentally diseased that he felt impelled to act by a power which overcame his reason and judgment, and which to him was irresistible.' *That is not the test with us.*"[262] Cardozo knew he was required by New York law to stay within the limits of the cognitive test. As he repeatedly maintained, all he wanted to establish was the fairly mild proposition that, "there are times and circumstances in which the word 'wrong,' as used in the statutory test of responsibility, ought not to be limited to legal wrong."[263]

After this exhaustive analysis, Cardozo then returned to Hans Schmidt, as if to tie all this free-floating analysis to a living, breathing defendant. "We have considered the charge of the trial judge upon the subject of insanity, because the question is in the case, and the true rule on a subject so important ought not to be left in doubt."[264] Then, however, he bookends the opinion with another aphorism: "The law does not force its ministers of justice to abet a criminal project to set the law at naught."[265]

One feels, reading *Schmidt*, that the facts of this case do not matter at all. This is certainly true of the insanity analysis, which is never applied to *Schmidt*'s facts. Cardozo is not making a decision about the fate of Hans Schmidt. He is making a decision about the future of the law of insanity.

Once the real Hans Schmidt drops out of the picture, we are left with Cardozo's masterpiece of pragmatist indirection. The accumulation of historical detail disguises the fact that Cardozo is, in fact, creating law. The absence of Schmidt himself from the right/wrong analysis enhances the opinion's resemblance to a treatise. Similarly, the devoted mother hypothetical is somewhat disguised. It seems to have precedents, though these precedents are also hypotheticals. Further, Cardozo takes this "emotionally charged hypothetical"[266] and applies the trial court's jury instructions to it. Since

262. *Schmidt*, 110 N.E. at 949 (emphasis added) (quoting *Cooper*, 106 N.E. at 547).
263. *Id.*
264. *Id.* at 950.
265. *Id.*
266. POLENBERG, *supra* note 213, at 75.

Cardozo treats his own illustration with so much care and regard, the stage is set for the illustration to be elevated to the level of doctrine.

C. State v. Crenshaw[267] *and* State v. Cameron[268]

The *Schmidt* case did not immediately go on to create a deific decree exception. A review of citations to *Schmidt* before 1983 reveals no references to deific decree, deific command or a discussion of it as a discrete exception.[269] *Schmidt's* more general proposition, that "legal wrong" alone is an insufficient definition of "wrong" under the *M'Naghten* test, is widely accepted, though still debated.[270]

Deific decree, however, did not make another appearance until 1983, when the cases *State v. Crenshaw* and *State v. Cameron* were decided. Combined, they are the foundation for the modern doctrine of deific decree. Their facts also embody the major contradictions inherent in the doctrine.

In *Crenshaw*, the defendant, Rodney Crenshaw, had been in and out of mental hospitals for most of his life.[271] He was on his honeymoon in Canada with his wife, Karen, when he got in a brawl and was deported.[272] He waited for his wife in a motel room across the border, in Blaine, Washington.[273] When she arrived, however, Crenshaw immediately "sensed" that something was wrong.[274] According to Crenshaw, "'it wasn't the same Karen . . . she'd been with someone else.'"[275] Crenshaw's solution to his wife's perceived infidelity was deliberate and thorough: he took her to the motel room and beat her unconscious; went out, stole a knife from a store, came back and stabbed her twenty-four times, killing her; went out again,

267. 659 P.2d 488 (Wash. 1983).
268. 674 P.2d 650 (Wash. 1983).
269. *See* 216 SHEPHARD'S CITATOR SERVICE (NEW YORK REPORTS) 346 (listing over 80 citations to *Schmidt*). The vast majority cite the proposition that "[a] criminal may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted to experiment with another." *Schmidt*, 110 N.E. at 946.
270. *See, e.g.*, Ranade, *supra* note 13.
271. *See Crenshaw*, 659 P.2d at 490.
272. *See id.* at 490-91.
273. *See id.*
274. *Id.*
275. *Id.*

borrowed an axe, came back and cut off her head with it.[276] He then sponged down the entire motel room; drove twenty-five miles to a wooded area to conceal the body and enlisted the help of two hitchhikers to conceal his wife's car.[277]

Crenshaw confessed to the killing.[278] At trial, he pleaded not guilty by reason of insanity.[279] The jury rejected the defense and found him guilty.[280] Crenshaw appealed.[281]

The main issue on appeal was the same one as in *Schmidt*. Insanity defense instruction number ten, which closely followed the *Washington Pattern Jury Instructions*,[282] also included a phrase at the end which was not in any code: "What is meant by the terms 'right and wrong' refers to knowledge of a person at the time of committing an act that he was acting *contrary to the law*."[283]

Such an instruction was particularly troubling to Crenshaw, given the nature of his defense. In arguing that he should be found insane, Crenshaw presented the following elements: first, that he had been diagnosed as paranoid schizophrenic and had been in mental hospitals for much of his life; second, that his "knowledge" of his wife's infidelity was an insane delusion; and third, that he was a follower of the "Moscovite" religion, and Moscovites have a duty to kill their unfaithful wives.[284] It was the last element that implicated deific decree.

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276. *See id.*
277. *See id.*
278. *See id.* at 491.
279. *See id.*
280. *See id.* at 490.
281. *See id.*
282. *See* WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 20.01 (2d ed. 1994) (following WASH. REV. CODE ANN. § 9A.12.010 (West 1988), which is in turn the *M'Naghten* test, codified).
283. *Crenshaw*, 659 P.2d at 491 (emphasis added) (quoting Clerk's Papers at 27, State v. Crenshaw, (No. 47498-2) (Wash. Super. Ct. 1980)).
284. *See id.* at 495. The Muscovite Christians were a conservative sect of the Russian Orthodox Church, active in the fifteenth century. *See* Margaret E. Clark, Comment, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense After* People v. Serravo, 70 DENV. U. L. REV. 161, 171 n.73 (1992) (citing ARNOLD J. TOYNBEE, A STUDY OF HISTORY 244, 372 (1947)). However, the court refers to "Moscovite" in quotations. *Crenshaw*, 659 P.2d at 494. It is possible that Crenshaw thought up his own form of "Moscovism."

There is no evidence that Crenshaw invoked the deific decree doctrine at trial. He did not argue that the Moscovite God *told* him to kill his wife. He instead argued that the delusion regarding his wife's infidelity, coupled with the belief that Moscovites must kill unfaithful wives, made him unable to distinguish moral right from wrong.[285]

Nonetheless, the *Crenshaw* court went to great lengths to point out that deific decree does *not* excuse a murderer like Crenshaw.[286] The fact that the court chose to refute a defense that the defendant did not even raise is circumstantial evidence that Crenshaw's case was uncomfortably close to Cardozo's classic devoted mother hypothetical.[287] Compare Crenshaw: he is newly married, on his honeymoon, with his presumably beloved wife. He delusively suspects her of adultery and is further under an insane delusion that his *faith* has commanded him to kill his wife. He knows the nature and quality of his act, and that it is prohibited by law. However, his "Moscovite" beliefs dictated that he kill his "unfaithful" wife. He has made a choice between "the laws of God and man."[288] If the real Muscovite Church actually demanded that suspected unfaithful wives be summarily executed by their husbands, then Crenshaw might be like the polygamist which Cardozo excluded from his exception, and his insanity defense would be precluded.[289] That would comport with common sense: persons who follow "religious" dictates that are against the law are presumed to have made a premeditated choice and therefore must live with that choice, even if it means going to jail.

Crenshaw, on the other hand, operated from his own delusive "Moscovite" belief, not the dictates of organized religion. The idea that one ought to brutally murder an unfaithful wife does not come from scripture, but from Crenshaw's disordered mind.[290] It is

285. *See Crenshaw*, 659 P.2d at 499-500 (Dore, J., dissenting).
286. *See id.* at 494-95.
287. *See Schmidt*, 110 N.E. at 949.
288. *Id.* at 948 (paraphrasing Bellingham's Case, 1 COLLINSON ON LUNACY 636 (1812)).
289. *See id.* at 950.
290. It is also possible that Crenshaw concocted his "Moscovite" defense after the fact, hoping that it would explain behavior that he himself did not understand. If so, then the deific decree defense could simply be excised, and

important to recognize that he has satisfied one of the elements of Cardozo's deific decree. He has made a moral choice within the parameters of a mental disorder. In that sense, Crenshaw genuinely does not know right from wrong. It is also important to recognize that Cardozo's hypothetical mother displays no other indicia of insanity—it is enough that she committed that act, with that motivation, to relieve her of responsibility. The difference between her and Crenshaw is that she heard the voice of God and Crenshaw did not. Had Crenshaw said that the "Moscovite" God had ordered him to kill his wife, he might have had a complete deific decree defense.[291]

However, Crenshaw did not have such a defense, and he did not win. This also seems intuitively correct, considering his brutal crime, with its evidence of deliberateness, post-homicide concealment, and Crenshaw's apparently rational behavior with everyone except his unfortunate wife.[292] But all this rational behavior has nothing to do with deific decree, and the court struggles to reconcile the doctrine with its own statutes and case law.

The court attempts to address Crenshaw's case in light of the original *M'Naghten* rules.[293] First, the court reasons that Crenshaw's fact situation is analogous to that addressed in the justices' answer to Question One: "a partial insane delusion that he was redressing or revenging some supposed grievance or injury."[294] The right/wrong distinction in Question One is whether the defendant knew "he was acting contrary to law; . . . the law of the land."[295] In contrast, the answers to Questions Two and Three require that the defendant be "conscious that the act was one which he ought not to do . . . and at

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Crenshaw would be evaluated on the other evidence of his insanity, which is substantial. *See Crenshaw*, 659 P.2d at 499 (Dore, J., dissenting) (discussing how two court psychiatrists observed numerous symptoms of paranoid schizophrenia in Crenshaw, and pointing out that Crenshaw had been in mental hospitals 15 times in the eight years prior to his crime).

291. *Schmidt* does not explicitly require that the "God" of deific decree be a widely-recognized God. *See Schmidt*, 110 N.E. at 947.

292. *See Crenshaw*, 659 P.2d at 492. ("[Crenshaw's] behavior towards others, i.e., the motel manager and the woman who loaned him the ax, at the time of the killing was normal.").

293. *See supra* note 4.

294. *Crenshaw*, 659 P.2d at 492.

295. *Id.* (emphasis omitted) (quoting M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).

the same time contrary to the law of the land."[296] On their face, these answers would exempt Crenshaw, who believed he "ought" to murder his wife.

Unfortunately, this distinction is specious under the reasoning of *Schmidt*, since one of the advantages of deific decree was that it *reconciled* the answer to Question One with the answer to Questions Two and Three. In fact, *Crenshaw*, though it superficially appeared to resemble the facts of *Schmidt*, was quite different. Crenshaw, unlike Schmidt, never suggested that he was pursuing a false defense.[297] The judges in *Crenshaw* therefore had to distinguish Crenshaw's acts, not from the acts of Schmidt, but from the acts of the devoted mother in Cardozo's hypothetical.

They accomplished this in two ways. First, they pointed out that Crenshaw's acts were similar, not to the devoted mother, but instead to the "devotee of polygamy or human sacrifice" who knew right from wrong, but instead responded to a personal belief at odds with societal morality.[298]

This reasoning seems intuitively right—but not because Crenshaw resembles a member of a religious cult. It seems to fit because of the other indicia of Crenshaw's rationality: the fact that his crime occurred in stages, with prolonged trips to look for weapons and clean-up tools,[299] the fact of his chat with the motel manager after the murder,[300] and the fact that suspected infidelity is a common "sane" motive for murder.[301] In other words, irrespective of whether there was a deific decree exception, Crenshaw could have been found legally sane.

However, the court went on to further distinguish *Schmidt*, and in so doing, it created a doctrine: "A narrow exception to the societal standard of moral wrong . . . [occurs when] a party performs a criminal act, knowing it is morally and legally wrong, but believing, because of a mental defect, that the act is ordained by God."[302] It goes

296. *Id.* (quoting *M'Naghten*, 8 Eng. Rep. at 723).
297. *See Schmidt*, 110 N.E. at 945.
298. *See Crenshaw*, 659 P.2d at 494. Of course, the "devotee[s] of polygamy or human sacrifice" are also hypothetical.
299. *See id.* at 490.
300. *See id.* at 491.
301. *See id.* at 495.
302. *Id.* at 494 (emphasis added).

on to describe Cardozo's hypothetical in its own words: "Although the woman knows that the law and society condemn the act, it would be unrealistic to hold her responsible for the crime, *since her free will has been subsumed by her belief in the deific decree.*"[303]

With this phrase, the Washington Supreme Court has magically transformed deific decree into a *volitional* exception to the cognitive *M'Naghten* doctrine.

This test performed its intended work: it excluded Crenshaw. There is no question, on the facts of the majority's case, that Crenshaw had a problem with his volition. He freely *chose* his "Moscovite" duty over societal morality.[304] The problem is that Cardozo's devoted mother did the same thing.[305] The *Crenshaw* court's devoted mother, however, did not. Under the court's reasoning, her choosing mechanism, or "will" was subsumed.[306] In attempting to exclude Crenshaw from their exception, the court had subtly altered Cardozo's reasoning and created a new exception.

The court did not have to wait long to use it. Later that same year, the judges decided the case of *State v. Cameron*.[307]

Gary Cameron, a diagnosed paranoid schizophrenic, was accused of stabbing his stepmother, Marie Cameron, over seventy times.[308] Cameron did not deny it. Instead, in a rambling confession, he explained his actions:

> "[S]he kept moving and moving and moving, and kind of grabbed me like this, but laughing, as if she was enjoying [being stabbed] . . . I mean, the thing was set up that, that's what she wanted to happen . . . . [S]he was very much into sorcery very, uh, anti-God, not really anti-God but takes the God's truth and twists it into her sorcery."

303. *Id.* (emphasis added) (citing *Schmidt*, 110 N.E. at 945).

304. *See id.* However, as is pointed out in the dissent, one of the examining psychiatrists, Dr. Nathan Kronenberg, testified that Crenshaw suffered from classic symptoms of schizophrenia, including auditory hallucinations. *See id.* at 499 (Dore, J., dissenting).

305. *See Schmidt*, 110 N.E. at 949.

306. *See Crenshaw*, 659 P.2d at 494.

307. 674 P.2d 650 (Wash. 1983).

308. *See id.* at 651.

> . . . "[L]egally I know, that it is against the law, but as far as right and wrong in the eye of God, I would say I felt no particular wrong."[309]

In Cameron's confession, he never mentioned a "deific command."[310] In fact, his feeling of "no particular wrong" "in the eye of God" is very much like Crenshaw's rational choice of moralities.[311] However, when he was examined by the court-appointed psychiatrists, they had no trouble concluding that he "believed he was an agent of God . . . [and that] God commanded him to kill his stepmother."[312] Again, as in *Crenshaw*, the trial judge gave the same *Washington Pattern Jury Instructions*, defining "knowledge of wrong" as "knowledge that [defendant] was acting contrary to the law."[313] Cameron was convicted and appealed.[314]

In contrast to *Crenshaw*, the Washington Supreme Court had no trouble concluding that Cameron fit their new "Crenshaw exception."[315] They made the following inferences from the evidence: that Cameron suffered from a mental disease; that he believed his stepmother was "Satan's angel"; that he could not understand that what he was doing was wrong; and that his free will "had been subsumed by [his] belief in the deific decree."[316] Note that the question of choosing God's law over the law of man is entirely absent.

The above conclusions are distilled from psychiatric testimony. However, there are other indicia of Gary Cameron's dissociative psyche. For instance, he was also convinced that Yasser Arafat and the Ayatollah Khomeini were persecuting him.[317] Similarly, when he was picked up by police on the highway, he was wearing a woman's pair of stretch pants and only one shoe.[318] In fact, Cameron

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309. *Id.* at 652.
310. *See id.*
311. *Id.*; *see also Crenshaw*, 659 P.2d at 494 (rationale choice of moralities).
312. *Cameron*, 674 P.2d at 652.
313. *Id.* at 653 (quoting WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 20.01, *supra* note 282, which in turn follows WASH. REV. CODE § 9A.12.010 (West 1988)).
314. *See id.* at 651.
315. *Id.* at 654.
316. *Id.*
317. *See id.* at 653.
318. *See id.* at 651. Previously, Cameron was picked up and released. At that time, he also had on a woman's housecoat and a shirt. *See id.*

is demonstrating two of the characteristic symptoms of schizophrenia as described in *DSM IV*: disorganized thinking and grossly disorganized behavior.[319]

Contrast this to Schmidt's behavior after his fictional "murder"[320] and Crenshaw's behavior after his real murder.[321] Both chopped up their victims' bodies and tried to dispose of them—[322] characteristic "guilty" and organized behavior. Nor was Crenshaw's speech disorganized.[323]

Within the limits of the doctrine, however, Cameron and Crenshaw look very much the same. In his dissenting opinion, Justice Dore pointed out the parallels: both Cameron and Crenshaw were diagnosed paranoid schizophrenics who had been repeatedly institutionalized,[324] both believed they had religious duties to kill their victims, both carried out their beliefs, both challenged the same jury instructions.[325] The real difference, as Justice Dimmick points out in his dissent, is that Cameron received a direct command, and Crenshaw merely interpreted his religious beliefs (supposedly the teachings of that same God) to compel him to carry out the act.[326] In other words, without changing the Cardozo hypothetical to a *volitional* exception, there is no distinction between Cameron and Crenshaw.

Are these cases consistent, and are they consistent with *Schmidt*? The answer lies in the idea of "choice" within the confines of a delusion. *If* we are convinced that the defendant makes an "insane choice" of God's law over societal law, then all three go free,

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319. These are two of the five "characteristic symptoms" which make up "Criterion A" in the *DSM IV* manual. *See* DSM IV, *supra* note 16, at 285. To be diagnosed with schizophrenia, the subject must exhibit two "Criterion A" symptoms in his "active phase," and the condition must persist for at least six months. *See id.* at 274-75. If the delusions are "bizarre," like Gary Cameron's, then only one "A" criterion is required. *See id.* at 285.

320. *See Schmidt*, 110 N.E. at 945.

321. *See Crenshaw*, 659 P.2d at 490-91.

322. *See id.*; *Schmidt*, 110 N.E. at 945.

323. Crenshaw murdered his wife because he thought she had been unfaithful. "'[I]t wasn't the same Karen . . . she'd been with someone else.'" *Crenshaw*, 659 P.2d at 490. Compare Cameron's speech: "'[S]he was very symbolic with the 'Scarlet Whore Beast' she was very much into sorcery very, uh, anti-God . . . .'" *Cameron*, 674 P.2d at 652.

324. *See Cameron*, 674 P.2d at 656-67 (Dore, J., dissenting).

325. *See id.* at 657-58 (Dore, J., dissenting).

326. *See id.* at 658-59 (Dimmick, J., dissenting in part).

the devoted mother, Cameron, and Crenshaw. If we make deific decree a problem of "subsumed will," then Crenshaw, who chose his belief, goes to jail. Cameron, who received a command, is presumptively insane. As for the devoted mother, we need more facts.

Some of the facts we would want to know are: Did she receive a direct command from God? Did she believe her child was "Satan's angel"? And, perhaps more important, what were the other indicia of her insanity? Was her speech dissociative, her affect flat? Did she wander naked on the highway after her murder? Did she delusively believe that Judge Cardozo was persecuting her?

The above points to two conclusions. First, it is arguable that what distinguishes *Cameron* from *Crenshaw* is not command versus choice, but the fact that Cameron's collateral behavior was so much more disordered than Crenshaw's. Cameron wandered on the highway, leaving his stepmother dead in the bathtub;[327] Crenshaw went to a nearby service station for a sponge and a bucket to clean up the blood and concealed the body 200 miles from the scene of the crime.[328] Do we really need deific decree to distinguish these cases?

Second, the very idea of choice is inimical to a volitional exception. By definition, the person whose "free will [is] subsumed by . . . the deific decree"[329] is not capable of making a choice. And yet choice of morals is what deific decree is all about. If defendant's will is overcome, the source of the command is irrelevant; it can be God, or it can be Paul Newman.[330] If defendant makes a choice (of God's law), he is no longer within the borders of the exception.

Subsequent case law seems to recognize some of these inherent inconsistencies. In *People v. Serravo*,[331] the Supreme Court of Colorado, sitting en banc, refused to certify deific decree as a per se exception to the standard of "societal wrong," instead defining it as "an integral factor in assessing a person's cognitive ability to distinguish

327. *See id.* at 651.
328. *See Crenshaw*, 659 P.2d at 490-91.
329. *Id.* at 494.
330. *See* IRVING I. GOTTESMAN, SCHIZOPHRENIA GENESIS 47 (1991). In this case study, the subject said that he received encouragement in his struggles against the CIA from the television, in the person of Paul Newman, among others. *See id.* at 47-48.
331. 823 P.2d 128 (Colo. 1992).

right from wrong."[332] Following *Serravo*, a Washington Appeals Court refused to follow the volitional nature of the "*Crenshaw* deific decree" exception, reasoning that, since the Washington Supreme Court has never allowed an irresistible impulse defense, it must not have meant to define deific decree as a volitional defense.[333]

However, just as the sun seems to be setting on deific decree, new applications come to light which apply the test without alteration. In *People v. Galimanis*, the Colorado Court of Appeals, citing *Serravo*, distinguished the defendant, who sometimes felt "God-like" from the person who is commanded by God to act.[334] In *People v. Wilhoite*, an Illinois Appellate Court distinguished "voice of God" hallucinations from defendant's actions: she took her child to the window, told him, "We have been saved and we are going to Heaven," and attempted to throw him out the window.[335]

None of these opinions addresses the central contradiction in deific decree—that, though it must logically be a cognitive exception to a cognitive doctrine, it really has no practical value except as a volitional exception. And, by extension, if it is a volitional exception, it really should be broadened to include *all* "command hallucinations." If it were so inclusive, its status as a per se exception could be abandoned, and it could be, to paraphrase the *Serravo* court "an integral factor" in determining whether defendant is capable of perceiving a coherent reality, in which right and wrong exist as cognitive opposites.

VI. SHOULD WE KEEP IT?

It is possible that, in 1915, when Justice Cardozo wrote his opinion in *Schmidt*,[336] he thought he was addressing a matter which might actually arise in the courts. After all, *Guiteau's Case*[337] had included a defense of "divine command."[338] Further, Cardozo may

332. *Id.* at 139. The court also noted that the Washington court added the volitional component to the *Schmidt* definition. *See id.* at 139 n.12.

333. *See* State v. Potter, 842 P.2d 481, 488 (Wash. Ct. App. 1992).

334. *See* People v. Galimanis, 944 P.2d 626, 631 (Colo. Ct. App. 1997).

335. People v. Wilhoite, 592 N.E.2d 48, 55-56 (Ill. App. Ct. 1991).

336. 110 N.E. 945 (N.Y. 1915).

337. 10 F. 161 (D.D.C. 1882).

338. *Id.* at 186.

have thought that, by positing an exception, he would be occupying the field of command hallucination fairly well.

This conclusion is supported by the highly literary facts of *Schmidt*, most of which were left out of the opinion.[339] Schmidt's delusions were exceedingly detailed, and full of gaudy imagery.[340] His images of blood-drinking and scandalous sexual practices probably made superb newspaper copy.

While true delusions are good indicators of cultural trends, fake delusions may be even better. Where Hans Schmidt got the idea for his story is purely speculative, but there is no doubt that he thought it would be believable. This suggests that deific decree delusions were not unheard of in early twentieth century America.[341] As discussed above, deific decree may once have had some practical use as a category in a largely Christian country.

To survive in a pluralistic society, however, deific decree has to justify itself on doctrinal terms. It is here that deific decree shows its deeply ingrained and fatal flaws.

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339. Schmidt claimed to have a lifelong sexual fascination with blood, which carried over into his relationship with Anna. His obsession with blood and its connections with the Catholic religion culminated in—he claimed—the manner of Anna's death.

According to Schmidt, he wanted to know what God thought of Schmidt's intimate relations with Anna. To this end, he brought her to the church and had sexual intercourse with her on the altar. The entire time, he kept his eye on the host to see if there was any change. There was no change—but later, while saying mass, Schmidt heard the voice of God: "Anna should be a sacrifice of love and atonement." On the night of the murder he heard the voice again, speaking insistently.

According to Schmidt, he consummated the sacrifice by cutting Anna Aumiller's throat, decapitating her, drinking her blood, and having sex with her corpse. He then chopped her body into seven pieces, because "seven was the number of candles on the altar, and seven was the number of the secrets of Christ." Later, of course, Schmidt claimed to have made all of this up. *See* Polenberg, *supra* note 213, at 59-60.

340. *See id.*

341. Deific decree has been part of the American literary landscape for a long time. One of the first novels written in the new republic was WIELAND; OR, THE TRANSFORMATION; AN AMERICAN TALE by Charles Brockden Brown. One of its major plots concerns a man (Wieland) who believes that God has commanded him to murder his wife and children. *See* CHARLES BROCKDEN BROWN, WIELAND; OR, THE TRANSFORMATION; AN AMERICAN TALE (Doubleday/Anchor 1973) (1798).

First, deific decree is internally contradictory. The first contradiction, briefly, is: if it is a compulsion, does it matter if God is speaking? If it is not a compulsion, is the defendant really insane? This question goes to another contradiction: deific decree makes sense only as a volitional category, with the defendant unable to resist a "command hallucination." Viewing it as anything else requires that the defendant make a moral choice. Yet this is what Rodney Crenshaw did,[342] and he was denied the exception. The only workable way to treat deific decree as anything but a volitional exception is to consider it as one factor among many, as did the *Serravo* court.[343] At such a point, the pseudo-doctrine has outlived its usefulness.

Second, deific decree is culturally archaic, a holdover from the time when secular and ecclesiastical courts were merged. As a doctrine of mercy, in line with the church's often humane treatment of the mentally ill, deific decree may once have been a positive force. As a doctrine which treats the religious mentally ill differently from the secular mentally ill, it is unfortunate. As a legal reflection of a cultural moment, it is part of the past.

Third, as a technique to make the *M'Naghten* doctrine more flexible, it is ineffectual. To begin with, deific decree is as rigid as *M'Naghten* itself, and just as hard to prove. Second, it simply does not do enough. It excepts rigidity with more rigidity. Courts tempted to use it would do better to adopt the Model Penal Code test.

Cardozo once wrote that "[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function they are diseased. If they are diseased, they must not propagate their kind."[344] One can think of no better person to pronounce the verdict of deific decree than the man who inadvertantly created it. If deific decree does survive—if only in legal casebooks—let it survive as a lesson concerning the hazy border between rule and rhetoric.

*Christopher Hawthorne**

342. *See supra* note 325 and accompanying text.
343. *See* People v. Serravo, 823 P.2d 128, 139 (Colo. 1992).
344. Cardozo, *supra* note 35, at 98-99.

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