TESTING RELIGIOUS INSANITY

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Abstract

An insane defendant is excused from conviction and punishment if, at the time they committed a criminal act, they suffered from a mental illness that made it impossible to tell right from wrong. "Delusions," which are fixed, false beliefs resistant to contrary facts, are the most common evidence of legal insanity. Thus, to determine whether a defendant is insane, courts must determine whether they are delusional, and to do that, courts must determine whether their beliefs are false.

Religious delusions create a constitutional problem. The First Amendment prohibits tests of religious verity—courts may not decide the truth or falsity of any matter of faith. However, courts have no reliable, objective way to distinguish "religion," which is protected by the First Amendment, from "delusion," which is not. Neither existing legal doctrine nor psychiatric diagnoses are enough. Courts thus must conduct a de facto religious verity test to decide whether a defendant suffering religious delusions is insane; if their beliefs are false, they are delusional.

This article offers new perspectives on religious insanity excuses. First, it orients the First Amendment right against religious verity tests as an adversarial criminal defense right, like the right to counsel or the right to a jury. Then, it shows why legal doctrine and psychiatric diagnoses fail to distinguish protected religion from unprotected delusion. Finally, the article proposes a compromise to protect religious rights while shielding the insane from conviction: waiver. Just as defendants may waive other adversarial rights, defendants who claim religious delusions should waive their right against religious verity tests before their insanity excuse is adjudicated.

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I. INTRODUCTION

On a warm summer evening in 2005, outside a six-unit apartment building in the North Park neighborhood of Chicago, Amir Kando stabbed Jason Burley nearly to death.[1] Before that day, neither man had spoken much to the other and they had no prior disputes.[2] But while sitting in the common back stairwell of the building, Burley suddenly "felt someone grab him around the neck from behind" and start stabbing at him with a knife.[3] It was Kando.[4] The two men fought for several minutes; Burley suffered a severed finger, a lacerated arm, and several stab wounds to his torso, one of which collapsed a lung and sliced part of his heart.[5] He collapsed outside the building but miraculously survived. Kando escaped back to his first-floor apartment only to be arrested shortly after.[6] He was charged under Illinois law with one count of attempted first degree murder and three counts of aggravated battery.[7]

Amir Kando had a history of mental illness.[8] After failing an initial competency hearing, he was eventually found "fit to stand trial with medication" and then waived his right to a jury.[9] At his bench trial Kando raised an insanity excuse, which under Illinois law required him to show, by clear and convincing evidence, that "at the time of . . . [the criminal]

1. People v. Kando, 921 N.E.2d 1166, 1168 (Ill.App. Ct. 2009).
2. *Id.* at 1173.
3. *Id*. at 1172.
4. *Id.* at 1173.
5. *Id.*
6. *Id.* at 1174, 1183.
7. *Kando*, 921 N.E.2d at 1168.
8. *Id.* at 1169.
9. *Id.* at 1172.

conduct, as a result of mental disease or mental defect, he lack[ed] substantial capacity to appreciate the criminality of his conduct."[10] As evidence of his "mental disease or mental defect," Kando's counsel called two psychiatric experts.[11] Both testified that Kando had been consistently diagnosed with various forms of schizophrenia expressed through chronic "delusions, hallucinations, disorganized thought processes, and bizarre behavior."[12]

Kando's schizophrenia had an intense religious character.[13] In the years prior to his attack on Jason Burley, Kando had been periodically hospitalized for aggressive behavior sparked by religious paranoia and delusions.[14] Kando believed his family members were possessed by demons.[15] If he missed doses of antipsychotic drugs like Clozapine and Clozaril, "his behavior rapidly deteriorated, with [Kando] immediately beginning to exhibit symptoms of his psychosis, including heavy praying."[16] Before he attacked Burley, Kando reported that he had heard the voice of God "during increasingly intense prayer at night," and that God was urging him to "lock up" Satan.[17] Kando suffered other symptoms like "'echoes of religious figures' accompanied by severe hyper-religious preoccupation and delusional ideation, 'praying a lot,' as well as paranoia."[18] Kando's family told a state social worker that his "psychosis exhibits as hyper-religiosity, namely that on such occasions defendant increases the amount, frequency and intensity of his praying, and that he becomes very preoccupied with religion and with matters of God and Satan."[19] Kando frequently "talks about God and Satan and appears to be

10. *Id.* at 1188 (quoting 720 ILL. COMP. STAT. 5/6-2(a) (1998). *See also* 720 ILL. COMP. STAT. 5/6-2(e) ("When the defense of insanity has been presented during the trial, the burden of proof is on the defendant to prove by clear and convincing evidence that the defendant is not guilty by reason of insanity. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of each of the offenses charged, and, in a jury trial where the insanity defense has been presented, the jury must be instructed that it may not consider whether the defendant has met his burden of proving that he is not guilty by reason of insanity until and unless it has first determined that the State has proven the defendant guilty beyond a reasonable doubt of the offense with which he is charged.").
11. *Id.* at 1189.
12. *Id.* at 1177.
13. *Kando*, 921 N.E.2d at 1179.
14. *Id.* at 1181.
15. *Id.* at 1178.
16. *Id.* at 1178.
17. *Id.* at 1183.
18. *Id.*
19. *Kando*, 921 N.E.2d at 1184.

internally stimulated by them," they said, and he "experienced auditory and visual hallucinations with religious themes, including Jesus."[20]

Kando told one of the expert psychiatrists that his aggression lessens when he is medicated, but his religious beliefs persisted whether he was on drugs or not.[21] In fact, on the day he stabbed Jason Burley in a fit of religious delusion, Kando had taken a prescribed dosage of the antipsychotic drug Abilify.[22] And even though he was "free of current overt delusions" during a pre-trial interview, Kando told one of his psychiatric expert witnesses that he had "failed the mission" by not killing Burley and that God would ultimately punish him for it.[23] He made similar comments to the arresting officers when they took him into custody, saying "that [Burley] said Jesus was black and that [Burley] was a demon so [Kando] stabbed him and had to kill him."[24]

The trial court ignored Kando's experts and instead relied on the prosecution's lay witnesses, who said Kando acted how a knowingly guilty person would: he ran from the scene of the crime, he initially lied about what had happened, he hid the knife used in the attack, and he changed out of his bloody clothes.[25] The trial judge rejected Kando's insanity excuse and instead ruled that he was "guilty but mentally ill" of attempted murder and aggravated battery.[26]

The appellate court sided with Kando, noting that while trial courts *can* ignore expert testimony, they should only do so if there are competing experts, or the experts fail to consider relevant authorities or evidence.[27] Pointing to extensive state court precedent showing a strong preference for psychiatric expert witnesses over lay testimony,[28] the appellate court found that the experts' testimony "was firmly entrenched and provided clear and

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20. *Id.*

21. *Id.* at 1182 (While "being treated with Paxil, Depakote and Clozaril," Kando "admitted to continued intermittent referential and religious ideations. . . .").

22. *Id.*

23. *Id.* at 1182–83.

24. *Id.* at 1184.

25. *Kando*, 921 N.E.2d at 1172–85.

26. *Id.* at 1188. "Guilty but mentally ill" is defined by 720 ILL. COMP. STAT. 5/6-2(c) (1998) ("A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill."); 720 ILL. COMP. STAT. 5/6-2(d) (1998) ("For purposes of this Section, "mental illness" or "mentally ill" means a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior.").

27. *Kando*, 921 N.E.2d at 1191–92; *accord* State v. Leroya M., 264 A.3d 983, 998–1000 (Conn. 2021) (affirming trial court's rejection of expert who claimed defendant was religiously delusional).

28. *Kando*, 921 N.E.2d at 1199–1201.

convincing evidence that as a result of his delusion, defendant would not have been able to comprehend the criminality of his conduct at the time of the offense."[29]

What was the "clear and convincing evidence" that Kando lacked comprehension when he stabbed Jason Burley? The appellate court explained:

> "[I]t is undisputed in this case that the incident for which defendant was charged was conceived and took place in the grip of a psychotic delusion. No one suggested an alternative motive for defendant's attack other than to eliminate Satan pursuant to a commandment from God. No one suggested or imputed any other design or motive to explain defendant's actions other than his delusion, namely that the victim was Satan whom he was determined to kill or incarcerate for 1,000 years. Accordingly defendant's ability to appreciate the criminality of his conduct must be viewed from the perspective of this delusion, that whatever he did was to implement a divine command to attack the victim whom he envisioned as a demon or Satan. Thus, from the outset there is no reason to think that defendant in carrying out this command would necessarily know that his divine commission of destroying a demon, or Satan, would be unlawful."[30]

The *Kando* court never defined the term "delusion," but its usage was clear. Amir Kando was delusional, and therefore too insane to be convicted, because his mind was gripped by false beliefs. Jason Burley was not actually a demon or Satan and neither God nor Jesus had commanded Kando to stab him. Stabbing Burley would not "lock up" Satan "for 1,000 years." None of Kando's many "hyper-religious" beliefs were true.

His conviction reversed, the appellate court remanded Kando's case for an order committing him to a secure facility as required by Illinois law for anyone found "not guilty by reason of insanity."[31]

Kando's case is hardly unique. American criminal courts have entertained many insanity excuses based on religious delusions and "deific

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29. *Id.* at 1196.

30. *Id.* at 1190–91.

31. *Id.* at 1202 (citing 730 ILL. COMP. STAT. 5/5-2-4 (2021). The appellate court declined to address Kando's separate argument that he had been denied effective assistance of counsel where his trial attorney "failed to properly handle his insanity defense by failing to impeach two of the State's key witnesses." *Id.* at 1168, 1202.

decrees."[32] Usually, these excuses are made by defendants who have, at some point, been diagnosed with mental illnesses like schizophrenia and delusional disorder, which are characterized by persistent delusional thinking.[33] In psychiatric terms, delusions are false "fixed beliefs that are not amendable to change in light of conflicting evidence."[34] Though American courts lack a uniform *legal* definition of "delusion," generally, evidence of psychiatric delusion is enough to prove the existence of a defendant's "mental defect" or "mental illness" sufficient to make them insane, like in *Kando*.[35] In American law, "delusional thought has been considered the very essence of insanity."[36]

But what if religion is the very essence of a defendant's delusional thought? In an earlier article on satanic themes in American law, I suggested that *Kando* and similar cases might be unconstitutional.[37] To decide whether Kando had proven insanity, the court "had to assess [his] religious beliefs and determine[] them to be so detached from reality as to be delusional."[38] Is this not a religious verity test, something the Supreme Court long ago declared forbidden under the First Amendment?[39] Assuming verity tests are generally prohibited, "under what principle are [they] appropriate in the context of a criminal prosecution but not in any other case?"[40]

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32. *See* Linda Ross Meyer, *Unreasonable Revelations: God Told Me to Kill*, 39 PACE L. REV. 745, 750 n. 18 (2019) (collecting "deific decree" cases) [hereinafter Meyer, *Unreasonable Revelations*]; Grant H. Morris & Ansar Haroun, *"God Told Me to Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 1009–11 nn.236–38 (2001) (same) [hereinafter Morris & Haroun, *God Told Me to Kill*]. *See also* People v. Sword, 34 Cal. Rptr. 2d 810 (Cal. Ct. App. 1994); State v. Armstrong, 671 So.2d 307 (La. 1996).

33. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 87 (5th ed. 2013) (listing "delusions" as one of several "key features that define the psychotic disorders" including "schizophrenia spectrum.") [hereinafter DSM-5].

34. *Id.*

35. *See* E. Lea Johnston, *Delusions, Moral Incapacity, and the Case for Moral Wrongfulness*, 97 IND. L.J. 297, 300 (2022) [hereinafter Johnston, *Moral Wrongfulness*]. *See also* 18 U.S.C. §§ 4242(a), 4247(b) (1984) (requiring courts to order a "psychiatric or psychological examination" that "shall be conducted by a licensed or certified psychiatrist or psychologist" if the defendant gives notice that they "intend[] to rely on the defense of insanity.").

36. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1019.

37. L. Joe Dunman, *The Devil in Recent American Law*, 39 PACE L. REV. 929, 970 (2019) [hereinafter Dunman, *The Devil*].

38. *Id.* at 970 n. 208.

39. A "religious verity test," is a factual and/or legal determination of the truth or falsity of a religious belief. *See* United States v. Ballard, 322 U.S. 78, 87 (1944) ("Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.").

40. Dunman, *The Devil*, *supra* note 37, at 970 n. 208.

Two possible answers come to mind. The first is that courts do not really test the truth of "religion" when assessing religious insanity excuses because they are testing something that is not religion at all: a mental illness or disease that just happens to express itself in religious terms. This assumes that insane delusions, no matter how religiously coded, can be legally or psychiatrically distinguished from the kind of religious beliefs the Constitution protects from scrutiny. They are categorically different things.

The second answer is that even if religious insanity excuses do trigger constitutionally prohibited verity tests, it is probably okay because that is what defendants want. This is not a witch trial or inquisition where the government persecutes and punishes a heretic.[41] Here a criminal defendant like Amir Kando *invites* religious scrutiny to *escape* criminal conviction. The prohibition on religious tests is meant to prevent injury to religious freedom and autonomy and there is no risk of such injury from a voluntary, non-punitive verity test.

This article argues that both answers are wrong, but with an important caveat. First, courts cannot reliably distinguish between constitutionally protected religious beliefs on the one hand and mental illness that expresses itself in religious delusions on the other, because both the law and psychiatry (on which the law often relies) lack clear or consistent definitions of "religion" and "delusion." And both of those terms defy accurate measurement. There is no objective way to tell the two apart.

Second, because neither the law nor psychiatry can objectively tell the difference between constitutionally protected religious beliefs and insane delusions coded in religious terms, courts are left to conduct de facto religious verity tests. To declare that a religiously delusional criminal defendant is insane requires a court to declare, as a matter of fact and law, that their religious beliefs are untrue. The First Amendment prohibits this.

The caveat: it *is* constitutionally meaningful that criminal defendants invite such religious tests on themselves. Criminal defendants have an array of constitutional rights, such as the right against warrantless searches,[42] the right to a jury,[43] the right to counsel,[44] the right against self-incrimination,[45] and a general right to procedural due process.[46] We can add a right against religious verity tests to the pile. But criminal defendants can also waive these rights, and for various reasons of strategy or

41. *See Ballard*, 322 U.S. at 87 ("If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.").

42. U.S. CONST. amend. IV.

43. U.S. CONST. amend. VI.

44. U.S. CONST. amend. VI.

45. U.S. CONST. amend. VI.

46. U.S. CONST. amend. V.

expedience may want to subject themselves to otherwise prohibited governmental conduct.[47] A criminal defendant, if they so choose, can plead guilty, or consent to a warrantless search, or confess, or represent themselves, or have their case decided by bench trial—they just have to waive their rights first. Defendants should also be required to waive their right against religious verity tests before a court can resolve the question of their religious insanity.

Part II of this article describes the First Amendment right against religious verity tests, and, as a novel proposition, orients it among other criminal defense rights such as those found in the Fourth, Fifth, and Sixth Amendments.[48] As an individual right, the right against religious verity tests should be considered waivable. Part II concludes with a brief explanation of how constitutional waiver works in criminal law.[49]

Part III turns to the question of whether religion-based insanity excuses trigger de facto verity tests, first by showing how fact finders lack reliable ways to legally distinguish religion from delusion.[50] Next, the Part shows how courts, unable to tell religious faith apart from mental illness in legal terms, rely on psychiatric experts to distinguish them with ostensibly scientific evidence.[51] However, because psychiatric diagnoses of religious delusion are relativistic and subjective,[52] courts cannot rely on them to reliably distinguish protected religious beliefs from expressions of mental illness that seem religious but are something else. With no clear way to distinguish the two, a legal finding that a defendant's delusional religious beliefs are insane is a de facto verity test.

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47. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

48. *See infra* Part II.

49. *Id.*

50. *See infra* Part III.

51. *Id.*

52. "Subjective" is used here as the opposite of "objective," which means, "of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers **:** having reality independent of the mind." *Objective*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/objective [https://perma.cc/VYX8-VCRJ] (last visited Dec. 31, 2024). *See also* Thomas Nagel, THE VIEW FROM NOWHERE, 5 (1986) ("A view . . . is more objective than another if it relies less on the specifics of the individual's makeup and position in the world, or on the character of the particular type of creature he is."). Psychiatrists themselves acknowledge that there is an "irreducible element of the subjective" in their methods. Ronald Pies, *How "Objective" Are Psychiatric Diagnoses? (Guess Again)*, 4 PSYCHIATRY (EDGEMONT) 18, 22 (2007) (Though there may be "an impressive but not overwhelming amount" of objectivity in psychiatric diagnosis, there remains "a great deal of 'art' in [the] field."). That said, even "objective" observations depend on the position of the observer. *See generally* Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 130 (1993).

The constitutional dilemma established, Part IV proposes a waiver requirement.[53] Though waiver could create a paradox in some cases where a defendant cannot waive their right due to ongoing mental incapacity, in most cases insanity-claiming defendants should be able to assure the court that they knowingly and voluntarily want their religious beliefs to be declared false (and therefore delusional). Waiver is also crucial to ensure that defendants found not guilty by reason of insanity are subjected to subsequent medical incarceration only on a knowing and voluntary basis. For these reasons, this article urges courts to conduct hearings or colloquies, just as they do when defendants waive other trial rights, to ensure that religiously insane defendants know what they are doing and are acting freely.

II. THE FIRST AMENDMENT RIGHT AGAINST RELIGIOUS VERITY TESTS

The Constitution makes religion special by explicitly excluding it, by name, from certain types of government regulation.[54] The Supreme Court has long held that this is a good and natural thing.[55] Many legal scholars agree.[56] The consensus in American law has long been that religion is

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53. *See infra* Part IV.

54. U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]").

55. *See, e.g.*, Everson v. Board of Educ. Of Ewing Twp., 330 U.S. 1, 14–15 (1947) (extolling "the complementary clauses" of the First Amendment as integral to "the structure of our government" and the suppression of "evils" such as religious discrimination and oppression); Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary."); Lynch v. Donnelly, 465 U.S. 668, 674 (1984) ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."); Kennedy v. Bremerton School Dist., 597 U.S. 507, 523–24 (2022) ("That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent.").

56. *See, e.g.*, Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000) (arguing religious freedom is integral to liberal democracy, limited government, and individual autonomy); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 ("'[S]ingling out religion' for special constitutional protection is fully consistent with our constitutional tradition."); Richard W. Garnett, *Religious Accommodations and—And Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CALIF. L. REV. 493, 497 (2015) [hereinafter Garnett, *Religious Accommodations*] ("[W]e should keep in view the fact that

properly—even *necessarily*—protected because it is socially good, individually virtuous, and integral to personal identity.[57] For the purposes of this article, I will offer no argument otherwise.

To protect individual religious autonomy from government infringement, the Supreme Court has interpreted the vague language of the First Amendment to prohibit religious inquisitions, heresy trials, and verity tests. The First Amendment "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy" to others, and ensures that no person must answer "for the verity of [their] religious views."[58] "[T]riers of fact . . . enter a forbidden domain" when religious beliefs are "subject to trial before a jury charged with finding their truth or falsity."[59] "Inquiries" into the "existence of . . . a 'Supreme Being'" or the truth of anyone's beliefs are "foreclosed to Government."[60] "[C]ourts must

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the right to religious freedom is . . . a fundamental human right, grounded on the inherent dignity and . . . equal and inalienable rights of all members of the human family.") (internal quotations omitted); and Stanley Fish, *Where's the Beef?*, 51 SAN DIEGO L. REV. 1037, 1042 (2014) ("The moral is clear. Being special is the business religion is in. And as it so happens it is a business recognized by the Constitution. So specialness is validated all around. End of story, end of argument."). Not everyone agrees, of course. *E.g.*, Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1086 [hereinafter Schwartzman, *Legal Proxy*] ("Given the diversity of religious and philosophical perspectives that have developed within our society, the inequality between religious and nonreligious views implied by the constitutional text is morally indefensible.").

57. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring in result) ("[N]o liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause."); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. OF CONTEMP. LEGAL ISSUES 279, 284 (2013) ("Religious liberty has been a central and invaluable part of our constitutional tradition."); John Witte Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016) ("[R]eligious freedom accommodations have been part of American law from its colonial beginnings. . . ."); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1249 (1994) ("While the group aspect of religious practice thus may produce false signs of constitutional privilege, it is a genuine element in the cultural dynamic that produces *the need* for constitutional protection.") (emphasis added); and Christopher Lund, *Religion is Special Enough*, 103 VA. L. REV. 481, 496 (2017) ("If religious liberty is justified, it is justified for many overlapping reasons.").

58. United States v. Ballard, 322 U.S. 78, 86 (1944).

59. *Id. accord* Africa v. Com. of Pa., 662 F.2d 1025, 1030 (3d Cir. 1981) ("It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy."). *See also* Nathan Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1253 (2017) ("The Constitution forbids the government from determining the accuracy or plausibility of a claimant's religious beliefs.").

60. United States v. Seeger, 380 U.S. 163, 184 (1965).

not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[61] "The validity of what [a person] believes cannot be questioned."[62] And, though the question of what qualifies as "religion" in the first place may not always be clear, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[63] This prohibition is further justified because "the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."[64] And for these reasons, as Frederick Gedicks puts it, "theological and ecclesiastical questions," are simply "not justiciable."[65]

It would seem then to be simple: the constitution denies courts the power to engage in *any* inquiry into whether religious beliefs are true or false.[66] But, as Richard Fallon observes, even where the constitutional text speaks in prohibitions, "we tend to express the conclusion not in terms of a limit on powers but through the vocabulary of individual rights."[67] Religious rights are no different. As far back as *Watson v. Jones* in 1871, the Court framed the prohibition of judicial religious inquiries as a matter of individual right arising from common law. "[T]he law knows no heresy," because "[i]n this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine . . . is conceded to all."[68] Since *Watson*, the Court has

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61. Emp't Div. v. Smith, 494 U.S. 872, 887 (1990).

62. *Seeger*, 380 U.S. at 184.

63. Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981).

64. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

65. Frederick Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 (1989). *But see* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 501 (2005) [hereinafter Goldstein, *Religious Question*] (arguing that "on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.").

66. However, the First Amendment does allow inquiry into whether the beliefs at issue are "religious" in the first place, and whether they are sincerely held. *See* Frazee v. Illinois Dept. of Emp. Sec., 489 U.S. 829, 833 (1989) (noting the ability and difficulty of such inquiries in First Amendment cases).

67. Richard H. Fallon Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 364 (1993). *See also* Beazell v. Ohio, 269 U.S. 167, 171 (1925) (holding that the strict ban on *ex post facto* laws in Article I, Sec. 10 "was intended to secure substantial personal rights against arbitrary and oppressive legislation."); and Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 34 (1998) (explaining that Article III standing also frames government overreach not as a question of prohibited powers but as an injury to individual rights).

68. Watson v. Jones, 80 U.S. 679, 728 (1871). *Watson*'s ban on civil judicial meddling into internal church disputes has been assigned various names. *See, e.g.*, Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of*

reframed the ban on religious inquiries as arising from the First Amendment,[69] and the First Amendment, despite its unqualified prohibitory text, has been interpreted to convey individual rights that are not absolute but instead must be balanced against well-justified governmental interests.[70]

If the prohibition of religious verity tests arises from an individual right, then, a court could engage in *some* inquiry, either when some specific governmental interest in doing so outweighs the party's more generalized interest against it,[71] or when the party—pursuing their own interests—gives the court permission by waiving the right.

Inherently Dangerous Speech in Free Speech Law and Theory, 36 PEPP. L. REV. 317, 329 (2009) (calling it the "ecclesiastical abstention" doctrine); Goldstein, *Religious Question*, *supra* note 65, at 501-14 (calling it the "religious question doctrine"); and Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1398 (1981) (calling it "the right of church autonomy.").

69. *E.g.*, Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (identifying both antiestablishment and free exercise as "values protected by the First Amendment" that are jeopardized when courts inquire into religious disputes). As to which of the First Amendment's two religion clauses is the better source for the ban on religious inquiries and verity tests, there is scholarly debate. Some argue for the establishment clause. *See, e.g.*, Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1120 (2013) (it is "the Establishment Clause [that] forbids the state from declaring religious truth."); William P. Marshall, *Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law*, 44 TEXAS TECH L. REV. 239, 257 (2011) (arguing that the "no-inquiry principle" articulated in *Ballard* was focused on "differential treatment of religion" by the state, traditionally an establishment clause concern, as opposed to *Smith*'s focus on "disparate treatment" of individual believers, a free exercise clause concern). The Supreme Court, however, has rooted the general prohibition of religious inquiries in the soil of the free exercise clause. *See* Thomas v. Rev. Board of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 ("[T]he guarantee of free exercise [means that] it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."). *See also* Goldstein, *Religious Question*, *supra* note 65, at 510 (describing *Ballard* as a free exercise case). For the purposes of this article, it does not matter whether the right against religious verity tests comes from one clause or the other, or rather, consistent with Justice Douglas's later constitutional jurisprudence, from "penumbras, formed by emanations from those guarantees." Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

70. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520, 533 (1993) (explaining that even a law whose object "is to infringe upon or restrict practices because of their religious motivation" can survive judicial scrutiny if it is "justified by a compelling interest and is narrowly tailored to advance that interest."). *See also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (explaining how the Court balances competing interests with its "tiers of scrutiny").

71. Jones v. United States, 463 U.S. 354, 374 n.4 (1983) ("The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing

The concept of constitutional waiver is a familiar one in criminal law. It applies to defendant rights under the Fourth, Fifth, and Sixth Amendments. For example, those subject to investigation may waive their Fourth Amendment right against warrantless searches by consenting.[72] Those subject to custodial interrogation may waive their Fifth Amendment right against self-incrimination by confessing.[73] They may waive their Sixth Amendment rights to a jury trial by pleading guilty.[74] And those who proceed to trial can waive their Sixth Amendment right to counsel by representing themselves.[75]

A "waiver," for constitutional purposes, is "an intentional relinquishment or abandonment of a known right or privilege."[76] In other words, a defendant can give the government permission to engage in procedures that would otherwise be unconstitutional, such as a warrantless search or a trial without a jury. Though it may seem counterintuitive for a defendant to purposely give up their rights, waiver lets defendants "use their constitutional rights as bargaining chips" to achieve strategic goals or avoid harsher penalties.[77]

But a defendant's waiver is only valid if it is made "voluntarily, knowingly and intelligently."[78] To be "voluntary," the relinquishment "must have been . . . the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a

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[the insane], because they are neither blameworthy nor the appropriate objects of deterrence.") (citing Abraham Goldstein, THE INSANITY DEFENSE 15 (1967)); *see also* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 216–17 (1977) (discussing competing interests in waiver analysis such as "societal interest in expediency of case processing," "preservation of appearance of accuracy," and "interests of persons other than the waiving defendant."); *C.f.* Michigan v. Fisher, 558 U.S. 45, 47 (2009) ("[T]he exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.") (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978)).

72. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

73. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

74. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (citing Malloy v. Hogan, 378 U.S. 1 (1964)).

75. *See* Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

76. *Id.* at 464.

77. Jason Mazzone, *The Waiver Paradox*, 97 NW. L. REV. 801, 832 (2003) [hereinafter Mazzone, *Waiver Paradox*]; *But see* Russell Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHICAGO-KENT L. REV. 179, 185 (2010) (suspects who waive rights against interrogation "and open themselves up to questioning . . . are often in peril and may not realize it.").

78. *Miranda*, 384 U.S. at 444. An invalid waiver can entitle a defendant to various remedies. *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 281 (1942) (holding that an invalid waiver of right to jury required reversal of conviction and new trial); and *Zerbst*, 304 U.S. at 469 (holding invalid waiver of the right to counsel justified habeas relief).

full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[79] For the waiver to be "knowing," the criminal defendant usually must be made aware that they have a waivable right in the first place, often through direct instruction by interrogating officers or through an in-person colloquy with the trial judge.[80] Further, those rights that apply to adversarial criminal proceedings, like trial, must be *expressly* waived, often in person. For example, a "literate, competent, and understanding" defendant can waive the Sixth Amendment right to trial counsel by "clearly and unequivocally declar[ing] to the trial judge" a desire to represent themselves.[81] And the Federal Rules of Criminal Procedure require the waiver of the right to a jury trial be in writing.[82] Though some circuits have declined to strictly enforce that rule, they still require the defendant to "personally [give] express consent in open court, intelligently and knowingly."[83]

All this said, there is no need for waiver if there is no right implicated. Part III discusses first how criminal defendants can seek excuse from conviction by proving insanity, and how such an excuse, when grounded in religious delusion, unavoidably results in a de facto religious verity test,

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79. Moran v. Burbine, 475 U.S. 412, 421 (1986).

80. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 293 (1988) (holding that "the *Miranda* warnings given petitioner" by interrogating officers "made him aware of his right to have counsel present during the questioning."); Boykin v. Alabama, 395 U.S. 238, 242–44 (1969) (holding that a guilty plea implicates numerous constitutional rights and therefore "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); Von Moltke v. Gillies, 332 U.S. 708, 723 (1948) (imposing "the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused," by "investigat[ing] as long and as thoroughly as the circumstances of the case before him demand.") and Faretta v. California, 422 U.S. 806, 835 (1975) (holding that waiver of right to counsel was knowing when defendant declared desire to proceed *pro se* after judge "warned [him] that he thought it was a mistake not to accept the assistance of counsel. . . .").

81. *Faretta*, 422 U.S. at 835.

82. FED. R. CRIM. P. 23(a)(1).

83. United States v. Robertson, 45 F.3d 1423, 1431 (10th Cir. 1995) (quoting United States v. Reyes, 603 F.2d 69 (9th Cir. 1979)). *See also Adams*, 317 U.S. at 277–78 (holding that waiver of the right to a jury trial requires "express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court," the validity of which depends "upon the unique circumstances of each case."). The rules are generally the same in state courts as well. *See, e.g.*, People v. Meyers, 109 N.E.3d 555, 558 (N.Y. 2018) ("[T]he requisite affirmative showing" that trial rights like confrontation and counsel have been validly waived "will include a direct colloquy between the court and the defendant."); and Jackson v. Commonwealth, 113 S.W.3d 128, 136 (Ky. 2003) (vacating conviction of defendant for lack of valid waiver even though defendant was present in court when his counsel requested a bench trial on his behalf).

because courts lack objective means to distinguish religious beliefs from insane delusions.

III. INSANITY EXCUSES AS DE FACTO RELIGIOUS VERITY TESTS

The Constitutional protection against religious verity tests is irrelevant if, when defendants claim insanity due to religious delusions, courts are not really testing a criminal defendant's religious beliefs. If courts can clearly distinguish religious beliefs that are constitutionally protected from insane delusions that are not, then there is no reason to worry about the First Amendment or the need for waiver.

But there is reason to worry. Courts cannot clearly distinguish religion from delusion for two reasons. First, fact finders have no reliable legal definition to distinguish religious beliefs from substantially similar non-religious beliefs—especially not those typically presented as evidence of insanity.[84] Second, psychiatrists, on whom fact finders often rely, have no clear clinical definition or diagnostic methods to do the distinguishing for them. Courts cannot safely defer to scientific or medical experts to ensure they are testing mental illness rather than religious belief as a categorically different thing. This Part will address each reason in turn, beginning with the lack of clear legal line-drawing and finishing with the weaknesses of psychiatric diagnosis.

A. The Elusive Line Between Religion and Not-Religion

A constitutional problem arises only if the courts inquire into a party's *religious* beliefs; the truth of all other beliefs remains subject to scrutiny and disproof.[85] If a court can reliably distinguish non-religious beliefs from religious beliefs, it can avoid any kind of constitutional obstacle by limiting its inquiry to the former.

"Religion is whatever a given social group decides is religion."[86] Making that decision is easier said than done, however. The U.S

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84. Meyer, *Unreasonable Revelations*, *supra* note 32, at 750 ("[I]n in all of the reported [deific decree] cases, the[] defendants purport to be following Christian practices, not those of other faiths.").

85. Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 713 (1981) ("[O]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); *accord* Frazee v. Illinois Dept. of Emp. Sec., 489 U.S. 829, 833 (1989) (citing *Thomas*, 450 U.S. at 713).

86. Daniel McClellan, YHWH'S DIVINE IMAGES: A COGNITIVE APPROACH xiii n. 5 (2022), available at https://www.sbl-site.org/assets/pdfs/pubs/9781628374407.pdf [https://perma.cc/V7BY-JCPN].

Constitution uses the word "religion" but leaves it undefined.[87] Courts are left to decide if "religion" is sufficiently at issue to trigger the First Amendment's protection, and to do that they have to know what "religion" is.[88] Though long ago quite certain about the term,[89] the Supreme Court has since backed away from any firm definition, instead only taking cases where the religiousness of the claimant is uncontested, even when their claimed beliefs are unorthodox or extreme.[90] And, careful not to exceed

87. *See, e.g.*, U.S. CONST. amend. I; Legal scholars have proposed a vast array of definitional approaches. *See generally* A. Stephen Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PENN. L. REV. 479 (1968); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Ben Clements, *Defining Religion in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y 167 (1994); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Hon. Jeffrey O. Usman, *Defining Religion: the Struggle to Define Religion Under the First Amendment*, 83 N.D. L. REV. 123 (2007); *and* Sarah Lubin, *Defining Religion Under the First Amendment: An Argument for Anchoring a Definition in Injury*, 28 S. CAL. REV. L. & SOC JUST. 107 (2019). In response, others argue that there is no meaningful definition of religion in current American law or that distinguishing religion from similar non-religious views is undesirable or impossible. *See, e.g.*, Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1426 (2012) ("[R]eligious views, at least as traditionally conceived, cannot easily be distinguished from comprehensive secular doctrines on epistemic or psychological grounds."); Schwartzman, *Legal Proxy*, *supra* note 56, at 1089 ("There are no necessary and sufficient conditions that distinguish between religious and nonreligious beliefs."); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 75 (2013) ("Even if theorists could converge upon a single definition, American law will not have relied upon that definition, and that definition may not be suited to the law's purpose.'"); and Andrew Koppelman, *'Religion' as a Bundle of Legal Proxies*, 51 SAN DIEGO L. REV. 1079, 1079 (2014) ("'Religion' is a label for something that has no ontological reality.").

88. *See Frazee*, 489 U.S. at 833 (noting the ability of courts to determine whether a claim qualifies as "religious" under the First Amendment and the difficulty of doing so).

89. *See* Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."); and United States v. Macintosh, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting, joined by Holmes, Brandeis, and Stone, JJ.) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.") (citing *Davis*, 133 U.S. at 342).

90. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (no question that Amish plaintiffs were religious); *Frazee*, 489 U.S. at 831 (no challenge to plaintiff's sincerity as a Christian opposed to working on Sunday); Emp't Div. v. Smith, 494 U.S. 872, 874 (1990) (no question that plaintiffs were members of the Native American Church who "ingested peyote for sacramental purposes."); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520, 531 (1993) (no one "questioned the sincerity of the petitioners' professed desire to conduct animal sacrifices for religious reasons."); Locke v. Davey, 540 U.S. 712, 717 (2004) (no question that plaintiff sincerely sought a devotional degree at a Pentecostal college); and Kennedy v. Bremerton School Dist., 597 U.S. 507, 508 (2022)

constitutional command by protecting or accommodating more beliefs than required by the First Amendment, the Court has distinguished religious doctrine from the merely personal or philosophical,[91] but without offering lower courts any guidance on how to distinguish those things themselves, if they are allowed to try at all.[92]

Meanwhile, beyond the Constitution's religion clauses, the Court has interpreted the statutory phrase "religious belief" so broadly it is now hopelessly ambiguous. In *United States v. Seeger*, a military conscientious objector case under the Selective Service Act, the Court interpreted the phrase "belief in relation to Supreme Being" to mean "a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[93] According to the Court, this definition, which "[did] not distinguish between externally and internally derived beliefs," was consistent with a historically novel congressional intent "to embrace all religions," even nontheistic ones.[94]

("[N]o one questions that [plaintiff] seeks to engage in a sincerely motivated religious exercise involving giving 'thanks through prayer' briefly 'on the playing field' at the conclusion of each game he coaches."); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014) (noting that "no one has disputed the sincerity" of corporate RFRA plaintiffs' religious beliefs that non-abortive contraceptives cause abortions); Holt v. Hobbs, 574 U.S. 352, 361 (2015) (noting that RLUIPA plaintiff's desire to grow a beard in prison was "a dictate of his religious faith" the sincerity of which was uncontested); and Groff v. DeJoy, 600 U.S. 447, 454 (2023) (noting no question that Title VII plaintiff "is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not 'secular labor' and the 'transport[ation]' of worldly 'goods'".). Indeed, throughout the 20th century, the Court's major religious freedom cases generally lacked any dispute about sincerity or the claimants' general religiosity. *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 325 (1986) (noting that "*Yoder*, *Sherbert*, *Lee*, *Bob Jones*, *Quaring*, and *Roy* all involved situations in which the sincerity of the religious claim was undisputed.").

91. *Yoder*, 406 U.S. at 216 ("Thoreau's choice [to 'reject the social values of his time'] was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.").

92. *See* Fowler v. State of Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); and Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 713–14 (1981) (acknowledging that distinguishing between a religion and a "personal philosophical choice" "is more often than not a difficult and delicate task" but warning courts that "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

93. United States v. Seeger, 380 U.S. 163, 166 (1965).

94. *Id*. *But see* Berman v. U.S., 156 F.2d 377, 381 (9th Cir. 1946) (holding that the Selective Service Act excluded nontheistic conscience objectors "as demonstrated by congressional hearings"— "The committee in writing the present law was not venturing

Several years later, the Court in *Welsh v. U.S.* went further, granting objector exemptions to those who "deeply and sincerely hold[] beliefs that are purely ethical or moral in source and content but nevertheless impose upon [them] a duty of conscience" and "certainly occupy in [their] life . . . a place parallel to that filled by God in traditionally religious persons."[95] This included Elliott Welsh, who deliberately crossed out the word "religious" from his conscientious objector application and testified that his beliefs were neither theistic nor otherwise religious "in the conventional sense."[96] Though the *Welsh* plurality insisted that they were not expanding the definition of religious belief to include views that were "essentially political, sociological, or philosophical," they had nevertheless removed, by a "feat of judicial surgery," the statute's very specific theistic condition.[97] Similarly, when interpreting the First Amendment to prohibit state religious test oaths (like Article VI's federal test oath ban),[98] the Court extended its protections to "non-believers"[99] and attached an illustrative list of nontheistic "religions" that is probably overinclusive.[100]

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anything new in limiting exemptions of conscientious objectors on a religious basis. That has been done in every draft law ever enacted in the United States.").

95. Welsh v. United States, 398 U.S. 333, 340 (1970).

96. *Id.* at 341–342.

97. *Id.* at 351 (Harlan, J., concurring in result) ("Against his legislative history it is a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement" of the conscientious objector provision of the Selective Service Act.). *See also* Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 909 (2005) ("In two important cases interpreting the Selective Service Act [*Seeger* and *Welsh*], the Supreme Court essentially eroded any distinction between religious and nonreligious claims to conscientious objection."); and Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 260 (1989) (describing *Welsh*, "[t]he Justices . . . obfuscated any distinction between religion and all other belief systems.").

98. U.S. CONST. art. VI ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

99. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

100. *See id.* at 496 n. 11 (1961) (listing "Secular Humanism" among "religions in this country which do not teach what would generally be considered a belief in the existence of God" like Buddhism and Taoism.). However, lower courts have since rejected claims that secular humanism is a religion or promotes a religious perspective. *See, e.g.*, McGinley v. Houston, 361 F.3d 1328, 1332 (11th Cir., 2004) ("[N]either the Supreme Court nor this court has determined that "secular humanism is a religion for purposes of the establishment clause.") (quoting Smith v. Board of School Com'rs of Mobile Cnty., 827 F.2d 684, 690 (11th Cir. 1987)); Peloza v. Capistrano Unified School Dist., 37 F.3d 517, 521 (9th Cir. 1994) ("[N]either the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes. Indeed, both the dictionary definition of religion and the clear weight of the caselaw are to the contrary."). *Cf.* Donald Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 563 (1968) ("[I]f the

Not that Congress has been particularly helpful, either, defining religion circularly in statutes ostensibly designed to protect free exercise from burdensome employers and government action, like Title VII, the Religious Freedom Restoration Act, and the Religious Land Use and Incarcerated Persons Act.[101] State legislatures have offered similarly self-referential definitions—if they offer a definition at all.[102] Meanwhile, some state constitutions offer definitions of religious freedom that are either exclusively monotheistic or so broad they extend to more ambiguous rights of "conscience."[103]

Lower federal courts have tried harder to find clarity, developing a "definition by analogy" approach to discerning religion from not-religion.[104] For example, the Third Circuit has employed a multifactor test

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humanist values promoted by the public school be religion, they are part of the religion established by the Constitution itself.").

101. *See* 42 U.S.C. § 2000e(j) (Title VII: "The term 'religion' includes all aspects of religious observance and practice, as well as belief. . . ."); 42 U.S.C. § 2000bb-2(4) (RFRA: "The term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."); and 42 U.S.C. § 2000cc-5(7)(A) (RLUIPA: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

102. *See, e.g.*, 775 Ill. COMP. STAT. 5/1-103(N) (adopting verbatim federal Title VII definition in state civil rights act); and KY. REV. STAT. § 344.030(7) (same); *accord* ARK CODE § 16-123-102(13) ("'Religion' means all aspects of religious belief, observance, and practice."); TEX. LAB. CODE § 21.108 (same but ordered as "observance, practice, or belief."); and VA. CODE § 2.2-3901(E) ("'Religion' includes any outward expression of religious faith, including adherence to religious dressing and grooming practices and the carrying or display of religious items or symbols."). Many other state civil rights acts prohibit discrimination on the basis of "religion" but provide no definition. *See, e.g.*, COL. REV. STAT. § 24-34-301; IND. CODE § 22-9-1-3; MO. REV. STAT § 213.010; OKLA. STAT. tit. 25 § 1301. *See generally* Elizabeth Sepper, *The Role of Religion in State Public Accommodation Laws*, 60 ST. LOUIS U. L.J. 631 (2016) (surveying how state laws protect and exempt religion in antidiscrimination statutes).

103. *Compare, e.g.*, MASS. CONST. art. II ("It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.") *with* KY. CONST. § 5 ("[T]he civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."). *See also* Kent Greenawalt, *The Concept of Religion in State Constitutions*, 8 CAMPBELL L. REV. 437, 439–440 (1986) (comparing the constitutions of states like Kansas, which protect "the right to worship God," to states like North Carolina, which protect "the rights of conscience" more generally).

104. Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring); *see also* Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (summarizing the "helpful indicia" of religion offered by Judge Adams in his *Malnak* concurrence: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as

first proposed by Judge Arlin Adams in his concurrence to *Malnak v. Yogi*, in which the court ruled that a public school course on transcendental meditation was an unconstitutional establishment of religion.[105] Two years later, Judge Adams, writing for that court in *Africa v. Commonwealth*,[106] employed these "useful indicia" to reject a claim that the black liberationist organization MOVE was a religion that entitled one of its incarcerated members to dietary accommodations:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. . . . Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.[107]

As useful as the *Malnak/Africa* indicia may seem, they were probably abrogated by the Supreme Court's pronouncement in *Thomas v. Review Board* that "the resolution of [the] question" whether a belief is religious or nonreligious "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable,

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opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.").

105. *Malnak*, 592 F.2d at 207 (Adams, J., concurring).

106. *Africa*, 662 F.2d 1025.

107. *Id.* at 1032, 1035. *Cf.* United States v. Meyers, 906 F.Supp. 1494, 1502–1503 (D.Wyo. 1995) (weighing fifteen factors including "ultimate ideas," "metaphysical beliefs," a "moral or ethical system," "comprehensiveness," religious "accoutrements," a "founder, prophet, or teacher," "important writings," "gathering places," "keepers of knowledge," "ceremonies and rituals," religious "structure or organization," "holidays," "diet or fasting," religious "appearance and clothing," and "propagation."). Whether using the *Malnak/Africa* factor test or some other standard to fill the definitional gap left by the Supreme Court, lower federal courts have often denied First Amendment protection to minority or unorthodox claimants. *See, e.g.*, United States v. Kuch, 288 F.Supp. 439, 445 (D.D.C. 1968) (rejecting claim that members of the "Neo-American Church" used psychedelic drugs for religious reasons); Jacques v. Hilton, 569 F. Supp. 730, 736 (D.N.J. 1983) (holding that the United Church of Saint Dennis is not a religion under the *Malnak/Africa* analysis); and Alvarado v. City of San Jose, 94 F.3d 1223, 1229 (9th Cir. 1996) (same for plaintiffs' "New Age" beliefs); *but see* Dettmer v. Landon, 799 F.2d 929, 931–932 (4th Cir. 1986) (affirming district court's finding that Church of Wicca was a religion using the *Malnak/Africa* analysis). *See also* International Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (finding that "Krishna Consciousness is a 'religion' for free exercise purposes" because "adherence to the sect's theological doctrines is an 'ultimate concern' of the devotees.").

logical, consistent, or comprehensible to others in order to merit First Amendment protection."[108] The Court has offered no definitional guidance since then.

This doctrinal vacuum is not a problem in most cases, however. American courts routinely dodge the definitional question "*is this religion?*" either because the parties do not dispute the religiousness of the claim or because everyone just assumes they can spot "religion" when it appears. As Andrew Koppelman puts it, "[t]he question of what 'religion' means is . . . barely relevant. We know it when we see it."[109]

Ultimately, the Constitution ensures an individual right against judicial tests of religious verity but offers no consistent way to tell when "religion" is being tested and when it is not. If we want to keep courts from engaging in the kind of religious inquiries the First Amendment prohibits, not having a working legal definition of "religion" certainly makes things more difficult. If we cannot reliably define what counts as "religious" and therefore off-limits from testing, we cannot reliably assure that other, similar beliefs are not religious and therefore safe to test.

Like in *Seeger*, *Welsh*, and *Africa*, this definitional gap can cause trouble in cases where a party claims to be religious in unfamiliar or unpopular terms. But what about the "hyper-religious" beliefs of Amir Kando? It is impossible to argue that Kando's stated beliefs are not "religious" if assessed solely by their thematic content. Before, during, and after his attempt to kill his neighbor, Kando spoke in terms any Christian would recognize. He said he heard the voices of God and Jesus.[110] He saw Satan as an eternal enemy.[111] He prayed obsessively and studied the Bible.[112] He expressed an internally consistent religious worldview of supernatural good versus evil.[113] No court need apply the loose *Seeger* formulation or the more discerning *Malnak/Africa* factors to decide if Amir Kando's beliefs are constitutionally "religious." In any other context, such as accommodation, Kando's religiousness would likely be unquestioned.

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108. *Thomas*, 450 U.S. at 714.

109. Koppelman, *supra* note 69, at 1121–22 (noting that the number of reported cases where "religion" is a contested term is tiny compared to other more common terms, such as "abuse of discretion."). *But see* Rabia Belt, *When God Demands Blood: Unusual Minds and the Troubled Juridical Ties of Religion, Madness, and Culpability*, 69 U. MIAMI L. REV. 755, 773 (2015) ("Supreme Court religious jurisprudence is the direct opposite of its jurisprudence on pornography: while the Court 'knows pornography when [it] sees it,' only individuals 'know' religion, while the Court does not.") (citing Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 986).

110. *Kando*, 921 N.E.2d at 1177.

111. *Id.* at 1170, 1176, 1185, 1186.

112. *Id.*at 1183, 1184.

113. *Id*. at 1184.

Yet, even assuming Kando's beliefs sound "religious" in the way courts typically hear the word, is there still some way to distinguish his particular beliefs from those the courts say are constitutionally protected? Perhaps some beliefs, religious though they may sound, are something else entirely: the symptoms of an insane mind.

B. The Elusive Line Between Religion and Delusion

Though commonly referred to as a "defense," insanity is an "excuse" to criminal prosecution and conviction because it is based on a "lack of subjective blameworthiness" and is "available even [if] the [defendant] satisfies the offense's elements."[114] In federal courts and every state but four, an insane defendant cannot be convicted if, at the time they committed the crime, they lacked cognitive, moral, and/or volitional capacity to control or understand the consequences of their actions.[115]

The test for insanity differs from state to state, but all versions descend to some extent from *M'Naghten's Case* from the British House of Lords.[116] The M'Naghten Rule, as it is known, allows a defendant to rebut a presumption of sanity by showing that "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."[117] English courts generally interpreted the phrase "defect of reason, from disease of the mind," to mean a defendant suffered from "one of the recognized forms of psychosis or major diseases of the mind," not from "minor forms of mental disorder" or physical ailments.[118]

Some states still adhere to the *M'Naghten* formulation while many others have modified it. In both *Clark v. Arizona* and *Kahler v. Kansas*, the Supreme Court identified four different versions of the insanity defense now used by American jurisdictions (as well as four jurisdictions that lack a specific insanity defense and instead allow defendants to use

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114. Russel Weaver, John Burkoff, & Catherine Hancock, CRIMINAL LAW: A CONTEMPORARY APPROACH 577 (4th ed. 2021).

115. Kahler v. Kansas, 589 U.S. 271, 274 (2020) (summarizing various approaches to the insanity defense).

116. The origins of the insanity defense and its evolution in United States jurisdictions has been detailed exhaustively. *E.g.*, Daniel Robinson, WILD BEASTS AND IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT (1996).

117. Daniel M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718, 722 (House of Lords 1843).

118. J. E. Hall Williams, *Defect of Reason from Disease of the Mind*, 20 THE MODERN LAW REVIEW 55, 55 (1957). Williams notes, however, that in at least one case, the predecessor to the current Crown Court had extended *M'Naghten*'s reasoning to defendants who suffer from "epilepsy and cerebral tumour." *Id.* at 56.

evidence of mental illness to rebut the state's proof of *mens rea*).[119] The different versions define "insanity" (or an equivalent term) as a form of incapacity: cognitive, moral, volitional, or some combination of those.[120] Regardless of which version applies, however, in every jurisdiction insanity can be proven by evidence of "mental illness," "mental disorder," "mental defect," or some other serious "cognitive impairment" present at the time the crime was committed.[121] In most jurisdictions, "[w]ithout proof of a mental disease or defect, a defendant will not be adjudged insane even though [they] may otherwise have lacked the mental capacity to have committed the crime."[122]

Such a mental illness, defect, etc. can be proven by evidence that the defendant suffers from delusions, especially religious delusions.[123] The legal concepts of delusion and insanity—the inability to tell right from wrong—are so intertwined that the court in *M'Naghten's Case* spoke of

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119. *See* Clark v. Arizona, 548 U.S. 735, 749 (2006) and *Kahler*, 589 U.S. at 274–76 ("The first strain asks about a defendant's 'cognitive capacity'—whether a mental illness left him 'unable to understand what he [was] doing' when he committed a crime. The second examines his 'moral capacity'—whether his illness rendered him 'unable to understand that his action [was] wrong.' . . . Yet a third 'building block[ ]' of state insanity tests, gaining popularity from the mid-19th century on, focuses on 'volitional incapacity'—whether a defendant's mental illness made him subject to 'irresistible[ ] impulse[s]' or otherwise unable to 'control[ ] his actions.' . . . And bringing up the rear . . . the 'product-of-mental-illness test' broadly considers whether the defendant's criminal act stemmed from a mental disease." (citations omitted)).

120. *Kahler*, 589 U.S. at 274–275.

121. *Id.* at 320–325 (collecting statutes). Generally, the burden of proof is on the defendant. *See* Johnston, *Moral Wrongfulness*, *supra* note 35, at 298 n. 3 (citing 1 Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 8.3(a) (3d ed. 2018)). Note, however, that a general state of mental illness is not enough to prove insanity in jurisdictions that apply the "partial delusion only" rule; to be excused, the mentally ill defendant must believe false things that, if true, would justify their wrongful actions. *Id.* at 330. *See also* Finger v. State, 27 P.3d 66, 85 (Nev. 2001) ("Persons suffering from a delusion that someone is shooting at them, so they shot back in self-defense are insane [but] [p]ersons who are paranoid and believe that the victim is going to get them some time in the future, so they hunt down the victim first, are not."); and Stevens v. State, 350 S.E.2d 21, 22 (Ga. 1986) ("To support a finding that a defendant is not guilty of a criminal act [due to insanity] it must appear: (1) that the defendant was laboring under a delusion; (2) that the criminal act was connected with the delusion under which the defendant was laboring; and (3) that the delusion was as to a fact which, if true, would have justified the act.").

122. 41 AM. JUR. *Proof of Facts* 2d 615 (1985, updated 2024); *but see*, *e.g.*, MD. CODE ANN., CRIM. PROC. § 3-109(a) (allowing defendants to escape conviction if incapacitated by "an intellectual disability" in addition to "a mental disorder.").

123. *E.g.*, People v. Serravo, 823 P.2d 128, 130 (Colo. 1992) ("[A] defendant may be judged legally insane where . . . the defendant's cognitive ability to distinguish right from wrong . . . has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act.").

them as one in the same.[124] This is consistent with research which suggests that "deluded individuals may have a diminished tendency to accurately evaluate external events, generate options for actions, engage in reflective decision-making, and reach reasoned decisions, especially when under stress and confronted by evidence that challenges preexisting beliefs."[125]

However, there is no uniform legal definition of "delusion," and various sources offer formulations that have evolved over time. Black's Law Dictionary, for example, has repeatedly changed its definitions of "delusion" and "insane delusion." In the Fourth Edition (1950s), delusion is defined as "an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely or . . . impossible under the circumstances of the individual," and "is never the result of reasoning and reflection."[126] In the Fifth Edition (late 1970s), a delusion became a "[f]alse, unshakeable belief which is (a) contrary to fact, (b) inappropriate to the person's education, intelligence or culture, and (c) adhered to in spite of tangible evidence that it is false."[127] The Fifth Edition also includes a separate entry for "insane delusion," which it defines as "a conception of a disordered mind which imagines facts to exist of which there is no evidence and belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis."[128] Fast forward to today; the current Twelfth

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124. *See generally* Daniel M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (House of Lords 1843) (repeatedly using the phrase "insane delusion."). By the time of *M'Naghten's Case*, the notion of the "insane delusion" as a legally incapacitating force had already arisen in English probate law. *See* Eunice Ross & Thomas Reed, *The Insane Delusion Rule*, WILL CONTESTS § 6:10 (2d ed. 2024) (citing the 1826 case of *Dew v. Clark*). Scholarship in religious insanity cases primarily focuses on one particular subset—the "deific decree" cases—where the defendant claims to have lacked the capacity to know right from wrong at the time of the crime because they were acting in furtherance of a delusional order from God. *See, e.g.*, Christopher Hawthorne, *"Deific Decree": The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755 (2000); Jeanine Girgenti, *Bridging the Gap Between Law & Psychology: The Deific Decree*, 3 RUTGERS J. L. & RELIGION 10 (2001); Morris & Haroun, *God Told Me to Kill*, *supra* note 32; Andrew Demko, *Abraham's Deific Decree: Problems With Insanity, Faith, and Knowing Right From Wrong*, 80 NOTRE DAME L. REV. 1961 (2005); Bella Feinstein, *Saving the Deific Decree Exception to the Insanity Defense in Illinois: How a Broad Interpretation of Religious Command May Cure Establishment Clause Concerns*, 46 J. MARSHALL L. REV. 561 (2013) [hereinafter Feinstein, *Saving the Deific Decree*]; Belt, *When God Demands Blood*, *supra* note 109; and Meyer, *Unreasonable Revelations*, *supra* note 32.

125. Johnston, *Moral Wrongfulness*, *supra* note 35, at 326.

126. *Delusion*, BLACK'S LAW DICTIONARY 516 (4th ed. 1957).

127. *Delusion*, BLACK'S LAW DICTIONARY 386 (5th ed. 1979).

128. *Insane Delusion*, BLACK'S LAW DICTIONARY, 714 (5th ed. 1979). *See also Insanity*, BLACK'S LAW DICTIONARY 930 (4th ed. 1957) (listing and defining "delusion" as an imprecise synonym of "insanity," because "[d]elusion is not the substance but the evidence of insanity.").

Edition has two simpler definitions. It first defines "delusional belief" as "a false, often bizarre belief that derives usually from a psychological disturbance."[129] It defines "insane delusion" as "[a]n irrational, persistent belief in an imaginary state of facts resulting in a lack of capacity to undertake acts of legal consequence, such as making a will."[130]

Common law definitions of "delusion" arose primarily in probate courts, where insanity has long been a basis for contesting a will.[131] Like Black's Fourth Edition, probate courts a century ago defined delusion as a fixed belief in something false that springs spontaneously from an ill mind, as opposed to an erroneous conclusion reached through defective reasoning.[132] In other words, a delusion is not a mere mistake, but a product of some underlying mental malfunction.

Criminal courts have followed suit. A prominent early example is *United States v. Guiteau*, in which a federal jury found Charles Guiteau guilty of the murder of President James Garfield.[133] In his instructions to the jury, Judge Watler Cox defined delusion as "a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of."[134] That general definition persists. In *People v. Mejia-Lenares*, for example, the California Court of Appeals more recently explained that "[a] person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality."[135]

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129. *Belief*, BLACK'S LAW DICTIONARY (12th ed. 2024).

130. *Insane Delusion*, BLACK'S LAW DICTIONARY (12th ed. 2024). *See also* Bryan Garner, GARNER'S DICTIONARY OF LEGAL USAGE 402, 425 (3d ed, 2011) (defining "delusion" three different ways: "a belief that results from disturbed thinking, as when a person imagines that he or she is being persecuted," "an idea or thing that deceives or misleads a person about some aspect of the real world," and a "dangerously wrong apprehension[].").

131. *See, e.g., In re* Millar's Estate, 207 P.2d 483, 487 (Kan. 1949); and *In re* Estate of Edwards, 433 So.2d 1349, 1351 (Fla. Dist. Ct. App. 1983).

132. *See, e.g.,* Coffey v. Miller, 169 S.W. 852, 854 (Ky. Ct. App. 1914) ("An insane delusion is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact; it is distinguishable from a belief which is founded upon prejudice or aversion, no matter how unreasonable or unfounded the prejudice or aversion may be. If it is the product of a reasoning mind, no matter how slight the evidence upon which it is based, it cannot be classed as an insane delusion."); *accord* Schweitzer v. Bean, 242 S.W. 63, 66 (Ark. 1922). *Cf.* Taylor v. McClintock, 112 S.W. 405, 412 (Ark. 1908) (distinguishing an insane delusion like that articulated in *Coffey* from a sane "systematized delusion" which is "based on a false premise, pursued by a logical process of reasoning to an insane conclusion.").

133. United States v. Guiteau, 10 F. 161 (D.D.C. 1882).

134. *Id.* at 166.

135. People v. Mejia-Lenares, 135 Cal.App.4th 1437, 1453–54 (Cal.App. 2006) (citing the definition of "delusion" from Webster's 3d New Int'l Dictionary 598 (1986)). Not all courts have defined delusion under the same mistakes of reason/products of mental illness dichotomy. *E.g.,* People v. Schmidt, 216 N.Y. 324, 330 (N.Y. 1915) (defining delusion

The distinction between false beliefs that spring from mental illness on one hand, and mistaken errors of reason on the other, is conceptually clear but only of great use in limited situations where a party's belief is so easily falsifiable that it defies the normal process of reason and would also be socially unacceptable. For example, a person who sincerely believed that the moon is made of barbeque spareribs would be delusional because astronauts have been to the moon and found it made of rock, no plausible mistake in reason would lead to such a contrary conclusion, and it sounds so absurd it is funny.[136]

But, for several reasons, most legal definitions of "delusion" lose their usefulness when applied to beliefs commonly considered "religious." Consider religious faith itself. First, among the faithful, religious beliefs are often "adhered to against all evidence and argument to the contrary" as Black's Fifth would say. Or, as Caleb Mason puts it, summarizing theologians like Paul Tillich and John Hick, "[a] belief is not properly a 'religious' belief if it is one which the believer is seriously prepared to jettison if evidence contradicts it."[137] According to Tillich, "the certitude of faith has not . . . the character of formal evidence. . . . It belongs to a dimension other than any theoretical judgment."[138]

Second, much religious belief cannot be proven "false." Consider the belief that inside the human body is an incorporeal soul that, after death, will ascend to a supernatural realm called Heaven.[139] Is this an insane delusion? Under most legal definitions, probably not because it cannot be disproven. Although no objective evidence for the religious idea of ensoulment has ever been found, it defies objective disproof, and thus cannot truly be considered "false."

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vaguely as "the result of a defect of reason" under since-repealed state law). Four states—Minnesota, Mississippi, New Jersey, and North Carolina—still use the "defect of reason" phrasing. *See* MINN. STAT. § 611.026; State v. Hinckley, 5 N.W.3d 680, 687 (Minn., 2024); Parker v. State, 273 So. 3d 695, 705–706 (Miss. 2019); N. J. STAT. ANN. § 2C:4–1; and State v. Thompson, 402 S. E. 2d 386, 390 (N.C. 1991). Pennsylvania courts have described delusion as an "impairment of the reasoning process." Commonwealth v. Young, 572 A.2d 1217, 1226, 524 Pa. 373, 392 (Pa., 1990).

136. *See* Saturday Night Live (Episode 426, NBC television broadcast May 17, 1997), https://www.nbc.com/saturday-night-live/video/space-the-infinite-frontier-dr-kent-wahler/3505886 [https://perma.cc/ZMM7-Y472].

137. Caleb E. Mason, *What is Truth? Setting the Bounds of Justiciability in Religiously-Inflected Fact Disputes*, 26 J.L. & RELIGION 91, 104 (2010–2011).

138. *Id.* at 107 (quoting PAUL TILLICH, THE DYNAMICS OF FAITH 34–35 (1958)).

139. *See Ecclesiastes* 12:7 ("and the dust returns to the earth as it was, and the breath returns to God who gave it."); and *2 Corinthians* 5:1 ("For we know that, if the earthly tent we live in is destroyed, we have a building from God, a house not made with hands, eternal in the heavens."). All Bible translations come from the New Revised Standard Version Updated Edition (NRSVue) unless otherwise noted.

Another reason a belief in the soul's eternal life in heaven is probably not legally delusional is because it is popular; a majority of Americans hold it.[140] Recall Black's Fifth Edition, which says a delusion is a belief "inappropriate to the person's . . . culture,"[141] or the Twelfth Edition, which refers to delusional beliefs as "bizarre,"[142] or Judge Cox, who said "every one" must recognize an idea as absurd for it to be delusional.[143] Definitions like this carve an exception for beliefs that are widely held (regardless of their falsifiability), giving "delusion" and "insanity" nebulous boundaries set by social acceptability.

Worse yet, social acceptability is a nebulous concept in itself. What if a defendant claims beliefs that seem absurd in their details but nevertheless incorporate commonly held religious themes? Amir Kando, for example, claimed to be in constant communication with God and Jesus and at constant war with Satan, who God told him to "lock up."[144] Though few people might believe that God speaks directly to Amir Kando, many people believe that God speaks directly to *them*.[145] And a majority of Americans still believe in the devil as God's supernatural nemesis.[146] Why would Kando's thematically-common religious statements not meet sanity's acceptability threshold?

This same problem arose in Charles Guiteau's case. To help the jury comprehend Guiteau's insanity defense and determine whether he should escape conviction, Judge Cox tried to distinguish mainstream Christian beliefs from the insane religious delusions Guiteau's counsel claimed he suffered from:

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

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140. *See Spirituality Among Americans*, PEW RSCH. CTR. (Dec. 7, 2023), https://www.pewresearch.org/religion/2023/12/07/spirituality-among-americans/ [perma.cc/MPV3-8BSD] (83% of American adults believe that "people have a soul or spirit in addition to their physical body.").

141. *Delusion*, BLACK'S LAW DICTIONARY 386 (5th ed. 1979).

142. *Belief*, BLACK'S LAW DICTIONARY (12th ed. 2024).

143. United States v. *Guiteau*, 10 F. 161, 166 (D.D.C. 1882).

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

145. *When Americans Say They Believe in God, What Do They Mean?*, PEW RSCH. CTR. (Apr. 25, 2018), https://www.pewresearch.org/religion/2018/04/25/when-americans-say-they-believe-in-god-what-do-they-mean/ [perma.cc/UU63-LWLP] ("[T]hree-quarters of American adults say they try to talk to God . . . , and about three-in-ten U.S. adults say God . . . talks back.").

146. Megan Brenan, *Belief in Five Spiritual Entities Edges Down to New Lows*, GALLUP (July 20, 2023), https://news.gallup.com/poll/508886/belief-five-spiritual-entities-edges-down-new-lows.aspx [perma.cc/HJ5W-W7X9] (poll shows 58% of Americans believe in "the devil").

> providential guidance and illumination in reference to both their inward thoughts and outward actions, and, in an undefined sense, are inspired to pursue a certain course of action; but this is a mere sane belief, whether well or ill founded. On the other hand, if you were satisfied that a man sincerely, though insanely, believed that, like Saul of Tarsus, on his way to Damascus, he had been smitten to the earth, had seen a great light shining around him, had heard a voice from heaven, warning and commanding him, and that thenceforth, in reversal of his whole previous moral bent and mental convictions, he had acted upon this supposed revelation, you would have before you a case of imaginary inspiration amounting to an insane delusion.[147]

This illustration offers little help. One problem is that Judge Cox, in his "struggles to limit religious conviction to modest irrationalities," inadvertently suggests that St. Paul should be considered legally insane.[148] Another problem is that Cox's distinction between "mere sane belief" and "imaginary inspiration amounting to an insane delusion" depends entirely on what "a great many Christians believe." What number of believers is great enough to turn an insane delusion into an article of acceptable faith? Judge Cox does not say, nor does any similar legal definition that makes social acceptability a relevant factor.

To this day, American courts lack reliable terms and standards to distinguish between sane religious beliefs and insane delusions dressed in religious terms. Scholars have tried to help, offering various suggestions on how to avoid conducting de facto verity tests in the absence of doctrinal clarity. These suggestions are similarly unsatisfying.

C. Scholarly Efforts in Line-Finding

Focusing primarily on "deific decree" cases, scholars have recognized the legal difficulty of objectively distinguishing sane religious beliefs from

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147. *Guiteau*, 10 F. at 177.

148. Meyer, *Unreasonable Revelations*, *supra* note 32, at 767. In a poem written shortly before his execution, Charles Guiteau more fully explained his spiritual motivations for shooting Garfield: "'Ye murdered Garfield, And ye must die.' 'Twas God's will, Not mine, That he should die. Thirty eight cases, In the Bible can be found, Where the Almighty Has directed The Removal of Rulers, who were going wrong. I executed, The Divine Command And Garfield did remove, To save my party, And my country, From the bitter fate of War." *See Charles Guiteau's Reasons for Assassinating President Garfield, 1882*, THE GILDER LEHMAN INSTITUTE OF AMERICAN HISTORY, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/charles-guiteaus-reasons-assassinating-president [https://perma.cc/5SLK-ET9M].

insane delusions, or even "the incompetent from the mildly irrational or idiosyncratic."[149] They have proposed a number of solutions or mitigations—some extreme and others more modest. None of the solutions, however, frame the problem in constitutional terms, and most would convict at least some defendants who suffer from severe mental illness, simply because they express themselves religiously.

One way for courts to draw a line between religion and insanity and avoid the verity test pitfall is to jettison any concern for social acceptability and more clearly say that a "delusion" can only be a fixed belief in something that is *false*, not a fixed belief in something that is *not falsifiable*. To say something is not falsifiable is to say that it cannot be objectively disproven; there is no known observable fact or condition that proves it is false.[150]

The line of falsifiability has long been used "to demarcate the boundary between science and metaphysics."[151] Metaphysics is the philosophical "study of what is outside objective experience," a realm similarly inhabited by religious belief.[152] By drawing the same line, perhaps, a court could avoid the thorny problem of declaring religious beliefs to be delusional. It could distinguish the underlying nature of the two concepts—delusional beliefs are "false" because they can be disproven, but religious beliefs cannot be "false" (and thus not delusional)

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149. Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 963 (1991) [hereinafter Saks, *Competency*].

150. *See Falsifiable*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/falsifiable [https://perma.cc/PLD6-8CUV]. ("Able to be proved to be false.").

151. D.H. Kaye, *On "Falsification" and "Falsifiability": The First Daubert Factor and the Philosophy of Science*, 45 JURIMETRICS J. 473, 478 (2005) (citing SUSAN HAACK, DEFENDING SCIENCE—WITHIN REASON: BETWEEN SCIENTISM AND CYNICISM 252 (2003)). The use of the terms "falsifiable" and "falsity," especially after their reference in the majority opinion of Daubert v. Merrell Down Pharmaceuticals, 509 U.S. 579 (1993) has triggered substantial scholarly discussion about their usefulness as a standard for expert testimony. *E.g.*, Barbara P. Billauer, *Admissibility of Scientific Evidence Under* Daubert*: The Fatal Flaws of "Falsifiability" and "Falsification,"* 22 B.U. J. SCI. & TECH. 21 (2016).

152. *Metaphysics*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/metaphysics [https://perma.cc/4KPA-LZ4C] (last visited May 31, 2024). Note however that "metaphysics" is not an exact synonym for "religion" or "theology" and there are significant philosophical differences between the terms that exceed the scope of the discussion here. For background, *see, e.g.*, Paul Tillich, *Relation of Metaphysics and Theology*, 10 THE REV. OF METAPHYSICS 57 (1956) ("Theology, unlike metaphysics, "leaves the philosophical road" because it "deals with concrete revelatory experience."); and Gordon Kaufman, *Metaphysics and Theology*, 28 CROSSCURRENTS 325 (1978) ("Metaphysics and theology come at questions of "ultimate issues and ultimate claims" from "sharply differing standpoints.").

because they cannot be disproven. Courts might say that delusions fly in the face of proof, but religious beliefs exist without concern for it.[153]

To see the difference, consider first a disprovable belief. Under normal circumstances an object dropped will not fall up, no matter how firmly someone believes that it will. Contrast that to a belief that is not disprovable, such as a belief that sometimes things fall down not because of gravity but because an invisible, incorporeal creature is pushing them down with its magical hand.[154] If a court drew the line between falsity and falsifiability, it would conclude that the first belief was delusional but the second was something else, which means a person firmly holding the first belief could be considered insane, but someone firmly holding the latter could not be. The latter person might be mistaken, but not delusional. And social acceptability would be irrelevant.

Along these lines, Grant Morris and Ansar Haroun suggest that a "proof of falsity" test for delusions would allow courts to dodge religious inquiries by focusing on the empirical falsifiability of a belief without concern for its social acceptability.[155] Under this test, they define a false, delusional belief to be one that "violates the laws of the natural and physical world."[156] For example, a person who believes themselves to be pregnant but is incapable of pregnancy, Morris and Haroun say, expresses a delusional belief, because the pregnancy would defy physical reality.[157] By contrast, a pregnant person who believes their pregnancy to be the result of "an immaculate conception with God" is *not* delusional—legally

153. *See* PAUL TILLICH, THE DYNAMICS OF FAITH 34–35 (1958). Meanwhile, psychological experiments suggest that the strength of religious beliefs increases as their falsifiability decreases. *See* Justin Friesen, Troy Campbell & Aaron Kay, *The Psychological Advantage of Unfalsifiability: The Appeal of Untestable Religious and Political Ideologies*, 108 J. PERS. SOC. PSYCHOL. 515, 521 (2015).

154. Carl Sagan offers a similar scenario where someone claims to have an "invisible, incorporeal, floating dragon who spits heatless fire," living in their garage to illustrate the difference between faith and the scientific process of disproof. *See* CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK, 160–179 (1996).

155. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1046.

156. *Id.* The DSM-5 has taken a similar approach, defining a "bizarre delusion" as a belief that "involves a phenomenon the person's culture would regard as physically impossible." DSM-5, *supra* note 33, at 819. Some courts have adopted a similar standard. *E.g.*, Jackman v. North, 75 N.E.2d 324, 330 (Ill. 1947) ("An insane delusion is a belief in something impossible in the nature of things.") (internal quotations and citations omitted). *But see* Saks, *Competency*, *supra* note 149, at 963 ("[T]he law's criteria for delusions fail to identify falsehoods with complete reliability, much less to single out falsehoods so patent that no capable person would believe them. Philosophers have long bemoaned our inability to prove the very existence of the physical world.").

157. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1046.

speaking—because "incontrovertible proof that the belief is false does not exist."[158]

This test is not the simple solution it may appear to be, however. First, determining what is objectively false is not always as easy as the not-really-pregnant example suggests. As Elyn Saks points out, evidence that something is true or false "simply may be inaccessible," making it impossible to know if a claimed belief violates the laws of reality.[159] Furthermore, the "laws of the natural and physical world" (as Morris and Haroun phrase it)[160] remain incompletely known and largely theorized, and "beliefs that appear impossible given our ordinary assumptions about the world may even indicate more intact reasoning ability than 'possible' beliefs that are flatly contradicted by the evidence."[161]

Second, what if the not-really-pregnant person phrases their imaginary pregnancy in religious terms? What if, when asked, the not-really-pregnant person testifies, "despite what you think, I know I am pregnant because God told me that I am."? Certainly, a simple ultrasound exam would reveal the belief to be objectively false, but should a jury find, as a matter of fact, or an appellate court declare, as a matter of law, that such a belief is false and therefore delusional? What would that mean for other, more common religious beliefs that similarly defy scientific objectivity? Or, from another angle, would it be better to deny the insanity excuse and convict a mentally ill person just to avoid any possible religious verity test?

Morris and Haroun acknowledge this problem with a good example: the Catholic sacrament of the Eucharist.[162] Catholics traditionally consider Christ's words in the Bible, "This is my body ... This is my blood" to mean that "the Eucharistic bread and wine are really his body and blood."[163]

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158. *Id.* For what it is worth, I disagree that this is a good example of an unfalsifiable claim because genetic testing could objectively reveal that the child was conceived through the standard biological process involving two existing human beings.

159. Saks, *Competency*, *supra* note 149, at 963.

160. Morris & Haroun, *Gold Told Me to Kill*, supra note 32, at 1046.

161. Saks, *Competency*, *supra* note 149 at 964.

162. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1047.

163. JOSEPH MARTOS, DOORS TO THE SACRED: A HISTORICAL INTRODUCTION TO SACRAMENTS IN THE CATHOLIC CHURCH, 233 (1981); *see also* CATECHISM OF THE CATHOLIC CHURCH 346 (2nd ed., 2019) ("In the most blessed sacrament of the Eucharist "the body and blood, together with the soul and divinity, of our Lord Jesus Christ and, therefore *the whole Christ is truly, really, and substantially* contained." (emphasis in the original) (quoting Council of Trent (1551)). Perhaps surprisingly, this doctrine is less accepted than it used to be; transubstantiation is now a minority belief among American Catholics. Only about one third believe that "during Catholic Mass, the bread and wine actually become the body and blood of Jesus." Gregory A. Smith, *Just One-Third of U.S. Catholics Agree With Their Church that Eucharist is Body, Blood of Christ*, PEW RESEARCH CENTER (Aug.

"And yet," say Morris and Haroun, if the wine and bread used in that ceremony were "subjected to a laboratory test," they would, "by the laws of physics and chemistry," still just be wine and bread.[164]

The Eucharist thus fails this "proof of falsity" test for delusion. Under that test, anyone who believes in the religious concept of transubstantiation would be legally delusional because the belief is scientifically falsifiable.[165] Wine is simply not blood, and bread is not flesh. But this example shows why social acceptability cannot be ignored. Would any court in the United States rule in such a way? Probably not if interested in maintaining its political legitimacy. And even if a court was not as religiously sympathetic as the current Supreme Court,[166] it would likely not want to offend or denounce other people who hold the same belief and raise reasonable concerns about the risk of heresy trials *Ballard* warned against.[167] Any "proof of falsity" test would likely have to be hollowed out by culturally sensitive and politically selective exceptions; it would have to consider social acceptability.

Recognizing these problems, Morris and Haroun suggest that *all* religious beliefs, even those that would fail the "falsity test" (because they can be objectively disproven), should receive "a specific exclusion" from legal scrutiny to assure "that they are not mischaracterized as delusions."[168] "If the [defendant's] belief at the time he or she acted is declared to be a religious belief and not a delusional belief," they argue, "then an insanity defense should not succeed."[169]

Either way, the problem of fairness remains. On one hand, simply drawing a hard line at falsifiability would allow some religious believers to dodge conviction but would leave defendants like Amir Kando with no excuse. None of Kando's beliefs were falsifiable, meaning none of them

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5, 2019), https://www.pewresearch.org/short-reads/2019/08/05/transubstantiation-eucharist-u-s-catholics/ [https://perma.cc/4BYS-QNYE].

164. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1047.

165. The author takes no position on the verity of transubstantiation or any other aspect of Catholic or Orthodox belief.

166. *See* Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 328 (finding that core members of the *Hobby Lobby* majority (author Justice Alito, Justice Thomas, and Chief Justice Roberts) vote in favor of religious claimants in 88% or more of cases).

167. *Cf.* Commonwealth v. Graves, 88 Va. Cir. 32, 37 (Cir. Ct. 2013) ("[W]hile it can be speculated that [defendant's] condition might have been a factor in his deciding to join this religious group, to decide that he is rendered incompetent because he has done so is to decide that all who have joined this group, and any other religion whose beliefs we deem bizarre, are thereby rendered incompetent to stand trial. This is a patently absurd conclusion, and a conclusion with many constitutional implications as well.").

168. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1047.

169. *Id.*

could be delusional under such a strict test. No one can objectively disprove his claims that Jesus spoke to him, or that he saw demons all around him, or that Jason Burley was, at least at the time Kando nearly stabbed him to death, Satan himself.[170] Nevertheless, it seems very likely that Kando did in fact suffer from an incapacitating mental illness. Would it be fair to excuse the traditionally pious (and psychiatrically sane) Catholic for their falsifiable belief in transubstantiation but not him?

Categorically excluding religious beliefs makes the problem worse for other reasons, too. First, *no* criminal defendant suffering what may be a severe and incapacitating mental illness could ever avoid conviction if they happen to express their symptoms in religious terms, falsifiable or not. No belief coded in religious language—whether about physical impossibilities like transubstantiation or about unprovable supernatural conflicts between Jesus and Satan—would qualify as delusional. Thus, the insanity excuse would be totally foreclosed to anyone whose delusions had any kind of religious content. Amir Kando and any other violent religious believer would go straight to jail, regardless of their mental health condition.

Second, a blanket exclusion would require courts to determine, as a threshold matter, whether a defendants' claimed beliefs are "religious," as opposed to delusional, taking us back to the fundamental diagnostic problem already discussed above. What is "religion?" Should every belief expressed in familiar religious terms be considered "religious" by default? What if a defendant's delusions are coded in religious terms that are far less familiar (i.e., far less Christian) than Kando's? Would an insanity excuse be available to them but not to Kando, even if they both suffered from schizophrenia?

Morris and Haroun generally dismiss such concerns because religious insanity excuses, specifically those based on "the deific decree doctrine," are "rarely claimed, and when claimed, rarely successful."[171] Even so, a blanket ban on such excuses would theoretically result in the trial and

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170. Or at least a demon possessing him. *See Mark* 5:1-20 and *Luke* 8:26–39 (Jesus exorcises demons from a possessed man who is known as the "Gerasene Demoniac").

171. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1008. More recent scholarship suggests that the "not guilty by reason of insanity" defense remains rare (used in about 1% of criminal cases) but has a success rate around 25%. *See* Kayla R. Sircy & Amanda ElBassiouny, *Exploring Differences in the Perceptions of the Not Guilty by Reason of Insanity Plea Based on the Defendant's Motive and Religious Affiliation*, 11 J. INTEGRATED SOC. SCI. J.SOC. .34, 36 (2021) [hereinafter Sircy, *Exploring Differences*]. *But see* Johnston, *Moral Wrongfulness*, *supra* note 35, at 300 (noting that forensic psychiatric opinions support insanity verdicts in less than fifteen percent of cases) (citing GARY B. MELTON ET AL, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 200 (4th ed. 2018)).

conviction of at least *some* defendants who truly suffer from serious mental illness.

To assuage this problem, Morris and Haroun, along with other scholars such as Christopher Slobogin, suggest that claims of religious insanity (specifically "deific decree" claims) could be repackaged as duress defenses or as rebuttals to the state's proof of *mens rea*.[172] However, the latter suggestion is not an option in states like Arizona, which forbid the use of psychiatric evidence of mental illness to rebut or negate the element of *mens rea*.[173] And in states that have taken the opposite path by abolishing affirmative insanity excuses in favor of the use of rebuttal defenses, like Kansas,[174] an argument that a defendant's delusional religious beliefs made it impossible for them to form the requisite intent would still subject them to the same de facto verity tests already discussed above.[175]

As perhaps a middle ground, some scholars suggest a more nuanced judicial inquiry in religious insanity cases. For example, Linda Ross Meyer, focusing narrowly on deific decrees, argues that "a person who sincerely claims that God has commanded them to do an act should not be treated as insane under any standard by virtue of that command in itself."[176] Instead, courts should look for evidence that a defendant has "knowledge of generally accepted principles of right and wrong, against a background of a rational, organized life." Only in cases where a defendant "suffers from general disorders of thought," should insanity excuses be available.[177] Following Meyer's suggestions, courts could take a more

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172. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1048; and Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1200 (2000).

173. *See* Clark v. Arizona, 548 U.S. 735 (2006) (upholding the Arizona rule as constitutional).

174. *See* Kahler v. Kansas, 589 U.S. 271 (2020) (upholding the Kansas rule, Kan. Stat. Ann. 21-5209, as constitutional). The Appendix to *Kahler* lists each state that allows affirmative insanity defenses (along with the District of Columbia and the federal government). *Id.* at 347–55. The four states that do not allow such a defense—Montana, Utah, Idaho, and Kansas—are omitted. Notably, Utah allows a "special mitigation" for certain murder convictions if the defendant was acting "under a delusion attributable to a mental condition" and their actions would have been legal and reasonable had the delusion been true. UTAH CODE ANN. § 76-5-205.5. Though the Kansas rule cuts out "moral incapacity" as a total defense or excuse, and thus conceivably limits specific religion-based insanity defenses, such as the "deific decree" allowed under the traditional M'Naghten rule, a defendant could still show they lacked the requisite mental capacity to commit the crime because they suffer from delusional thinking. *See Kahler*, 589 U.S. at 284.

175. *See also* Meyer, *Unreasonable Revelations*, *supra* note 32, at 829 (making a similar point).

176. *Id.*

177. *Id.*

holistic view of the defendant's life and mental condition instead of focusing solely on specific delusions or deific decrees, conceivably basing a decision on some other, non-religious evidence of mental illness (and thus avoiding a verity test).

This approach seems reasonable but would only work in cases where the otherwise religious defendant expresses their "general disorders of thought" in non-religious ways. Consider again Amir Kando. All of his "disorders of thought" were religious in nature. The court in his case did not focus solely on the fact that he believed God and Jesus wanted him to "lock up Satan for 1000 years" (a deific decree) but also on the fact that he prayed obsessively, often heard the voice of God, and persistently obsessed about religious topics.[178] Meyer's approach to deific decree cases would not solve the verity test problem in cases, like Kando's, where a defendant's insanity expressed itself solely in religious terms.[179] A court would still have no choice but to declare certain religious beliefs false in order to find someone like Kando delusional and therefore insane.

As courts and legal scholars have struggled to find a clear line between religion and insane delusion to protect the former and excuse the latter, they have turned to psychiatrists for help.

D. Psychiatric Efforts in Line-Finding

A clear line between sane religion and insane delusion evades the logic of the law. To find a line elsewhere, courts, like in *Kando* and other cases, turn to expert psychiatrists who explain in clinical terms why a defendant's beliefs are symptoms of disorienting mental illness.[180] This way, one might argue, those clinical experts, though their scientific, objective methods, are the ones who decide that certain beliefs are false, not the courts, thus avoiding a constitutionally prohibited verity test.

But are these expert diagnoses reliable? Not particularly. Diagnosing mental illness, especially those pathologies marked by delusional religious beliefs, is a tricky process, as psychiatrists themselves acknowledge. And this is particularly true when it comes to religion. If courts are to avoid conducting constitutionally prohibited religious verity tests, their reliance on psychiatric diagnoses is bad for three key reasons. First, psychiatry has

178. People v. Kando, 921 N.E.2d 1166, 1183 (Ill.App. Ct. 2009).

179. *C.f.* People v. Mahaffey, 651 N.E.2d 1055, 1063–64 (Ill. 1995) (affirming lower court finding of fitness to stand trial because, according to state psychiatric experts, "the defendant was simply preoccupied with religion, [not] laboring under a mental delusion.").

180. Johnston, *Moral Wrongfulness*, *supra* note 35, at 300. *See also* 18 U.S.C. §§ 4242(a), 4247(b) (requiring courts to order a "psychiatric or psychological examination" that "shall be conducted by a licensed or certified psychiatrist or psychologist" if the defendant gives notice that they "intend to rely on the defense of insanity.").

a fundamental conflict with religion and a long, rocky history of open hostility to it. Second, a clear biological cause of delusional mental illness continues to elude scientific detection. And third, the lack of a clear biological marker means clinicians have only behavioral symptoms and relativistic social norms to guide them. Human behavior, often shaped by social expectations and viewed through them, is tough to interpret objectively. The combination of all these factors makes the psychiatric process for distinguishing between religion and delusion unreliable, and thus the law does not, by relying on it, avoid the verity test problem.

At a very basic, conceptual level, there is an irreconcilable divide between psychiatry and psychology on one side and religion on the other. Psychiatry "is the branch of medicine focused on the diagnosis, treatment and prevention of mental, emotional and behavioral disorders."[181] Psychology is "the science of mind and behavior."[182] As medical and scientific pursuits, psychiatry and psychology seek rational, evidence-based explanations for human thoughts and expression.

Religion, on the other hand, does not rely on the scientific method to discover truth. Religious thoughts and expression can be rational but not necessarily so.[183] And faith, by its nature, requires no objective proof and is often insulated from it.[184] In the Bible for example, the book of Hebrews defines faith as "the assurance of things hoped for, the conviction of things not seen."[185] Even if, as some Christian theologians argue, "faith entails

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181. *What is Psychiatry?*, AMERICAN PSYCHIATRIC ASSOCIATION, https://www.psychiatry.org/patients-families/what-is-psychiatry [https://perma.cc/7MX4-RN8J].

182. *Psychology*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/psychology [https://perma.cc/DXY7-YF9A].

183. James Swindal, *Faith: Historical Perspectives*, INTERNET ENCYCL. OF PHIL., https://iep.utm.edu/faith-re/ [perma.cc/BAW2-JFRC] ("Religious faith is of two kinds: evidence-sensitive and evidence-insensitive. The former views faith as closely coordinated with demonstrable truths; the latter more strictly as an act of the will of the religious believer alone.").

184. *See Faith*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/faith [https://perma.cc/9UWU-2GXX**]** ("[A] firm belief in something for which there is no proof."). *See also* BRIAN LEITER, WHY TOLERATE RELIGION? 34 (2013) ("[R]eligious beliefs, in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification, the ones we employ in both commons sense and in science."); STANLEY FISH, THE TROUBLE WITH PRINCIPLE 268 (1999) ("For [the skeptic], falsification follows from the absence of any rational account of how the purported phenomena . . . could have occurred; for [the believer] the absence of a rational explanation is just the point, one that, far from challenging the faith, confirms it."); DONALD BLOESCH, FAITH AND ITS COUNTERFEITS 65 (1981) ("[F]aith means . . . believing even when our senses testify otherwise. . . ."); and Tillich, *supra* note 153, at 34–35.

185. *Hebrews* 11:1. Other translations differ in wording but not meaningfully. *See Hebrews* 11:1 (King James) ("Now faith is the substance of things hoped for, the evidence of things not seen.") and *Hebrews* 11:1 (New International) ("Now faith is confidence in what we hope for and assurance about what we do not see."). The rest of Hebrews 11

knowledge and truth in some important sense,"[186] it does not reveal the same knowledge and truth in the same way as the scientific method. After all, it was not religion's "ultimate concern" with "the totality which is [a person's] true being"[187] that revealed the atomic structure of matter.[188] On the other hand, science has proven itself incapable of revealing the existence and nature of God.[189] In a very general sense, "science concerns the natural world, whereas religion concerns the supernatural world and its relationship to the natural."[190] Because the supernatural world cannot be objectively measured by the scientific method, any alternative method that claims or seeks to understand it, such as religion, stands apart.[191]

Psychiatry, not religion, finds an ally in the law for the same conceptual reasons. "[L]aw is committed to reason and evidence as its metaphysics of truth," much like any discipline considered to be "scientific," including psychiatry.[192] But if one takes a positivist or realist or critical perspective, law is not science, because it merely *reflects* social and political choices far more than it *reveals* objective truth.[193] At any rate,

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presents a long list of biblical characters (Enoch, Noah, Abraham, Moses, Isaac, etc.) who acted on faith alone and were rewarded for their trust in God. *See Hebrews* 11:2–40.

186. Walter Lowe, *Christ and Salvation*, *in* CHRISTIAN THEOLOGY: AN INTRODUCTION TO ITS TRADITIONS AND TASKS 222, 236 (Peter C. Hodges & Robert H. King, eds., 1985). *See also* THOMAS MERTON, THE ASCENT TO TRUTH 29 (2002) ("Reason is in fact the path to faith, and faith takes over once reason can say no more.").

187. PAUL TILLICH, SYSTEMATIC THEOLOGY VOL. I 14 (1951).

188. *See generally* BERNARD PULLMAN, THE ATOM IN THE HISTORY OF HUMAN THOUGHT 198–203 (1998) (tracing the scientific development of early atomic theory by John Dalton and others).

189. See KARL BARTH, EVANGELICAL THEOLOGY: AN INTRODUCTION 6 (1963) ("The separation and distinction of th[e] one true God from all the others . . . cannot be reduplicated by any human science. . . .").

190. *Religion and Science*, STAN. ENCYCL. OF PHIL. (Sept. 3, 2022), https://plato.stanford.edu/entries/religion-science/ [perma.cc/VFH3-PP9V].

191. Admittedly, these are sweeping generalizations about the differences between religious faith and scientific reason that have been exhaustively, but not conclusively, debated for centuries. For a more thorough discussion, *see, e.g.*, FAITH AND REASON (Paul Helm, ed., 1999); and HOLMES ROLSTON III, SCIENCE AND RELIGION: A CRITICAL SURVEY (1987).

192. Meyer, *Unreasonable Revelations*, *supra* note 32, at 765.

193. *See, e.g.*, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, *in* PHILOSOPHY OF LAW AND LEGAL THEORY 76 (Dennis Patterson, ed., 2003) ("If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules."); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 4 COLUM. L. REV. 431, 464 (1930) ("[T]he complex phenomena which are lumped under the term 'law' have been too broadly treated in the past, and that a realistic understanding, possible only in terms of observable behavior, is again possible only in terms of study of the way in

in its search for truth through reason and evidence, the law must choose which evidence it treats as reliable and which evidence it discards as unhelpful. If the law chooses psychiatry as reliable evidence of the truth of what we call "insanity," whatever truth law reflects through psychiatry will be whatever truth psychiatry is capable of revealing. The problem is that psychiatry, as a science, is not very good at revealing the truth of insanity.

Despite extensive study for decades, psychological pathologies like schizophrenia and delusional disorder still have no clear neurological cause.[194] There is no known "schizophrenia gene" or other biological source for these mental pathologies.[195] Further, "attempts to locate the origin of religious delusions in the brain have not revealed findings that are consistent" with the brain activity observed among those with psychotic symptoms and "the neuroanatomical origin of religious delusions remains uncertain."[196] Though antipsychotic drugs can minimize the symptoms of certain mental disorders like schizophrenia, these drugs are not considered to be "cures" because the drugs do not affect the underlying cause, whatever it might be, assuming there is one.[197] This was

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which persons and institutions are organized in our society. . . ."); and Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1517 (1991) (The critical assertion that "law is politics" means "that when one understands the moral, epistemological, and empirical assumptions embedded in any particular legal claim, one will see that those assumptions operate in the particular setting in which the legal claim is made to advance the interests of some identifiable political grouping."). Some translations of the Bible also describe law as a "reflection." *E.g.*, *Hebrews* 10:1 (International Standard) ("For the Law, being only a reflection of the blessings to come and not their substance, can never make perfect those who come near by the same sacrifices repeatedly offered year after year.").

194. Deborah Greenwald, *Psychotic Disorders with Emphasis on Schizophrenia*, *in* PERSONALITY AND PSYCHOPATHOLOGY: FEMINIST REAPPRAISALS 144, 151 (Laura S. Brown & Mary Ballou eds., 1992) ("[T]he core of the disorder, whether defined by its identifying characteristic(s) or by its causal agent(s)—whatever their nature—is not conclusively identified.").

195. Richard Bentall & David Pilgrim, *There are No 'Schizophrenia Genes': Here's Why*, THE CONVERSATION (Apr. 8, 2016), https://theconversation.com/there-are-no-schizophrenia-genes-heres-why-57294 [perma.cc/YS9F-W5NM].

196. Harold G. Koenig, *Religion, Spirituality and Psychotic Disorders*, 34 REV. PSIQ. CLIN. 40, 42 (2007) [hereinafter Koenig, *Religion, Spirituality and Psychotic Disorders*].

197. Peggy Hayes, *Rational Prescribing Guidelines for Antipsychotic Drugs*, 6 FAM. & CMTY. HEALTH 1, 2 (1983) ("Although antipsychotic drugs do not offer a cure, their effectiveness in ameliorating psychotic symptoms is well established."). *But see, e.g.*, David Cohen, *Research on the Drug Treatment of Schizophrenia: A Critical Appraisal and Implications For Social Work Education*, 38 J. OF SOC. WORK EDUC. 217, 227–28 (2002) ("[S]ubstantial evidence exists to suggest the quality of research on the psychopharmacological treatment of schizophrenia has been uniformly poor, or is conducted in such a way as to make results of drug trials appear in the best light possible for the tested drugs. . . .").

certainly true for Amir Kando; he continued to hold the same religious beliefs whether medicated or not.[198]

Some psychologists, such as J. Ernest Keen, have urged psychiatrists to abandon the "medicalized approach" to treating schizophrenia as a biological pathology and replace it with a multi-faceted approach that recognizes the effect of external, social stimuli.[199] Keen suggests that schizophrenia should be viewed as a "spiritual struggle" in "response (however ineffectual) to the moral, social, and spiritual world one finds oneself in."[200] Similarly, psychiatrist Loren Mosher developed a treatment program called Soteria as an unconventional approach that does not rely on antipsychotic medication and instead focuses on intense social integration.[201] Other psychologists have gone so far as to argue that the term "schizophrenia"—conceived of as a stand-alone "chronic brain disease"—should be abandoned entirely because it lacks a clear cerebral cause and fails to accurately describe a wide spectrum of social behaviors associated with the condition.[202]

Because there is no clear biological cause or marker, professionals can only diagnose psychological disorders like schizophrenia by clinically observing behavioral symptoms such as delusional beliefs.[203] "Delusions are a cardinal feature of psychotic illness."[204] But what are "delusions," clinically speaking, and how do psychiatrists distinguish them from non-delusional beliefs?

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198. People v. Kando, 921 N.E.2d 1166, 1192 (Ill.App. Ct. 2009). *See also* People v. Sword, 29 Cal. App. 4th 614, 632 (1994) (denial of outpatient care for insane defendant affirmed because he "continues to suffer from psychotic thinking of a religious nature. Despite his taking medication, it is likely that his present and future behavior will be determined by the excessive and psychotic religiosity in his thought processes, and these have clearly proven to be dangerous to the health and safety of others.").

199. J. Ernest Keen, *Schizophrenia and Institutional Violence*, 13 J. L. & RELIGION 57, 58 (1996–1998).

200. *Id.*

201. Tim Calton et al., *A Systematic Review of the Soteria Paradigm for the Treatment of People Diagnosed with Schizophrenia*, 34 SCHIZOPHRENIA BULL. 181 (2008) (citing, *e.g.*, L. R. Mosher & A. Z. Menn, *Soteria: An Alternative to Hospitalisation for Schizophrenics*, 21 CURR. PSYCHIATRIC THER. 189 (1975)).

202. Simon McCarthy-Jones, *The Concept of Schizophrenia is Coming to an End—Here's Why*, THE CONVERSATION (Aug. 24, 2017) https://theconversation.com/the-concept-of-schizophrenia-is-coming-to-an-end-heres-why-82775#:~:text=The%20concept%20of%20schizophrenia%20is%20dying.,passing%20will%20not%20be%20mourned. [https://perma.cc/P79A-MLW7] (citing the work of psychologists Jim van Os and Sir Robin Murray).

203. DSM-5, *supra* note 33, at 99.

204. Robel Iyassu et al., *Psychological Characteristics of Religious Delusions*, 49 SOCSOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1051, 1051 (2014) [hereinafter Iyassu et al., *Psychological Characteristics*]

Psychiatric definitions and diagnostic methods are, much like those in the law, imprecise and culturally relative, and have been subject to extensive internal and external criticism for decades. For diagnostic guidance, psychiatrists generally rely on the Diagnostic and Statistical Manual of Mental Health Disorders, otherwise known as the DSM.[205] The DSM, which is now in its fifth edition, is published by the American Psychological Association "and authored by task forces of mental health professionals."[206] First published in 1952, "the DSM was created . . . to provide reliable diagnostic categories, ensuring clinicians are discussing the same pathology, and to provide researchers with operational definitions of disorders."[207] Its influence on the profession of psychiatry has been great; "the DSM pervasively influences the enactment of clinical work."[208] The DSM has also been important to the law and is regularly cited by courts in a variety of contexts, especially criminal law, with some courts going so far as to incorporate DSM criteria into statutory requirements.[209] The DSM is routinely cited by experts and courts to decide questions of competency and insanity.[210]

Over the course of several revisions of the DSM, the APA has modified the definitions of terms like "delusion" to be more culturally sensitive, at the expense of clarity and precision. For this reason, twenty years ago Grant Morris and Ansar Haroun critiqued psychiatrists' (and courts') reliance on the DSM-IV as a diagnostic guide to delusions and related mental disorders.[211] The problem with the DSM-IV, they argued,

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205. Michael Halpin, *The DSM and Professional Practice: Research, Clinical, and Institutional Perspectives*, 57 J. OF HEALTH & SOC. BEHAV. 153, 154 (2016) [hereinafter Halpin, *The DSM*].

206. *Id.*

207. *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-1) (1st ed. 1952). *See also* DSM-5, *supra* note 33, at xii. ("DSM is intended to serve as a practical, functional, and flexible guide for organizing information that can aid in the accurate diagnosis and treatment of mental disorders.").

208. Halpin, *The DSM*, *supra* note 205, at 159.

209. *E.g.*, *In re* Detention of Hayes, 40 N.E.3d 374, 381 (Ill. App. 2015) (holding psychological report was sufficient under state sexual offender statute because it comported with DSM-5 standards); *but see In re* N.R., 539 P.3d 417, 430 (Ca. 2023) (declining to incorporate DSM definition of "substance abuse" into juvenile court jurisdiction statute).

210. *E.g.*, Lundgren v. Mitchell, 440 F.3d 754, 788-791 (Merritt, J. dissenting) (discussing the use of the DSM to diagnose religious delusions for the purpose of insanity excuses). *See also* Dominic Sisti & Rebecca Johnson, *Revision and Representation: The Controversial Case of the DSM-5*, 29 PUB. AFFS. Q. 76, 79, 96-97 (2015) (noting that changes made to the DSM over time are legally important because they "will have an impact on the liberties of individuals by providing justification for decisions related to coercive treatments, assertive outpatient treatment, preventative commitment, or the termination of parental rights.").

211. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1022–35.

was that it provided vague, contradictory, and relativistic definitions of "delusion" unsatisfactory even within the psychiatric profession.[212]

For example, the DSM-IV's Glossary of Technical Terms defined a delusion much like courts and legal dictionaries have, as "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary."[213] Delusional beliefs are not just false but also "not . . . ordinarily accepted by other members of the person's culture or subculture (e.g., it is not an article of religious faith)."[214] The exception of "articles of religious faith" from the definition of delusion is especially noteworthy because "[r]eligious themes are common across delusion categories and types," with as many as "two-thirds of all delusions reflecting religious content."[215]

Under the DSM, it is a lack of social acceptance, not any kind of inherent feature of the belief itself, that transforms a sane article of religious faith into an insane delusion. "To be classified as a religious delusion, the belief must be idiosyncratic, rather than accepted within a particular culture or subculture."[216] "Devout religious beliefs may be viewed by some as delusional," but "the important differentiating factor is that the beliefs of those who are not psychotic are *culturally sanctioned*."[217]

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212. *Id.* Expert psychiatric witnesses also often rely on versions of the Minnesota Multiphasic Personal Inventory Test (MMPI) to diagnose disorders like schizophrenia. See, e.g., State v. Roque, 141 P.3d 368, 380–81 (Ariz.,2006) (MMPI-2); and Fisher v. Johnson, 508 N.W.2d 352, 353–55 (N.D.,1993) (MMPI). Morris and Haroun have criticized the MMPI on similar grounds as the DSM, arguing that it misleadingly claims objectivity despite being scored "entirely on the patient's self-report." *See* Ansar M. Haroun & Grant H. Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. OF CONT. L. ISSUES 227, 237–38 (1999).

213. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 765 (4th ed. 1994) [hereinafter DSM-IV].

214. *Id.*

215. Iyassu et al., *Psychological Characteristics*, *supra* note 204, at 1051. Psychiatrist and anthropologist Simon Dein identifies three types of religious delusions: "persecutory (often including the Devil), grandiose (involving messianic beliefs), and belittlement (including beliefs about having committed unforgiveable sins)." Simon Dein, *Working with Patients with Religious Belief*, 10 ADVANCES IN PSYCHIATRIC TREATMENT 287, 290 (2004) [hereinafter Dein, *Working with Patients*].

216. Iyassu et al., *Psychological Characteristics*, *supra* note 204, at 1051 (citing the World Health Organization's ICD-10 diagnostic manual).

217. Harold Koenig, Michael McCullough & David Larson, HANDBOOK OF RELIGION AND HEALTH 155 (2001) (emphasis in the original). *See also* I. Mitrev & M.Y. Mantarkov, *Non-traditional Religion, Hyper-Religiosity and Psychopathology: The Story of Ivan from Bulgaria*, *in* INTERNATIONAL PERSPECTIVES IN VALUES-BASED MENTAL HEALTH PRACTICE 237 (Stoyanov et. al., eds, 2021), https://link.springer.com/chapter/10.1007/978-3-030-

Critics of the DSM-IV's relativism noted the difficulties of differentiating false beliefs among the mentally ill from false beliefs that are common among the general population, not to mention separating pathological fanaticism from "non-psychotic fanatics of one sort or another."[218] At a fundamental level, the basic diagnostic definition of "delusion" explicitly excluded religious beliefs that are widely acceptable in the patient's surrounding culture, so that common religious beliefs would not count, no matter how objectively implausible. This is problematic for two reasons: first, it tells clinicians to consider as sane even objectively absurd beliefs as long as they are otherwise commonly held, and second, it tells clinicians to be suspicious of uncommon beliefs even if they are closer to objective reality. Moreover, where does one draw the line for acceptability or commonality in a pluralistic, religiously free society like the United States, where religious minorities are common and a great diversity of religious beliefs thrive? Hindus, for example, make up less than one percent of the American population[219]—does their minority status alone make their religious beliefs more likely to be diagnosed as culturally implausible and therefore bizarrely delusional?[220]

Yes. To illustrate the problem, Morris and Haroun point to a study done on psychiatric clinicians to see how they would distinguish between delusional and non-delusional religious beliefs.[221] When confronted with three different vignettes reflecting conventional, less conventional, and fully unconventional religious beliefs, the practitioners rated the conventional religious beliefs "significantly less pathological" than the less conventional and unconventional beliefs.[222] The unconventional beliefs were rated to be pathological far more often. "The essential determining factor in the ratings was not the dimensions of religious

47852-0 [https://perma.cc/HW8M-HPEM] ("In order to define a religious idea as delusional, it should exceed what is within the expected beliefs for an individual's background, including culture and education.").

218. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1027–28 (quoting Anthony S. David, *On the Impossibility of Defining Delusions*, 6 PHIL. PSYCHIATRY & PSYCHOL. 17, 17–18 (1999); and Theo C. Manschreck, *Pathogenesis of Delusions*, 18 PSYCHIATRIC CLINICS N. AM. 213, 213 (1995)).

219. *Measuring Religion in Pew Research Center's American Trends Panel*, PEW RSCH. CTR., (Jan. 14, 2021), https://www.pewresearch.org/religion/2021/01/14/measuring-religion-in-pew-research-centers-american-trends-panel/ [perma.cc/H6XZ-LTRT].

220. Globally, there are more than 1.1 billion Hindus. Jonathan Evans, *7 Facts About Hindus Around the World*, PEW RSCH. CTR. (Oct. 26, 2022), https://www.pewresearch.org/short-reads/2022/10/26/7-facts-about-hindus-around-the-world/ [perma.cc/YD2R-2ZZZ].

221. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1038–39 (citing Susan Sanderson et al., *Authentic Religious Experience or Insanity?*, 55 J. CLINICAL PSYCH. 607, 610, 612, 614 (1999)).

222. *Id.*

experience, but the degree to which religious experience deviated from conventional [i.e. popular] religious beliefs and practices."[223] The DSM-IV thus enabled clinicians to consider uncommon or culturally "unacceptable" religious beliefs to be delusional more often than their common and acceptable counterparts.[224]

Morris and Haroun also saw another, more fundamental diagnostic problem for psychiatry: beliefs could be declared delusional despite the clinician having no way to prove them "false" in the first place.[225] For example, a psychiatrist cannot disprove a patient's fixed belief that aliens from other planets regularly appear to them and give them instructions, but might nevertheless declare that belief to be delusional because it certainly *seems* false, based on the clinician's own perception of reality, the fact that most people do not share such a belief, and the patient's inability to provide objective evidence for its truth. But in psychiatric diagnosis, the burden of (dis)proof falls on the clinician,[226] and it can be an impossible burden to carry.

Worse yet, clinicians might be *predisposed* to declare certain religious beliefs delusional due to professional biases against faith in general. "Most scientifically trained psychiatrists and other mental health professionals believe in a scientific, secular worldview."[227] And psychiatry has had, from its origins, a distrust and disrespect for religion, a history that one scholar generously describes as "rocky."[228] Freud and other formative

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223. *Id.* Laypeople show similar favorable bias toward conventional religions, at least when the motivation for a crime is religious. *See* Monica Miller, Jordan Clark & Maurico Alvarez, *Exploring the Boundaries of Societally Acceptable Bias Expression Toward Muslims and Atheist Defendants in Four Mock-Juror Experiments*, 59 SOC. SCI. J. 439, 467 (In mock-juror study, "Muslim defendants face prejudice [from American Christian jurors] when they commit religion-motivated crimes."); and Sircy, *Exploring Differences*, *supra* note 171, at 43–44 (2021) ("[Mock-jurors] believed Christian defendants whose motives were incited by the devil's voice more to be [not guilty by reason of insanity] than when their motive was unidentified voices.").

224. *See* Allison L. Allmon, *Religion and the DSM: From Pathology to Possibilities*, 52 J. RELIG. HEALTH 538, 544 (2013) [hereinafter Allmon, *Religion and the DSM*] ("The DSM-IV is a cultural document based on western assumptions that may result in culture-bound syndromes and be less applicable for non-western clients.").

225. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1027–28 (citing Manfred Spitzer, *On Defining Delusions*, 31 COMPREHENSIVE PSYCHIATRY 377, 379 (1990)). Nevertheless, Morris and Haroun's proposed "proof of falsity" test seems to assume that courts can find objective truth more reliably. *See supra* Part III-C.

226. A diagnosis is a positive assertion or claim. *Diagnosis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/diagnosis [perma.cc/7BBG-C9ZK] (last visited June 29, 2024) ("[A] statement or conclusion from" an "analysis of the cause or nature of a condition, situation, or problem.").

227. Koenig, *Religion, Spirituality and Psychotic Disorders*, *supra* note 196, at 40.

228. Allmon, *Religion and the DSM*, *supra* note 224, at 539. *See also* Kevin Newman, *Sounding the Mind: On the Discriminatory Administration of Psychotropics Against the*

psychiatrists considered religious belief inherently delusional and associated it with "hysteria and neurosis," beginning a "deep divide that would separate religion from mental health care for the next century."[229] Though open hostility has steadily diminished over time, today "psychiatrists tend to ignore religion" and "it is rarely part of standard psychiatric assessment and treatment."[230] And while "[r]eligion and/or spirituality has evolved in the DSM from pathology to a cultural consideration," some psychiatrists are still urging their colleagues to be more respectful toward the religious.[231]

Other problems with the DSM-IV included its relativistic distinction between "bizarre" and "nonbizarre" delusions and their usage in diagnoses of disorders like schizophrenia and delusional disorder.[232] The DSM-IV defined bizarre delusions—which alone could be enough for a diagnosis of schizophrenia without any other symptoms—as beliefs that "involve[] a phenomenon that the person's culture would regard as totally implausible" and "do not derive from ordinary life experiences."[233] Nonbizarre delusions, on the other hand, involve "situations that occur in real life, such as being followed, poisoned, infected, loved at a distance, or deceived by a spouse or lover, or having a disease."[234]

So under which category of bizarreness would religious delusions fall? Morris and Haroun, relying heavily on criticism by psychiatrist Robert

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Will of the Institutionalized, 22 S. CAL. REV. L. & SOC'L JUST. 265, 279 (2013) ("[P]sychiatric diagnoses that may seem merely to reflect the good intentions and best understanding of the medical establishment are embedded with the unconscious drive of society to purify or expel patterns and modes of thought that do not comport with the larger goals of the society.").

229. Raphael M. Bonelli & Harold G. Koenig, *Mental Disorders, Religion and Spirituality 1990 to 2010: A Systemic Evidence-Based Review*, 52 J. RELIG. HEALTH 657, 658 (2013) (citing Harold G. Koenig, *Research on Religion, Spirituality, and Mental Health: A Review*, 54 CAN. J. PSYCHIATRY 283 (2009)). In some religious circles, the feeling is mutual. *See, e.g.*, Jon McArthur, COUNSELING: HOW TO COUNSEL BIBLICALLY *179 (2005), http://hcf-india.org/wp-content/uploads/2021/01/Counselling-How-to-counsel-Biblically-John-MacArthur.pdf [perma.cc/HSC7-FHVT] ("The concept of the mind being sick is a theory with no scientific proof."); and Jay Adams, COMPETENT TO COUNSEL 40 (1970) (Rejecting the psychological concept of "mental illness" in favor of a Biblical approach to treating behavioral deviance.).

230. Simon Dein, *Against the Stream: Religion and Mental Health—The Case for the Inclusion of Religion and Spirituality into Psychiatric Care*, 42 BJPSYCH BULL. 127, 127 (2018) (citing D. Rosmarin, S. Pirutinsky & K. Pargament, *A Brief Measure of Core Religious Beliefs for Use in Psychiatric Settings*, 41 INT'L J. PSYCHIATRY MED. 253 (2011)).

231. Allmon, *Religion and the DSM*, *supra* note 224, at 538; *see also* Dein, *Working with Patients*, *supra* note 210, at 287.

232. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1030–32.

233. DSM-IV, *supra* note 213, at 275, app. C. at 765.

234. *Id.* at 301.

Spitzer, argued that the definitions provided by the DSM-IV would count religious delusions as both bizarre and nonbizarre at the same time.[235] Many religious beliefs involve "situations that occur in real life" (like being watched from a distance)[236] while others do "not derive from ordinary life experiences" (like heavenly wars between supernatural beings).[237] Still, others may transcend the two categories, such as a belief in physical communication with a supernatural God.[238] The DSM-IV offered clinicians no guidance on how to differentiate them beyond a vague sense of their social acceptability, despite warnings from critics in response to the DSM-III's same weaknesses.[239]

In 2013, the American Psychiatric Association published the similarly controversial DSM-5.[240] It contains no notable change to the previous definition of delusion. Like before, the current DSM defines delusion as "a false belief based on incorrect inference about external reality that is firmly held despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary."[241] And again, like the DSM-IV, the DSM-5 further states that a delusional belief "is not ordinarily accepted by other members of the person's culture or subculture (i.e., it is not an article of religious faith)."[242]

However, the DSM-5 did make significant changes to its assessment of schizophrenia such as "the elimination of the special attribution of

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235. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1030–32.

236. *See Psalm* 33:13–15 ("The Lord looks down from heaven, he sees all humankind; from where he sits enthroned he watches all the inhabitants of the earth, he who fashions the hearts of them all, and observes all their deeds.").

237. *See Revelation* 12:7–8 ("And war broke out in heaven; Michael and his angels fought against the dragon. The dragon and his angels fought back, but they were defeated, and there was no longer any place for them in heaven.").

238. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1038–39 (citing Robert L. Spitzer et al., *The Reliability of Three Definitions of Bizarre Delusions*, 150 AM. J. PSYCHIATRY 880, 881 (1993)). *See also*, 1 *Samuel* 3:10 ("Now the Lord came and stood there, calling as before, 'Samuel! Samuel!' And Samuel said, 'Speak, for your servant is listening.'").

239. Morris & Haroun, *God Told Me to Kill*, *supra* note 32, at 1032 (citing Michael Flaum et al., *The Reliability of "Bizarre" Delusions*, 32 COMPREHENSIVE PSYCHIATRY 59, 59 (1991)).

240. DSM-5, *supra* note 33. For a summary of the controversy, *see* Martyn D. Pickersgill, *Debating DSM-5: Diagnosis and the Sociology of Critique*, 40 J. MED. ETHICS 521, 521–23 (2014). The APA has subsequently published a "text revision" update to the DSM-5 but includes no changes relevant to this article. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5-TR) 819 (5th ed. 2022).

241. DSM-5, *supra* note 33, at 819. The only difference between the two definitions is the word "held," which is replaced with "sustained" in the DSM-IV. DSM-IV, *supra* note 213, at 765.

242. DSM-5, *supra* note 33, at 819.

bizarre delusions," meaning bizarre delusions alone are insufficient for a diagnosis.[243] A diagnosis of schizophrenia requires the presence of either bizarre or nonbizarre delusions and at least one other so-called "Criterion A symptom," such as hallucinations, disorganized speech, or grossly disorganized behavior.[244] Further, a diagnosis of delusional disorder "no longer has the requirement that the delusions must be nonbizarre."[245] And, notably, the DSM-5 changed the definition of "bizarre delusion" from something a person's culture would consider "totally implausible" to something it would regard as "physically impossible."[246] These changes have made schizophrenia-related diagnoses somewhat more exclusive (allowing fewer people to meet the criteria), against the general trend among other disorders in the DSM-5, which have become more inclusive.[247]

Despite these changes, the DSM-5 definition and explanations of what "delusion" means to psychiatrists do not seem to resolve the problems of previous editions. What counts as a "delusion" is still heavily reliant on cultural norms and expectations, and diagnosis still relies heavily on the subjective assumptions and conclusions of clinicians.[248] The DSM-5 still offers no guidance on how to determine whether a belief is "false," what makes an inference "incorrect," and exactly how many people count as "almost everyone" when deciding whether a belief is "ordinarily accepted." Its new definition of "bizarre delusion" tries to incorporate more objectivity (belief in something "physically impossible" versus "totally implausible") but still makes it dependent on an undefined threshold of cultural acceptance; a belief in something physically impossible is not delusional if others believe it too.

Beyond the DSM, psychiatrists have tried to distinguish religious belief from psychiatric symptoms of disease by using diagnostic practices

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243. *Id.* at 810. This is a return to the original DSM-III standard, which gave no added weight to bizarre delusions. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) app. B at 356 (3d ed. 1980).

244. DSM-5, *supra* note 33, at 99.

245. *Id.* at 810.

246. *Id.* at 819.

247. Guy A. Boysen & Ashley Ebersole, *Expansion of the Concept of Mental Disorder in the DSM-5*, 35 J. MIND & BEHAV. 232–35 (2014).

248. *See* Jonathan Gornall, *DSM-5: A Fatal Diagnosis?*, 346 BRIT. MED. J. 18, 19 (2013) (quoting National Institute of Mental Health director Thomas Insel's criticism that, unlike physical ailments which are diagnosed through "biomarkers," "the DSM diagnoses are based on a consensus about clusters of clinical symptoms, not any objective laboratory measure."); and Simon Planzer, *DSM-5: What's New?*, 4 EUR. J. RISK REGULATION, 531, 533 (2013) ("DSM-5 continues to rely exclusively on qualitative diagnostic criteria" and does not even include a quantitative criterion for substance abuse, such as "a certain number of alcoholic drinks . . . per week.").

even more esoteric. Andrew Sims, for example, says "the key for making the distinction between belief and symptom lies in the use of phenomenology to explore subjective experience."[249] By that, he means psychiatrists should diagnose their patients "using the method of empathy" and try to "observe and understand the psychological event or phenomenon so that the observer can know for himself what the patient's experience must feel like."[250] The psychiatrist should focus only on the form of the patient's beliefs, not their content, because "only the study of the form can reveal whether a symptom is present or not" and the content merely "arises from the social and cultural background."[251] Sims offers the example of a person who believes "he was at war with the Evil One," and that "devils were talking about him, taunting him and commenting upon his thinking."[252] The form of this belief, says Sims, "reveals the psychiatric diagnosis; in this case the form was a delusion, and also an auditory hallucination."[253] But how can the psychiatrist conclude such a belief has the form of a delusion without first deciding that the content of that belief is false? Easy, says Sims, "[d]elusions will be unacceptable to [the patient's] fellow believers."[254] Again, a culturally relativistic diagnosis turning on social acceptance.

Ultimately, because there is no objective way to clinically diagnose delusional mental illnesses, psychiatry cannot reliably distinguish "sane," constitutionally protected religious beliefs from beliefs that may seem religious but are really "a byproduct of . . . mental disorders."[255] Thus any legal determination of religious delusion that relies on psychiatric diagnosis cannot avoid being a de facto religious verity test. A court is still left declaring, based on a subjective appraisal by someone (in this case a psychiatrist rather than a lay witness, jury, or judge), that a defendant is insane because they are delusional and delusional because their beliefs, expressed in religious terms, are false.

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249. Andrew C.P. Sims, *Symptoms and Beliefs*, 112 J. ROYAL SOC'Y OF HEALTH 42, 43 (1992).

250. *Id.*

251. *Id.* at 44.

252. *Id.* at 43.

253. *Id.* at 43–44.

254. *Id.* at 44.

255. Feinstein, *Saving the Deific Decree*, *supra* note 124, at 577. Feinstein suggests there is a clear divide between voluntary, sane religious beliefs and beliefs that are symptoms of mental illness but cites only a brief summary from WebMD that says "some mental illnesses have been linked to abnormal functioning of nerve cell circuits or pathways that connect particular brain regions" without specifying which illnesses. *Causes of Mental Illness*, WEBMD, https://www.webmd.com/mental-health/mental-health-causes-mental-illness [perma.cc/P2RJ-PZEB] (last visited Sept. 28, 2024).

For what it is worth, these problems have not gone unnoticed by courts. Even though they routinely rely on psychiatric experts in cases of insanity, some courts have acknowledged the experts' unreliability for the purposes of lawmaking and judicial decision-making. For example, in *Jones v. United States*, the Supreme Court held that a criminal defendant "acquitted by reason of insanity" could be involuntarily committed longer than he would have been sentenced to prison for committing the crime.[256] Attacking the statute under which he was being hospitalized, the defendant argued that Congress had failed to base its assumption of the "predictive value of prior dangerous acts" on "empirical evidence."[257] Justice Lewis Powell, writing for the majority, wrote that "[w]e do not agree . . . that Congress' power to legislate in this area depends on research conducted by the psychiatric community," especially because of "the uncertainty of diagnosis in this field and the tentativeness of professional judgment."[258]

Over two decades later, Justice David Souter, writing for the majority in *Clark v. Arizona*, went further, quoting *Jones* and other cases to give three reasons why Arizona was justified in "channeling the consideration of [mental disease and capacity] evidence to the insanity [excuse]" that placed the burden of proof on the defendant, not the state: "the controversial character of some categories of mental disease, . . . the potential of mental-disease evidence to mislead, and . . . the danger of according greater certainty to capacity evidence than experts claim for it."[259]

Explaining each reason more fully, Justice Souter wrote, "[t]o begin with, the diagnosis may mask vigorous debate within the profession about the very contours of the mental disease itself."[260] "[T]he consequence of this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct."[261] Second, psychiatric experts could mislead jurors, "through the power of this kind of evidence," to conclude that a defendant lacks capacity that

256. Jones v. United States, 463 U.S. 354, 370 (1983).

257. *Id.* at 370 n. 13.

258. *Id.* (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)). *But see* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.").

259. Clark v. Arizona, 548 U.S. 735, 774 (2006).

260. *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS (DSM-4-TR) xxxiii (4th ed. 2000)). *See also* Ake v. Oklahoma, 470 U.S. 68, 81 (1985) ("[P]sychiatrists disagree widely and frequently on what constitutes mental illness, on [proper] diagnos[es, and] on cure and treatment.").

261. *Clark*, 548 U.S. at 775.

their mental illness does not necessarily deprive them of, especially in cases where experts disagree, like in *Clark* itself.[262] Finally, Justice Souter explained, "capacity evidence consists of judgment . . . fraught with multiple perils" because "a defendant's state of mind at the crucial moment can be elusive no matter how conscientious the enquiry, and the law's categories that set the terms of the capacity judgment are not the categories of psychology that govern the expert's professional thinking."[263] Bridging the gap between law and science, "requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility."[264]

Legal scholars have long warned courts not to reflexively defer to psychiatrists. Jerome Hall in 1956 argued that, "because Anglo-American criminal law embodies and safeguards important values, it ought to be obvious that not all the discoveries of psychiatry are grounds for modification of the criminal law."[265] Similarly, Stephen Morse has argued that, "[m]ental health science cannot set the legal standard for [insanity] because setting the standard is not a scientific issue. [It] is a moral and social standard."[266] That moral standard, as Justice Kagan similarly noted in *Kahler*,[267] turns on the question of culpability, a purely legal judgment supposedly responsive to popular will through legislation or jury verdict.[268] Ultimately, "[n]o matter how the test for insanity is phrased, a psychiatrist or psychologist is no more qualified than any other person to

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262. *Id.* at 775–76 ("[T]hey agree that Clark was schizophrenic, but they come to opposite conclusions on whether the mental disease in his particular case left him bereft of cognitive or moral capacity.").

263. *Id.* at 776–77. *See also* Medina v. California, 505 U.S. 437, 451 (1992) ("Our cases recognize that '[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations,' because '[p]sychiatric diagnosis ... is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician.'") (quoting Addington v. Texas, 441 U.S. 418, 430 (1978)).

264. *Clark*, 548 U.S. at 777 (citing P. Giannelli & E. Imwinkelried, SCIENTIFIC EVIDENCE § 9–3(B), p. 286 (1986) ("[N]o matter how the test for insanity is phrased, a psychiatrist or psychologist is no more qualified than any other person to give an opinion about whether a particular defendant's mental condition satisfies the legal test for insanity")).

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

266. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV., 777, 787 (1985) [hereinafter Morse, *Excusing the Crazy*].

267. *See* Kahler v. Kansas, 589 U.S. 271, 274 (2020) (noting four "insanity defense" standards in American law "for when to absolve mentally ill defendants of criminal culpability.").

268. Morse, *Excusing the Crazy*, *supra* note 265, at 789.

give an opinion about whether a particular defendant's mental condition satisfies the legal test for insanity."[269]

Moore's point about moral and social standards is crucial. If insanity is a question of culpability, and culpability is a question of morality, then insanity is a question of morality as well, and a court's conclusion that a defendant is insane comes down to the question of whether that person *should be considered* insane, not whether they actually *are*, in any scientific or objective sense. If the defendant presents delusions in the form of religious beliefs, then their legal insanity depends on the social and moral conclusion that those religious beliefs are so wrong that they should excuse the defendant of responsibility. The result may not be the same as a heresy trial, but the process is much alike. The fact finder must decide whether the defendant's religious beliefs are false based on their unorthodoxy.

For all of these reasons, the law cannot objectively tell religion from not-religion, nor can it objectively tell religion from insane delusion. Neither can psychiatrists, on whom the law often relies. When criminal defendants claim insanity because they suffer from religious delusions, courts are left conducting de facto religious verity tests, declaring insane defendants who are delusional because they believe religious things that judges, juries, or psychiatrists assume to be false.

But the First Amendment prohibits such religious verity tests, de facto or otherwise. Should they be allowed regardless? Perhaps, if there is a way to ensure the constitutional rights and autonomy of mentally ill defendants are nevertheless respected. The next Part offers such a way: waiver. Just like any other defendant right, courts should consider the right against religious verity tests waivable, thus allowing the government and the defendant to flexibly pursue their respective interests as long as the defendant makes a knowing and intelligent choice to subject themselves to an otherwise unconstitutional procedure.

IV. WAIVING THE RIGHT AGAINST RELIGIOUS VERITY TESTS

Just because insanity excuses based on religious delusions (deific decree or otherwise) trigger de facto, unconstitutional religious verity tests, does this mean courts must cease entertaining such excuses entirely, potentially trying and convicting defendants who lack the capacity to understand what they did was wrong?

No. First, a defendant's right against religious verity tests—like all individual rights—does not have to be considered absolute, so it can be

269. *Clark*, 548 U.S. at 778 (quoting P. Giannelli & E. Imwinkelried, SCIENTIFIC EVIDENCE § 9–3(B), 286 (1986)).

balanced against competing (or perhaps complimentary) government and individual interests. Second, criminal defendants have the power to waive all of their adversarial constitutional rights, including the right to a jury and the right to counsel. They may therefore also waive their right against religious verity tests. First, this Part will discuss the competing interests for and against allowing religiously insane defendants to be subjected to de facto religious verity tests and why waiver is an effective way to balance them. Then the Part will propose a process for criminal courts to follow to ensure that the defendant has knowingly and voluntarily waived their right against such tests before they pursue a religious insanity excuse.

A. Competing Interests and the Need for Waiver

Religious insanity excuses implicate two competing governmental interests. The first is the government's interest in trying, convicting, and punishing criminals to maintain order and public safety. The second is a competing interest in not trying, convicting, and punishing people who have been incapacitated by mental illness and thus are not criminally culpable. "A long-standing tenet of common law is that the state cannot indict, try, sentence or execute any individual if [they are] known to be insane."[270] The insanity excuse "is among the oldest of the defenses known to criminal law."[271] Even though there is no *constitutional* right to any particular formulation of the insanity excuse,[272] "for hundreds of years jurists and judges have recognized insanity . . . as relieving responsibility for a crime."[273] In *Kahler v. Kansas*, majority author Justice Elena Kagan noted that, under English common law (as explained by Coke and later Blackstone), "lunatics" and "mad men" could not be convicted: "the act and wrong . . . shall not be imputed to them."[274] Post-colonial American law followed suit. By 1828, "insanity [was] an excuse for the commission of every crime."[275] And the federal government and every state but four have retained some version of a standalone insanity excuse, with the

270. Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 630 (1995).

271. Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 CASE WESTERN L. REV. 19, 23 (2007) [hereinafter Rozelle, *Fear and Loathing*].

272. *Clark*, 548 U.S. at 752 ("[N]o particular formulation [of the insanity excuse] has evolved into a baseline for due process, and . . . the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.").

273. Kahler v. Kansas, 589 U.S. 271, 283 (2020).

274. *Id.* at 284.

275. *Id.*

remainder allowing evidence of mental illness to rebut the state's evidence of *mens rea*.[276]

But why? There is, according to Stephen Morse, a "basic moral issue" underlying excuses like insanity that raises the question "whether it is just to hold responsible and punish a person who was extremely crazy at the time of the offense."[277] Holding those who suffer incapacitating mental illness responsible for their crimes is fundamentally unfair.[278] More pragmatically, Susan Rozelle argues that convicting the insane serves neither the retributive nor utilitarian purposes of punishment: the insane defendant is neither deserving of society's wrath nor able to learn any lessons from it.[279] And convicting the insane would break what Mirah McLeod calls American law's foundational "commitment to punishing offenders no more than they deserve."[280]

Religious insanity excuses also implicate two individual interests: religious autonomy and bodily autonomy. First, individuals have an interest in not having their religious beliefs put to verity tests. As already explained at length in Part II, everyone has a First Amendment right "to maintain theories of life and of death and of the hereafter that are rank heresy" to others, and must prove to no one "the verity of [their] religious views."[281] Why? As Richard Garnett puts it, "the right to religious freedom is . . . a fundamental human right, grounded on the 'inherent dignity . . . of all members of the human family.'"[282] Whether protective of dignity, or autonomy, or just the political preferences of the framers,[283] American law assumes religious freedoms of belief and exercise are good for their own sake.

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276. *Id*. at 276 n. 3.

277. Morse, *Excusing the Crazy*, *supra* note 265, at 780. In a footnote, Morse explains that he uses the potentially offensive term "crazy" because he believes "it is the best generic term to describe the type of behavior that leads to a diagnosis or label of mental disorder." *Id*. at 780, n. 4.

278. *Id*. at 781.

279. Rozelle, *Fear and Loathing*, *supra* note 270, at 23. Rozelle notes that the utilitarian theories of incapacitation and rehabilitation are still served by civil commitment of the insane defendant, however. *Id*. at 25.

280. Mirah Smith McLeod, *Preventing Undeserved Punishment*, 99 NOTRE DAME L. REV. 493, 505 (2023).

281. United States v. Ballard, 322 U.S. 78, 86–87 (1944).

282. Garnett, *Religious Accommodations*, *supra* note 55, at 497 (quoting the Universal Declaration of Human Rights, G.A. RES. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl., art. 18 (Dec. 10, 1948)).

283. *See* Schwartzman, *Legal Proxy*, *supra* note 56, at 1086 ("Perhaps it made sense during the drafting of the Constitution and the Bill of Rights, at a time when claims of conscience were understood mainly in religious terms," to single out religion the way the framers did.).

On the other hand, individuals have an interest in not being criminally tried or punished—no interest is greater than the freedom from physical restraint or injury.[284] The common law tort of battery, for example, arises from the "inviolability of the person."[285] This concept of inviolability underlies all of the core "defendant's rights" Amendments, none more explicitly than the Fifth, which prohibits deprivations of "life" and "liberty" without due process.[286] Regardless of the fact that "[b]odily autonomy," so to speak, "has not been recognized as a fundamental right," "references to bodily autonomy . . . feature heavily in the Supreme Court's reasoning for protecting many rights."[287]

Religious insanity excuses implicate bodily autonomy in other ways. Defendants who plead insanity but are ultimately found guilty often serve longer sentences than those tried on similar charges who do not assert insanity.[288] Meanwhile, defendants successfully found not guilty by reason of insanity rarely walk out of court free. For example, those found insane in federal court "shall be committed to a suitable facility" indefinitely, with release only allowed if the defendant "has recovered from his mental disease or defect to such an extent that [their] release, or [their] conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another."[289] This requires certification from the director of the facility, who has considerable power over the committed defendant.[290] Though only a minority of states follow the federal mandatory commitment model,[291] many states nevertheless anticipate at least a brief detention even if the insane defendant is ultimately released.[292]

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284. *See* Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens, J., dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty.").

285. Union Pac. R. Co. v. Botsford, 141 U.S. 250, 252 (1891).

286. U.S. CONST. amend V.

287. Miri Trauner, *My Body, Whose Choice?*, 89 BROOKLYN L. REV. 643, 645 (2024). *See, e.g.*, Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 29 (1905) ("There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government. . . ."); and Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self. . .").

288. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case West. L. Rev. 599, 649 (1990).

289. 18 USC § 4243(f).

290. *Id.*

291. Wayne R. LaFave, *Commitment*, 1 SUBSTANTIVE CRIMINAL LAW § 8.4(a) (3d ed. 2023).

292. *See, e.g.*, CONN. GEN. STAT. § 17a-582 (2022) ("When any person charged with an offense is found not guilty by reason of mental disease or defect . . . the court shall order such acquittee committed to the custody of the Commissioner of Mental Health and Addiction Services who shall cause such acquittee to be confined . . . for an examination

As the Supreme Court held in *Jones*, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[293] The government therefore must have "a constitutionally adequate purpose for the confinement."[294] For defendants who have successfully pleaded insanity, commitment often has an "adequate purpose" because an insanity excuse in many jurisdictions is a pseudo guilty plea—the defendant, though insane and legally innocent, usually stipulates to having committed the criminal act.[295] As the Court said in *Jones*, "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness" even though they are not legally guilty.[296] That indication of dangerousness justifies, at least as far as courts are concerned, the insane defendant's subsequent involuntary treatment.

A defendant who escapes conviction due to insanity also subjects themselves to the multi-dimensional social stigma imposed on the mentally ill.[297] For example, defendants declared legally insane likely face "labeling, stereotyping, separation, status loss, and discrimination."[298] And the stigma is not just imposed by others. Those deemed mentally ill often internalize stereotypes about their condition, creating self-stigma that "may be a major threat to recovery."[299]

With so many political, personal, and constitutional interests at stake, a balance should be sought. Outright forbidding religious insanity excuses, as some scholars have suggested,[300] would unnecessarily elevate the

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to determine his mental condition."); and KY. REV. STAT. § 504.030 (West 1982) ("When a defendant is found not guilty by reason of insanity, the court shall conduct an involuntary hospitalization proceeding" that requires detention for up to ten days regardless of outcome.).

293. Jones v. United States, 463 U.S. 354, 361 (1983) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)). *See also* Vitek v. Jones, 445 U.S. 480, 491 (1980) ("We have recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty. . . .") (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

294. *Jones*, 463 U.S. at 361 (quoting O'Connor v. Donaldson, 422 U.S. 563, 574 (1975)).

295. *See* Miller v. Angliker, 848 F.2d 1312, 1319 (2nd Cir. 1988) ("A plea of not guilty by reason of insanity resembles the plea of guilty . . . as it waives important trial rights belonging to the defendant, including his right to argue that he did not perform the acts with which he is charged. . . .").

296. *Jones*, 463 U.S. at 364.

297. Brian K. Ahmedani, *Mental Health Stigma: Society, Individuals, and the Profession*, 8 J. OF SOC. WORK VALUES and ETHICS 4-1, 4-1 (2011).

298. *Id*. at 4–6.

299. Nathalie Oexle et al., *Self-Stigma as a Barrier to Recovery: A Longitudinal Study*, 268 EUR. ARCH. PSYCHIATRY CLIN. NEUROSCi. 209 (2018).

300. *See supra* Part IIIC.

individual's interest in religious autonomy over their interest in avoiding conviction. It would similarly elevate the government's interest in convicting criminal actors over its interest in sparing those who, due to mental illness, should not be considered culpable. Instead, courts should allow religious insanity excuses but require defendants to knowingly, voluntarily, and explicitly waive their right against religious verity tests.

"Where there is a right, there is (usually) a way to waive it."[301] However, the Supreme Court has never articulated a criminal waiver test specific to First Amendment rights, perhaps because those rights were intended "to guarantee the preservation of an effective system of free expression," not "guarantee a fair trial."[302] No states nor the federal government currently criminalize heresy, and religious belief and expression are not usually implicated in standard criminal procedure. Nevertheless, *Ballard* declares that "[people] may not be put to the proof of their religious doctrines or beliefs."[303] Because "the First Amendment precludes such a course,"[304] a defendant should have to waive this right before being subjected to any criminal procedure that functions like a religious verity test, even if unintentionally, and even if at the defendant's own behest.

Granted, the right against religious verity tests differs from other defendant rights because the former restricts judicial action while the others primarily restrict executive action; it is the police who search without warrants and coerce confessions, and it is the prosecutors who move to admit these fruits of the poisonous tree into evidence. However, it is a court (through a jury or a fact-finding judge), at the behest of the

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301. Note, *Constitutional Waivers by States and Criminal Defendants*, 134 HARV. L. REV. 2552, 2552 (2021). Even the Eighth Amendment right to be free from cruel and unusual punishments may be waived, such as by requesting a specific method of execution. *See* Stewart v. LaGrand, 526 U.S. 115, 119 (1999) ("By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it.").

302. Brittany Scott, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, HASTINGS CONST. L.Q. 451, 464 (2019). However, the Supreme Court has held that public employees waive their First Amendment free speech rights—at least for "expressions made pursuant to [their] duties"—simply by accepting employment from the government and has not cast that doctrine in the same terms as criminal waiver like in *Miranda* or *Zerbst*. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

303. United States v. Ballard, 322 U.S. 78, 86 (1944). In *Ballard*, defendants were charged with mail fraud for soliciting donations to their religious cause, the I Am Movement. Fraud claims are the area of criminal law where religious beliefs have historically been most implicated. *See generally* Bruce J. Casino, *"I Know it When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (1987); and Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. STATE U. L. REV. 325 (1990).

304. *Ballard*, 322 U.S. at 86.

defendant themselves, that would declare a defendant's religious beliefs to be untrue. These distinctions are of no consequence, however; the Supreme Court has long held that constitutional rights restrict *any* unjustified government action, be it executive, legislative, *or* judicial, even when prompted by a private action.[305]

Waiver for religious insanity excuses would be similar to the waiver of other rights in the criminal justice system. It would allow criminal defendants to gain some power against the government; they would cede some constitutional protection in exchange for some practical or personal benefit.[306] Similar to plea bargaining, where a defendant waives their right to a trial in exchange for a lesser charge or lighter punishment, a waiver of the right against religious verity tests could help the defendant avoid conviction entirely.

So, both the government and the defendant have a lot at stake when the defendant pleads a religious insanity excuse. The best way to balance these competing interests is to require defendants to formally waive their right against religious verity tests before the court may resolve the question of their sanity. Waiver gives the defendant an opportunity to assure the court that they know that their rights are at stake and what consequences may lie ahead should their religious insanity excuse be successful.

The only question left to answer is *how* a defendant would waive their right against religious verity tests in order to pursue a religious insanity excuse.

B. The Waiver Colloquy

Like when a defendant waives any other adversarial right, it should be the responsibility of the trial court to secure, on the record, the religious-insanity-claiming defendant's knowing and voluntary waiver of their right against religious verity tests. The trial judge should take "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure [they] have a full understanding of what the plea

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305. *See* Shelley v. Kraemer, 334 U.S. 1, 14, 20 (1948) ("[T]he [Fourteenth] Amendment makes void state action of every kind which is inconsistent with the guaranties therein contained," whether "by its legislative, its executive, or its judicial authorities," even if prompted "initially by the terms of a private agreement.") (internal quotations omitted).

306. *See* Mazzone, *Waiver Paradox*, *supra* note 77, at 831–43 (thoroughly discussing the individual benefits of criminal waivers). *See also* Faretta v. California, 422 U.S. 806, 834 (1975) ("[I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense.").

connotes and of its consequence."[307] That canvassing should "leave[] a record adequate for any review that may be later sought."[308]

Procedurally, an insanity excuse takes time. For example, in the federal courts, "[a] defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion" so that the parties may seek mental examinations and disclose their results to each other and the court.[309] The defendant can be committed for as long as forty-five days while they await examination by a psychiatrist or psychologist, or even longer if the director of the facility shows good cause for the additional time.[310]

Eventually, once the court has received them, the trial judge should review any psychiatric examination reports to ascertain whether the defendant's symptoms, if any, contain religious content or themes. As explained in Part III.A, above, this may be difficult as a definitional matter, but the court could also seek briefing from the parties on the question.[311] The defendant could then stipulate that their insanity excuse has a religious component. Then, in a pretrial hearing in which the defendant is present,[312] the trial judge should engage them and their counsel in an extended colloquy, much like the kind conducted when a defendant enters a guilty plea.[313]

First, the judge should ask the defendant to identify themselves and to confirm that they can understand the judge's questions. Second, the judge should ascertain whether the defendant is inebriated by drugs or alcohol or feeling the effects of any medications they may be taking. Third, the judge should ask whether the defendant is being treated by medical or

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307. Boykin v. Alabama, 395 U.S. 238, 244 (1969).

308. *Id.*

309. FED. R. CRIM. P. 12.2(a), (c); 18 U.S.C. § 4242.

310. 18 U.S.C. § 4247(b).

311. In cases like Amir Kando's, however, the religious nature of a defendant's delusions may be readily apparent. *See* People v. Kando, 921 N.E.2d 1166, 1170 (2009) (Psychiatric report showed defendant's obsession with Jesus, Satan, and other Christian beliefs).

312. A trial court may order a pretrial hearing related to the mental condition of a defendant seeking an insanity excuse under 18 U.S.C. § 4247(d).

313. *See* FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court."). Many courts use uniform questionnaires or scripts when defendants plead guilty. *See, e.g.*, United States District Court for the Western District of North Carolina, Entry and Acceptance of Guilty Plea (Rule 11 Proceeding), available at https://www.justice.gov/criminal/criminal-fraud/file/937266/dl?inline [perma.cc/UMW3-8DJN]; United States District Court for the Eastern District of Michigan, *Questions for Taking a Guilty Plea*, available at https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf [https://perma.cc/T478-X7N6].

mental health professionals—a question especially relevant to defendants who claim insanity excuses—and whether such treatment interferes with their ability to understand the judge's questions or the procedure at hand. As a final preliminary question, the trial judge should ask defendant's counsel to confirm that the defendant is alert and competent, to the best of their knowledge.[314]

If satisfied that the defendant is presently competent, the trial judge should confirm first with defense counsel, and then with the defendant, that the defendant intends to plead insanity to the crimes for which they have been charged. The defendant should be asked whether they understand what that means, both as it applies to the question of guilt and to the certainty that, if successful, the defendant will be involuntarily committed to receive mental health treatment for an indefinite amount of time.

The trial judge should then ask defense counsel whether, in their opinion, the defendant's insanity plea implicates delusions, hallucinations, or any other symptom of mental illness that has themes or content either the defendant or a reasonable person would perceive to be religious. Next, the trial judge should ask the defendant to describe the nature of their delusions or hallucinations at the time the crime was committed. Did those delusions have religious themes or content? If so, does the defendant still hold those or similar religious beliefs (even if now otherwise competent to stand trial)?

If the trial judge is satisfied that the defendant's alleged mental illness involves delusions of a religious nature, the judge should then apprise the defendant of their right against religious verity tests. "Under the First Amendment, you have the right to religious freedom. Normally, that means that no judge or jury may test the truth or falsity of any religious beliefs you hold. Do you understand that?" The trial judge should then ask if the defendant has discussed this right with their counsel, and whether the defendant understands that this right is implicated by the religious nature of their insanity plea. This part is crucial. The defendant must be made aware that, in order to determine whether they were insane at the time the crime was committed, the court must determine that they suffered

314. If, however, "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense," the court shall order, on its own motion, a hearing to determine, by a preponderance of the evidence, whether the defendant is even fit to stand trial. 18 U.S.C. §§ 4241(a), (d). *See also* Pate v. Robinson, 383 U.S. 375, 385 (1966) (reversing state criminal conviction because defendant's "failure to receive an adequate hearing on his competence" as required by state law, violated his "constitutional right to a fair trial").

from incapacitating delusions, and that delusions are beliefs that are false. Therefore, because the defendant's alleged delusions have a religious character, a successful insanity plea will require the defendant's religious beliefs to be declared false.

If the defendant states that they understand how a religious insanity plea can result in a de facto religious verity test, the trial court should then ask the defendant whether they have had the chance to discuss the decision to plead insanity with their counsel. Counsel should then be asked to confirm this.

Finally, the judge should ask if the defendant is sure they want to proceed with the insanity plea by waiving their right against religious verity tests. If so, the judge should next confirm that the defendant is making that decision voluntarily and without coercion by the prosecutor or their own counsel.[315] If satisfied by the defendant's answers to each of these questions, and otherwise confident that the defendant understands the nature of their religious rights and insanity plea, the court should allow the questions of the defendant's guilt or insanity to proceed to trial.

V. CONCLUSION

Because courts have no reliable, objective methods to distinguish religious-sounding delusions from sane religious beliefs, the adjudication of insanity pleas based on the former become de facto religious verity tests. To be insane, the defendant must be delusional, and to be delusional, they must believe things that are false. If their delusions are religious in nature, then courts must decide that their religious beliefs are false in order for the defendant to be insane. This is a de facto religious verity test, which the First Amendment forbids.

However, this article has argued that the constitutional problem can be mitigated through waiver. The First Amendment right against religious verity tests should be considered no different than any other adversarial defense right, like the right to a jury trial or the right to counsel. As such, defendants can knowingly and voluntarily waive the right against religious verity tests. If waived, the court may proceed to determine whether the defendant is insane, regardless of the religious content of their delusions. The process of waiver ensures that the court respects the constitutional implications of religious insanity pleas and that defendants proceed only

315. Only state coercion, not a defendant's history of mental illness, is relevant to the question of voluntariness, so the court, under prevailing Supreme Court precedent, should not reject a defendant's waiver even if the defendant suffers from "psychological pressures . . . emanating from sources other than official coercion." Colorado v. Connelly, 479 U.S. 157, 170 (1986) (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

with a full understanding of the right to religious autonomy that they are sacrificing to escape criminal conviction.