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CORRECTION THROUGH COERCION: DO STATE MANDATED ALCOHOL AND DRUG TREATMENT PROGRAMS IN PRISONS VIOLATE THE ESTABLISHMENT CLAUSE?

Rachel F. Calabro

INTRODUCTION

Over sixty percent of federal prison inmates are incarcerated for drug and alcohol offenses. The Bureau of Justice Statistics predicts that by the year 2000, eighty percent of all people in jails and prisons will be there because of substance abuse problems. It has been suggested that these statistics help to explain why prisons tend to exceed their maximum capacity. Because of the overpopulation problem, prison chiefs often seek acceptable mechanisms to provide early parole to prisoners. One such mechanism involves the early release of substance-abusing inmates who participate in drug and alcohol rehabilitation programs.

Several prisons have implemented such drug and alcohol rehabilitation programs, and most are based on the program designed by Alcoholics Anonymous (“A.A.”), and its drug-rehabilitation spin-off, Narcotics Anonymous (“N.A.”). As an example, the State of New York has developed a program—the Alcohol and Substance Abuse Treatment Program (“ASAT”)—which provides treatment for chemi-


2. Id. According to substance abuse coordinator Mary McDaniel at Indiana’s Marion County Jail, about 90% of jail inmates at Marion County have substance abuse problems. Id.


4. Id.


cally dependent inmates. According to the ASAT Program Operations Manual, the primary mission of ASAT is to prepare chemically dependent inmates for return to the community “by providing education and counseling focused on continued abstinence from all mood altering substances . . . and [through] participation in self-help groups based on the ‘12-step’ approach of A.A.8

Advocates of A.A. and N.A.-based rehabilitation programs9 profess that these self-help rehabilitation programs are attractive to state agencies because they have proven effective in rehabilitating substance abusers and reducing recidivism.10 Moreover, these groups represent an economical option for cash-poor state and federal prisons because the programs are free, while other private detoxification and counseling programs can be quite costly.11

Even though these programs have the substantial, practical effect of creating sober and, thus, safer communities (and safer prisons as well), the use of these self-help rehabilitation programs is in direct conflict with one of the fundamental premises in the United States Constitution—the separation of church and state.12 When the State conditions benefits for an inmate on attendance at these self-help treatment programs, it violates the Establishment Clause of the First Amendment

7. See, e.g., Griffin v. Coughlin, 673 N.E.2d 98, 99 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997) (holding “that under the Establishment Clause, an atheistic or agnostic inmate may not be deprived of eligibility for expanded family visitation privileges for refusing to participate in the sole alcohol and drug addiction program at his State correctional facility when the program necessarily entails mandatory attendance at and participation in a curriculum which adopts . . . religious-oriented [antics] and [the] precepts of Alcoholics Anonymous”); see also infra notes 290-315 and accompanying text.

8. Griffin, 673 N.E. 2d at 102 (referring to the ASAT manual). Alcoholics Anonymous bases its program on twelve steps which an alcoholic must follow in order to reach full recovery. See infra note 247.

9. The terms “self-help rehabilitation program” and “self-help treatment program” will be used throughout this Comment as a compact way of referring to drug and alcohol rehabilitation programs that are based on the unique, twelve-step, self-help approach which is the foundation of A.A. and N.A.


11. Alcoholics Anonymous is operated by volunteers and is fully self-supporting. ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., THE TWELVE STEPS AND TWELVE TRADITIONS 160 (1989); see also Robert Zimmerman, A Newer Bigger Effort to Reverse the Tide of Alcohol Abuse, SAN DIEGO UNION-TRIBUNE, Apr. 8, 1990, at C7 (discussing the overhaul of substance abuse treatment from expensive clinical treatment programs to the use of less costly alteration, such as A.A.).

because these programs rely on spirituality and trust in God to successfully treat alcohol and drug abusers.\textsuperscript{13} Allowing the State to dangle the carrot of early parole in exchange for participation in these self-help rehabilitation programs effectively permits the State to establish a nationally-supported religion, to impermissibly coerce the prisoner, and to compromise the principle of separation of church and state.\textsuperscript{14}

Until recently, courts have generally allowed this practice of state-established religion and coercion.\textsuperscript{15} Such courts have reasoned that these self-help rehabilitation programs do not establish nor impose religion on the inmate.\textsuperscript{16} Instead, the courts have applauded the states’ efforts in implementing self-help treatment programs in prisons.\textsuperscript{17} Furthermore, courts have justified their decisions by insisting that states have a strong and legitimate penological interest in assuring that inmates are detoxified before their release.\textsuperscript{18} These courts have held that the primary function of self-help rehabilitation programs is to treat alcoholism or addiction, not to forge religion; accordingly, the States interest outweighs the slight deprivation of a prisoner’s liberty.\textsuperscript{19} Recently, however, two United States Courts of Appeal—the Second and Seventh Circuits—and a state supreme court have diverged from this arcane line of reasoning, holding that compulsory attendance at certain self-help treatment programs constitutes establishment of, and coerced participation in, a state-sponsored religion.\textsuperscript{20}

This Comment discusses why the use of A.A. and N.A.-based programs, as a condition of early release from prison, is a violation of the Establishment Clause. After grappling with the difficult task of deciphering the courts’ various definitions of religion, this Comment argues that these self-help rehabilitation programs proselytize Western religious philosophies through prayer and submission to “God.”

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13. See infra Section I.A.


15. See infra notes 127–64 and accompanying text.


17. See infra notes 127–64 and accompanying text.


Comment also compares those cases in which the courts have held that A.A. and N.A. are valid state-sponsored treatment programs with opinions that have recently declared that such programs violate the requirement of separation of church and state.

Part I of this Comment provides an overview of the Alcoholics Anonymous program and the prevailing law concerning Establishment Clause jurisprudence. This section reviews the courts’ struggle with religion cases as manifested by their inability to produce a universal definition of religion. This section also presents a summary of Establishment Clause jurisprudence, concentrating on the long-standing Lemon test and the up-and-coming coercion test, both of which have been used to determine Establishment Clause violations.

Part II of this Comment reviews the application of Establishment Clause jurisprudence in mandatory self-help rehabilitation program cases. First presented are those cases in which courts have used the Lemon test to find that such self-help programs do not violate the Establishment Clause. Reviewed next are those cases in which courts found that the same programs do, in fact, contravene the Establishment Clause.

After having reviewed the cases, Part III argues that the Second and Seventh Circuits are correct in using the coercion test to find a violation of the Establishment Clause, rather than the arcane Lemon test. This is accomplished by demonstrating A.A.’s alignment with religious tenets and its proselytization of those beliefs during the course of self-help rehabilitation sessions; and, additionally, by arguing that the spiritual transformation demanded by A.A. confirms the program’s religious nature.

To prevent state authorities from committing future Establishment Clause violations, Part IV recommends an alternative to A.A., and suggests modifications to the program which will assure compliance with Establishment Clause requirements.

21. The Establishment Clause and the Free Exercise Clause have been the focus of extensive discussion, and the tension between these First Amendment clauses has been the subject of much debate. This Comment, however, is confined to a discussion of Establishment Clause jurisprudence. For a broader discussion of the Free Exercise Clause, see generally Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990). For a discussion of the tenuous relationship between the Free Exercise Clause and the Establishment Clause, see generally Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 (1980).
I. ESTABLISHMENT CLAUSE JURISPRUDENCE GENERALLY

The Supreme Court’s treatment of Establishment Clause issues has “undergone substantial changes during the last half of this century.”22 The Court has questioned the practices that were common during the first 150 years following the passage of the First Amendment.23 The transformation of Establishment Clause jurisprudence may be attributed to the difficulty in defining religion and to the Court’s attempt to incorporate modern ideas of religion into its analysis.

Establishment Clause jurisprudence has evolved over the past two centuries from acknowledging that, “we are a religious people whose institutions presuppose a Supreme Being,”24 to recognizing that atheism, which is rooted in not worshipping any deity, should also benefit from these same constitutional protections.25 Certain members of the United States Supreme Court have maintained that, at a minimum: “The [Establishment] Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”26 Further, these justices have asserted that the First Amendment: “[Forbids] all laws respecting an establishment of religion.”27 Accordingly, these justices have given the First Amendment a “broad interpretation . . . in the light of history and the evils it was designed to suppress.”28

In order for a prison-based self-help rehabilitation program to violate the Establishment Clause, it must first be determined that the

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23. See infra notes 24–28 and accompanying text.
25. On the basis of Supreme Court Establishment Clause jurisprudence, the court in Warner held that atheism fell within the protection of the First Amendment as “anti-religion” or “non-religion.” Id.
28. Id. The evils the Court referred to are: corruption by the government, repression of competing views, and promotion of sectarian violence. See, e.g., Thomas Jefferson, A Bill for Establishing Religious Freedom (1785), reprinted in ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 110 (1990) [hereinafter RELIGIOUS LIBERTY] (opposing the Virginia bill to establish religious teachers in part because it “assumed dominion over the faith of others . . . and . . . destroys religious liberty”); James Madison, Memorial and Remonstrance Against Religious Assessments No. 7 (1785), reprinted in RELIGIOUS LIBERTY supra, at 104 (explaining how ecclesiastical establishments, rather than those which strive to maintain the purity and efficacy of religion, damage government structures); James Madison, Memorial and Remonstrance Against Religious Assessments No. 11 (1785), reprinted in RELIGIOUS LIBERTY, supra, at 108 (“Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.”).
program constitutes a religion. After which, it must be determined whether the government sponsors that program, either through public money or encouragement through regulations. A number of tests have been developed, and subsequently criticized, to make such determinations. Specifically, the Lemon test and the coercion test have been applied to cases in which the government has been accused of establishing or sponsoring religion. Whether or not the government action has violated the Establishment Clause often depends upon which of the two tests is used. If the program is not a religion, or does not qualify as sufficiently religious, then First Amendment scrutiny is not triggered. If a contrary result is reached, the existence of an Establishment Clause violation will turn on whether the state coerced the inmate to participate in the program. As a result, a discussion of Establishment Clause jurisprudence should begin with a review of the manner in which courts have answered the question: What is religion?

A. Defining Religion

The first step in determining an Establishment Clause violation is deciding whether the statute has a secular legislative purpose. In other words, for the statute to be unconstitutional, the statute-authorized action or organization must constitute religion. This, by far, is the most contentious part of mandated treatment program cases or any Establishment Clause cases. The Constitution, unfortunately, does

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29. See supra notes 24–28 and accompanying text.
30. See supra notes 24–28 and accompanying text.
31. See infra Section I.B.1., discussing the Lemon test, and Section I.B.2., offering the coercion test as an alternative to Lemon.
32. See infra notes 68–120 and accompanying text.
33. See infra notes 127–82, 183–238 and accompanying text.
34. The test to decide whether state action exists is: "[W]hether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)). The state action doctrine has been analyzed in the race discrimination context. See, e.g., Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (holding that a restaurant’s refusal to serve African-Americans because of a local ordinance requiring segregation of races in such places was tantamount to the State having “commanded a particular result”); cf. Jackson, 419 U.S. at 354-55 (holding a private utility's termination of the petitioner's electric service did not constitute “state action” merely because the state “specifically authorized and approved” the termination practice, where the termination provision of the utility’s general tariff filed with the state’s utilities commission had appeared in the utility’s previously filed tariffs for many years but had, in fact, never been the subject of a hearing or other scrutiny by the Commission). According to the Supreme Court, where the impetus for discrimination is private, the state must have significantly involved itself with invidious discriminations in order for the discriminatory action to fall within the ambit of the constitutional prohibition. Moose Lodge, 407 U.S. at 173.
not define the word “religion,” and the framers gave little direction as to what the word meant for purposes of First Amendment protection. Therefore, the courts have been left with the task of distinguishing religion from non-religion in the course of determining exactly what is prohibited by the Establishment Clause. Many commentators have suggested ways to determine what constitutes religion under the Constitution and various lower courts have attempted to develop a generic definition. Nevertheless, the definition remains an unsettled question of constitutional law.

One scholar notes that undoubtedly, “the framers (sic) religion entailed a relationship between human beings and some Supreme Being.” The key to religion, this scholar argues, is not the name or nature of a Supreme Being, but the role that “a sacred or transcendental reality plays in imposing obligations upon the religious faithful.”

The Supreme Court has also attempted to differentiate that which constitutes religion from that which is merely ideology. In United

36. The word “religion” appears in only two places in the Constitution: the First Amendment and Article VI.

37. One commentator explained: “There is no doubt that, to the Framers, religion entailed a relationship of man to some Supreme Being . . . [but] while they were theists, there is no clear evidence that the founders wished to protect only theism.” Note, Toward a Constitutional Definition of Religion, 91 HARV. L. REV. 1056, 1060 (1978).


39. See, e.g., United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996) (holding that philosophy and/or way of life are not religion under the Religious Freedom Restoration Act); Africa v. Commonwealth, 662 F.2d 1025, 1035 (3rd Cir. 1981) (beliefs are secular when they “are more akin to Thoreau’s rejection of ‘the contemporary values accepted by the majority’ than to the ‘deep religious conviction[s]’ of the Amish”); Malnak v. Yogi, 592 F.2d 197, 207-10 (3rd Cir. 1979) (Adams, J., concurring) (presenting ideas that lay claim to an ultimate and comprehensive truth of the meaning of life, death, our role in the Universe and moral code through “formal, external or surface signs that may be analogized to accepted religions”); Berman v. United States, 156 F.2d 377, 380-81 (9th Cir. 1946) (holding that beliefs which are merely moral and social in nature, as opposed to pertaining to a belief in a Supreme Being, are not religious).


41. Id. at 240.

42. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (stating that philosophical and personal beliefs are secular beliefs); United States v. Welch, 398 U.S. 333, 343-44 (1970) (defining religion under the conscientious objector exemption as including those beliefs that are purely ethical and moral); Seeger v. United States, 380 U.S. 163, 166 (1965) (explaining that, under the conscientious objector exemption, religion includes any deeply-held belief that becomes of “ultimate concern” to an individual and “a belief that is sincere and meaningful [and that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God”).
States v. Seeger, the Supreme Court affirmed the importance of a supreme being when defining religion: “[Religion must be] based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.” The connection between the individual and the supreme being must involve duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

One of the most thorough treatments of the meaning of “religion” may be found in the concurring opinion of Judge Adams in Malnak v. Yogi. In Malnak, the United States Court of Appeals for the Third Circuit ruled that the Science of Creative Intelligence—Transcendental Meditation (“SCI/TM”), as taught in the New Jersey public schools, was a religion. As part of the SCI/TM course, students were required to read a textbook developed by the founder of SCI/TM, the Maharishi Mahesh Yogi, and to bring fruit, flowers, and a white scarf to a ceremony in which the teacher chanted and made offerings to a deity. While the court’s majority failed to provide an explanation for its holding, it affirmed the lower court’s decision that ceremonies, chanting, presenting sacrificial goods, and teaching from a book written by the Maharishi were characteristics that sufficiently qualified SCI/TM as a religion.

In his concurrence, Judge Adams opined that the definition of religion should be discussed at length and not given just cursory atten-

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43. 380 U.S. 163 (1965).
44. Id. at 176.
45. Id. at 178.
46. 592 F.2d 197, 200 (3rd Cir. 1979) (Adams, J., concurring). The Tenth Circuit also has given a comprehensive description of religion through its affirmation of the lower court’s decision in United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996). In Meyers, the Tenth Circuit stated that whether or not beliefs constitute a religion turns on a variety of factors, including the following: (1) whether the beliefs constitute ultimate ideas addressing fundamental questions of life, purpose and death or are metaphysical beliefs which address a reality that transcends the physical and immediately apparent world; (2) whether the beliefs are a moral and ethical system prescribed by a particular manner of acting or way of life; (3) whether the belief system is sufficiently comprehensive; and, (4) whether the beliefs are accompanied by accoutrements of religion, such as holy places, holy ceremonies and rituals, a founder, prophet, or teacher who is considered to be divine, enlightened, gifted or blessed, and other such characteristics commonly associated with religion. Id. at 1483-84.
47. Malnak, 592 F.2d at 199 (affirming the lower court’s holding that The Science of Creative Intelligence—Transcendental Meditation (“SCI/TM”) was religious activity for purposes of the Establishment Clause, and that the First Amendment prohibits teaching of SCI/TM in public schools).
48. Id. at 198.
49. Id. at 199.
He characterized the modern definition of religion as a "definition by analogy" and explained that, "[t]he modern approach . . . looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'" According to Judge Adams, "[t]here appear to be three useful indicia that are basic to our traditional religions and that are themselves related to the values that undergird the first amendment." The first and most important criterion is "the 'ultimate' nature of the ideas presented." Such ideas are concerned with "the meaning of life and death, man's role in the Universe, [and] the proper moral code of right and wrong." However, in Judge Adams' view, an idea is not religious simply because it addresses an ultimate question. Second, a religion must, Judge Adams maintained, "[lay a] claim to an ultimate and comprehensive 'truth.'" Finally, Judge Adams's test analyzes the "formal, external, or surface signs that may be analogized to accepted religions." Formal services, ceremonial functions, the existence of clergy, and a structural organization are just a few examples that fit into this category.

Two years after *Malnak*, in *Africa v. Commonwealth of Pennsylvania*, Judge Adams modified his approach and set a standard for distinguishing between secular beliefs and religious beliefs. According to him, beliefs are secular rather than religious when they are more akin to the rejection of "the contemporary values accepted by the majority . . . [than to] deep religious conviction[s]."

As religious beliefs throughout the United States diversified, the Supreme Court responded by expanding its definition of religion to encompass nontheistic religions. The Court broadened its definition of religion to include a person's "ultimate concern"—a "belief that is constitutional pass laws or impose requirements which aid all religions as against non-believers and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (citations omitted)).
sincere and meaningful [and that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."\textsuperscript{62} However, after many attempts to define religion, the courts have been unable to agree on a single definition which distinguishes religion from any other deep, sincere belief.

C. Establishment Clause and Applicable Tests

Although the Supreme Court has had difficulty deciding Establishment Clause cases, the Court has been consistent in articulating certain principles at the heart of the clause: "Civil power must be exercised in a manner neutral to religion,"\textsuperscript{63} neither favoring "one religion to another [nor] religion to irreligion."\textsuperscript{64} Traditionally, the Court has found Establishment Clause violations only when the beneficiaries of state action are clearly religious, such as Catholic schools\textsuperscript{65} or Christian organizations.\textsuperscript{66} When a state indirectly encourages religion, and the state support of religion is incidental to whatever is the state's primary action, the Court will not find an Establishment Clause violation.\textsuperscript{67} To determine whether or not the state has violated the

62. United States v. Seeger, 380 U.S. 163, 166 (1965); see also Welsh v. United States, 398 U.S. 333, 339 (1970) (explaining that under Seeger the "central consideration in determining whether [a person's] beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the [person's] life").


64. Id. (citing Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985)).


67. In Lynch v. Donnelly, 465 U.S. 669 (1984), the Supreme Court ruled that a statute or state program may have the "remote and incidental" effect of advancing religion yet still not be an Establishment Clause violation. \textit{Id.} at 683; see also Bowen v. Kendrick, 487 U.S. 589, 603-04 (1988) (holding that federal funding of sex education projects does not violate the First Amendment "simply because some of the goals of the statute coincide with the beliefs of religious organizations" or because the statute lacked rigid limits preventing funding from intermingling with religious support for the same programs); Harris v. McRae, 448 U.S. 297, 319-20 (1980) (holding that though strict limits on federal funding for abortions may reflect religious opinion, they are constitutional; constitutional rights to religion or to abortion are freedoms from interference, not guarantees of financial support). \textit{But see} Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (striking down a statute granting employees a right to work on Sabbath days, since observation of the Sabbath serves little or no secular purpose). Under the incidental benefit doctrine, if the establishment or encouragement of religion only "accidentally" arises from a program installed or supported by the state, and if the state's primary purpose was not to encourage religion, than religion was only an incidental result of the program. Michael C. Dorf, \textit{Incidental Burdens on Fundamental Rights}, 109 HARV. L. REV. 1175, 1210-18 (1996). Under this situation, there would be no First Amendment violation. For example, in the case of drunk drivers being sentenced to A.A. as a term of probation, the sentence is secular in purpose—to rehabilitate the driver. Although religion may be advanced in the treatment program, the principal effect of the
clause, the Court has developed and refined many tests, two of which are applicable to mandated treatment programs in prisons: the Lemon test and the coercion test.

I. The Lemon Test

The modern era of Establishment Clause jurisprudence began with the Court’s decision in Lemon v. Kurtzman. In Lemon, the Court enunciated a three-part test to determine if a state unconstitutionally established religion. To pass muster under the Establishment Clause, the challenged state action, “first must have a secular legislative purpose, second its principal or primary effect must be one that neither advances nor inhibits religion, finally [it] must not foster an excessive entanglement with religion.”

In deciding whether a violation exists, the term “secular” has been given a broad interpretation. If government can point to a secular purpose, its action is not struck down simply because the secular purpose coincides with religious beliefs. Thus, for example, Sunday closing laws, which developed out of religious beliefs and practices, have been upheld because the State may have a secular purpose of giving shopkeepers a day of rest or encouraging workers to spend time with their families once a week. Under this situation, Christians benefit because Sunday is, according to their Bible, the day of rest; however, Jews, whose Sabbath begins sundown Friday and ends Saturday, are burdened because they would be unable to work for two days out of the week—Saturday and Sunday. With few exceptions, the action arguably remains rehabilitation. Thus, this doctrine precludes a First Amendment violation and the sentencing survives constitutional muster. The incidental benefit doctrine is an indication of the judiciary’s acceptance of cooperation between the government and religious institutions in the provision of social services. See generally Thomas W. Pickrell & Mitchell A. Horwich, “Religion as an Engine of Civil Policy”: A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field, 44 LAW & CONTEMP. PROBS., Spring 1981, at 111 (discussing the incidental benefit doctrine). The long history of accommodation of religion where a program’s purpose is sufficiently secular dates back to Bradfield v. Roberts, 175 U.S. 291 (1899), which affirmed state funding of a Catholic hospital. Id. at 299-300. The Court reasoned that the secular purpose of the hospital was so important that the religious character was “wholly immaterial.” Id. at 299.

68. 403 U.S. 602 (1971).
69. Id. at 612-13 (quoting Walz v. Tax Comm’r, 397 U.S. 664, 674 (1970)).
70. See id. at 612-14.
71. Id. at 612-13.
Court easily finds a sufficient secular purpose and moves on to address the other two factors.\textsuperscript{74}

Even if the government has a sectarian purpose, its conduct only violates the Establishment Clause if it has the essential effect of advancing religion.\textsuperscript{75} Certain types of effects are absolutely prohibited: discrimination among different religious denominations; lending of state powers to religious bodies; and the State borrowing the "aura of legitimacy" from religion.\textsuperscript{76} Other effects are not as easily defined and, thus, require a searching inquiry to determine whether the non-secular effect is remote, indirect, and incidental. This leads to an examination of whether the secular purpose or effect can be sufficiently separated from the religious effect—something which often cannot be done. Some of the most difficult cases arise when government provides aid to a religious organization, such as financial support to a parochial schools or to the students attending such schools.\textsuperscript{77}

The final prong of the \textit{Lemon}\textsuperscript{78} test prohibits excessive church and state entanglement.\textsuperscript{79} Such entanglement might take the form of the State turning traditional governmental power over to religious bodies;\textsuperscript{80} government action or aid that leads to religiously motivated political divisiveness;\textsuperscript{81} government regulation, particularly in the employment relationship, which leads to litigation seeking exemptions for religious organizations;\textsuperscript{82} or government inquiry, through courts or

\textsuperscript{74} \textit{McGowan}, 366 U.S. at 435-37, 453.

\textsuperscript{75} See supra notes 25-27 and accompanying text.

\textsuperscript{76} \textsc{Laurence H. Tribe, American Constitutional Law} ch. 14, § 10, at 1214 (2d ed. 1988).

\textsuperscript{77} Professor Tribe identifies five factors which "are often relevant and sometimes dispositive" in such cases. \textit{Id.} at 1219-20. Some state courts have sustained statutes granting free transportation or free schoolbooks to children attending denominational schools on the theory that the aid was a benefit to the child rather than to the school. See Nichols v. Henry, 191 S.W.2d 930, 934-35 (Ky. 1945); Borden v. Louisiana St. Bd. of Educ., 123 So. 655, 661 (La. 1929); Adams v. County Comm'nrs, 26 A.2d 377, 380 (Md. 1942); Board of Educ. v. Wheat, 199 A. 628, 632-33 (Md. 1938). Other courts have held such statutes unconstitutional under state constitutions as aid to the schools. See \textit{Judd v. Board of Educ.}, 15 N.E.2d 576, 584-85 (N.Y. 1938); \textit{Smith v. Donahue}, 195 N.Y.S. 715 (App. Div. 1922); Mitchell v. Consolidated Sch. Dist., 135 P.2d 79, 82 (Wash. 1943).

\textsuperscript{78} \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612-13 (1971).

\textsuperscript{79} \textit{Id.} at 613 (quoting \textit{Walz v. Tax Comm'r}, 397 U.S. 664, 674 (1970)).

\textsuperscript{80} \textit{See, e.g., Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-27 (1982)} (holding that a state may not vest governing powers in a church which allows that church to veto applications for liquor licenses within a 500-foot radius of the church or school).

\textsuperscript{81} \textit{See, e.g., Mueller v. Allen}, 463 U.S. 388, 403-04 (1983) (upholding a Minnesota statute that allowed the state to provide financial assistance to sectarian institutions).

\textsuperscript{82} \textit{See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor}, 471 U.S. 290, 305-06 (1985) (holding that when a religious foundation is subject to secular regulatory activity such as fire inspections, building and zoning regulations, and record-keeping requirements of the Fair Labor Standards Act, this does not constitute a Free Exercise or Establishment Clause violation).
agencies, into religious beliefs or doctrine. In practice, this last prong has proven to be the deciding factor in Establishment Clause cases.

Lemon, with its rigid framework, has proved over time "to be a difficult structure to apply." At best, its use is "unclear and unpredictable" and application of the Lemon test has often resulted in contradictory decisions. Thus, scholars and Supreme Court Justices have criticized the Lemon test. Furthermore, recent Supreme

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83. See, e.g., Thomas v. Review Bd., 450 U.S. 707, 716 (1981) (affirming that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program; and holding that a state may not deny unemployment compensation benefits to a claimant who terminated his job because of religious beliefs).


86. Timothy V. Franklin, Squeezing the Juice Out of the Lemon Test, 72 EDUC. L. REP. 1, 3 (1992). According to Franklin: "The literal language of Lemon has remained intact but the meaning attached to each of the three test questions has fluctuated depending on which Justice wrote the Court's decision." Id. at 2 (citation omitted).

87. For example, Lynch and County of Allegheny were both decided using the Lemon framework, however each application led to opposite conclusions. Lynch upheld the constitutionality of a crèche display, 465 U.S. at 685; while Allegheny invalidated a similar crèche display, 492 U.S. at 601-02.


89. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985). Justice Rehnquist, in his dissent, maintained his criticism of Lemon. Id. at 91, 108-14 (Rehnquist, J., dissenting). According to Justice Rehnquist, Lemon "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." Id. at 110. Justice Rehnquist criticized the metaphor of the wall which is supposed to separate church and State as "a metaphor based on bad history . . . which has proved useless as a guide to judging . . . [and should therefore be] . . . "frankly and explicitly abandoned." Id. at 107.

In Grand Rapids School District v. Ball, 473 U.S. 373 (1985), overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997), Justice White voiced his criticism of the Lemon test, stating that, particularly in the context of state aid to private schools, he "disagreed with the Court's interpretation and application of the Establishment Clause" and that the Court, by applying the Lemon test has acted contrary to the interests of the United States. Id. at 400 (White, J., dissenting).

In Edwards v. Aguillard, 482 U.S. 578 (1987), Justice Scalia, in his dissent, expressed his "doubt whether [the] 'purpose' requirement of Lemon [was] a proper interpretation of the Constitution." Id. at 613 (Scalia, J., dissenting). Recently in Lee v. Weisman, 505 U.S. 577 (1992), Justice Scalia bitterly dissented and outwardly favored the "interment" of the Lemon test. Id. at 644 (Scalia, J., dissenting). In a comment on Justice Kennedy's declaration that Lemon need not be reconsidered and would remain precedent in Establishment Clause issues, Justice Scalia stated: "The Court today demonstrates the irrelevance of Lemon by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." Id.
Court decisions, although neither directly overturning nor limiting the *Lemon* test, indicate that the Court does not intend to rely so heavily upon it.90 For example, in *Zobrest v. Catalina Foothills School District*,91 the Court upheld an Arizona statute that, pursuant to the *Individuals with Disabilities Education Act*,92 provided a deaf parochial school student with a sign language interpreter.93 Although these funds were directed to a parochial (religious) school, Chief Justice Rehnquist and the Court held this was permissible because the public funds aided the parochial schools only as a result of the choice of parents, not because of a requirement of the state.94 Furthermore, the aid was only indirect and, thus, permissible.95 The difference between direct and indirect aid, rather than the *Lemon* criteria, was the determining factor.96

Because the justices have criticized the *Lemon* test as vague and ambiguous, and have argued that *Lemon* promotes ad hoc decision-making,97 several of the Court's recent decisions have suggested that a majority of the justices have abandoned *Lemon* as the test du jour.98 However, instead of explicitly overruling *Lemon*, the Court appears

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In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy joined the anti-*Lemon* forces and became an advocate and supporter of the coercion analysis. *Id.* at 659-60 (Kennedy, J., concurring in part and dissenting in part); see also *infra* notes 98-99 and accompanying text.

90. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 6 (1993) (overturning an appellate court decision relying on *Lemon*); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) (noting that the Court essentially ignored *Lemon* in reaching its decision); *Southside Fair Housing Comm. v. New York*, 928 F.2d 1336, 1344-47 (2d Cir. 1991) (applying the *Lemon* test but expressing doubts as to whether it would continue to be applicable following *Lee*, then pending Supreme Court review).


94. *Id.* at 9-10.

95. *Id.*

96. See *id.* at 8-10 (highlighting cases in which Establishment Clause challenges were rejected because the aid flowed through a private citizen, rather than directly to the religious institution). The Court stated that since the interpreter would only be translating, rather than teaching, there was little fear that the publicly provided interpreter would import a religious meaning to the lesson. *Id.* at 13. Accordingly, no supervision would be necessary and the entanglement prong would not be implicated. *Id.*


98. See *supra* notes 85-96.
only to have ignored *Lemon* in certain Establishment Clause contexts in favor of several alternative tests, including the coercion test.\(^9\)

Justice Kennedy has long been an advocate of the coercion test. According to him, Establishment Clause cases "disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith.'"\(^{100}\) Justice Kennedy has further stated:

> These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.\(^{101}\)

Justice O'Connor, with Justice Kennedy as the decisive swing votes in religion cases, has also called for replacement or revision of *Lemon*.\(^{102}\) In fact, some scholars think the Court already has abandoned the test.\(^{103}\) With few exceptions, the Court's recent Establishment Clause cases were decided on other theories, without relying on *Lemon*.\(^{104}\) Nonetheless, Justice Scalia, in commenting on a 1993 case, wrote: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence."\(^{105}\)

2. **The Coercion Test**

In the wake of this criticism of *Lemon*, several Justices have advocated the use of an alternative approach: the coercion test.\(^{106}\) The Court recently applied the coercion test in *Lee v. Weisman*.\(^{107}\) In *Lee*, the Court held that a high school conducted a formal religious exercise in violation of the Establishment Clause by permitting prayer at a

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99. Note that the *Lemon* test is still used in the context where the government provides aid to parochial schools. *See* *Agostini*, 117 S. Ct. at 1997.


101. *Id.* at 659-60.


103. *See supra* note 86.


106. *See*, *e.g.*, *Lee*, 505 U.S. at 604 (Blackmun, J., concurring).

107. *Id.*
graduation ceremony in a public school.\textsuperscript{108} Applying the coercion test, the Court reasoned that the principal, a state actor, directed a formal religious exercise.\textsuperscript{109} Although the school district did not require attendance at the ceremony as a condition of graduation, the Court found attendance was "in a fair and real sense obligatory."\textsuperscript{110}

Although the Court agreed that the coercion test should be used, the justices differed on the terms and type of coercion sufficient to constitute an Establishment Clause violation. Justice Kennedy, in writing for the majority, defined coercion in terms of psychological coercion—peer or social pressure to participate in the religious event:

The undeniable fact is that the school district's supervision and control of high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.\textsuperscript{111}

Because peer pressure unacceptably placed "objectors in the dilemma of participating . . . or protesting," the Court held that the prayer violated the Establishment Clause.\textsuperscript{112}

Writing for the dissent, Justice Scalia criticized the majority's psychological coercion test and instead opted for a legal coercion test.\textsuperscript{113} Justice Scalia had "no quarrel with the Court's general proposition that the Establishment Clause guarantees that government may not coerce anyone to support or participate in religion or its exercise."\textsuperscript{114} But he chose to define coercion as legal coercion—"coercion of religious orthodoxy and of financial support by force of law and threat of penalty."\textsuperscript{115} According to Justice Scalia, the students voluntarily attended graduation and those students who chose not to attend were not disciplined or penalized.\textsuperscript{116} Thus, Justice Scalia would have upheld the graduation prayer as constitutional.

Yet another view of the coercion test is reflected by comments made by Justice Black, as early as 1948:

The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can force nor influence a person to go to or re-

\textsuperscript{108} \textit{Id.} at 586-87.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 586, 598.
\textsuperscript{111} \textit{Id.} at 593.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 636-39 (Scalia, J., dissenting).
\textsuperscript{114} \textit{Id.} at 642 (quoting the majority, \textit{id.} at 587).
\textsuperscript{115} \textit{Id.} at 640; \textit{see also id.} at 642 (defining legal coercion as threat of penalty).
\textsuperscript{116} \textit{Id.} at 637-39.
main away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.\textsuperscript{117}

Forty five years later, in \textit{Lee}, Justice Blackmun reaffirmed Justice Black’s view that if government pressures someone to participate in a religious activity, that action is an “obvious indication that the government is endorsing or promoting religion”\textsuperscript{118} regardless of whether it is psychological or legal coercion.\textsuperscript{119}

As demonstrated above, the Court does not agree on which coercion test it should use: the psychological coercion test posited by Justice Kennedy, the legal coercion test offered by Justice Scalia, or the general test presented by Justice Black. As a result, which test shall be used is simply a function of the composition of the Court’s majority. If the majority opinion includes Justice Kennedy, but excludes Justice Scalia, then most likely the psychological test used in \textit{Lee v. Weisman} will be applied. On the other hand, if Justice Scalia rests with the majority opinion, and Kennedy with the dissent, then the legal coercion test may be used. Justice Black’s version of the test, the only test which seems to actually reflect the true words of the Establishment Clause: “neither a state nor the Federal Government can . . . force nor influence a person to go to or remain away from a church”\textsuperscript{120}—is broader than both Justice Kennedy’s and Justice Scalia’s views. The justices’ diverse views regarding the coercion test mean that it is unclear which constitutional standard will be used by the Court when it next confronts an Establishment Clause matter.

II. Establishment Clause Jurisprudence and the Mandatory Treatment Cases

Theism and prayer, two quintessentially religious concepts, are fundamental to the A.A. program of recovery.\textsuperscript{121} The Supreme Court’s Establishment Clause jurisprudence is instructive when determining whether A.A. is a religion. Courts have expressed varying opinions on the constitutionality of state-mandated A.A. programs. Some courts view A.A. as a religion and thus any effort by the State to mandate attendance at the program constitutes an Establishment Clause

\begin{itemize}
  \item \textsuperscript{117} \textquote{Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).}
  \item \textsuperscript{118} \textquote{Lee, 505 U.S. at 604 (Blackmun, J., concurring).}
  \item \textsuperscript{119} \textquote{Id.}
  \item \textsuperscript{120} \textquote{Everson, 330 U.S. at 15-16.}
  \item \textsuperscript{121} \textquote{See infra notes 240–87 and accompanying text.}
\end{itemize}
violation.\textsuperscript{122} Other courts ignore A.A.'s use of traditional Christian practices and fail to find any such violation.\textsuperscript{123}

The Supreme Court has not been presented with the issue of whether a state correctional institution may require an inmate to attend a substance abuse counseling program that is arguably religious in nature. However, state and federal appellate courts have grappled with this issue.\textsuperscript{124} When such courts use the \textit{Lemon} test, mandatory use of A.A. as a condition of probation has generally been found constitutional.\textsuperscript{125} Conversely, courts that use the coercion test generally conclude that conditioning probation on mandatory participation in A.A. violates the Establishment Clause.\textsuperscript{126}

\section*{A. The Lemon Test As Applied to the Mandatory Treatment Cases}

The crux of the issue in determining whether a court finds a violation of the Establishment Clause is whether A.A. is a religion.\textsuperscript{127} Some courts have concluded that A.A. practices are not constitutionally religious, although they may partake in a blend of secular and spiritual activities.\textsuperscript{128} According to these courts, to be unconstitutional, the petitioner must demonstrate that the primary purpose of the program is to "compel advancement of constitutionally implicated religious practices or to stifle agnostic or atheistic preferences."\textsuperscript{129}

In \textit{Boyd v. Coughlin},\textsuperscript{130} a district court in New York dismissed an inmate’s complaint alleging that the alcohol and drug rehabilitation program in New York prisons, used as a prerequisite for family visitation rights, violated both the Establishment and Free Exercise

\begin{thebibliography}{99}
\bibitem{122} See Kerr v. Farrey, 95 F.3d 472, 479-80 (7th Cir. 1996); Warner v. Orange County Dep't of Probation, 827 F. Supp. 261, 266 (S.D.N.Y. 1993), aff'd, 870 F. Supp. 69, 72 (S.D.N.Y. 1994), aff'd, 115 F.3d 1068, 1074 (2d Cir. 1996); Arnold v. Tennessee Bd. of Paroles, 956 S.W.2d 478, 484 (Tenn. 1997).
\bibitem{124} See infra Part II.A., for a discussion of cases in which state and federal appellate courts have found A.A. to be merely spiritual and non-religious in nature; and supra Part II.B., for a discussion of cases in which state and federal appellate courts have equated A.A. with religion and found the state requirement of A.A. attendance unconstitutional.
\bibitem{125} See infra notes 127-82 and accompanying text.
\bibitem{126} See infra notes 183-238 and accompanying text.
\bibitem{127} See supra notes 22-34 and accompanying text.
\bibitem{128} See Boyd, 914 F. Supp. at 832; Feasel, 904 F. Supp. at 586; O'Connor, 855 F. Supp. at 308; Jones, No. 4-89-CV-20857, 1993 WL 719562, at *5; Stafford, 766 F. Supp. at 1017.
\bibitem{130} Boyd, 914 F. Supp. at 828.
\end{thebibliography}
Relying on the *Lemon* test, the court noted that "the expressly stated principal and primary goal of the program is the preparation of chemically dependent inmates for return to the community and to reduce recidivism." Although the court contended that there is no Establishment Clause violation if the state action survives the *Lemon* test, the court continued its analysis by explaining that even if the action fails the test, there still may not be a violation if "the program is reasonably related to legitimate penological interests." Under the first prong of the *Lemon* test, the *Boyd* court held that the program was secular because it served to treat inmates with substance abuse problems, "thereby reducing re-incarceration rates and helping to reduce the scope and effects of the serious social problem of alcoholics and drug addicts." The program also survived the second prong—that the principal or primary purpose of the program does not advance nor inhibit religion. In making this determination, the court considered the prison context of the case. It noted that Boyd was an inmate who had an alcohol problem and stressed that Boyd was not obligated to attend the program. According to the court, the program was "merely a prerequisite to [Boyd's] participation in the voluntary [Family Reunion Program]." Furthermore, under the second-prong, the court maintained that the A.A. literature references to God and a Higher Power did not reflect "any concept of organized religion, but rather, reflect[ed] a belief that some form of spirituality is necessary to recovery." In reference to the third prong, the court simply reiterated its notion that Boyd was not compelled to participate in the treatment program.

Similarly, in *Stafford v. Harrison*, a district court in Kansas upheld a mandated treatment program for prisoners that incorporated...
principles of A.A. The court found that the treatment program was reasonably related to legitimate penological interests and was, therefore, acceptable form of prison management. The Stafford court, like the Boyd court, embarked on an extensive analysis of the spiritual principles of A.A. and found that the A.A. program defined no single image or exclusive concept of a “Higher Power.” The court concluded by stating:

[W]hile the expression of the philosophy of Alcoholics Anonymous includes references to a Higher Power, this court cannot on that basis alone reasonably conclude either that Alcoholics Anonymous constitutes a religion or that a religion was impermissibly thrust upon plaintiff during his incarceration. The court therefore rejects plaintiff’s assertions that the state improperly established a religion and that the defendants imposed a religion on him.

This refusal to characterize A.A. as a religious organization has also been followed by other courts. In Feasel v. Willis, a district court in Texas held that mandated A.A. meetings for prisoners did not violate a clearly established right nor did it amount to forced indoctrination of religion. Likewise, in Jones v. Smid, the petitioner, an atheistic inmate, failed to meet the burden of proof that A.A. coerced him to express a belief in God. Like many courts, the Jones court found A.A. to be spiritual but not religious.

Alcoholics Anonymous treatment has also been used as a probation condition for drunk driving offenses. In O’Connor v. California, O’Connor was convicted of driving under the influence. As part of his probation terms, the court ordered him to enroll in the county’s

the state penitentiary, Stafford was admitted to Larned Hospital for inpatient alcohol treatment with the Chemical Dependency Recovery Program. Id. The program was designed to provide services for inmates who required treatment for abuse of alcohol or “mood-altering” chemicals prior to consideration for parole. Id. The treatment program incorporated information on the principles of both A.A. and N.A. Stafford was removed from the program, without satisfactory completion, because of his low motivation within the program. Id. As a result, the Kansas Parole Board denied Stafford consideration for parole and again recommended a treatment program for alcohol and drug abuse. Id. at 1016.

142. Id. at 1017.
143. Id.
144. Id.
146. 904 F. Supp. 582 (N.D. Tex. 1995).
147. Id. at 586.
149. Id. at *9.
150. Id. at *4.
152. Id. at 304.
alcohol and drug education program administered by the National Council on Alcoholism and Drug Dependence. The Council's program advised O'Connor that, in addition to its meetings, O'Connor must attend weekly self-help meetings from a list of approved providers. The approved list included A.A. and two non-sectarian organizations. O'Connor alleged that the endorsement and promotion of A.A. by the State through its approval of county alcohol programs violated the Establishment Clause.

Applying the Lemon test, the court concluded that California did not violate the Establishment Clause. Similar to Boyd, Stafford, Feasel and Jones, the O'Connor court first reasoned that the "principal and primary effect of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse." The court admitted that spirituality is a central part of the A.A. philosophy and that the program contains religious overtones. Nonetheless, the court determined A.A. was not a religion because various individual faiths may participate without renouncing their specific religious convictions. The court further substantiated its holding by reasoning that the A.A. program was one of a variety of options available to the convicted driver, not the only program that would satisfy the condition of probation. According to the court, had O'Connor not wanted to attend A.A., he could have devised his own means of self-help and sought approval from the county.

153. Id.
154. Id. Section 9860, title IX of the California Code of Regulations permits individual counties to mandate "additional program" requirements to the treatment, as long as the counties "ensure that a variety of options are available which take into account the unique needs of each participant." Id. at 305 (citing CAL. HEALTH & SAFETY CODE § 11837.4 (West 1991) (requiring that any such "additional program" requirements be specifically approved by the state, and the state must monitor these additional programs)). The purpose of allowing counties to mandate "additional programs" provides communities with control over community-type services that focus on the result of alcohol use or abuse. Id.
155. Id. According to the county, it is up to the individual to find a complying program. Id. Alcoholics Anonymous and Rational Recovery, a non-sectarian organization, are pre-approved programs; however, an individual may participate in any other non-religious programs approved by the county. Id.
156. Id.
157. Id. at 307.
158. Id.
159. Id.
160. Id. at 308. Other courts have addressed this issue. See, e.g., Youle v. Edgar, 526 N.E.2d 894, 898-99 (Ill. App. Ct. 1988) (holding that it was not a violation of a drunk driver's constitutional rights to require him to participate in an A.A. program, because the primary purpose of the group was to treat alcoholism, and because participation in only that group was not mandatory).
tended that there existed a lack of entanglement—the third prong of the *Lemon* test—between the State and A.A. Evidence indicated that A.A. "does not receive any money, materials, or administrative input from religious groups or institutions, nor does it receive any money from the State or County in exchange for accepting those convicted of drunk driving." The only involvement between the State and A.A., according to the court, was that the individual must fulfill the self-help requirement and that A.A. is a recommended means of doing so.

The five cases illustrated above use similar reasoning in holding that state-mandated A.A. programs are constitutional. While each court admitted that A.A. has religious and/or spiritual undertones, each court relied on the *Lemon* test to find no First Amendment violation. Accordingly, each court first reasoned that the primary purpose of A.A. is to treat the alcoholic's addiction, not to proselytize religion. Second, the courts declared A.A. neither advances nor inhibits religion because A.A. does not support any particular faith. Finally, the courts placed a strong emphasis on the element of choice. The State did not excessively entangled itself with A.A. if the participants could choose whether to attend A.A. meetings.

Sometimes the *Lemon* test has been used to the prisoner's advantage. In *Griffin v. Coughlin*, the Court of Appeals of New York used the second prong of the test to reject a prison rehabilitation program because, as the court held, such a program was religious, and forced attendance constituted a state endorsement of religion. Griffin, an atheist and heroin addict, was an inmate at Shawangunk Correctional Facility in New York. At the prison, he was eligible for the Family Reunion Program, but in order to receive that benefit he had to participate in the Alcohol and Substance Abuse Treatment (ASAT) program. In his grievance, Griffin conceded that he was not being forced to attend the ASAT program, but that his participa-

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162. *Id.*
163. *Id.*
164. *Id.*
166. *Id.* at 107-08.
167. *Id.* at 100.
168. *Id.* at 106. The ASAT-Family Reunion program is provided pursuant to *New York Compilation of Codes, Rules, & Regulations* tit. 7, §§ 220.2(a)(3)(ii), 220.8 (1995). The Family Reunion Program grants some inmates the opportunity to receive selected visitors for extended time periods. *Id.* § 220.1. Eligibility is dependent on satisfying specified criteria, including a minimum length of stay at a correctional facility and a clean disciplinary record. *Id.* § 220.2(a)-(b). A relevant feature in this case is attendance by inmates at therapeutic treatment programs related to their particular offenses or overall histories. *Id.* § 220.2(a)(3)(ii). Inmates
tion in the program was a precondition to receiving privileges under the family reunion plan. The court held that the Establishment Clause does not permit the State to deprive an atheistic or agnostic inmate of eligibility for an expanded family visitation program because of the inmate’s refusal to participate in the prison’s sole alcohol and drug rehabilitation program. The court reasoned that the Twelve Steps of A.A. amounted to a religious exercise as a matter of law, and that “adherence to the A.A. fellowship entail[ed] engagement in religious activity and religious proselytization.” The court discussed in detail how the “A.A. basic literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions.” Throughout the opinion, the majority emphasized how five of the Twelve Steps, as well as the fundamental teachings of A.A., referred to God.

In making its decision, the court of appeals held that the State violated the Establishment Clause by not remaining neutral with respect to religion and by compelling the petitioner to attend and participate in A.A. meetings. First, the court relied on the second prong of the Lemon test, the endorsement prong, to determine that A.A. has the primary effect of promoting religion. According to the court, “a fair reading of the fundamental A.A. doctrinal writings discloses that their dominant theme is unequivocally religious . . . [and manifests] faithful devotion to an acknowledged ultimate reality or deity.” Once the court demonstrated that A.A. tenets and practices entail religious exercise, the court declared that the ASAT Program violated the Establishment Clause because it compelled attendance by the inmates. The court stressed: “There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State’s power to force one to profess a religious belief or participate in a religious activity.” Thus, the court concluded that the Shawangunk Correctional Facility may not require an inmate, “to
forfeit his . . . benefits [e.g., eligibility for the Family Reunion Program] as the price of resisting conformance to state-sponsored religious practice."¹⁸⁰ In dicta, the majority conceded the proven effectiveness of A.A. to rehabilitate drug and alcohol addiction, and suggested that the State could continue the program if it were continued on a voluntary, rather than forced, basis.¹⁸¹ The court suggested that the program may be saved if the inmate has a choice of another, nonreligious treatment alternative.¹⁸²

B. The Coercion Test as Applied in the Mandatory Treatment Cases

Most courts that have applied the Lemon test have unequivocally held that the State has not violated the Establishment Clause.¹⁸³ More recently, as courts have started to abandon Lemon in favor of the coercion test, the contrary result has been achieved in virtually the same factual circumstances.¹⁸⁴

The Second Circuit used the coercion test to strike down mandatory participation in A.A. as a probation requirement for driving under the influence of mind altering substances offenses.¹⁸⁵ In Warner v. Orange County Department of Probation¹⁸⁶ the court held that the state required the probationer to become associated with a particular religious ideology.¹⁸⁷ Warner was convicted of driving while under the influence of alcohol and was given probation rather than imprisonment.¹⁸⁸ The probation required that Warner attend A.A.¹⁸⁹ Warner, an atheist, objected to the condition on the ground that mandatory attendance at A.A. meetings violated his right to free exercise of religion and violated the Establishment Clause.¹⁹⁰

The district court held, and the Second Circuit Court of Appeals affirmed, that Warner's complaint adequately alleged a violation of constitutional rights.¹⁹¹ First, the court found that atheism fell within

¹⁸⁰. Id. at 106 (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).
¹⁸¹. Id. at 99.
¹⁸². Id.; see, e.g., O'Connor v. California, 855 F. Supp. 303, 308 (C.D. Cal. 1994) (finding that the requirement of attending A.A. for DUI probation was not a violation of the establishment clause because A.A. was only one of a few treatment program options).
¹⁸³. See supra notes 128-64 and accompanying text.
¹⁸⁴. See supra Sections II.A.-B. for a discussion on the Lemon and coercion tests.
¹⁸⁶. Id.
¹⁸⁷. Warner, 115 F.3d at 1074–75.
¹⁸⁹. Id.
¹⁹⁰. Id.
First Amendment protection because the “government may not compel affirmation of religious belief,” and atheism was the antitheses of religious belief.\textsuperscript{192} Second, the court held that the condition was obligatory since Warner could have rejected the A.A. treatment for religious reasons, but only at the potential risk of incarceration.\textsuperscript{193} Finally, the court held that despite the fact that required attendance serves the secular purpose of rehabilitation, A.A. has the primary effect of advancing religion.\textsuperscript{194} The Second Circuit further noted that there was no doubt that Warner was coerced into participating in A.A.’s religious exercises by virtue of his probation sentence.\textsuperscript{195} According to the court, neither the probation recommendation nor the court’s sentence offered Warner a choice among other, non-sectarian therapy programs.\textsuperscript{196} It was “the coercive circumstance, conditioning a desirable privilege on the prisoner’s participation in a religious program, without alternative” that enabled the court to find a violation of the Establishment Clause.\textsuperscript{197}

Similarly, a prisoner in Tennessee brought a claim against the state’s prison board for requiring him to participate in an A.A. treatment program in order to receive parole.\textsuperscript{198} Prisoner Anthony Evans contended that A.A. is religious and, thus, required participation in it violates the Establishment Clause.\textsuperscript{199} In his petition, Evans stated:

\begin{quote}
[T]here is only one “alcohol program” available . . . and he is being coerced to participate in that program, as a condition of parole. . . . The “alcohol program” is administered by the Tennessee Department of Correction (TDOC), but the requirement [that] he continue [to] participate in the program as a condition of parole originates with the Board of Paroles. . . . The centerpiece of the program . . . is the twelve (12) steps of Alcoholics Anonymous. . . . The concept of a higher power is at the center of the twelve (12) steps. The twelve (12) steps explicitly deny that recovery from alcoholism is possible without reliance on a higher power. The emphasis a higher power is also . . . entitled “Alcoholics Anonymous” which is used as an all-purpose guide for anyone having difficulty in working the twelve (12) steps. Group prayer is common at the meetings. . . [and] meetings open with the “Serenity Prayer,” essen-
\end{quote}

\textsuperscript{192} Warner v. Orange County Dep’t of Probation, 827 F. Supp. 261, 265 (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)).
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 266–67.
\textsuperscript{195} Warner, 115 F.3d at 1075.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Arnold v. Tennessee Bd. of Paroles, 956 S.W.2d 478 (Tenn. 1997). While this case has two petitioners, Jimmy Arnold and Anthony Evans, only Evans’ claim opposed forced participation in the A.A. treatment program. Id. at 480.
\textsuperscript{199} Id. at 483.
tially non-denominational [sic], and close with “The Lord’s Prayer,” a Christian prayer.\textsuperscript{200}

The Tennessee Supreme Court acknowledged the United States Supreme Court’s difficulty in determining whether a certain policy or practice favors or establishes a religion.\textsuperscript{201} The Tennessee court also recognized that there is no debate, however, that a government policy that requires participation in a religious activity violates the Establishment Clause: “It [is] ‘beyond dispute’ that the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise.”\textsuperscript{202}

Evans had requested prospective injunctive relief by the trial court to ensure that future parole decisions would not consider an inmate’s participation in the A.A. program.\textsuperscript{203} The Tennessee Supreme Court held that the board illegally denied Evans parole and, thus, granted Evans his claim to relief.\textsuperscript{204} The supreme court stated that if the trial court finds that the A.A. program is a religious one, and if there are no secular alternative treatment programs offered, then the trial court must hold that to require a prisoner to attend such programs would constitute a violation of the Establishment Clause.\textsuperscript{205} The supreme court further noted that attending or failing to attend a state-supported religious meeting cannot be considered in deciding whether to grant or deny parole.\textsuperscript{206}

While most of the cases have involved the rehabilitation of alcoholics, the coercion test has also been used to strike down state use of a self-help rehabilitation program, based on Narcotics Anonymous (N.A.), for drug addicts as a requirement for early parole. The Seventh Circuit, in \textit{Kerr v. Farrey},\textsuperscript{207} while not totally disavowing use of the \textit{Lemon} test, held that the State impermissibly coerced inmates to participate in a religious program by forcing the inmates to attend N.A.\textsuperscript{208} The court never applied the \textit{Lemon} test, and only mentioned its use in cases where the Supreme Court has struck down statutes providing financial assistance to religions.\textsuperscript{209} James Kerr, an inmate at

\begin{itemize}
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id. at 484.
\item \textsuperscript{202} Id. (citing \textit{Kerr v. Farrey}, 95 F.3d 472, 479 (7th Cir. 1996)).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. The Supreme Court held that the trial court erred in dismissing Evans’ petition and remanded it back to the trial court. \textit{Id.}
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} 95 F.3d 472 (7th Cir. 1996).
\item \textsuperscript{208} Id. at 474.
\item \textsuperscript{209} Id. at 479.
\end{itemize}
the Oakhill Correctional Institution in Oregon, Wisconsin, was required to attend N.A. meetings to combat his chemical dependency. Oakhill chose to use N.A., the only substance abuse program available to inmates, because it had demonstrated success with inmates and the program was free for both the institution and the prisoners. According to Kerr, resisting the program would negatively impact his early parole eligibility.

Narcotics Anonymous, like A.A., follows a twelve-step program. At the first meeting, Kerr objected to the use of God’s name in “this messy business of addictions,” and asserted that the program’s use of God was in conflict with his own belief of free will. The district court, however, was not convinced by Kerr’s assertion that N.A. was closely aligned with religion. The court accepted the defendant’s position that the higher being concept in N.A. “could range from a religious view of God to the non-religious [sic] concept of individual willpower.” In making its decision, the district court relied on both the Lemon test and a balancing of penological interests versus personal interests. Under the penological balancing test, a prison policy that impinges on an inmate's First Amendment rights would be valid if it was “reasonably related to legitimate penological interests.” Therefore, if the state action was found to have established religion under the Lemon test, the program may still be found constitutional if the penological interest was a legitimate state action. Under the three-pronged Lemon test, the district court concluded that the N.A. program had a secular purpose that neither advanced nor

210. Id.
211. Id. Oakhill N.A. meetings always began with a prayer invoking the Lord and the participants were encouraged to read the N.A. book which contained many references to God and spirituality. Id. at 475.
212. Id. at 474.
213. Id. Kerr asserted in an affidavit that he objected immediately to the program. Id. His affidavit claimed that he was told by Alan Webb, the prison social worker assigned to his case, that he “didn’t have a choice in the matter; that attendance was mandatory; that if [he] didn’t go, [he] would most likely be shipped off to a medium (i.e., higher security) prison, and denied the hope of parole.” Id. at 475.
214. See infra note 247 and accompanying text.
215. Kerr, 95 F.3d at 475.
216. Id.
217. Id.
218. Id. at 479. The district court relied on Turner v. Safley, 482 U.S. 78 (1987), in which the Court allowed an infringement of an inmate’s rights relating to inmate marriages and inmate-to-inmate correspondences. Kerr, 95 F.3d at 479.
219. Kerr, 95 F.3d at 475.
220. Id; see also infra notes 294-99 and accompanying text.
inhibited religion, and that there was no state entanglement in the form of economic support.\textsuperscript{221}

The Seventh Circuit, in overruling the district court, noted that the Supreme Court has wrestled with Establishment Clause principles in primarily two contexts. According to the Seventh Circuit, the Supreme Court has first decided cases that deal with government efforts to coerce or force a person to support or participate in religion or its exercise.\textsuperscript{222} Second, says the Seventh Circuit, the Supreme Court has been confronted with cases in which an existing religious group seeks some benefit from the State, or in which the State wishes to confer a benefit on such a group.\textsuperscript{223} Under the first line of cases, the Seventh Circuit noted: “[A]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient.”\textsuperscript{224} Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.\textsuperscript{225} The \textit{Kerr} court, in deciphering the Supreme Court’s reasoning, stated:

Individuals may disagree in a particular case over other issues, such as whether it is the state who has acted, or whether coercion is present, or whether religion or something else is the aim of the coercion. But in general, a coercion-based claim \textit{indisputably} raises an Establishment Clause question.\textsuperscript{226}

The Seventh Circuit noted that the second line of cases, according to the Supreme Court, is one for which the \textit{Lemon} test was designed.\textsuperscript{227} These involve cases in which the State has taken steps to help existing institutions that establish a religion or tend to do so.\textsuperscript{228}

The appellate court found that Kerr’s case was more analogous to the first line of coercion cases because Kerr was coerced by the prison, an agent of the State of Wisconsin, to attend religious meetings under threat of penalties.\textsuperscript{229} The court, in an effort to provide a distinct test to reflect the Supreme Court’s division of two types of Establishment Clause cases, noted three points that are crucial in determining a violation through coercion. First, the State must have done an affirmative act; second, the action must amount to coercion; and third, the

\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 477.
\textsuperscript{223} \textit{Id.} at 477-78.
\textsuperscript{224} \textit{Id.} at 478 (Blackmun, J., concurring) (quoting \textit{Lee v. Weisman}, 505 U.S. 577, 604 (1991)).
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.} at 479 (emphasis added).
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}

\textsuperscript{229} \textit{Id.} Kerr analogized his forced participation in N.A. to forced “attendance of service at a Mosque, a Jewish Temple, or a meeting of Pentecostals [sic].” \textit{Id.} (correction in original text).
object of the coercion must be religious and not secular. The court held that all three criteria were met. First, the State of Wisconsin, through prison authorities, initiated the program; the fact that N.A. actually operated the treatment program was of no consequence because the prison officials required the inmates to attend the meetings. Second, required attendance at N.A. meetings constituted coercion because an inmate who refused was subject to penalties. Lastly, the court found that the defendant's description of N.A. as a "non-religious (sic) idea of willpower within the individual" was incorrect, and that the program was religious. According to the court, a "straightforward reading of the [T]welve [S]teps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being." Because all three criteria were met, the court held that the program ran afoul of the prohibition of a state favoring religion over non-religion.

These cases demonstrate a change in Establishment Clause jurisprudence. Instead of using the Lemon test, these courts recognized the test's limitations and applied the coercion test. Each court conceded that defining religion is a difficult task; yet, all three courts found A.A. proselytizes religious concepts. The courts relied heavily on the very words in Alcoholics Anonymous to reach these conclusions. Furthermore, the courts substantiated the holdings by indicating that the lack of choice between secular and sectarian programs played a part in the decisions. Existence of a choice may have helped the program survive constitutional challenge.

III. ANALYSIS

Compulsory participation in Alcoholics Anonymous as a condition of early parole or family visitation presents a conflict between individual rights under the First Amendment and state initiatives to produce safe prison environments. Generally, the rehabilitation of substance abuse inmates is a wise policy, and state-offered rehabilitation programs do not necessarily infringe constitutional rights. Constitutional

230. Id.
231. Id.
232. Id.
233. Id.
234. Id. at 480.
235. Id.
236. Id.
237. See infra note 247 and accompanying text (specifically, steps 3, 5, 6, 7 and 11).
238. See, e.g., Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1075 (2d Cir. 1996).
questions arise, however, when the state compels participation at A.A., an arguably religious, admittedly spiritual, organization.\textsuperscript{239}

This section maintains that A.A. is, indeed, a religious organization. Furthermore, this section demonstrates how A.A. supporters, as well as supporters of the infamous \textit{Lemon} test, attempt to hide behind the veil of defining A.A.'s religious intentions as merely spiritual. This section further explains that requiring participation in A.A. by prisoners is a state action that unduly coerces them to participate in a state-sponsored, religious activity. In supporting the reactivation of the coercion test, this section denounces the \textit{Lemon} test and demonstrates why, using the coercion analysis, prisoners with drug and alcohol problems are being deprived the protection of the First Amendment's Establishment Clause when they do not participate.

\textbf{A. The Immaculate Conception of Alcoholics Anonymous and Its Adherence to God}

Alcoholics Anonymous has over 95,000 chapters worldwide with approximately 2 million members.\textsuperscript{240} It is the leading self-help, rehabilitative organization for alcoholics.\textsuperscript{241} The book \textit{Alcoholics Anonymous}\textsuperscript{242} is the central text of A.A. and is often referred to as the "Bible" by A.A. members.\textsuperscript{243} Although the forward to \textit{Alcoholics Anonymous} states that A.A. is "not allied with any particular faith, sect or denomination,"\textsuperscript{244} the founders of A.A., Bill Wilson and Dr. Robert Smith, were greatly influenced by the religious doctrines of the Oxford Group, an evangelical Christian group,\textsuperscript{245} established on monotheistic principles.\textsuperscript{246}

Alcoholics Anonymous bases its treatment on twelve intervals called the "Twelve Steps" and governs its organization on twelve rules

\textsuperscript{239} \textit{Alcoholics Anonymous}, infra note 247, at 569-72. Some regard A.A. as "[using] religious principles . . . although [the organization is] not religious in nature." \textit{Treatment and Prevention}, infra note 243, at 173.


\textsuperscript{241} See \textit{Charles Q. Bufo, Alcoholics Anonymous: Cult or Cure?} 9 (1991) [hereinafter \textit{Cult or Cure}].

\textsuperscript{242} See \textit{Alcoholics Anonymous}, infra note 247, at xiv. Participants in A.A. frequently refer to this book as their "Bible" or the "Big Book."


\textsuperscript{244} \textit{Alcoholics Anonymous}, infra note 247, at xiv.

\textsuperscript{245} \textit{See Cult or Cure?}, supra note 241, at 62.

\textsuperscript{246} Id. at 62-63.
called the "Twelve Traditions."\textsuperscript{247} The Twelve Steps and Twelve Traditions appearing in \textit{Alcoholics Anonymous} illustrate the significance

\begin{itemize}
\item[1.]
We admit we were powerless over alcohol—that our lives had become unmanageable.
\item[2.]
Came to believe that a Power greater than ourselves could restore us to sanity.
\item[3.]
Made a decision to turn our will and our lives over to the care of God as we understood Him.
\item[4.]
Made a searching and fearless moral inventory of ourselves.
\item[5.]
Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
\item[6.]
Were entirely ready to have God remove all these defects of character.
\item[7.]
Humbly asked Him to remove our shortcomings.
\item[8.]
Made a list of all persons we had harmed, and became willing to make amends to them all.
\item[9.]
Made direct amends to such people wherever possible, except when to do so would injure them or others.
\item[10.]
Continued to take personal inventory and when we were wrong promptly admitted it.
\item[11.]
Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out.
\item[12.]
Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.
\end{itemize}

\textbf{ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS 59-60 (3d ed. 1976) [hereinafter ALCOHOLICS ANONYMOUS].} The Twelve Traditions are as follows:

\begin{itemize}
\item[1.]
Our common welfare should come first; personal recovery depends upon A.A. unity.
\item[2.]
For our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern.
\item[3.]
The only requirement for A.A. membership is a desire to stop drinking.
\item[4.]
Each group should be autonomous except in matters affecting other groups or A.A. as a whole.
\item[5.]
Each group has but one primary purpose—to carry its message to the alcoholic who still suffers.
\item[6.]
An A.A. group ought never endorse, finance, or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property and prestige divert us from our primary purpose.
\item[7.]
Every A.A. group ought to be fully self-supporting, declining outside contributions.
\item[8.]
Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers.
\item[9.]
Alcoholics Anonymous, as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve.
\item[10.]
Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy.
\item[11.]
Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio, television and films.
\item[12.]
Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles before personalities.
of religious principles to the A.A. program of recovery. For example, the second of the Twelve Traditions states: "For our group purpose there is but one ultimate authority—a loving ‘God’ as ‘He’ may express ‘Himself’ in our group conscience." The Twelve Steps, in turn, represent the cornerstone of the A.A. program of recovery and the center of every participant’s life. In order to be a fully recovered alcoholic, the participant must take each step as truth and must successfully accomplish each one.

B. The Religious Component of Alcoholics Anonymous

While the “primary objective of A.A. is to enable its adherents to achieve sobriety, its doctrine unmistakably urges that the path wholeheartedly embraces traditional theistic beliefs.” Alcoholics Anonymous’ twelve-step program plays a major role in treatment for addicts. Nonetheless, the preliminary debate among judicial scholars who question the implication of state compelled A.A. participation upon constitutional rights involves “whether A.A. should be characterized as religious or . . . religion-neutral.” Experts in the recovery field have viewed A.A. as a community support system, a social movement, therapy, a way of life, a religious movement, and even a cult.

Alcoholics Anonymous is properly considered a religion for three reasons. First, the founders modeled A.A. after a religious organization, the Oxford Group Movement, and A.A. continues to follow the theistic principles of the Movement. Second, the Twelve Steps and Twelve Traditions, the foundation principles of A.A., refer to God and contain other religious connotations. Third, the A.A. members incorporate religious prayer into the meetings and accept God as their savior from the depths of alcoholism.

Alcoholics Anonymous attributes its foundation to three belief systems: (1) the concept of surrendering powerless to a being greater than human; (2) the belief that spiritual needs require a spiritual expe-

Id. at 564; see also Alcoholics Anonymous World Servs., Inc., Twelve Steps and Twelve Traditions 129-89 (1981) [hereinafter Twelve Steps and Twelve Traditions] (examining the meaning and nature of the Twelve Traditions in depth).

248. See supra note 247.

249. See Alcoholics Anonymous, supra note 247, at 564.

250. Cult or Cure?, supra note 241, 59-60.


253. Treatment and Prevention, supra note 243, at 164 (citing a 1979 study by Gartner & Reisman); see also Cult or Cure?, supra note 241, at 82-102 (discussing the similarities and differences between A.A. and “cults”).
rience in order to achieve a successful change in one’s self; and (3) the tenets of the Oxford Group Movement. William (Bill) Griffith Wilson and Dr. Robert Smith, devoted followers of the Oxford Group Movement, were the co-founders and driving force behind A.A. The Oxford Group Movement began around 1908 and stemmed from the ideas preached by the Evangelical Lutheran, Frank Buchman. The Movement was a religious revivalist organization that mandated the confession of bad acts and the recognition of the need for change, with the desired result of direct access to God. In the beginning, A.A. was closely aligned with Buchman’s Movement. Following his own “spiritual awakening,” Wilson encouraged other alcoholics to practice the Oxford principles of admission of fault and seeking recovery and retribution though God in order for them to also reach sobriety. Early A.A. members attended Oxford Group meetings; in fact, Dr. Smith referred to the group as “the alcoholic squadron of the Akron Oxford Group.” In 1937, due to differences with the Oxford Group, the fledgling A.A. severed its formal connections with the Movement. While A.A. physically removed itself from the Movement, the religious tenets of the Oxford Group remained at the heart of A.A. Demonstration of this connection is that each of the Twelve

254. TREATMENT AND PREVENTION, supra note 243, at 164; see also CULT OR CURE?, supra note 241, at 35-37 (explaining the conception of A.A.).

255. See CULT OR CURE?, supra note 241, at 34-38.

256. Id. at 16.

257. See TREATMENT AND PREVENTION, supra note 243, at 165; see also CULT OR CURE?, supra note 241, at 35-37 (recounting the beginnings of A.A.).


259. See id. Wilson’s experience with sobriety began with the following statement: “I found myself crying out, ‘If there is a God, let Him show Himself! I am ready to do anything, anything!’” “Suddenly the room lit up with a great white light. . . . All about me . . . there was a wonderful feeling of Presence, and I thought to myself, ‘So this is the God of the preachers.’”


260. See CULT OR CURE?, supra note 241, at 38. The Akron Group, located in Akron, Ohio, was a chapter of the Oxford Movement. Id.

261. Although Wilson maintained faith in the principles of the Oxford Group Movement, he believed alcoholics needed to be fed the ideas “with teaspoons rather than buckets.” Id. at 39 (quoting WILSON, supra note 259, at 75). Alcoholics Anonymous founders also worried that a close link with the Buchmanites, those who followed the Oxford Group, might alienate the Catholic church and Catholic alcoholics. See CULT OR CURE?, supra note 241, at 39. Additionally, in 1936, Frank Buchman, founder of the Oxford Group, expressed controversial views approving of Adolf Hitler, providing good reasons for A.A. to distance itself from the Oxford Group movement. See id. at 23-26 (discussing Buchman’s 1936 interview where he “thank[ed] heaven for a man like Adolf Hitler, who built a front line of defense against the anti-Christ of Communism”).

262. CULT OR CURE?, supra note 241, at 39.
Steps and Twelve Traditions of A.A. is traceable to the teachings of Frank Buchman.\footnote{263}{Id. at 41. Charles Bufe observes that the Twelve Steps have remained unchanged through over the 50 years of A.A. growth and “probably not one member in 100 of A.A. . . . has more than the foggiest concept of where the . . . program originated.” Id. at 52-53.}

The literature and founding principles of A.A. further demonstrate its religious approach to alcohol recovery.\footnote{264}{See generally ALCOHOLICS ANONYMOUS, supra note 247.} The nucleus of the A.A. program is the Twelve Steps and Twelve Traditions approach.\footnote{265}{Id. at 62-81 (discussing the religious nature of the twelve steps and traditions).} Six out of twelve steps refer to the monotheistic God, a higher power or prayer. In fact, the word ‘God’ appears 132 times in Alchoholics Anonymous, and pronouns for God, such as ‘Him’ and ‘He’, are mentioned eighty times.\footnote{266}{See Stewart C., A REFERENCE GUIDE TO THE BIG BOOK OF ALCOHOLICS ANONYMOUS 115 (1986).} Under the Twelve Steps, step one requires the A.A. member to admit powerlessness over alcohol; step two to recognize that only a “Power greater than ourselves could restore us to sanity.”\footnote{267}{See Alcoholics Anonymous, supra note 247, at 59.} By step three, one has “[m]ade a decision to turn [his or her] will and [his or her life] over to the care of God . . . .”\footnote{268}{Id.} At step six, one is “entirely ready to have God remove all these defects of character;” and at step seven, the alcoholic “[h]umbly ask[s] Him to remove [his or her] shortcomings.”\footnote{269}{Id.} Under the second tradition of the Twelve Traditions, the member believes, “[T]here is but one ultimate authority—a loving God as He may express Himself.”\footnote{270}{Id.}

In addition to A.A.’s religious foundation and principles, group prayer is commonplace at A.A. meetings. Members frequently commence A.A. meetings with a recitation of the Serenity Prayer and usually end the meetings by joining hands and reciting the Lord’s Prayer.\footnote{271}{See Treatment and Prevention, supra note 243, at 166; see also Warner v. Orange County Dep’t of Probation, 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (stating that A.A. meetings that the plaintiff attended opened with the Serenity Prayer and closed with the Lord’s Prayer).} These two prayers are distinct to Western religions, primarily Christianity,\footnote{272}{Id.} and may often be heard out of the mouths of church congregations.

\begin{verbatim}
The Lord’s Prayer, commonly referred to as the Our Father, reads:

Our Father who art in heaven, Hallowed be thy name. Thy kingdom come, Thy will be done, On earth as it is in heaven. Give us this day our daily bread; And forgive us our debts, As we also have forgiven our debtors; And lead us not into temptation, But deliver us from evil . . . .

\end{verbatim}
The New York Court of Appeals in Griffin v. Coughlin performed an in-depth analysis of A.A. and its connection to religious philosophies. After a comprehensive examination of A.A., its literature and tenants, the court stated:

Concededly, there are passages in A.A. literature... which... eschew any intent to impose a particular sectarian set of beliefs or a particular concept of God upon participants. However, a fair reading of the fundamental A.A. doctrinal writings discloses that their dominant theme is unequivocally religious, certainly in the broad definitional sense as "manifesting faithful devotion to an acknowledged ultimate reality or deity." Indeed, the A.A. basic literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions. Thus, God is named or referred to in five of the 12 steps. "Working" the 12 steps includes confessing to God the "nature of our wrongs" (Step 5), appealing to God "to remove our shortcomings" (Step 7) and seeking "through prayer and meditation" to make "contact" with God and achieve "knowledge of His Will" (Step 11). The 12 Traditions include a profession of belief that "there is one ultimate authority—a loving God as He may express Himself in our group conscience."

While A.A. literature declares an openness and tolerance for each participant's personal vision of God ("as we understood Him" [Steps 3 and 11]), the writings demonstrably express an aspiration that each member of the movement will ultimately commit to a belief in the existence of a Supreme Being of independent higher reality than humankind.

[An analysis of Alcoholics Anonymous and the Twelve Steps and Twelve Traditions texts] demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the AA fellowship entails engagement in religious activity and religious proselytization. Followers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings. These expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes.

Members of A.A. attempt to nullify any connection to religion by characterizing the organization as spiritual without any religious affli-
However, something does not become a truth simply because someone says it is held as such. Just because members of A.A. say the program is not religious does not mean the program does not proselytize religious beliefs. Accordingly, courts, when determining whether the program is religious, “must examine the nature of the organization in practice and as administered, not merely defer to self-definition.” Assuming arguendo that the founders of A.A. intended the organization to be spiritual and nontheistic, this intention has not been supported by the reality of the organization. Recital of religious prayers at meetings clearly indicates the group’s religious intent. Using the words ‘God’, ‘Him’, or ‘He’ in the Twelve Steps, while purposely capitalizing the G and H further substantiates the reality of the organization’s religious connotations. Nevertheless, even if A.A. is spiritual and not religious, this semantic distinction is inconsequential for purposes of the Establishment Clause. Accepting A.A.’s self-definition as spiritual, rather than religious, would not lead to a different result. A.A. purports to preempt religiosity by turning “God as we understand Him,” into an awareness of just a power higher than one’s self and a general set of beliefs rather than a belief in a particular God. However, in light of the definition of religion offered by Justices Kennedy and Black, A.A. clearly fits into the functional definition of religion. Regardless of whether God is the traditional Christian, Jewish or other Western religion god, it is a higher power to which A.A. participants must “turn [their] will and [their] lives over” in order to remove the error of their ways.

B. Spiritual Component of Alcoholics Anonymous

Despite A.A.’s reliance on succumbing to the powers of God in order to lead the alcoholic to the path of sobriety, its members deny the

276. Id. at 101.

277. The Attorney General of South Dakota termed A.A. a religious society for tax purposes. S.D. CODIFIED LAWS § 10-4-9 (Michie 1996). Additionally, a Wisconsin court relied on A.A. literature and expert witnesses to reach the conclusion that religious activities were a part of A.A.’s treatment and that there was no merit in A.A.’s attempt to distinguish between spirituality and religion. CULT OR CURE?, supra note 241, at 92 (citing Granberg v. Ashland County, 590 F. Supp. 1005, 1010 (W.D. Wis. 1984)).


279. ALCOHOLICS ANONYMOUS, supra note 247, at 59.


281. ALCOHOLICS ANONYMOUS, supra note 247, at 59.
religious nature of the program. Members of A.A. assert that the key to recovery is “an unsuspected inner resource,” viewed as “a Power greater than themselves.” They profess that the Power is spiritual and not religious.

Admitting powerlessness to a higher being often requires one to redefine her or his identity. This radical life change is the underlying goal of A.A., effectuated by the “alteration of major belief systems.” As one A.A. member and counselor explained, “A.A. is a way of life. The notion of surrender, to admit that one is an alcoholic, begins to redefine who we are.” This indoctrinating nature conflicts with the Establishment Clause because it presents the question of whether government can compel such a forceful change in beliefs. State encouragement or establishment of a spiritual organization is just as violative of the First Amendment Establishment Clause because it treats religious organizations positively rather than providing neutral or indifferent treatment. The actual administration of the A.A. program increases the potential for rights infringement through both its religious and spiritual elements.

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282. The A.A. “preamble,” read at the beginning of each meeting, reinforces that A.A. has no affiliation with any “particular faith, sect or denomination.” See Alcoholics Anonymous, supra note 247, at xiv. Alcoholics Anonymous representatives term the organization as “spiritual” and only “suggest that you develop a relationship with a higher power.” B. Drummond Ayres Jr., Atheist Challenges Order to Attend A.A. Meetings, N.Y. Times, July 11, 1988, at A12.

283. See Alcoholics Anonymous, supra note 247, at 569-70.

284. Id.

285. See Treatment or Prevention, supra note 243, at 164.

286. Ron Gasbarro, Another Road to Recovery: A New Group Offers Alternative to AA, Wash. Post, May 14, 1991, at D5. Another member’s testimonial is as follows:

This is the how and why of [how we stopped our addiction to alcohol]. First of all, we had to quit playing God. It didn’t work. Next, we decided that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children. Most good ideas are simple, and this concept was the keystone of the new and triumphant act through which we passed to freedom. When we sincerely took such a position, all sorts of remarkable things followed. We had a new Employer. Being all powerful, He provided what we needed, if we kept close to Him and performed His work well. Established on such a footing we became less and less interested in ourselves, our little plans and designs. More and more we became interested in seeing what we could contribute to life. As we felt new power flow in, as we enjoyed peace of mind, as we discovered we could face life successfully, as we became conscious of His presence, we began to lose our fear of today, tomorrow or the hereafter. We were reborn.


287. Not only is the State establishing an indoctrinating program by requiring A.A. participation, but the State is also infringing on other First Amendment rights. See, e.g., Lyng v. Northwest Indian Cemetery Protection Ass’n, 485 U.S. 439, 445 (1988) (enacting a free exercise claim if a government act coerces an individual to violate religious beliefs by “denying any person an equal share of the rights . . . enjoyed by other citizens”); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (explaining that a person must be free to reach his or her own beliefs through his
Establishment Clause jurisprudence finds constitutional violations when religion is favored over non-religion, leading to the assumption that when the government requires someone to recognize a power greater than oneself, that in itself is religious. Furthermore, an organization’s self-definition should not govern the determination of the organization’s religiousness or spirituality. Courts should investigate the character of the group in its actual, not claimed, activities to determine its religious nature and be skeptical of First Amendment violations anytime God becomes a player in a state operation.

C. Compulsory Participation in A.A. is Unconstitutional

While the State may not establish nor encourage a religion, it also may not condition a benefit unconstitutionally. The doctrine of unconstitutional conditions declares that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. In other words, “the government cannot make an individual choose between receiving a state-conferred benefit and giving up a constitutional right.” For example, as one commentator has explained: “[I]ndividuals qualified for unemployment compensation may not be forced to choose between unemployment benefits and the free exercise of their religion.” Accordingly, “Once the Court has acknowledged that states cannot do indirectly what they are prohibited from doing directly, the only issue that remains is whether the burden on the constitutional right amounts to a violation, and whether it is justified by the appropriate level of scrutiny.”

or her conscience rather than by state coercion); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (striking down state laws requiring passages from the Bible or the Lord’s Prayer to be read in school).


290. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 10, § 18, at 681 & n.29 (2d ed. 1988); see also Kathleen M. Sullivan, Article: Unconstitutional Conditions, 102 HARV. L. REV. 1415, 1415 (1989) (arguing how the doctrine of unconstitutional conditions shifts the focus from individual entitlements to structural limits on power).


292. Id. Although this paper does not discuss the Free Exercise Clause implications of the Welfare Act, it is important to note the unconstitutionality of conditioning state benefits on A.A.

293. Id. at 911.
CORRECTION THROUGH COERCION 603
tively demonstrate the complete gambit of harm a state induces when it compels A.A. attendance on prisoners, the doctrine must be addressed.

But the rights of prison inmates are not absolute. They are balanced against the state’s penological interests.²⁹⁴ Striking the balance between the interest of the State in eradicating crime and overpopulation of prisons and the rights of the inmate is a difficult task for any court, but one which is a fundamental obligation of society.²⁹⁵ The prohibition on unconstitutional conditions applies to terms of probation and other privileges. In 1926, the Supreme Court held: “[T]he state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited . . . it may not impose conditions which require the relinquishment of constitutional rights.”²⁹⁶ Therefore, a condition on a benefit that violates First Amendment protection may establish the illegality of that condition.²⁹⁷ Prisoners retain constitutional protections even while incarcerated; however, the nature of incarceration justifiably limits those protections.²⁹⁸ Consequently, the Court applies a lesser standard of scrutiny when determining the constitutionality of prison rules.²⁹⁹

The Supreme Court has formulated a test for determining whether prison regulations violate inmates’ constitutional rights: “[W]hen a prison regulation impinges on inmates’ constitutional rights the regulation is valid if it is reasonably related to legitimate penological interest.”³⁰⁰ The Court uses a four-part inquiry to determine if the

²⁹⁵. Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring) (“[N]ot the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community.”).
²⁹⁶. Frost & Frost Trucking Co. v. Railroad Comm’n, 271 U.S. 583, 593-94 (1926). But see West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (“It was held that those who take advantage of [the state’s] opportunities may not on the ground of conscience refuse compliance with such conditions.”).
²⁹⁷. Note that the State is allowed to violate certain rights of the prisoners if the penological interest is strong. See infra note 300 and accompanying text.
³⁰⁰. Id. at 89. In Turner, inmates at the Missouri Division of Corrections challenged two regulations at the prison. Id. at 81. The first regulation allowed correspondence between inmates if it concerns legal matters but only allows other inmate correspondence if each inmate’s classification/treatment team deems it in the best interest of the parties. Id. The second regulation permitted an inmate to marry only with the prison superintendent’s permission, which can be given only when there are “compelling reasons” to do so. Id. at 82. Justice O’Connor, writing for the majority, held that: rules that regulated inmate-to-inmate correspondence were reasonably related to legitimate security concerns of prison officials; but the rule that prohibited inmates from marrying other inmates or civilians unless approved by the prison superintendent
inmate's rights have been violated. Probation and other privileges, based on conditions that infringe on constitutional rights, may still be upheld: (1) if there is a valid, rational connection between the condition and the legitimate government interest put forth to justify it; (2) if there are no alternative means; (3) if there is no negative effect on the inmate; and (4) if there are no easy alternatives.301

Prison officials, working as agents of the state, may interfere with a prisoner's exercise of First Amendment rights only when such interference is reasonably related to a legitimate penal interest.302 As a result, "Determining the reasonableness of the interference with a prisoner's First Amendment right depends not only on the legitimacy of the penal interest involved, but also on which First Amendment was not reasonably related to any legitimate penological objectives. Id. at 91-95. The Court reasoned that correspondence between inmates would allow inmates to develop informal organization that may threaten safety and security at the prison. Id. at 92. This regulation was also given approval because there was no easy alternative to the regulation and there was no inexpensive way to monitor inmate correspondence. Id. at 93. The marriage regulation, however, had de minimus security concerns. Id. at 98. Nonetheless, prison officials may regulate the time and circumstances under which a marriage would take place. Id. at 99.

301. See supra note 300 and accompanying text. In prisoners' rights cases the Supreme Court applies the minimal scrutiny standard. See Turner, 482 U.S. at 88-91. The Court inquires whether a prison regulation that burdens a fundamental right "is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." Id. at 87. Even though this level of scrutiny gives the government the presumption that the action is constitutional, state programs have been overruled.

302. Thornburgh v. Abbott, 490 U.S. 401, 414-15 (1989). In Thornburgh, prisoners challenged regulations governing receipt of subscription publications. Id. at 403. The Federal Bureau of Prisons permitted prisoners to receive publications from the "outside," but authorized wardens to reject an incoming publication that was found to be, "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1988). The Supreme Court affirmed the standard in Turner by stating that a regulation is "valid if [it is] reasonably related to legitimate penological interests." Thornburg, 490 U.S. at 413 (citing Turner, 482 U.S. at 89). The Court reasoned the Turner standard to be valid because alternative means of expression were open to the inmate even though specific publications may be prohibited. Id. at 414-15.

Historically, courts have recognized health, safety, and security interests as compelling interests in the prison context. See, e.g., Thornburgh v. Abbot, 490 U.S. 401, 419 (1989) (upholding the regulation of prisoners' receipt of incoming magazines); Turner v. Safley, 482 U.S. 78, 93 (1987) (upholding the regulation of inmate-to-inmate correspondence); Forbes v. Triggs, 976 F.2d 308, 312-15 (7th Cir. 1992) (holding that a prison's interest in combatting narcotics problems justified the periodic taking of inmate urine samples in order to conduct drug screens); Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992), cert. denied, 113 S. Ct. 472 (1992) (holding that a prison's interest in preserving permanent identification records of felons outweighs the intrusion involved in taking inmate blood samples); Harris v. Thigpen, 941 F.2d 1495, 1512-21 (11th Cir. 1991) (holding that a prison's interest in preventing transmission of HIV justified segregation of HIV-positive inmates); St. Claire v. Cuyler, 634 F.2d 109, 115-17 (3rd Cir. 1980) (upholding a prison rule which prohibited inmates from wearing hats because inmates could hide contraband in a hat).
right is being asserted.” For example, the speech of a prison inmate, while it could not be regulated if the individual were not in prison, may be regulated during incarceration. The Supreme Court has held that inmates have the right to send and receive information, subject to limits reasonably related to a legitimate penal interest. The Court has held that correspondence may be regulated between inmates and their immediate family members who are not inmates, and between inmates concerning only legal matters. The Court decided that there are legitimate security interests justifying the inmate-to-inmate correspondence rule, given the potential for communication of escape plans and other violent acts. On the other hand, because outgoing correspondence poses the least threat to internal prison security or other penal interests, the Court allows such communication.

Under the First Amendment, however, benefits cannot be conditioned upon forced participation in a state-sponsored religion. The Framers rejected an established church so much that they explicitly included in the First Amendment that “Congress shall make no law respecting an establishment of religion.” The Framers included this provision because they specifically feared: (1) government would corrupt religion; (2) an established religion would repress competing views; and (3) it would promote sectarian violence. Because religious protection is so deeply rooted in our notions of freedom and liberty, the state may not condition a benefit based on the burden of religion.

Participation in A.A. has become an integral part of prison management in many jurisdictions. Nonetheless, judicial sentencing qualifies as a state action and, therefore, may not infringe constitutional rights. The constitutional analysis must be affected by the fact that the challenged program is a condition of probation or family visitation. The choice between a longer sentence or separation from family members and probation or visitation offers no choice at all—

304. Turner, 482 U.S. at 93.
305. Id. at 81-82, 91-93.
306. Thornburgh, 490 U.S. at 411-12.
307. See supra note 291 and accompanying text.
308. U.S. CONST. amend. I.
309. Rutherford, supra note 291, at 915.
310. See supra note 6 and accompanying text.
the inmate essentially chooses A.A. as the lesser of two evils. The voluntary choice of probation or visitation renders impotent any constitutional claim. When the State requires A.A. participation as a condition to receive a benefit, and therefore conflicts with the constitutional premise of separation of church and state, the choice between privileges and no privileges alone cannot validate the State's forced rehabilitation.

Conditioning a benefit otherwise available to citizens upon conduct repugnant to his or her beliefs puts pressure on the adherent to violate those beliefs, thereby violating the person's freedom of religion. Conditions must be constitutional even if the state has no obligation to award the benefit. Therefore, if the state could not compel citizens to go to A.A. directly, it cannot indirectly require such attendance as a precondition to the benefits of probation or family visitation. Although the state has no obligation to award prisoners benefits, it cannot deny these benefits by setting conditions that conflict with the inmate's religious beliefs or allows the State to establish a religion.

D. Squeeze Out the Lemon: The Coercion Test is Sweet

Alcoholics Anonymous-type treatment for prisoners is secular in purpose—to rehabilitate the alcohol or substance abusing inmates to prepare them for re-entry into society. While the principal effect of the action arguably remains rehabilitation, entanglement between the State and A.A. clearly results. There exists a cooperation between the State and A.A., coupled with the fact that the recipient has an obligation to participate. Therefore, the mandated A.A. participation should be challenged using the coercion test set forth in Lee v. Weis-


315. Even though the State has no obligation to award unemployment benefits, it cannot impose a condition which inevitably deterred or discouraged the exercise of First Amendment rights of expression. Sherbert v. Verner, 374 U.S. 398, 405 (1963). The State cannot indirectly, via conditions, “produce a result which the State could not command directly.” Speiser v. Randall, 357 U.S. 513, 526 (1958).

316. In Zorach v. Clauson, 343 U.S. 306 (1952), in upholding cooperation between the government and religious institutions, the Supreme Court stated “there shall be no concert or union or dependency one on the other.” Id. at 312. The widespread practice of making referrals to A.A. rather than creating a state neutral program, arguably represents dependency by the state on a religious organization. The First Amendment should deny “to every denomination any advantage from getting control of public policy.” Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting).
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319. Id. at 614.
320. Id. at 613; see, e.g., Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988) (holding no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits).
322. Id. at 2021.
323. Id. at 2020-21 (emphasis added).

rather than the Lemon test, and, thus, found unconstitutional.

First, and foremost, the Lemon test should not be used in cases where the government creates or sponsors a religion or religious practice and then mandates, forces, or coerces a person to partake in such ideologies. The Lemon court itself noted that, “[s]ome relationship between government and religious organizations is inevitable.” As a result: “Entanglement must be excessive before it runs afoul of the Establishment Clause.” Those who object to A.A. participation would have to prove the State excessively interfered in the establishment or encouragement of a religion or religious practices. As demonstrated in the Boyd, Stafford, Feasel, Jones and O'Connor cases, an objector will most likely not be able to demonstrate excessive entanglement. Courts have found the interest in rehabilitation outweighs a state’s encouragement of religious practices.

When deciding the constitutionality of the state-mandated A.A. participation, it is important to note a recent statement by dissenting justices of the Supreme Court:

“When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being “tainted... with a corrosive secularism.” The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.

The Court viewed government approval of religion as a reinforcement of the religious message and as a carrier of that message, thereby excluding those of less favored views. The Court warned and reminded government why the Framers incorporated the religion clauses into the First Amendment:

The human tendency, of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. “That tendency to forget is the reason for having the Establishment Clause... in the hope of stopping the corrosion before it starts.”
There are two types of Establishment Clause cases. In the first group of cases, the State is forcing a person who does not subscribe to certain religious tenets to support or to participate in observing these tenets. These cases are considered “outsider” cases, where the State is imposing religion on an unwilling subject. For example, in *Torcaso v. Watkins*, the Court struck down a statute that required individuals appointed to public office in that state to declare their belief in the existence of God. The second group of cases concerns religious groups seeking some benefit from the state, or the state wishing to confer a benefit on such a group. For example, in *Everson v. Board of Education*, the Court upheld a state statute that provided publicly funded transportation services for parochial school students. In this case, no one was forcing families to send their children to parochial schools; the “establishment effect” came from the use of the protesting taxpayers’ dollars to help the students or their families.

Much debate has raged on the second type of cases: those elusive “insider” cases in which the State has taken some affirmative action that helps existing religions. These are the cases for which the *Lemon* test was designed. However, when a person alleges that the State coerces him or her, under threat of meaningful penalties, to attend religious meetings, then the court must look to a different test. When a court applies the *Lemon* test to claims arising from mandated A.A. participation, the court does not take into account the substantial Establishment Clause jurisprudence the Supreme Court has developed since *Lemon*. Whether under the general, psychological or legal approaches to the coercion test, if a plaintiff claims that the State is coercing him to subscribe to a religion, the court must only look at three crucial points: “[F]irst, has the state acted; second, does the action amount to coercion; and third, is the object of coercion religious or secular?”

325. *Id.* at 495-96.
327. *Id.* at 17-18.
330. Justice Blackmun wrote in his concurring opinion in *Lee*: “[A]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.” *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).
331. *Kerr*, 95 F.3d at 479.
With respect to mandated A.A. participation for prisoners, all three criteria are met. First, the State, acting through its prison wardens, chooses A.A. as the provider for drug and alcohol treatment. Although the State does not, itself, preach the tenets of God, it gives A.A. the power to do so. Second, prisoners are ultimately coerced to attend A.A. meetings. Just as a high school graduation ceremony is "in a fair and real sense obligatory," so is attending A.A. in return for early parole or family visitation rights. An inmate has no real choice—comply with the State requirement or remain in prison, possibly indefinitely, without the loving smile from his or her family. The argument that A.A. attendance in exchange for early parole or family visitation is voluntary, is extremely formalistic. Third, a straightforward reading of the Twelve Steps clearly demonstrates that the steps are based on the monotheistic idea of a single God or Supreme Being. True, the God may refer to Jesus Christ, Allah, Buddha or the Holy Trinity, but the Twelve Steps, nonetheless, consistently refer to "God, as we understood Him." Even if the steps are expanded to include polytheistic ideals, or animistic philosophies, they are still "fundamentally based on a religious concept of a Higher Power." Furthermore, the counseling meetings are permeated with explicit religious content. Participants are told to pray to God for help in overcoming their addiction, and meetings are opened and closed with group prayer. These activities belie with a heavy emphasis on spirituality and prayer. "This is not the same as when religion is not struck by the insertion of the words 'under God' in the Pledge of Allegiance, or other incidental references that the courts have upheld, because people can refuse to say God without penalty."

IV. THE REALITY OF IT ALL—BALANCING PUBLIC POLICY WITH INDIVIDUAL RIGHTS AND A SUGGESTED APPROACH

The partnership between states and mandated A.A. treatment unconstitutionally entangles church and state. However, as the Court intimated in Zorach v. Clauson, "[t]he problem, like many

332. Lee, 505 U.S. at 586.
333. Kerr, 95 F.3d at 480.
334. Id.
335. Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1075 (2d Cir. 1997).
336. Id.
337. Id.
338. See, e.g., Sherman v. Community Consol. Sch. Dist., 980 F.2d 437, 437 (7th Cir. 1992) (holding that Illinois public school teachers could lead the Pledge of Allegiance without violating the First Amendment so long as pupils were free not to participate).
problems in constitutional law, is one of degree." 340 No matter how well the Court articulates constitutional guarantees, the judiciary nevertheless will still balance the governmental interest served by the program against the burdens on constitutional rights posed by the State action. 341 Since 1890, 342 the Supreme Court has clarified that even deeply held religious or spiritual beliefs can succumb to important public policies. 343

The broadest government policy involved in state-mandated A.A. treatment is the State's interest in reducing the number of drug and alcohol related crimes so as to reduce the number of inmates in prison. In New York, substance abuse treatment programs "are fixtures in the state's 69 prisons: 15,000 inmates, or two in nine, go through substance-abuse rehabilitation every year." 344 According to an article in the New York Times, "[a]bout a third of the participants [in the treatment programs] had been sent to prison for drug convictions, but another 40 percent have other drug-related problems: they committed a burglary so they could fence the goods they stole for cash for drugs." 345 Inmates who fail the drug test when they arrive at the prison are also sent for treatment. 346 Rehabilitation programs address the problem at its roots and attempt to prevent problems of recidivist occurrences. While the strong government interest prison management compels some type of rehabilitation treatment, it does not necessarily demand A.A. to be that provider. The state interest in compelling A.A. specifically, is unjustifiable. 347

The absolute importance of separation of church and state should be, and is, guaranteed under the Constitution. The unconditioned, express prohibition of state actions which violate the Establishment

340. Id. at 314.
342. See *Davis v. Beason*, 133 U.S. 333, 343-48 (1890) (holding that the freedom of religion does not prohibit laws forbidding polygamy).
343. *Id.; see, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (approving a policy which prohibited use of sacramental peyote as adequate policy grounds to infringe upon free exercise rights); *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (indicating that even the government interest in maintaining a uniform system of benefits administration overcomes religious beliefs).
345. *Id.*
346. *Id.*
347. Richard Kohler, a former New York City corrections commissioner, now a professor at the John Jay College of Criminal Justice, stated: "It's very difficult for the state to show there is a legitimate state interest in forcing someone into a rehabilitation program when there's no evidence it works in the first place." Barron, supra note 344, at B6.
Clause are also denoted in the First Amendment. Still, one might argue that only a small percentage of intrusion occurs, or that violations are minor because the responsible source is a quasi-religious organization, not a church. In conducting such a balancing test, however, the minor or subtle nature of the First Amendment infringement does not dilute its importance:

[I]t is no defense to urge that religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of James Madison, "it is proper to take alarm at the first experiment on our liberties."\(^{348}\)

Because the freedom of belief, as well as a ban on state-religion establishment, is a "fixed star in our constitutional constellation,"\(^{349}\) the intrusion on any of these First Amendment rights should be accorded the highest value of protection.

Faced with the choice between jail without probation (or family visits) and conditioned privileges, the state compulsion to attend A.A. is unquestionable. Denying probation or visitation to those who refuse to participate in a state-established religious exercise clearly demonstrates the State’s power of coercion. Although the government’s policy interest in rehabilitating substance abusers is high, the interest in rehabilitating inmates through A.A. participation specifically, without exceptions or alternatives, is not acceptable.

Infringements of constitutional protections caused by the mandated A.A. treatment program require only minor modifications. Such modifications would allow governments to maintain rehabilitation programs thereby reducing recidivism in prisons while still preserving constitutional protection of church and state.

The easiest and most favorable modification is for the prison to offer an alternative that serves the same counseling and support-group function of A.A., but which lacks the religious or indoctrinating characteristics.\(^{350}\) The option for alternative rehabilitation programs could be offered to all prisoners, or just those who express an objection to A.A. One such type of alternative currently exists—Rational Recovery. Rational Recovery, a support group which helps keep alcoholics

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\(^{350}\) In many cases, an alternative to A.A. may be geographically unavailable which would create a \textit{de facto} compulsion to A.A.: “For over 40 years after its inception in 1935, Alcoholics Anonymous was the only national self-help organization for alcoholics.” \textit{CULT OR CURE?}, supra note 241, at 123. Numerous alternatives to A.A. now exist, including Women for Sobriety, Men for Sobriety, Save Our Selves/Secular Organizations for Sobriety, and Rational Recovery, \textit{id.} at 123-27; not to mention private, individual counseling.
sober, was designed specifically to offer a philosophical alternative to A.A.351 Rather than requiring powerlessness and turning to God as prerequisites to recovery, Rational Recovery focuses on the individual’s responsibility of overcoming alcoholism and other addictions.352 This program also avoids “replacing one addiction with another,”353 meaning participants need not continue to attend the counseling sessions after attaining confident sobriety, unlike A.A. which maintains the road to recovery is a life-long process of counseling sessions. Private counseling could also be a satisfactory alternative, whether at a medical facility away from the prison or as conducted by an in-house (prison) trained professional.

The creation of a neutral treatment program presents an obvious cure for the State; but this proposal instantly creates fear and resistance in the present atmosphere of budgetary restraint. Establishing the legislative and financial support necessary for such an effort may not impossible; however, it is unlikely. Furthermore, removing the Twelve Steps from the options for treatment altogether is not a wise option. Strong advocates for A.A. believe that if A.A. is no longer offered as a treatment program for substance abusing inmates—that would be like “throwing the baby out with the bath water.”354 These advocates rightly believe if the state removes A.A. from the prison system, inmates’ sobriety and recovery will be at risk because of the absence of this important support mechanism.355 Aside from the difficulties of developing a purely religion-neutral program, cures to the constitutional violation of compulsory A.A. are logical, readily available, and capable of implementation. The prisons must simply require the inmate to participate in a counseling program that is effective in rehabilitating alcoholics and drug addicts, rather than specifically requiring participation in A.A.

CONCLUSION

Alcoholics Anonymous clearly fits the functional definition of religion. Regardless of whether God is the traditional Christian God, it is a higher power to which A.A. participants must “turn [their] will and

352. Id. Rational Recovery has over 600 treatment groups and 10,000 clients in the United States and Canada. Self-Help Advocates Say Field Must Escape A.A. Tentacles, ALCOHOLISM & DRUG ABUSE WEEKLY, June 24, 1996, at 1, 5.
353. Gasborro, supra note 351, at D5.
354. Barron, supra note 344, at B6 (quoting Abukarriem Shabazz, president of the New York State Association of Alcoholism and Substance Abuse Treatment Providers).
355. Id.
Their lives over" in order to remove their flaws. Because members must first admit powerlessness, their lives and well being depend upon this power and the A.A. support system. Because A.A. goes beyond a mere ideology into the realm of religion, A.A. as a condition for probation or family visitation implicates the Establishment Clause of the First Amendment.

While Alcoholics Anonymous plays a vital role in rehabilitating thousands of alcoholics, it is religious, spiritual and indoctrinating in nature and practice. A.A. participation as a condition of conferring benefits to a prisoner is impermissible coercion by the State. This compulsion clearly violates the Establishment Clause because it allows the government to endorse a religion that is adopted by the indoctrinating Twelve-Step program. Furthermore, a constitutional infringement, which attacks one of the most fundamental notions of the United States—the separation of church and state—is not, and cannot be justified by a specific compelling interest of the State. Judges should take heed from the Second and Seventh Circuit Appellate Courts and use the coercion test any time the government forces, compels or coerces a religion into society. In order to avoid a constitutional blunder, legislatures and prison officials should offer religion-neutral alternatives to A.A.-based drug and alcohol rehabilitation programs, thereby allowing effective rehabilitation of substance abusing inmates without violating the clear command of the First Amendment Establishment Clause.

356. CULT OR CURE?, supra note 241, at 67 (the Third Step).
357. Id. at 65 (the First Step).