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# 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)

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# SAVING THE DEIFIC DECREE EXCEPTION TO THE INSANITY DEFENSE IN ILLINOIS: HOW A BROAD INTERPRETATION OF "RELIGIOUS COMMAND" MAY CURE ESTABLISHMENT CLAUSE CONCERNS

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## I. INTRODUCTION

> And [God] said, Please take your son, your only one, whom you love — Issac — go to the land of Moriah, and bring him up there as an offering . . . .[1]

> [A] man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.[2]

It seems logical to conclude that a defendant who killed someone because "the voice of God" commanded him to is suffering from a mental illness. It also seems logical to take this conclusion one step further and deduce that the defendant is "insane." Or is it? Although courts are divided on this issue, this deduction serves as the underlying premise behind the deific decree exception to the insanity defense. Under the deific decree exception, a defendant who is commanded to perform an act by God can be found not guilty by reason of insanity even though he seemingly understands the "nature and quality" of his act and its legal "wrongness."[3] The defendant's primary deficiency is a moral one.[4] Courts hold that this "moral deficiency" is a get-out-of-jail-free card.

The deific decree exception came under fire in a recent Seventh Circuit decision.[5] The Court expressed concerns that the exception violates the First Amendment's Establishment Clause

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1. *Genesis* 22:2 (Sapirstein Edition).
2. Trial of Edward Arnold, 16 How. St. Tr. 695, 765 (Eng. 1724). This quote articulates the "Wild Beast Test," one of the earliest tests used to assess criminal insanity. United States v. Freeman, 357 F.2d 606, 616 (2d Cir. 1966).
3. State v. Potter, 842 P.2d 481, 486 (Wash. App. 1992).
4. *Id.*
5. Wilson v. Gaetz, 608 F.3d 347, 354 (7th Cir. 2010).

because it gives preferential treatment to "religious hallucinations" over "non-religious" ones.[6]

In Part II, this Comment provides an overview of the three tests that courts use to evaluate a defendant's sanity as well as a discussion of Illinois's approach to the insanity defense. In Part III, this Comment analyzes the origins of the deific decree exception and how courts have applied it in Illinois. Finally, in Part IV, this Comment evaluates the constitutionality of the deific decree exception. The Comment concludes that although a narrow application of the deific decree exception violates the Establishment Clause, a broader application is constitutional.

## II. BACKGROUND

### *A. Evolution of the Insanity Defense*

The insanity defense has the reputation of being a get-out-of-jail-free card.[7] In fact, defendants denied an insanity defense often complain that juries rely on their misconceptions about insanity defense "abuse" in rejecting insanity defenses.[8] In actuality, the insanity defense is invoked in less than one percent of felony cases and is successful in only a small fraction of those cases.[9]

There are three tests courts use to evaluate a defendant's sanity. The McNaughton[10] test is the most widely used of the

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6. *Id.*

7. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 609-11 (1990) (arguing society's misconceptions about the insanity defense stem from the media's focus on only the most sensational insanity plea cases).

8. *See* People v. Pasch, 604 N.E.2d 294, 307 (Ill. 1992) (upholding the trial court's decision to deny the defendant's challenge for cause on the grounds that jurors who voiced skepticism regarding the insanity defense during *voir dire* subsequently indicated they would evaluate the defendant's sanity on the merits); *see also* People v. Seuffer, 582 N.E.2d 71, 78 (Ill. 1991) (rejecting defendant's mistrial claim on the basis that the none of the prospective jurors that voiced skepticism about the insanity defense were actually selected to serve on the jury).

9. MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 108 (Carolina Academic Press 1994).

10. The McNaughton test originated from "McNaughten's Case." Regina v. McNaughten, 8 Eng. Rep. 718, 719 (1843). Daniel McNaughton was accused of murdering the British Prime Minister's secretary, whom he believed to be the Prime Minister at the time. *See* RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 11 (Free Press 2000). At trial, McNaughton asserted that "[t]he Tories in my native city have compelled me to do this." *Id.* at 10. The court found McNaughton not guilty by reason of insanity. *Id.* at 19. Public outcry after the verdict led to a meeting of the House of Lords for the purpose of clarifying the insanity defense. *Id.* at 22. The outcome of this meeting serves as the basis for the McNaughton test. *Id.* at 23.

Courts and legal commentators have spelled "McNaughton" in various

tests.[11] To be found insane under the McNaughton test, a defendant must prove that at the time he committed his crime he was "laboring 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."[12]

Although more than half the states have adopted the

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ways. *See id.* at xi (noting that "McNaughton" has been spelled in at least twelve different ways).

11. More than half the states have adopted some variation of the McNaughton test. *See*, *e.g.*, ALA. CODE § 13A–3–1 (1975); ALASKA STAT. ANN. § 12.47.010(a) (West 1962); ARIZ. REV. STAT. ANN. § 13-502(a) (1956); CAL. PENAL CODE § 25(b) (West 1999); COLO. REV. STAT. ANN. §§ 16–8–101, 16–8–101.5 (West 1986 & Supp. 1999); FLA. STAT. ANN. § 775.027 (West 2000); GA. CODE ANN. §§ 16–3–2, 16–3–3, 16–3–28 (West 1988); IND. CODE ANN. § 35–41–3–6 (West 1998); IOWA CODE ANN. § 701.4 (West 1993); LA. REV. STAT. ANN. § 14:14 (1993); MINN. STAT. ANN. § 611.026 (West 1987); MONT. CODE ANN. § 546-14-101 (1991); N.J. STAT. ANN. § 2C:4–1 (West 1995); N.Y. PENAL LAW § 40.15 (McKinney 1998); OHIO REV. CODE ANN. § 2901.01(A)(14) (West 1996); OKLA. STAT. ANN. tit. 22, § 1161 (West 1998); 18 PA. CONS. STAT. ANN. § 315 (West 1998); S.C. CODE ANN. § 17–24–10(a) (1985); S.D. CODIFIED LAWS § 22-1-2(20) (1983); TEX. PENAL CODE ANN. § 8.01 (West 1973); WASH REV. CODE ANN. § 9A.12.010 (West 1988); Laney v. State, 486 So.2d 1242, 1245 (Miss. 1986); State v. Hotz, 795 N.W.2d 645, 653 (Neb. 2011); Finger v. State, 27 P.3d 66, 76 (Nev. 2001), *cert.* denied 534 U.S. 1127 (2002); State v. Hartley, 565 P.2d 658, 660 (N.M. 1977); State v. Helms, 201 S.E.2d 850, 854 (N.C. 1974); Reid v. Taylor, Case No. 00-C-V00859, 2002 WL 31107536, *13 (W.D. Va. Sept. 23, 2002).

12. *McNaughten*, 8 Eng. Rep. at 722. Because the McNaughton test does not provide a definition of "wrongness," courts have taken vastly different approaches in defining it. *See* Bageshree Ranade, *Conceptual Ambiguities in the Insanity Defense:* State v. Wilson *and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1378 (1998) (noting that courts have defined "wrongfulness" as "contrary to the law," "contrary to one's own conscience" and contrary to "societal morality"). Some courts define "wrong" to mean "against the law." *See*, *e.g.*, McElroy v. State, 242 S.W. 883, 884-85 (Tenn. 1922); State v. Crenshaw, 659 P.2d 488, 491 (Wash. 1983). Other courts define "wrong" to mean "contrary to societal morals." *See*, *e.g.*, State v. Corley, 495 P.2d 470, 473 (Ariz. 1972); People v. Skinner, 704 P.2d 752, 761 (Cal. 1985); State v. Hamann, 285 N.W.2d 180, 187 (Iowa 1979); State v. Di Paolo, 168 A.2d 401, 408 (N.J. 1961); People v. Wood, 187 N.E.2d 116, 121 (N.Y. 1962). Courts that have adopted a "moral wrongness" standard generally employ an objective definition of morality. *See* United States v. Ewing, 494 F.3d 607, 620 (7th Cir. 2007) ("Moral wrongfulness is determined by reference to societal or public standards of morality."); People v. Serravo, 823 P.2d 128, 138 (Colo. 1992) (noting that insanity is measured "by existing societal standards of morality rather than by defendant's personal and subjective understanding of legality"); *Wood*, 187 N.E.2d at 121 ("the law does not mean to permit the individual to be his own judge of what is right or wrong"). A subjective definition of morality would be impractical. *See* State v. Reece, 486 P.2d 1088, 1090 (Wash. 1971) (asserting that psychiatrists "cannot crawl into a defendant's cranium and determine for the court information as subjective as whether the defendant knew or appreciated the difference between right and wrong").

McNaughton test,[13] some courts criticize the test for being "too simplistic."[14] These courts assert that a defendant may understand the legal or moral "wrongness" of his crime yet nevertheless be unable to stop himself from committing it.[15] This criticism has led several courts to adopt the McNaughton test in conjunction with the irresistible impulse test.[16]

Whereas the McNaughton test focuses on the defendant's knowledge of right and wrong, the irresistible impulse test—commonly referred to as the "police at the elbow test"[17]—focuses on whether the defendant had the ability to choose "right" in the first place.[18] This test asks one question: Would the defendant have committed the crime had a police officer been standing at his elbow?[19]

Under the irresistible impulse test, a defendant is not guilty by reason of insanity if a mental illness so overwhelmed his "reason, conscience and judgment" that he acted from an "irresistible and incontrollable impulse" rather than voluntary choice.[20] Thus, a defendant may very well understand the nature of his crime, yet still be found not guilty by reason of insanity because he lacked volition.[21]

The irresistible impulse test is unpopular among the states[22]

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13. *Potter*, 842 P.2d at 486.

14. United States v. Freeman, 357 F.2d 606, 620 (2d Cir. 1966) (evaluating the McNaughton test as "too simplistic" for "today's complex and sophisticated society"); *see also* United States v. Smith, 404 F.2d 720, 726 (6th Cir. 1968) (finding that the McNaughton test is "deficient as an exclusive test" because it only applies to a limited class of insane defendants).

15. *See Smith*, 404 F.2d at 725 (explaining that "[t]here are many forms of mental illness where the illness may be serious enough to deprive the person concerned of any actual choice of conduct where nonetheless he does possess knowledge of what is right or wrong in legal or moral terms."); Hill v. State, 251 N.E.2d 429, 433 (Ind. 1969) (denying that a defendant who knows it is wrong to inflict bodily harm on another is always capable of controlling his impulse to commit the act); Commw. of Pa. v. Weinstein, 451 A.2d 1344, 1349 (Pa. 1982) (stating that the McNaughton test incorrectly presupposes that a defendant always has the freedom to choose wrong over right).

16. *See Hartley*, 565 P.2d at 661 (noting that New Mexico courts will consider "irresistible impulses" in evaluating an insanity defense, but these impulses standing alone are insufficient for an insanity acquittal); Bennett v. Commw. of Va., 511 S.E.2d 439, 446 (Va. App. 2001) (recognizing that under Virginia law a defendant can establish criminal insanity using either the McNaughton or irresistible impulse tests).

17. JOHN A. SCHINKA, HANDBOOK OF PSYCHOLOGY: RESEARCH METHODS IN PSYCHOLOGY 391 (John Wiley & Sons, Inc. 2003).

18. Maxwell v. United States, 368 F.2d 735, 741 (9th Cir. 1966).

19. Cecil v. Commw. of Ky., 888 S.W.2d 669, 674 (Ky. 1994).

20. *Id.*

21. *Insanity Defense*, ENCYCLOPEDIA OF EVERYDAY LAW, http://www.enotes.com/everyday-law-encyclopedia/insanity-defense#irresistible-impulse-test (last visited Dec. 22, 2012).

22. *See*, *e.g.*, Mincey v. Head, 206 F.3d 1106, 1139 (11th Cir. 2000) (stating

and has been bombarded with criticism by the Supreme Court.[23] Currently, no state relies solely on this test to evaluate a defendant's sanity.[24]

Criticism of the McNaughton and irresistible impulse Iinsanity tests led the American Law Institute to devise a new approach to the insanity defense for the 1962 Model Penal Code.[25] Under the Model Penal Code, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[26]

Although the Model Penal Code combines elements of both the McNaughton and irresistible impulse tests, it eases the burden on a defendant.[27] Unlike the other tests, which impose "absolute knowledge" or "absolute control" requirements, the Model Penal Code requires a defendant to demonstrate that he lacked "substantial capacity" to appreciate his conduct or conform to the law.[28] Only seventeen states and the District of Columbia have adopted the Model Penal Code test.[29]

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that the irresistible impulse test is unpopular in Georgia).

23. *See* State v. Wilson, 306 S.C. 498, 506 (1992) (stating that "[t]he irresistible impulse test is very difficult, if not impossible, to apply with accuracy" and has been "plagued by internal debate over its validity within the profession of psychiatry."); Leland v. State of Or., 343 U.S. 790, 801 (1952) (finding that "adoption of the irresistible impulse test is not 'implicit in the concept of ordered liberty'").

24. State v. Finn, 100 N.W.2d 508, 511 (Minn. 1960).

25. ENCYCLOPEDIA OF EVERYDAY LAW, *supra* note 21.

26. MODEL PENAL CODE § 4.01 (Official Draft 1962).

27. WAYNE L. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 329-30 (2d ed. 1986).

28. *Id.* Four circuits that have expressed approval of the Model Penal Code test prefer the word "criminality" be replaced with "wrongfulness." *See Freeman*, 357 F.2d at 622; United States v. Lyons, 731 F.2d 243, 245 (5th Cir. 1984); United States v. Shapiro, 383 F.2d 680, 685 (7th Cir. 1967) (en banc), *superseded by statute on another point as stated in Ewing*, 494 F.3d at 619; Wade v. United States, 426 F.2d 64, 71 (9th Cir. 1970). This modification "exclude[s] from the criminally responsible category those who, knowing an act to be criminal, committed it because of a delusion that the act was morally justified." *Wade*, 426 F.2d at 71.

29. More than twenty states have adopted at least one prong of the Model Penal Code test. *See* ARK. CODE ANN. § 5-2-312 (West 1975); CONN. GEN. STAT. ANN. § 53a-13 (West 1969); HAW. REV. STAT. § 704-400 (West 1972); 720 ILL. COMP. STAT. ANN. 5/6-2 (West 1961); KY. REV. STAT. ANN. § 504.020 (West 1988); ME. REV. STAT. ANN. tit. 17–A, § 39 (1983); MD. CODE ANN., CRIM. PROC. § 3–109 (West 2001); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2008); MICH. COMP. LAWS ANNOTATED § 768.36 (West 2002); N.D. CENT. CODE ANN. § 12.1-04.1-01 (West 1985); OR. REV. STAT. ANN. § 161.295 (West 1971); TENN. CODE ANN. § 39–11–501 (1997); VT. STAT. ANN. tit. 13, § 4801 (West 1983); WIS. STAT. ANN. § 971.15 (West 1969); WYO. STAT. ANN. § 7-11-304 (West 1977); Pegues v. United States, 415 A.2d 1374, 1378 (D.C. 1980); State v.

### *B. A New Verdict to Appease the People*

The "guilty but mentally ill" verdict emerged in the mid-1980s as an alternative to the traditional verdicts of guilty, not guilty, and not guilty by reason of insanity.[30] It was intended as a "compromise verdict"; the defendant pays for his crime by serving a long prison sentence while at the same time getting the treatment he needs.[31] A verdict of "guilty but mentally ill" says three things about a defendant: (1) he is guilty of the crime beyond a reasonable doubt; (2) he was not legally insane at the time he committed the crime; and (3) he was suffering from a mental

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Johnson, 399 A.2d 469, 476 (R.I. 1979). Even jurisdictions that have expressed approval of the Model Penal Code test admit that it is not perfect. *See Freeman*, 357 F.2d at 623 (noting that, although the Model Penal Code test is not perfect, "[p]erfection is unattainable when we are dealing with a fluid and evolving science"); *Johnson*, 399 A.2d at 475-76 (concluding that the Model Penal Code test is a significant improvement over prior insanity tests even though it is not perfect); Graham v. State, 547 S.W.2d 531, 541 (Tenn. 1977) (stating that, although the Model Penal Code test "is not perfect and will itself produce problems, . . . it is the best test of insanity in existence today").

30. *See*, *e.g.*, People v. McCumber, 477 N.E.2d 525, 552 (Ill. App. Ct. 1985) (explaining the differences between "insanity" and "guilty but mentally ill" verdicts). The "guilty but mentally ill" verdict emerged in response to the trial of John Hinckley. Mark A. Woodmansee, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 344 (1996). Hinckley attempted to assassinate President Ronald Reagan in 1981. United States v. Hinckley, 292 F. Supp. 2d 125, 126 (D.D.C. 2003). At trial, a jury found Hinckley not guilty by reason of insanity. *Id.* at 127. The public was outraged by this verdict. *See* Irving R. Kaufman, *The Insanity Plea on Trial*, N.Y. TIMES (Aug. 8, 1982), http://www.nytimes.com/1982/09/12/magazine/l-the-insanity-plea-on-trial-145233.html (noting that "outrage over the verdict was immediate and intense"). Within three years of the trial, half the states placed additional restrictions on the use of the insanity defense, and Utah abolished the insanity defense altogether. Kimberly Collins et al., *The John Hinckley Trial & Its Effect on the Insanity Defense*, http://law2.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyinsanity.htm (last visited Sept. 22, 2012).

31. *See* William F. Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605, 614 (1982) (interpreting a "guilty but legally insane verdict" as "a point of compromise or as a means of providing recognition of responsibility while assuring some form of consideration of the defendant's mental state at the sentencing stage of the proceedings"). In practice, this compromise verdict has failed on all fronts. Although proponents of the verdict believed it would "reduce the number of insanity acquittals," it appears that it has actually had the opposite effect. *See* Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 507 (1985) (finding that, because some states now require a plea of insanity as a prerequisite for a "guilty but legally insane" verdict, the number of not guilty by reason of insanity verdicts may actually have risen). Moreover, many defendants have not received the treatment their sentences promised. Amy D. Gundlach-Evans, State v. Calin*: The Paradox of the Insanity Defense and Guilty but Mentally Ill Statute, Recognizing Impairment Without Affording Treatment*, 51 S.D. L. REV. 122, 143 (2006).

illness at the time he committed the crime.[32] Illinois is among the thirteen states that have adopted this verdict.[33]

### *C. Where Illinois Stands with the Insanity Defense*

Before 1863, Illinois courts adhered to the early common law rule that a defendant who pled insanity had to demonstrate that he was "totally deprived of understanding and memory" at the time he committed the crime.[34] The Illinois Supreme Court modified this rule in 1863, adopting a test that encompassed both the McNaughton and irresistible impulse tests.[35] Under this modified test, a defendant was exempt from punishment if he had an uncontrollable impulse to commit the crime that overrode his judgment and overcame his ability to choose right over wrong.[36]

In 1961, the Illinois legislature passed a statute adopting the Model Penal Code test.[37] Thirty years later Illinois eliminated the second prong of this test.[38] As the test stands today, a defendant is not guilty by reason of insanity "if at the time of [his] conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct."[39]

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32. People v. Fierer, 503 N.E.2d 594, 598 (Ill. App. Ct. 1987). In Illinois, each of these three elements must be proven beyond a reasonable doubt. *Id.*

33. These states include Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Montana, New Mexico, Pennsylvania, South Carolina, South Dakota, and Utah. *See* ALASKA STAT. ANN. § 12.47.040 (West 2004); DEL. CODE ANN. tit. 11, § 401(b) (West 2005); GA. CODE ANN. § 17-7-131 (West 2005); 720 ILL. COMP. STAT. ANN. 5/6-2 (West 2004); IND. CODE ANN. §35-36-2-3 (West 2004); KY. REV. STAT. ANN. § 504.120 (West 2004); MICH. COMP. LAWS ANN. § 768.36 (West 2005); MONT. CODE ANN. § 46-14-103 (2005); N.M. STAT. ANN. § 31-9-3 (West 2005); 18 PA. STAT. ANN. 314 (West 2005); S.C. CODE ANN. § 17-24-20 (2004); S.D. CODIFIED LAWS § 23A-26-14 (2004); UTAH CODE ANN. § 77-16a-102 (West 2005).

34. Hopps v. People, 31 Ill. 385, 391 (1863).

35. *Id.* at 391-92.

36. People v. Munroe, 154 N.E.2d 225, 229 (Ill. 1958). This test was a merger between the irresistible impulse test and the "wrongfulness" prong of the McNaughton test.

37. ILL. REV. STAT. 1987, ch. 38, par. 6-2(a). Illinois has expressly rejected the McNaughton test. *See* People v. Nobles, 404 N.E.2d 330, 337 (Ill. App. Ct. 1980) (stating that the Illinois statute has abandoned the McNaughton test for the Model Penal Code test).

38. Ill. Legis. Serv. P.A. 89-404 (West 1995).

39. *Id.* Illinois courts presume that all persons are sane. People v. Silagy, 461 N.E.2d 415, 425 (Ill. 1984). Therefore, the burden of proof is on the defendant to demonstrate with clear and convincing evidence that he was insane at the time he committed the crime. *Wilson*, 608 F.3d at 356. Although at one time Illinois only required a showing by the "preponderance of the evidence," Illinois adopted this heightened standard of proof in 1995 at the same time it eliminated the "failure to . . . conform his conduct to the requirements of law" prong from its insanity defense. *Id.* at 353, 356.

### *D. Birth of the Deific Decree Exception*

Courts that have adopted the McNaughton test[40] generally apply an objective standard to assess whether the defendant knew his act was wrong at the time he committed it.[41] However, courts have recognized an exception in cases where a defendant, due to mental illness, objectively knew that his act was illegal and morally wrong yet was commanded to perform it by a divine entity.[42] Under this exception—commonly referred to as the "deific decree exception"—a defendant's subjective belief in the command justifies a "not guilty by reason of insanity" verdict.[43]

The deific decree exception was first articulated by Justice Cardozo[44] in *People v. Schmidt*.[45] Schmidt was convicted of first degree murder.[46] On appeal, Schmidt claimed the trial court erred in instructing the jury that the word "wrong" in the second prong of the McNaughton test meant "contrary to the law of the state."[47] The Court agreed with Schmidt that in some cases a broader definition of "wrong" is warranted.[48] Justice Cardozo used the following hypothetical to illustrate his point:

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40. This exception has also been adopted by courts that adhere to the Model Penal Code test. *See*, *e.g.*, People v. Kando, 921 N.E.2d 1166, 1191-92 (Ill. App. Ct. 2009) (reversing a guilty verdict on the grounds that defendant was unable to appreciate the criminality of his conduct because of his hallucination that God commanded the act).

41. *Wilson*, 608 F.3d at 354.

42. *Crenshaw*, 659 P.2d at 494.

43. *Id.*

44. One commentator noted that if Justice Cardozo had not authored the opinion in *Schmidt*, "the deific decree exception would not exist." Christopher Hawthorne, *"Deific Decree": The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1784 (2000).

45. People v. Schmidt, 110 N.E. 945, 949 (N.Y. 1915). Prior to *Schmidt*, the premise behind the exception was mentioned in *Commw. of Mass. v. Rogers*, 7 Metcalf 500, 500 (Mass. 1884). In *Rogers*, the court stated:

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

*Id.* at 503.

46. *Schmidt*, 110 N.E. at 945. Schmidt confessed to the murder of a woman but claimed that a voice from God commanded him to kill her as a "sacrifice and atonement." *Id.* At trial, two doctors testified that Schmidt's free will had been overpowered by the command and opined that he was "insane." *Id.* Several doctors for the state testified that Schmidt was malingering. *Id.* The jury did not believe Schmidt was "sincerely insane" and returned a verdict of guilty. *Id.* The jury was right; on appeal Schmidt admitted that he feigned his hallucinations. *Id.* at 945-46. He said that the victim died during a criminal abortion, and that he initially lied about what happened so as not to implicate the other parties involved. *Id.* at 945.

47. *Id.* at 946.

48. *Id.*

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say . . . she knows that the act is wrong.[49]

The deific decree exception did not make another court appearance for more than sixty years later, in *State v. Crenshaw*.[50] Crenshaw was charged with first degree murder.[51] At trial, Crenshaw argued that he acted upon suspicions that his wife cheated on him and killed her because his Moscovite faith required adulterous behavior be punished by death.[52] Notwithstanding his defense, a jury found him guilty.[53] On appeal, Crenshaw raised the same issue as Schmidt in *People v. Schmidt*.[54] In *Crenshaw*, the court ultimately found that the jury instructions were correct, yet, the court adopted the exception articulated by Justice Cardozo in *Schmidt*.[55] The court reasoned that in cases where a defendant acts under a deific command, it is unrealistic to hold him liable for his actions.[56]

A defendant was not successful in invoking the deific decree exception until *State v. Cameron*.[57] Cameron was accused of murdering his mother-in-law.[58] At trial, four doctors testified that

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49. *Id.* at 949. Justice Cardozo went on to say that "[the devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law. In such cases the belief, however false according to our own standards, is not the product of the disease." *Id.* at 950. Because Schmidt feigned his insanity, the deficit decree exception did not apply to him. *Id.* at 950.

50. *Crenshaw*, 659 P.2d at 494. The deific decree exception first received its "name" in Crenshaw. *Id.*

While on their honeymoon, Crenshaw "sensed" that his wife had been unfaithful to him. *Id.* at 490. Crenshaw did not confront his wife with his suspicions; rather, he took her to a motel room and beat her until she was unconscious. *Id.* While his wife was unconscious, Crenshaw drove to a nearby store and stole a knife. *Id.* Upon his return to the motel room, Crenshaw stabbed his wife twenty-four times. *Id.* He then borrowed an ax from a local farmer and returned to the hotel room to decapitate her. *Id.* Crenshaw proceeded to cover up his crime by cleaning the motel room and hiding his wife's body parts in a remote area twenty-five miles away from the motel. *Id.* at 491. After disposing of the body, Crenshaw continued driving until he came across hitchhikers who he enlisted to help him dispose of the car. *Id.* After Crenshaw told the hitchhikers about the murder, they contacted the police, who then arrested him. *Id.*

51. *Id.* at 490.

52. *Id.* at 491.

53. *Id.* at 490.

54. *Id.* at 491.

55. *Id.* at 494. The court categorized Crenshaw as the "[t]he devotee of a religious cult that enjoins . . . human sacrifice as a duty." *Id.*

56. *Id.* at 501.

57. State v. Cameron, 674 P.2d 650, 654 (Wash. 1983).

58. *Id.* at 657. Cameron stabbed his mother-in-law more than seventy

Cameron suffered from paranoid schizophrenia and that God commanded him to commit the murder.[59] Nevertheless, the jury rejected Cameron's insanity defense.[60] On appeal to the Washington Supreme Court, Cameron argued that the trial court erred in instructing the jury with a definition of "wrong" that only encompassed "legal wrongness."[61] Applying the deific decree exception to the facts of the case, the Washington Supreme Court reversed Cameron's guilty verdict.[62]

Two important patterns emerge from these cases. First, a defendant must have been acting directly under a divine command at the time he committed the crime to be exempt from liability under the deific decree exception. A defendant who simply commits a crime in accordance with the tenets of his faith will not be exempt.[63] Second, the scope of the exception must be analyzed on a case-by-case basis.[64]

## III. ANALYSIS

### *A. Deific Decree Exception in Illinois*

#### *1. Illinois's Application of the Deific Decree*

An Illinois court first applied the deific decree exception in 1987 in *People v. Garcia*.[65] Since *Garcia*, courts have only applied

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times and left her body in a bathtub before departing for another state. *Id.* at 651.

59. *Id.* at 652. Cameron was hospitalized fifteen times within an eight-year period leading up to the murder. *Id.* at 657.

60. *Id.* at 651. The Washington Court of Appeals affirmed the guilty verdict. *Id.*

61. *Id.* at 653. Cameron made the same argument on appeal as Schmidt and Crenshaw. *Schmidt*, 110 N.E. at 946; *Crenshaw*, 659 P.2d at 494.

62. *Cameron*, 674 P.2d at 654. However, the court noted that it "[did not] see much or any distinction . . . in carrying out or executing a murder under the direction of God or Crenshaw's Moscovite religious beliefs . . . ." *Id.* at 658. Other courts consider this distinction critical. *See Crenshaw*, 659 P.2d at 494 (differentiating between a hallucinatory command to commit a crime and a choice to commit a crime in adhering to one's religious beliefs).

63. *Crenshaw*, 659 P.2d at 494.

64. *Cameron*, 674 P.2d at 654.

65. People v. Garcia, 509 N.E.2d 600, 605 (Ill. App. Ct. 1987). Garcia and his brother were living in the same house at the time of the crime. *Id.* at 600. On the morning of June 30, 1983, Garcia entered the room where his brother was sleeping and stabbed him repeatedly. *Id.* He then left the house, only to return two hours later. *Id.* The police were notified, and Garcia was subsequently arrested. *Id.* at 600-01.

Following his arrest, Garcia was evaluated by a psychiatrist. *Id.* at 602. When asked about the incident, Garcia told the psychiatrist that "Astros" had commanded him to kill his brother. *Id.* at 602-03. Garcia described "Astros" as "spirits . . . which communicated with him." *Id.* at 603. At trial, although the psychiatrist testified that Garcia was psychotic, the court found Garcia guilty

the exception in a handful of cases.[66] Until recently, the deific

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but mentally ill. *Id.* at 600.

On appeal, the First District Appellate Court of Illinois reversed Garcia's conviction on the grounds that Garcia's religious hallucinations "gravely impaired . . . his ability to conform his conduct to the requirements of the law" at the time he committed the crime. *Id.* at 605.

66. *See*, *e.g.*, People v. Baker, 625 N.E.2d 719, 732-33 (Ill. App. Ct. 1993); People v. Wilhoite, 592 N.E.2d 48, 58 (Ill. App. Ct. 1991); *Wilson*, 608 F.3d at 354; *Kando*, 921 N.E.2d at 1191-92 (noting that this exception has also been adopted by courts that adhere to the Model Penal Code test).

In *Wilhoite*, the defendant, acting under the command of God, pushed her nine-year-old daughter head first out the window of an eighth floor apartment. *Wilhoite*, 592 N.E. 2d at 49. Wilhoite thought that the command from God "was a test to see if [she] could get into heaven." *Id.* at 50. Wilhoite's daughter managed to hang on to a curtain until a neighbor saw her and ran into the apartment to pull her back inside. *Id.* at 49.

At Wilhoite's bench trial, three psychiatrists for the defense testified that Wilhoite, as a result of her psychotic condition, was "unable to conform her behavior to the requirements of the law" at the time she committed the crime. *Id.* at 50. A psychiatrist for the state testified that Wilhoite smoked marijuana shortly before the incident and that her behavior was attributable to the effects of the marijuana and not psychosis. *Id.* The trial court adopted the state psychiatrist's account of the incident and found the defendant guilty of attempted murder. *Id.* at 58.

On appeal, the Court ignored the testimony of the State's expert and reversed the guilty verdict. *Id.* at 58. Relying on Justice Cardozo's illustration of the deific decree exception in *Schmidt*, the Court concluded that the commands rendered Wilhoite incapable of conforming her conduct to the requirements of the law. *Id.* at 57-58.

The Court adopted the same reasoning when it overturned the defendant's guilty verdict in *Baker*. *Baker*, 625 N.E.2d at 728-29. Baker was charged with the murder of his parents. *Id.* at 720. While in custody, Baker relayed the following account of what happened: He got into a heated debate over "methods of religion" with his father. *Id.* at 724. He left temporarily to retrieve a gun. *Id.* at 722. When he returned he told his father, "[t]he father dies before the son." *Id.* His father reacted by grabbing for his throat, and, in response, Baker shot his father. *Id.* He then turned to his mother, who was in the room at the time, and shot and stabbed her to death before fleeing the scene. *Id.*

Six months before the killings Baker was diagnosed with schizophrenia and treated with medication. *Id.* at 727. At trial, four doctors for the defense affirmed Baker's psychosis. *Id.* at 724-26.

The State did not call any experts to testify on its behalf, focusing instead on the fact that Baker fled the scene of the crime to demonstrate that he was not insane at the time he committed it. *Id.* at 729. The trial court accepted the State's argument and found Baker guilty but mentally ill. *Id.* at 720.

On appeal to the First District of Illinois Appellate Court, Baker argued that "the trial court's finding of guilty but mentally ill was against the manifest weight of the evidence. . . ." *Id.* The Appellate Court agreed. *Id.* at 732-33. The Court relied on *Wilhoite* for the proposition that flight from a crime scene is not necessarily indicative of sanity. *Id.* at 729. The court concluded that the trial court had no basis for disregarding the testimony of the four doctors who opined that Baker's religious hallucinations had rendered him incapable of conforming his conduct to the requirements of the law. *Id.* at

decree exception was only invoked in cases that applied the old compulsion-based insanity defense.[67] However, in 1999, the First District Illinois Appellate Court applied the exception under the new non-compulsion based insanity defense. Thus, it appears that Illinois courts will continue to apply the exception even under the new insanity defense.[68]

A common factual pattern runs through Illinois deific decree exception cases. All of the defendants committed their crimes under the direct command of a "divine entity."[69] The crimes were committed against someone living in close proximity to the defendants.[70] In each case the defendant was diagnosed with a psychotic disorder subsequent to his crime.[71] Moreover, in every case but one, the family members or friends of the defendant seriously questioned the defendant's mental condition prior to the

729-30. Like the court in *Garcia*, the *Baker* court did not directly cite to *Schmidt*, although it did cite extensively to *Garcia*. *Id.* at 728-29.

67. *Baker*, 625 N.E.2d at 728-29; *Wilhoite*, 592 N.E.2d at 58.

68. *Kando*, 921 N.E.2d at 1191-92. The First District Appellate Court of Illinois in *Kando* reversed the defendant's guilty but mentally ill verdict on the grounds that, as a result of his religious hallucinations, Kando was unable to appreciate the criminality of his conduct at the time he committed the crime. *Id.* at 1199.

Kando stabbed his neighbor after his neighbor told him that, "Jesus is black." *Id.* at 1175. Although critically injured, the neighbor survived. *Id.* at 1173. After the incident, Kando told a psychiatrist that that he been receiving messages from Jesus "telling him that he was the Angel in human form on earth and that he should kill and lock up Satan for 1,000 years." *Id.* at 1176. At the time of the incident, Kando thought his neighbor was Satan. *Id.* at 1182.

At trial, two doctors testified that Kando had been hospitalized for psychiatric problems on twenty-seven occasions prior to committing the crime. *Id.* at 1192. Although the doctors arrived at different diagnoses, they agreed that Kando's "hyper-religious hallucinations" had overpowered his ability to "appreciate the criminality of his conduct." *Id.* at 1177, 1183. Notwithstanding, the trial court found Kando guilty but mentally ill of aggravated battery and attempted murder. *Id.* at 1168.

On appeal, the First District Appellate Court reversed Kando's conviction. The Court stated that the trial court had no basis for rejecting the doctors' testimony. *Id.* at 1191. The Court relied on *Wilhoite*, *Baker* and *Garcia* as precedent in reaching its ultimate conclusion that Kando's hallucinations rendered him incapable of appreciating the criminality of his crime. *Id.* at 1199-1200. The Court was not bothered by the fact that these cases applied the old compulsion-based insanity defense. *Id.* at 1200.

*See also* State v. Wilson, 700 A.2d 633, 641-42 (Conn. 1997) (serving as another example of a jurisdiction that has applied the deific decree exception to the Model Penal Code test).

69. *Kando*, 921 N.E.2d at 1191; *Baker*, 625 N.E.2d at 722; *Wilhoite*, 592 N.E.2d at 55; *Garcia*, 509 N.E.2d at 603.

70. *Kando*, 921 N.E.2d at 1168; *Baker*, 625 N.E.2d at 720; *Wilhoite*, 592 N.E.2d at 49; *Garcia*, 509 N.E.2d at 600.

71. *Kando*, 921 N.E.2d at 1177; *Baker*, 625 N.E.2d at 724; *Wilhoite*, 592 N.E.2d at 55; *Garcia*, 509 N.E.2d at 601.

crime.[72] In fact, several of the defendants were hospitalized for mental health problems on numerous occasions in the past.[73] Finally, in every case the defendant was initially found "guilty" or "guilty but mentally ill" by a trial court and then subsequently found "not guilty by reason of insanity" by an appellate court.[74]

*2. The Deific Decree Under Fire*

The deific decree exception came under fire in the recent Seventh Circuit decision in *Wilson v. Gaetz*.[75] The Court expressed concerns that the exception violates the First Amendment's Establishment Clause because it gives preferential treatment to "religious" hallucinations over "non-religious" ones.[76] A defendant who murders someone because he was commanded to by God for example, may be exempt from liability under the deific decree exception, whereas a defendant who commits the same murder under the command of his dog is not exempt.[77]

Despite its concerns regarding the constitutionality of the exception, the Seventh Circuit noted that Justice Cardozo's logic in *Schmidt* "has lost none of its intellectual power by the passage of years."[78] The Court left the issue of the deific decree exception's constitutionality undecided and concluded that the exception continues to be available to defendants in Illinois.[79]

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72. *Kando*, 921 N.E.2d at 1171; *Baker*, 625 N.E.2d at 723-24; *Garcia*, 509 N.E.2d at 602.

73. *Kando*, 921 N.E.2d at 1200; *Baker*, 625 N.E.2d at 720.

74. *Kando*, 921 N.E.2d at 1168; *Baker*, 625 N.E.2d at 720; *Wilhoite*, 592 N.E.2d at 58; *Garcia*, 509 N.E.2d at 600.

75. *Wilson v. Gaetz*, 608 F.3d 347, 354 (7th Cir. 2010). In *Wilson*, the defendant suffered delusions for more than fifteen years that the "Catholics" were conspiring against him. *Id.* at 349. The defendant's delusions led him to kill his boss, one of the "conspirators." *Id.* at 348.

Although the defendant's delusions had a "religious slant," the deific decree exception was not available to him because he was not acting directly under a divine command at the time he committed the crime. *Id.* at 354.

76. *Id.*

77. *See*, *e.g.*, Corky Siemaszko et al., *Son of Sam; New York's Summer of Terror: 30 Years Later—The Letter*, N.Y. DAILY NEWS, http://www.nydailynews.com/features/sonofsam/letter.html (last visited Oct. 16, 2012) (discussing the case of David Berkowitz, who murdered six and wounded seven others in New York City between 1976 and his arrest in 1977). Berkowitz eventually pled guilty to avoid the death penalty. *David Berkowitz*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/times topics/people/b/david_berkowitz/index.html (last visited Dec. 31, 2012). The deific decree exception was not applicable to Berkowitz because the "commander" was a dog rather than a divine entity. *Id.*

78. *Wilson*, 608 F.3d at 354-55.

79. *Id.*

### *B. The Scope of the Establishment Clause*

The Establishment Clause prohibits the federal government from passing a law "respecting an establishment of religion."[80] One would think the phrasing "an establishment" rather than "the establishment" illustrates that the framers of the Constitution intended to prohibit one particular religion from being the "favored religion" as opposed to disfavoring religious preferences in general.[81] Courts, however, have interpreted the Establishment Clause not only to forbid the establishment of an "official religion," but also to prohibit the government from giving undue preference to religion over non-religion and vice-versa.[82] Consequently, under the Establishment Clause, a law cannot "aid one religion, aid all religions, or prefer one religion over another."[83]

The Supreme Court has adopted the three-prong "Lemon Test" to determine whether legislation is constitutional under the Establishment Clause.[84] To be upheld a law must: (a) serve a secular purpose; (b) not have the primary effect of advancing or inhibiting religion; and (c) not promote "excessive government entanglement with religion."[85] Although an Establishment Clause violation results if any one of these three prongs is violated,[86] the Lemon test allows for some leeway.[87] For instance, a law may be religiously motivated as long as it simultaneously serves a secular purpose.[88] Moreover, a law may have the "incidental effect" of promoting a particular religion as long as its "primary effect" is

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80. U.S. CONST. amend I. Although the Bill of Rights explicitly refers only to the federal government, the Fourteenth Amendment makes some of the protections enumerated in the Bill of Rights applicable to the states as well. Doug Linder, *The Incorporation Debate*, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm (last visited Dec. 31, 2012).

81. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14 (American Enterprise Institute for Public Policy Research 1978).

82. *Establishment Clause*, CORNELL UNIV. L. SCH. LEGAL INFO. INST. (Aug. 19, 2010), http://www.law.cornell.edu/wex/establishment_clause.

83. Everson v. Bd. of Ed. of Ewing Tp., 330 U.S. 1, 15 (1947).

84. Edwards v. Aguillard, 482 U.S. 578, 583 (1987). There are two other tests that the Supreme Court has applied in Establishment Clause cases. Those tests are the "Coercion Test" and the "Endorsement Test". Because the Supreme Court has applied the Lemon Test to evaluate other religious exemptions to criminal liability, this Comment focuses on the Lemon Test. Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231, 242-43 (1999).

85. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

86. *Everson*, 330 U.S. at 15.

87. BARRY W. LYNN ET AL., THE RIGHT TO RELIGIOUS LIBERTY 3 (S. Ill. Univ. Press 1995).

88. *Id.*

not to advance or inhibit religion.[89] Finally, the test allows for "entanglement" between government and religion that falls short of "excessive."[90]

### *C. Escaping Liability on Religious Grounds*

Courts have not directly addressed whether the deific decree exception violates the Establishment Clause. However, in other circumstances courts have held that religious exemptions are not valid defenses to criminal liability. For instance, a growing number of jurisdictions are holding that child abuse and neglect statutes that provide exceptions for religious observers violate the Establishment Clause.[91] These exceptions allow a parent to escape criminal liability for failing to secure medical treatment for his sick child if the parent has religious objections to the treatment.[92] A typical exception is worded as follows:

> A person does not commit an offense under . . . [this] section . . . [if] he provides a child . . . or a dependent spouse with remedial treatment by spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical treatment.[93]

Exceptions like the one noted above do not withstand the Lemon Test.[94] First, they serve no purpose other than to accommodate those whose religious beliefs do not coincide with the beliefs of the "majority."[95] Moreover, such exceptions have the primary effect of advancing religion by giving preferential treatment to religious parents over non-religious parents.[96] In some cases these exceptions also single out a select group of religious parents—namely, those who belong to "recognized churches or religious denominations"—for preferential

89. *Id.*
90. *Id.*
91. *See*, *e.g.*, Walker v. Super. Ct, 763 P.2d 852, 876 (Cal. 1988) (holding that a statute absolving parents from liability for relying on "religion-based" methods to treat their children violated the Establishment Clause); State v. Miskimens, 490 N.E.2d 931, 935-36 (Ohio Com. Pl. 1984) (holding that innocent children should not be denied equal protection under the guise of religious freedom because they may eventually disagree with their parents' religious beliefs).
92. *See* James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 147 (2000) (explaining that there are various views on whether the law should permit individuals to avoid legal responsibility when failing to obtain adequate medical treatment for their children because of their religious beliefs).
93. ALA. CODE § 13A-13-6 (2012).
94. *Miskimens*, 490 N.E.2d at 934.
95. *Id.* at 934-35.
96. *Id.* at 934.

treatment.[97] Parents who hold sincere religious beliefs that are not "officially recognized" are excluded just like the "non-religious."[98]

Religious exceptions to neglect and abuse statutes also result in "excessive governmental entanglement with religion."[99] The state should not be involved in questions that will inevitably arise in determining whether a parent should be exempt from liability such as, "What constitutes a 'recognized religious denomination?'" and, "Are the parent's religious beliefs sincere?"[100]

True, a parent has the right to believe that medical intervention is not necessary because prayer alone will cure his child; however, courts differentiate between belief and action.[101] A parent can believe whatever he wants, but does not have the absolute right to act on his beliefs.[102] With religious exemptions to child abuse and neglect statutes, a child's life is too high a price to pay for religious "freedom."[103]

Similarly, courts have held that religious exemptions to compulsory vaccination laws violate the Establishment Clause.[104] Under these exemptions, parents can refuse to vaccinate their children if they have religious objections to the vaccination.[105] However, only parents who belong to "recognized religious denominations" are able to invoke such exceptions.[106]

Religious exemptions to compulsory vaccination laws fail the Lemon Test for the same reasons as religious exemptions to neglect and abuse statutes. These exceptions not only differentiate between religious and non-religious parents, but also give preferential treatment to parents who subscribe to "recognized" denominations over those that hold sincere but not "officially recognized" religious beliefs.[107] They also involve the same types of questions that states simply have no business answering.[108]

From these examples it is apparent that religious exemptions to criminal statutes pose serious Establishment Clause concerns.

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97. *See* Dwyer, *supra* note 92, at 147-76 (providing several examples of statutes that limit religious beliefs to those recognized by a state).

98. *Walker*, 763 P.2d at 876.

99. *Id.* at 874.

100. *Miskimens*, 490 N.E.2d at 934.

101. *Id.*

102. *Id.*

103. Rita Swan, *When Faith Fails Children*, THE HUMANIST (Nov. 2000), http://www.thehumanist.org/ humanist/swan_neglect.html.

104. McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002); Dalli v. Bd. of Educ., 267 N.E.2d 219, 223 (Mass. 1971).

105. *McCarthy*, 212 F. Supp. 2d at 949; *Dalli*, 267 N.E.2d at 221-23.

106. 212 F. Supp. 2d at 949; 267 N.E.2d at 223.

107. 212 F. Supp. 2d at 949; 267 N.E.2d at 223.

108. 212 F. Supp. 2d at 949.

### *D. Constitutionality of the Deific Decree Exception*

Applying these examples to the deific decree exception, the Seventh Circuit in *Gaetz* had good reason to question the constitutionality of the exception.[109] Like the abuse and neglect and immunization exemptions, the deific decree exception gives preferential treatment to the "religious" over the "non-religious."[110]

True, insane defendants do not "choose" their religious beliefs like the parents in neglect and abuse and immunization exception cases because their beliefs are a byproduct of their mental disorders.[111] Nevertheless, the effect of the exemptions in all three cases is the same: the religious believers—irrespective of the "reason" for their beliefs—escape liability for their crimes while the non-religious do not. This preferential treatment has the "primary effect of advancing religion" and thus fails the second prong of the Lemon Test.[112]

The deific decree exception also fails the first prong of the Lemon Test. The exception serves no purpose other than to provide a "break" to defendants who suffer from religious command hallucinations. Although one can argue that the exception ensures that defendants suffering from religious command hallucinations are not punished for conduct they cannot control, this argument does not address why "non-religious command hallucinations" are not treated similarly. Does it really matter who the "commander" is if the defendant is truly suffering from a mental disorder? After all, "[o]nce we concede that the defendant has been compelled to act, the source of the compulsion [should] become[] irrelevant."[113]

The deific decree exception also cannot survive under the third prong of the Lemon Test. Although doctors can assist the court in assessing whether a defendant is malingering,[114] it will remain up to the court to determine whether the defendant's "commander" was, in fact, a divine entity and whether the defendant truly was "subsumed" by the command.[115] Moreover, courts are left to decide whether the command was sufficiently "direct" in its instructions to the defendant. Like with the neglect

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109. *Wilson*, 608 F.3d at 354.

110. *Id.*

111. *See Causes of Mental Illness*, WEBMD, http://www.webmd.com/anxiety-panic/mental-health-causes-mental-illness (last visited Dec. 31, 2012) (stating that mental illnesses are attributable to a number of biological factors).

112. *Lemon*, 403 U.S. at 612-13.

113. Hawthorne, *supra* note 44, at 1784.

114. *See Malingering and Deception*, PSYCHOLEGAL & CLINICAL ASSESSMENT SERVICES, http://psycholegalassessments.com/areas-of-expertise/malingering-and-deception/ (last visited Dec. 31, 2012) (noting that doctors are frequently asked to conduct malingering evaluations to determine whether a defendant is suffering from mental illness or merely "faking it").

115. *Cameron*, 674 P.2d at 654.

and abuse and vaccination exceptions, these kinds of determinations cross the line into "excessive entanglement of government with religion" in violation of the third prong of the Lemon Test.

Because the deific decree exception fails all three prongs of the Lemon Test, it is reasonable to conclude that, although the exception may seem logical at first glance, it is not constitutional under the Establishment Clause.

## IV. PROPOSAL

### *A. The Supreme Court's Approach to Avoiding Establishment Clause Concerns in the Past*

The Establishment Clause concerns implicated by the deific decree exception can be avoided if courts adopt the same broad definition of "religion beliefs" that the Supreme Court adopted in *United States v. Seeger* and *Welsh v. United States*.[116]

In *Seeger* and *Welsh*, the Supreme Court considered whether a federal statute that exempted from the military draft those opposed to war "by reason of religious training and belief" was unconstitutional under the Establishment Clause.[117] In arriving at its conclusion that the statute was constitutional, the Court adopted a broad construction of the definition of "religious belief" to side-step Establishment Clause concerns.[118] The Court defined a religious belief as any "meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption."[119] Under this definition a

116. Welsh v. United States, 398 U.S. 333, 339-40 (1970); United States v. Seeger, 380 U.S. 163, 165-66 (1965). With the exception of *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), the Supreme Court has not directly discussed the definition of "religious beliefs" since *Welsh* and *Seeger*. Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, The Arts, and Anthropology*, 83 N.D. L. REV. 123, 159 (2007).

117. *Welsh*, 398 U.S. at 335; *Seeger*, 380 U.S. at 164-65.

118. *Welsh*, 398 U.S. at 338; *Seeger*, 380 U.S. at 166. This definition was a substantial departure from past definitions of "religious belief" which revolved around Christianity. For example, in *Church of Jesus Christ of Latter-Day Saints v. United States* the Court held that a Mormon belief in polygamy was not a religious belief because it was "contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world." 136 U.S. 1, 49 (1890). In *Torcaso v. Watkins*, the Supreme Court finally expanded the definition of "religious belief" to encompass all religions, including nontheistic religions like Buddhism and Secular Humanism. 367 U.S. 488, 495 (1961).

119. *Welsh*, 398 U.S. at 339; *Seeger*, 380 U.S. at 176. Seeger believed in "goodness and virtue for their own sakes," a belief he claimed imposed upon him a duty to refrain from taking the life of another. *Seeger*, 380 U.S. at 166.

person does not have to believe in God or any other divine entity; as long as the person's beliefs serve a "religion-like function" in his life, he is exempt from serving in the draft.[120]

Despite the broad definition of "religious belief" that the Supreme Court adopted in *Seeger* and *Welsh*, the Court did add a few caveats. First and most importantly, the Court noted that a religious belief must be sincerely held for the believer to qualify for the exemption.[121] If the belief is not asserted in good faith, the believer's claim is denied without further consideration.[122] In a later case, the Supreme Court further elaborated that the belief does not even have to be "acceptable, logical, consistent, or comprehensible to others" provided that it is sincere.[123]

Second, the belief cannot be based upon the believer's opinions on politics, sociology, or philosophy.[124] For example, a person who opposes military expenditure abroad because he believes in isolationist government policy will be unsuccessful claiming his beliefs are "religious." Similarly, a person who disagrees that the United States should be involved in a particular war but is not opposed to war in general will not be exempt.[125]

Finally, a mere belief in a "personal moral code" standing alone is insufficient to constitute a "religious belief."[126] Rather, to be exempt, one's personal moral code must "impose upon him a duty of conscience to refrain from participat[ion]."[127] This sense of duty reinforces the notion that the belief functions in a parallel way to religion in the believer's life.[128]

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Welsh believed that war was "unethical." *Welsh*, 398 U.S. at 338. Neither petitioner expressed a "traditional" belief in God or any other divine entity. *Id.* at 340-41; *Seeger*, 380 U.S. at 193. In fact, Welsh adamantly denied that his views were religious. *Welsh*, 398 U.S. at 340-41.

Under the Supreme Court's broad construction of the definition of "religious belief," both petitioners qualified as conscientious objectors. *Welsh*, 398 U.S. at 343-44; *Seeger*, 380 U.S. at 187. In both cases the Court reasoned that the petitioners' beliefs were indistinguishable from the "traditional" devotion to God, which compels someone to pursue goodness and avoid evil. *Welsh*, 398 U.S. at 343-44; *Seeger*, 380 U.S. at 186.

120. *Welsh*, 398 U.S. at 339.

121. *Welsh*, 398 U.S. at 339; *Seeger*, 380 U.S. at 165.

122. *Welsh*, 398 U.S. at 339; *Seeger*, 380 U.S. at 165.

123. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981). In other words, the command hallucination only has to make sense to the defendant, not the rest of the world.

124. *Welsh*, 398 U.S. at 336; *Seeger*, 380 U.S. at 165.

125. *See* Gillette v. United States, 401 U.S. 437, 437-38 (1971) (denying conscientious objector status to a petitioner who asserted it was "his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars" and opined that the Vietnam War fell into the latter category).

126. *Welsh*, 398 U.S. at 336; *Seeger*, 380 U.S. at 164.

127. *Welsh*, 398 U.S. at 340.

128. *Id.*

### *B. Applying a Broad Definition of Religion to the Deific Decree Exception*

Courts can apply the Supreme Court's broad definition of religion from *Seeger* and *Welsh* to avoid the Establishment Clause concerns implicated by the deific decree exception. Based on the *Seeger* and *Welsh* definition of "religious beliefs,"[129] as long as the defendant's "commander" serves a parallel function in the defendant's life to that of a religious entity (or is, in fact, a religious entity), the defendant would be exempt from liability under the deific decree exception.

Courts already apply elements of this definition in assessing deific decree exception claims. For example, courts begin their analysis of a defendant's claim by considering the sincerity of his belief in the command hallucination.[130] With the assistance of psychiatrists and other mental health professionals, courts determine whether the defendant is actually suffering from a mental defect or merely malingering.[131] If a defendant's beliefs are determined to be insincere, the defendant is not eligible for exemption from liability under the deific decree exception.

Moreover, courts already look to whether the belief that led the defendant to commit the crime stemmed from his "personal moral code" or "personal opinions" rather than a command hallucination. Only a mentally ill defendant who acts under a direct command from God is exempt; the defendant who kills someone merely because he thinks that person "deserved it" cannot escape liability.[132] Likewise, as Justice Cardozo articulated in *Schmidt*: "The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law."[133]

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129. *Welsh*, 398 U.S. at 339; *Seeger*, 380 U.S. at 176.

130. *See Wilson*, 700 A.2d at 633 (stating that "a defendant would be entitled to prevail under [the deific decree exception] if, as a result of his mental disease or defect, he sincerely believes that society *would* approve of his conduct *if* it shared his understanding of the circumstances underlying his actions") (emphasis in original); Lundgren v. Mitchell, 440 F.3d 754, 787 (Ohio 2006) (citing Guiteau's Case, 10 F. 161, 170 (D.D.C. 1882)) (stating that under the deific decree exception a defendant "must act under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature").

One may think it is entirely illogical for a defendant to honestly believe God commanded him to commit a crime; however, as the Supreme Court stated in *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, the religious belief only has to be logical to the defendant. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 726 (1981). Moreover, is this belief really that far-fetched given that God commanded Abraham to kill his son in Genesis 22:1-18?

131. PSYCHOLEGAL & CLINICAL ASSESSMENT SERVICES, *supra* note 114.

132. *Crenshaw*, 659 P.2d at 494.

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

There are a few courts that have already broadly construed the definition of "religious beliefs" in finding defendants not guilty by reason of insanity under the deific decree exception. For example, in *People v. Garcia*, the First District Appellate Court of Illinois reversed the guilty verdict of a defendant who killed his brother under the direct command of the "Astros."[134] The only mention of "conventional" religion in *Garcia* was a statement made by the defendant that he had seen visions of the devil two years prior to the murder.[135] Similarly, in *People v. Baker*, the First District Appellate Court of Illinois reversed the guilty verdict of a defendant who killed his parents despite the fact that the defendant made only vague references to religion in his confession.[136]

By adopting the broad definition of "religious beliefs" espoused by the Supreme Court in *Seeger* and *Welsh*,[137] courts can side-step the Establishment Clause concerns mentioned by the Seventh Circuit in *Gaetz*.[138]

### *C. Aren't All Command Hallucinations Created Equal?*

Courts can avoid the Establishment Clause concerns implicated by the deific decree exception altogether by dropping the distinction between "religious" command hallucinations and non-religious ones.[139] That way, the courts are not giving preference to religion but recognizing instead that a defendant commanded to commit a crime by his dog is no less mentally ill than one commanded by God to commit the same crime.[140]

Ultimately, a command hallucination is a command hallucination, irrespective of who the "commander" is.[141] Does it really matter whether the defendant was commanded by God to

134. *Garcia*, 509 N.E.2d at 605.

135. *Id.* at 602.

136. *Baker*, 625 N.E.2d at 724. The only religious references in *Baker* were the defendant's argument with his father over "methods of religion" and the defendant's apocalyptical statement ("the father dies before the son") prior to the murders. *Id.* The case does not mention whether an inquiry was made into the nature of the argument between the defendant and his father.

137. *Welsh*, 398 U.S. at 339; *Seeger*, 380 U.S. at 176.

138. *Wilson*, 608 F.3d at 354.

139. The vast majority of deific decree exception cases involve a direct command issued by God to the defendant to commit a crime. *Lundgren*, 440 F.3d at 784-86.

140. This would allow the "Berkowitzes" of the world an exemption from liability irrespective of the fact that their crimes were not religiously motivated. *See generally* Siemaszko, *supra* note 77 (discussing the circumstances around Berkowitz's case at length).

141. *See* Hawthorne, *supra* note 44 ("[T]his exception makes less sense than meets the eye. If all of the above criteria are in place—paranoid schizophrenia, auditory hallucinations, compulsive behavior—do we really care which voice is commanding the defendant?").

murder his brother, as opposed to his cat or Elvis Presley?[142] After all, a defendant who believes God is commanding his crime is no more capable of appreciating the "wrongness" of his conduct than one who believes a "non-divine source" issued him the command. Mental health professionals do not differentiate between "religious command hallucinations" and non-religious ones; why should the courts?[143]

## V. CONCLUSION

For the time being, the deific decree exception remains a viable defense to criminal charges in Illinois.[144] It appears that Illinois courts will continue to apply the exception even under the amended non-compulsion based insanity defense.[145] Although the Seventh Circuit in *Gaetz* rightfully noted that the deific decree exception may be unconstitutional under the Establishment Clause,[146] a broad construction of "religious commands" avoids Establishment Clause issues. In practice, one Illinois appellate court has already adopted this broad construction in preserving the deific decree exception.[147] Only time will tell whether the Illinois Supreme Court will join this court and save the deific decree exception to the insanity defense.

142. *Id.*

143. *See Hallucinations*, ENCYCLOPEDIA OF MENTAL DISORDERS, http://www.minddisorders.com/Flu-Inv/Hallucinations.html (last visited Oct. 16, 2011) (discussing command hallucinations in depth without differentiating between religious and nonreligious commands hallucinations).

144. *Wilson*, 608 F.3d at 354-55.

145. *Kando*, 921 N.E.2d at 1191-92.

146. *Wilson*, 608 F.3d at 354-55.

147. *Baker*, 625 N.E.2d at 724; *Garcia*, 509 N.E.2d at 602.