Counseling and the Courts: First Amendment Challenges to Coerced Therapy
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First Amendment Challenges to Coerced Therapy

"Blessed is the man who does not walk in the counsel of the ungodly...." Psalm 1

A Wisconsin prisoner is faced with a dilemma: Does he spend the rest of his in prison, or does he act contrary to his deepest religious convictions by submitting to a counseling program grounded in anti-Christian values he abhors? His parole agent won't bend. It's either coerced secular counseling and "recovery" meetings, or life imprisonment. His own words tell the story of the agonizing decision he faces:

> "I am a newly born again Christian. I am also a prisoner at the [name deleted] Correctional Institution...in a few short months I will be faced with having to make a decision of to either submit to a secular treatment program or possibly spend the rest of my life in prison. Needless to say, it's a difficult decision to make...I love my Heavenly Father and I want to do what is pleasing to Him, not man, and if I need to make a decision that may cost me my freedom, well, so be it, after all, Jesus went to the cross and sacrificed His life for me.... I have done some legal research and contained in the Wisconsin State Constitution is a section that states that the right of every person to worship Almighty God according to the dictates of conscience shall never be infringed upon nor shall any control of, or interference with the rights of conscience be permitted. This to me very clearly states that the practice in this state of forced treatment is in violation of their own constitution.... I did get in touch with a pastor of a church who does counsel from the Word of God and upon my release he agreed to accept me in to his church and to counsel me. I wrote my parole agent and shared with him the new life I have found in Christ and also the arrangements I've made for counseling. My parole agent wrote me back and told me that I needed more than Christ and the Bible to succeed in life and if I refuse what he decides is appropriate treatment for me I will suffer the consequences, meaning revocation of my parole.... Upon my release I do plan to seek legal representation and if my parole agent continues to force secular treatment, perhaps I can do something for my brothers and sisters in prison who are faced with the same circumstances."

Religious freedom is hardly a new legal issue. Nor is it confined strictly to the state of Wisconsin and its constitution. It is an issue that touches the basic freedoms guaranteed to American citizens since the founding of our

country. Nevertheless, this particular fact scenario is one that dares us to venture into uncharted legal waters, as the specific issue of *psychotherapy*, and its relationship to religious freedom, has not been the subject of litigation. A few cases across the country have considered the religious content of Alcoholics Anonymous for purposes of the First Amendment religion clauses. These and other judicial decisions have attempted to define the contours of "religion," with a wide variety of results.

How can a Christian lawyer help this incarcerated brother? His testimony evokes compassion. His faithfulness to God's sufficient Word, and his willingness to suffer life imprisonment rather than turn from his Lord, are an exhortation to those of us on the "outside" who can easily take our liberty for granted. By carefully examining the judicial history of both Religion Clauses, we can construct a well-reasoned case.

The Establishment Clause: Background and History

"Congress shall make no law respecting an establishment of religion..."

The early years of our nation's history brought few Establishment Clause challenges before the courts. That all changed in 1947 when a squabble over school bus money reached the Supreme Court. *Everson v. Board of Education*[1] set the stage for future Establishment Clause jurisprudence. The fact scenario (state bus money for both public and private school children) is far from analogous to our prisoner's situation, but basic principles were set forth as the Court began to interpret the Establishment Clause:

> "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 pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain 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, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

[1] 330 U.S. 1 (1947).

> participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[2]

Our prisoner, we will argue, is being "punished for entertaining or professing religious beliefs" that forbid him from attending either psychotherapy or a 12-step recovery group. That punishment takes the form of a government denial of parole for which he would otherwise be presently qualified.

A significant difficulty with Establishment Clause jurisprudence arises because laws are inherently a matter of morality. The state deems some actions wrong and others right. There is bound to be both coincidence and clash with the teachings of various religions. Otherwise, we could have no law even against murder. Many American laws are consistent with the Bible. Other laws, as we will see, are more consistent with secular humanism, a system the Court has recently acknowledged to be a *religion*. The mere coincidence with tenets of some or all religions does not automatically invalidate a government regulation.[3] The counseling condition imposed on our prisoner is not immediately struck down by its coincidence with the values of secular humanism. That coincidence must be combined with additional arguments in order to sustain a charge that the Establishment Clause has been violated. One of the key arguments is that psychotherapy may be deemed to constitute a "religion" for Establishment Clause purposes. Thus we turn to an examination of how "religion" has been judicially defined over the years.

What is a "Religion" for Establishment Clause Purposes?

A century ago, our highest court presupposed this country to be a *Christian* nation.[4] That assumption remained intact in the early years of the twentieth century, as one Supreme Court

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[2] *Id.* at 15-16.

[3] In *McGowan v. Maryland*, 366 U.S. 420, 443 (1961), involving a state statute that forbid the sale of many items on Sundays, the Court said that "...the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

[4] *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

defined religious liberty in terms of respect that Christians were to accord one another:

> "We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[5]

In early challenges voiced by minority religions, theism was the basis for identifying religion. When a voter oath was challenged by a Mormon who advocated polygamy, the court declared that:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[6]

The Court's presupposition about Christian America has all but disintegrated as we approach a new millennium. In our religiously plural society, numerous First Amendment claims have come from all religious corners of our culture. The Court's response has been to stretch the term "religion" to the breaking point. Christians may be chagrined at this ominous development, but we need not despair. As Joseph exclaimed to his long-lost brothers centuries ago, what man has intended for evil, *God* has intended for His good (Genesis 50:20). If the Court were continuing to define religion in narrow terms, our prisoner would have little chance of success on an Establishment Clause claim. However, under the elastic definition that the Court itself has advanced, a strong case can be set forth that modern psychology is indeed a *religion* for legal purposes.

A mere dozen years after *Macintosh* affirmed the traditional view of religious liberty in explicitly Christian terms, the Court began to waffle. In denying a draft exemption because the litigant's views were not sufficiently grounded in *religious* belief and training, the Court evidenced confusion as to what "religion" is all about:

> "It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of

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[5] *United States v. Macintosh*, 283 U.S. 605 (1971).

[6] *Davis v. Beason*, 133 U.S. 333, 342 (1890).

> reason as a means of relating the individual to his fellow-men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."[7]

It is almost comical to observe the Court's inconsistency. Immediately following its assertion that it is not necessary to "attempt a definition of religion," that is precisely what the Court proceeds to do. Leaving Christianity in the dust, the Court gropes in the dark, cutting religion from rationality. Although these judicial remarks about martyrdom are helpful to our prisoner, who would choose life imprisonment rather than disobedience to God's Word, the Court has nonetheless initiated a downhill slide that will escalate in its future decisions. What is "religion"? The Court no longer knows.

The continuing erosion of judicially defined "religion" is seen in a 1961 case concerning an atheist's objection to an oath required for him to become a notary public. The oath, which required an affirmation of belief in God, was struck down as an unconstitutional requirement for holding public office:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[8]

A footnote immediately following explicitly embraces various forms of atheism under the umbrella of "religion":

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[9]

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[7] *United States v. Kauten*, 133 F.2d 703, 703 (1943).

[8] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

[9] *Id.* at 495.

So far, the Court's definitions give us hope of proving that psychology is *religion*: Secular Humanism. Yet we have by no means exhausted the judicial evidence on this matter.

Conscientious objector cases in the Vietnam era add fuel to the fire. Three agnostics were convicted in federal court for refusing to submit to the Selective Service. One of them, Mr. Seeger, expressed his devotion to "goodness and virtue for their own sakes." His "religious faith" was a "purely ethical creed." When the Court considered congressional intent behind the meaning of "Supreme Being" in Section 6(j) of the Universal Military Training and Service Act,[10] the following "essentially objective" test was formulated as to the definition of "religion":

> "...does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption [from military service as a conscientious objector]?"[11]

In this expansive definition of "religion," the *Seeger* court cited modern theologians such as Paul Tillich, who viewed God as the "ground of all being," and the liberal J.A.T. Robinson. The opinion also cited favorably an Ecumenical Council's declaration:

> "The community of all peoples is one. One is their origin, for God made the entire human race live on all the face of the earth. One, too, is their ultimate end, God. Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death?"[12]

It seems that New Age theology has invaded the courts, and the definition of "religion" is so elastic that nearly any sort of meaningful belief system qualifies for judicial remedy. The question "what is man," certainly jumps off the page.

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[10] 50 U.S.C. App. 456(j) (1958 ed.).

[11] *United States v. Seeger*, 380 U.S. 163, 184 (1965).

[12] *Id.* at 182.

Psychology addresses this very issue, and the Court here affirms the essentially *religious* nature of the subject.

Another conscientious objection to military service was valid in spite of the registrant's crossing out of the word "religious" on his exemption application.[13] Significantly, Welsh's own characterization of his beliefs as "not religious" was not controlling. Referring to the same Sect. 6(j) addressed in *Seeger*, the Court stated:

> "That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[14]

Alcoholics Anonymous does not hold itself out to be a "religion," but as we will see, courts have held it so for purposes of the Establishment Clause. Psychologists certainly do not identify their field as a "religion," but that self-characterization is not necessarily controlling in view of the *Welsh* decision. The Court has stretched the definition of "religion" in order to exempt numerous young men from military service, an important civic duty. Surely, the same judicial elastic can be stretched to encompass the claims of our prisoner, who merely seeks a religious alternative to the offensive teachings of humanistic psychology.

Alcoholics Anonymous as Religion. Although First Amendment claims involving AA have not yet reached the Supreme Court, several courts across the country have responded to litigants challenging government-mandated AA meetings. The decisions turn in both directions, but there is an emerging consensus that AA should be deemed a "religion" for Establishment Clause purposes.

There are a few unfavorable decisions in this arena, but these can be distinguished from the factual situation of our prisoner. In a Texas district court, one prisoner asserted a claim under 42 U.S.C. Sect. 1983 against the county and its officials for violating his civil rights by requiring his participation in a support program for persons dependent on alcohol. For purposes of the qualified immunity under that section, it wasn't "clearly established" that such requirement

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[13] *Welsh V. United States*, 398 U.S. 333 (1970).

[14] *Id.* at 344.

"amounted to forced indoctrination of religion or the adoption of any particular religious preference in violation of any First Amendment right to free exercise of religion."[15] The purpose here, establishing a "qualified immunity defense" for state officials, differs significantly from the case where a prisoner is attempting to establish a religious exemption from a parole condition. This prisoner would have had to show that a reasonable government official should have known that AA constituted a religion and thus deliberately violated his constitutional rights.

In a California case, a convicted drunk driver, required to attend a self-help program, brought suit based on the Establishment Clause. He had to attend an educational program administered by the National Council on Alcoholism and Drug Dependence, plus weekly "self-help" meetings.[16] The state argued that "AA is not a religious organization" and that it neither advances nor inhibits religion.[17] The plaintiff's defeat turned on the fact that other acceptable alternatives were available to him to satisfy the mandated weekly meeting requirement. AA in particular was not mandated, so even if the Court had considered it to be a religion, the claim would have been defeated. Meanwhile, the religious nature of AA is openly admitted in the text of the decision:

> "While AA is not a 'religion'--various faiths may all participate without renouncing their religious convictions --a review of the 'Big Book of Alcoholics Anonymous' reveals that it is founded on monotheistic principles."[18]

An unsuccessful drunk driver in Kansas failed to prevail on a Free Exercise objection to AA, because his allegations of substantial burden were inadequate.[19] The Court willingly acknowledged the "spirituality" inherent in the AA program but refused to take the next step and declare it a religion:

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[15] *Feasel v. Willis*, 904 F.Supp. 582, 583 (N.D. Tex. 1995).

[16] *O'Connor v. State of California*, 855 F.Supp. 303 (C.D. Cal. 1994).

[17] *Id.* at 305.

[18] *Id.* at 307.

[19] *Stafford v. Harrison*, 766 F.Supp. 1014 (D. Kan. 1991).

> "While the spiritual nature of Alcoholics Anonymous cannot be denied, the court is not persuaded this program may properly be characterized as a religion."[20]

The Court evidently conceded AA's self-definition. AA has no "exclusive concept" of what constitutes a "Higher Power" and does not define itself as religion.[21] The Court, citing *Seeger*, does note cases wherein the belief in a Supreme Being is insufficient to define a religion. Religions such as Hinduism and Buddhism, for example, do not include a theistic concept. The court's flow of reasoning is flawed and its reliance on *Seeger* misplaced, because that case actually *expanded* the concept of religion to include views of spirituality that are non-theistic. Under such an expansive revision of what constitutes "religion," AA more than qualifies, and *modern psychology quickly follows suit*.

The battle does not end with these unfavorable decisions, which are outnumbered by judicial conclusions that recognize AA as a religion. In a 1994 New York case, AA meetings were required as a condition of probation for a motorist convicted of an alcohol-related driving offense.[22] The issue is phrased as "whether the A.A. program *as plaintiff experienced it* was essentially religious in nature" (emphasis added).[23] This plaintiff described himself as an atheist, objecting that "the Twelve Steps stand for the proposition that recovery from alcoholism requires a spiritual awakening." The court notes that "the first three steps explicitly deny that recovery from alcoholism is possible without reliance on a higher power." AA's use of prayer, specifically the Serenity Prayer and Lord's Prayer (recited at close of each meeting), is noted.[24] The Court summarizes its finding that:

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[20] *Id.* at 1016.

[21] *Id.* at 1017. This lack of exclusively is precisely what Christians would most vehemently object to, because Jesus Christ is declared to be the unique, exclusive way of salvation (John 14:6; Acts 4:10).

[22] *Warner v. Orange County Dept. of Probation*, 870 F.Supp. 69 (S.D.N.Y. 1994).

[23] *Id.* at 70.

[24] *Id.* at 71.

> "In short, the A.A. program that plaintiff experienced placed a heavy emphasis on spirituality and prayer, in both conception and practice."[25]

Although a "gut reaction" to the AA program is that it does not constitute a religion, "testimony and evidence in this case support the finding that the A.A. meetings plaintiff attended were the functional equivalent of religious exercise."[26] The Court used a rather subjective test, centered around the plaintiff's particular experience of AA, but nevertheless reached the conclusion that AA is a religion for First Amendment purposes.

A more recent challenge (1996), similar to our case, involved the requirement that an inmate attend Narcotics Anonymous, and a counseling program with religious content, as a condition for parole eligibility and upon pain of being rated a higher security risk.[27] Narcotics Anonymous was the *only* substance abuse program offered to inmates at Oakhill Correctional Institution, and attendance was required for those with chemical dependence problems. The Court of Appeals reversed an action of the District Court, wherein summary judgment had been granted to the defendant prison officials. The District Court purportedly applied the tripart *Lemon* test, but declared its conclusions with little analysis except a bare assertion that excessive church-state entanglement "in terms of economic support" did not exist.[28] Kerr stated to the District Court that "to force me to attend [NA] is at least as offensive as many people would find forced attendance of services at a Mosque, a Jewish Temple, or a meeting of Penticostals [sic] to be."[29] On appeal, Kerr's conflict was stated more specifically:

> "Kerr regarded NA's deterministic view of God to be in conflict with his own belief about free will; more

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[25] *Id.* at 71.

[26] *Id.* at 72.

[27] *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

[28] *Id.* at 475.

[29] *Id.* at 479. Our prisoner is equally offended at the anti-Christian values advocated by modern psychology. More specific details will follow in a review of the "substantial burden" test for Free Exercise.

> generally, he found it offensive to his personal religious beliefs."[30]

This court evidently had little trouble formulating an appropriate legal test and finding the NA requirement invalid:

> "In our view, when a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion, only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular? In Kerr's case, the first two criteria are satisfied easily."[31]

Here, according to the Court, NA meetings are mandatory (the state has acted) and significant penalties result from non-compliance (prisoner is rated a higher security risk and has far less chance of parole).[32] Unlike the *Stafford* court, this Court of Appeals rejected the District Court's conclusion that NA's inclusiveness ("God" could be understood as the individual's willpower) rendered the program non-religious. A clear reading of the 12 steps reveals them to be based on monotheism. Even if that monotheism were expanded to include polytheism or other such concepts, the program would nevertheless be religious in nature. But as in *Feasel*, supra, the officials involved had a claim to qualified immunity: "The appropriate question is whether reasonable public officials in their position would have understood that what they were doing was unlawful."[33] First Amendment challenges to mandated 12-step recovery programs are relatively recent in origin, so a reasonable official would not necessarily have known that the Establishment Clause was violated.

Another parole candidate (Evans) appealed an unsuccessful religious challenge to AA.[34] Although there were sufficient conditions to deny parole on other grounds, Evans properly stated a cause of action when he requested injunctive relief to ensure that future parole decisions would not hinge on his

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[30] *Id.* at 474.

[31] *Id.* at 479.

[32] *Id.* at 479.

[33] *Id.* at 480.

[34] *Evans v. Board of Paroles*, 956 S.W.2d 478 (1997).

participation in AA. On appeal the higher court concluded that "...the trial court erred in dismissing Evans' claim for injunctive relief as to the Board's requirement that he continue to participate in Alcoholics Anonymous."[35] The case was remanded with instructions:

> "If, on remand, the trial court finds that the treatment program at issue is a religious one and that there are no alternative secular treatment programs offered, then to require a prisoner to attend or participate in such a treatment program would constitute a violation of the Establishment Clause. Attending or failing to attend such religious meetings cannot be considered in a decision whether to grant or deny parole."[36]

A lengthy New York case, which the Supreme Court declined to review, concerned yet another inmate who objected to a substance abuse program modeled after AA principles ("Alcohol and Substance Abuse Treatment Program," or ASAT).[37] Attendance was mandatory for his continued participation in the state's family reunion program. That requirement was challenged, based on the prisoner's "right to practice atheism" under the First Amendment. Initially, the county court dismissed the action for failure to state a claim, and the Appellate Division affirmed. The Court reasoned that the AA references to "God" are actually to some "higher power" as understood by each individual, rather than "God" as understood by organized religious institutions. There is no worship, praise, or prayer to a Creator in AA, and no demand to conform to a particular faith but rather an open-minded "spirituality."[38] The Court of Appeals reversed, in favor of the prisoner, holding the regulation to be a violation of the Establishment Clause. The regulation favors prisoners who adhere to religious beliefs and symbolically constitutes religious proselytizing. The Appellate Division applied a concept of religion that was too narrow because:

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[35] *Id.* at 480.

[36] *Id.* at 483.

[37] *Griffin v. Coughlin*, 673 N.E.2d 98, 113 (N.Y. 1996). ASAT involves "approximately 330 hours of counseling and therapy," including lectures, group discussion, and counseling sessions focused on "addiction and recovery." Only about 26 of such hours are devoted to "self-help."

[38] *Id.* at 101.

> "...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' (Webster's 9th New Collegiate Dictionary 1995 [9th ed. 1990]). Indeed, the A.A. basic literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions."[39]

In examining the nature of AA's 12 steps, the court found that there is unquestionably sufficient "religious exercise" to violate the Establishment Clause. There is confession of wrongs, asking for removal of shortcomings, and seeking of God in general.[40] AA's steps are allegedly "spiritual in nature" and meant to be "practiced as a way of life."[41]

The *Griffin* dissent was long on words and short on sympathy for the plaintiff prisoner's position:

> "A.A. principles unquestionably arise from a secular philosophy and psychology.... The transcendent, human, spiritual qualities of this commitment and endeavor do not thrust the experience into a religious realm. Nor does the recognition and acceptance of some 'Higher Power,' outside of the 'Ego,' constitutionally connote a theistic ontology."[42]

> "Indeed, the repeated evocation of a generalized deity figure and symbol or some nondenominational, secular alternative 'Higher Power' fails to support this profound absorption of A.A. and ASAT into the territory of a compulsory, constitutionally forbidden religious encounter."[43]

This dissent, however, seems not to have come to grips with the Supreme Court's ever expanding definition of religion. AA is more obviously religious in character than some of the

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[39] *Id.* at 102.

[40] *Id.* at 103.

[41] *Id.* at 104.

[42] *Id.* at 115.

[43] *Id.* at 122.

"religions," including secular humanism, acknowledged by the nation's highest court.

The trend here is toward acknowledging AA as a religion for First Amendment purposes. The few unfavorable cases can be distinguished. Furthermore, there is a significant difference between an *atheist* challenging AA due to the religious content *per se*, and a *Christian* who challenges the same requirement because AA's religious content conflicts with the Bible. The Christian can support his case, in relation to both AA and psychotherapy, with elaborate details to show exactly how such coercive counseling opposes his religious convictions. The Christian is in a much stronger position because he can combine both Establishment Clause *and* specific Free Exercise claims.

Evolution and Religion. A couple of Supreme Court cases have considered the issue of teaching evolution in the public schools, and the results are not encouraging to the Christian community. Here the Court has not been inclined to recognize the religious nature of a modern worldview competing with Christian theism. In *Epperson v. Arkansas*,[44] the Court struck down an Arkansas statute that forbid the teaching of evolution in the public schools. The statute allegedly lacked a "secular purpose," imposing a theological viewpoint from the biblical book of Genesis on the public school curriculum. This unfortunate, poorly reasoned decision fails to acknowledge the "theological viewpoint" inherent in evolutionary theory, which is deemed "scientific." The Court fails to recognize that government cannot show hostility to religion. Public schools cannot teach the biblical account of creation but they can indoctrinate students with the anti-biblical theory of evolution. This is hardly the "benevolent neutrality" espoused by the Court. Similarly, some twenty years later, the decision in *Edwards v. Aguillard*[45] prohibited even a state requirement for balanced teaching of creation and evolution. This particular subject has ignited serious public controversy, and the Court seems loathe to come down on the side of traditional Christian theism.

While evolution might seem beyond the scope of our inquiry, it is relevant in that psychology, like evolution, is generally regarded as a "science." In building our case, it will be important to present specific evidence as to the inherently

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[44] 393 U.S. 97 (1968).

[45] 482 U.S. 578 (1987).

religious nature of psychology, and the blatantly anti-Christian assertions of the major modern theorists.[46]

Secular Humanism as Religion. A fascinating Alabama case was brought to court based on the premise that secular humanism constitutes a religion that the government may not establish. This case was litigated in conjunction with a case where one parent had challenged statutes permitting public school prayer.[47] Christian parents sought injunctive relief against the use of certain public school texts (home economics, history, and social studies) that allegedly advanced the religion of secular humanism and inhibited Christianity. The District Court granted the requested injunction.[48] The Court of Appeals reversed but declined to consider whether secular humanism actually constitutes a religion for Establishment Clause purposes. Instead, their decision was based on the finding that the texts neither advanced nor inhibited either theistic religion *or* secular humanism, *even assuming* the latter *is* religion. Here is what they said about the legal definition of religion:

> "The Supreme Court has never established a comprehensive test for determining the 'delicate question' of what constitutes a religious belief for purposes of the first amendment, and we need not attempt to do so in this case, for we find that, *even if secular humanism is a religion for purposes of the establishment clause*, Appellees have failed to prove a violation of the establishment clause through the use in the Alabama public schools of the textbooks at issue in this case." (emphasis added)[49]

The Court's rationale about the challenged text is somewhat less than lucid and its assertion of religious neutrality highly questionable. The home economics texts were alleged to require students "to accept as true certain tenets of humanistic

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[46] This material appears in the section presented later on Free Exercise. Men such as Sigmund Freud and Albert Ellis, for example, are self-proclaimed atheists whose psychological theories explicitly attack Christianity. Others, such as Abraham Maslow and Carl Jung, engage in extended discussions of spiritual matters, demonstrating their contempt for Christian theism in a different manner.

[47] *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (1987).

[48] 655 F.Supp. 939.

[49] *Smith*, *supra* note 47, at 689.

psychology," based on the moral decision making process advocated.[50] That process was entirely subjective, based on feelings and internal values rather than an objective, universal standard of right and wrong. The process implies "that there are only temporal and physical consequences for man's actions" that determine morality, and that "man has no supernatural attributes."[51] The texts explicitly claimed that the eight-step decision making process therein could be applied to "more complex decisions" such as religious preference.[52]

Christians have valid theological reasons to object to this type of material in the public schools. The Court, however, cited the "broad discretion" granted to public school boards in the choice of curriculum (despite the need for "scrupulous compliance" with the Establishment Clause)[53] rejected mere offensiveness as a criteria for student materials,[54] and considered mere harmonization with the tenets of some or all religions insufficient to violate the Establishment Clause.[55] The encouraging point about this case is that the court's unfavorable decision was expressly not based on a finding that secular humanism is *not* a religion. The court in fact hints that it might be.[56] At the same time, these Christian litigants

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[50] *Id.* at 690.

[51] *Id.* at 691.

[52] *Id.* at 691, note 5. Following are the steps, which are entirely personal and subjective:

> "1. Define the problem;
> 2. Establish your goals;
> 3. List your goals in order of importance;
> 4. Look for resources;
> 5. Study the alternatives;
> 6. Make a decision;
> 7. Carry out the decision;
> 8. Evaluate the results of your decision."

[53] *Id.* at 689.

[54] *Id.* at 693. If mere offense to religious belief could result in censure of curriculum, very little could be taught in the public schools.

[55] *Id.* at 691. There is much more that could be cited from this case, which is evidence of the growing secularism in America. However, to do so would take us off on a tangent far from the inquiry at hand.

[56] *Id.* at 692, 693. "It is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion." When considering accusations that history and

were unable to successfully litigate an Establishment Clause claim directed at secular humanism. Had their challenge involved public school endorsement of some widely recognized religion, it might have succeeded. It is important that we distinguish the facts of our prisoner's claim from this case. *Smith* was solely an Establishment Clause case, while our situation integrates Free Exercise claims. *Smith* occurred in a public school setting, where a huge number of individuals are involved. Our case involves a single prisoner whose parole eligibility is individually monitored and could readily accommodate the biblical alternative to state-coerced psychotherapy. Meanwhile, court decisions highlighting the religious nature of secular humanism add strength to the overall case we are building.

Psychotherapy v. the Bible in the courts. It is worth mentioning a widely publicized California case, *Nally v. Grace Community Church*.[57] This case was a wrongful death action brought by parents of a church parishioner who committed suicide after a lengthy counseling relationship with the church. The issue was whether pastoral counselors have a duty to refer an individual to a psychiatrist or other "professional" counselor where there is a foreseeable risk of suicide. The court distinguished religious counselors from licensed psychotherapists and other mental health professionals whose special relationship would impose a much higher level of duty. The state supreme court decision reversed the Court of Appeals, which found that such a duty existed, and dismissed the action. There is no specific discussion concerning the conflict between modern psychology and the Bible, although the defendant church raised First Amendment issues in relation to the introduction of a biblical counseling tape as evidence. Church pastors actually did refer the young man for psychological counsel, so no religious objections to psychology were raised as a critical issue to the case. However, the official position of the church is one that would logically entail seeking counsel exclusively in the Bible rather than the speculations of men who have blatantly rejected the gospel:

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social studies texts failed to integrate information concerning religion and its role in American history, the Court viewed this omission as providing a mere "incidental benefit" to secular humanism, and such incidental benefits do not violate the Establishment Clause. These observations at least imply that secular humanism *is* a religion.

[57] 47 Cal. 3d 278 (1988).

> "Defendants taught that the Bible is the fundamental Word of God containing truths that must govern Christians in their relationship with God and the world at large, and in their own personal lives."[58]

In declining to impose a duty on religious counselors in a church setting, the religious nature of such counsel is assumed:

> "...it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."[59]

This case at least acknowledges that religious doctrine is an integral component of counseling in a church setting. Although this particular church did not prohibit psychotherapy in its official teachings, it does support our thesis that counseling is an essentially religious activity because is must be grounded in some underlying value system.

Conclusions. Modern psychology, much like Alcoholics Anonymous, is a twentieth century comprehensive system that provides counsel on how to address the problems of daily living. Psychology and AA have usurped the role of religion in the lives of many. The 12 steps, the AA "Big Book," along with the psychological theories of Freud and others, replace the Bible; the psychotherapist or the AA group replaces the pastor. Meanwhile, the Supreme Court has expanded the scope of "religion" and several lower courts have explicitly acknowledged AA as a religion for Establishment Clause purposes. Our next step is to investigate Establishment Clause jurisprudence and see how it applies to our fact scenario.

The Establishment Clause: Lemon and Its Seeds

Nearly a quarter century after *Everson*, another public school case resulted in a tripart Establishment Clause test that has haunted the courtroom ever since.[60] This landmark case, involving salary subsidies for private school teachers, devised

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[58] *Id.* at 284.

[59] *Id.* at 299.

[60] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

a three-prong test to determine whether a statute violates the Establishment Clause. First, the law must have a secular purpose.[61] Second, it must neither advance nor inhibit religion.[62] Finally, government must not become excessively entangled with religion.[63] Entanglement involves consideration of the character and purposes of the institution involved, the nature of the aid given to that institution, and the resulting church-state relationship.[64] Brennan's separate opinion, referring to the intentions of the framers, states that involvement between church and state must not serve the essentially religious activities of religious organizations, employ the organs of government for essentially religious purposes, or use religious means to achieve government purposes where secular means would be sufficient.[65]

The three enumerated prongs did not emerge out of thin air. The initial prongs were formulated during the intervening decades in other Establishment Clause cases, some of which outraged Christians who were accustomed to the vital role of their faith in the education of their children.

It became common for courts to strike down statutes that mandated, financed, or even appeared to endorse any sort of religious exercise. The government dare not lend its name or power to advance religious causes. *McCollum v. Board of Education*[66] involved an atheist's successful challenge to a "released time" plan, wherein public school students were excused for religious instruction during regular hours. The plan was deemed an unconstitutional use of public funds to spread religious faith. That decision anticipated the second *Lemon* prong in its prohibition of state funds for the advancement of religion.[67] The decision in *Abington Township*

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[61] *Id.* at 612.

[62] *Id.* at 612.

[63] *Id.* at 613.

[64] *Id.* at 615.

[65] *Id.* at 643.

[66] 333 U.S. 203 (1948).

[67] *Zorach v. Clauson*, 343 U.S. 306 (1952) also involved a "released time" plan for public school students, but this time the Court considered the interplay of Establishment Clause and Free Exercise concerns, acknowledging that government may lawfully *accommodate* religious interests.

School District v. Schemmp[68] struck down a Pennsylvania statute requiring the reading of daily Bible verses in public schools, because government may not prefer one religion over another, aid one or even all religions. Such reasoning again anticipated the second *Lemon* prong, requiring that the law must neither advance nor inhibit religion. School prayer was the next in line for excision. In *Engel v. Vitale*[69] the Court ruled public school prayer unconstitutional, even where voluntary, holding that even "indirect coercive pressure" to participate constitutes an Establishment Clause violation.[70]

Seeds of the "secular purpose" prong were also sown in pre-*Lemon* litigation. Not only must a law be religiously neutral in its effect; some secular, non-religious purpose must undergird the legislation to pass constitutional muster. This is perhaps the easiest of the Lemon hurdles, because the test is "a" secular purpose. In *Board of Education v. Allen*,[71] for example, public textbook loans to private schools had a valid secular (educational) purpose and did not primarily advance religion because beneficiaries were the individual students and their parents, not religious institutions.

Prior to the actual *Lemon* decision, we can see that judicial interpretation developed to the point of requiring religious neutrality in both statutory purpose and effect. The court considered them together in a context where Jewish merchants challenged Sunday closing laws that indirectly inhibited their religious exercise by forcing them to close their shops on both Saturday *and* Sunday:

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on

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[68] 374 U.S. 203 (1963).

[69] 370 U.S. 421 (1962).

[70] This decision appears to be a forerunner of the "perceived endorsement" test later articulated in *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

[71] 392 U.S. 236 (1968).

> religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[72]

The merchants lost, because the law had a valid secular purpose (public day of rest) not readily achieved otherwise without imposing an undue administrative burden on the government.

The primary contribution of *Lemon*, in addition to its definitive articulation of the purpose and effects tests declared in previous decisions, was the "entanglement" prong. The church-state "wall of separation" was finally constructed, though a wobbly wall indeed:

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[73]

Far from being a neat, easy test, this *Lemon* trinity has stirred controversy and produced mixed results. It has been applied both to uphold and strike down numerous states statutes,[74]

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[72] *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

[73] *Lemon*, *supra* note 60, at 614.

[74] *Waltz v. Tax Commission*, 397 U.S. 664 (1970) (tripart *Lemon* test was used to uphold New York property tax exemption for religious organizations); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (looking primarily to the first two prongs, the Court invalidated a Texas sales tax exemption granted to religious publications); *Thornton v. Caldor*, 472 U.S. 703 (1895) (Court invalidated a Connecticut statute that granted employees an absolute right not to work on their own religious Sabbath, because the law primarily advanced religion and fostered excessive entanglement); *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (excessive entanglement prong was triggered in determination of whether a school was "completely religious" for purposes of union representation of lay teachers); *Larson v. Valente*, 456 U.S. 228 (1982) (Court struck down Minnesota statute requiring selective registration of religious organizations, using all three Lemon prongs but focusing primarily on entanglement); *Stone v. Graham*, 449 U.S. 39 (1980) (Court invalidated Kentucky law requiring that Ten Commandments be posted in public school classrooms, because the statute had no secular purpose; the law thus failed even the first *Lemon* hurdle); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana statute requiring balanced treatment of creation and evolution in public schools was struck down on the basis of the first Lemon prong, because the "real purpose" was to discredit evolution on the basis of religious objections); *Tilton v. Richardson*, 403 U.S. 672 (1971) (Court invalidated construction grants for higher education, where religious use restriction expired after twenty years; effect of that reversion was deemed to advance religion); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) ("primary effect" *Lemon*

refined,[75] yet on rare occasions ignored or flatly rejected.[76] Our next task is to wind our way through this judicial maze in

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prong failed by public funding of repair-maintenance grant to religious schools, tuition reimbursements and tax deductions for low income parents who send children to private religious schools; these programs were held to subsidize the religious mission of the schools); *Wolman v. Walter*, 433 U.S. 229 (1977) (Court considered several types of state aid to religious private schools under *Lemon* test, allowing textbooks loans, testing/scoring, diagnostic services, and therapeutic services, but invalidating instructional materials/equipment and field trip transportation); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (reimbursement for legally mandated school testing passed "secular purpose" and "primary effect" tests; costs were easily identified and presented no entanglement problems); *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota tax deduction for private school tuition survived all three Lemon prongs).

[75] *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidated period of silence in public schools for "meditation or voluntary prayer" because statute had exclusively religious purpose); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (statute granting church veto power over liquor licenses was invalid because law had direct and immediate, rather than merely remote and incidental, effect of advancing religion); *Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994) (Court invalidated creation of special school district that coincided with Jewish sect population, due to "symbolic" church-state union that would probably be perceived as state endorsement of religion); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (in allowing a Christmas display that integrated religious and secular symbols, the Court refined the second *Lemon* prong: the "purpose" prong is what the government intends to communicate, while the "primary effect" prong is what its action actually does communicate); *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (Court upheld Menorah display alongside Christmas tree but forbid Nativity scene placed at the county courthouse; majority injected a "perceived endorsement" test into the second *Lemon* prong, which now might be read as *neither advances nor inhibits nor even appears to advance or inhibit religion*); *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at high school commencement was invalidated, based on a "psychological coercion" interpretation of second *Lemon* prong); *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995) (private expression in a public forum is constitutional, despite possibility that some hypothetical observers might confuse such expression with government endorsement of religion); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Adolescent Family Life Act of 1981, allowing grants to religious care providers in a program to prevent teenage pregnancies, passed all three prongs of *Lemon* test; mere contribution of religious organizations in solving social problems does not constitute "advancement" of religion); *Meek v. Pittenger*, 421 U.S. 349 (1975) (although textbook loan program was constitutional, provision of instructional equipment had "primary effect" of advancing religion and auxiliary services fostered "excessive entanglement"; dissent would have added a fourth prong to Lemon: potential political divisiveness); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (grants to private colleges passed "primary effect" and "entanglement" tests because religious and secular functions of institutions were separable and colleges were not "pervasively sectarian"); *Aguilar v. Felton*, 473 U.S. 402 (1985) (state funds for public school salaries for teaching of educationally deprived students satisfied "secular purpose" and "primary effect" tests but failed "entanglement" due to comprehensive monitoring of teachers and possibility that *religious freedom*

order to apply these *Lemon* criteria to our prisoner's Establishment Clause claim.

The First *Lemon* Prong: A Secular Purpose

The state has a legitimate purpose in the deterrence of crime and reduction of recidivism among paroled inmates. A successful case will acknowledge that purpose and develop an alternative means that does not burden the prisoner's free exercise of Christianity, e.g., by establishing a relationship with a local pastor and church to provided needed counsel and accountability.[77]

Most laws have at least "a" secular purpose and easily surmount this first hurdle. Our case is no exception, as observed in the AA-related challenges. The *O'Connor* court, for example, noted the existence of a secular purpose, namely, the treatment of substance abuse so as to prevent drunk driving and its associated tragedies such as traffic injuries and deaths.[78] In *Warner*, similarly, the Court recognized the rehabilitation of

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of the institutions would be threatened by such involvement); *Grand Rapids School v. Ball*, 473 U.S. 373 (1985) (public "leasing" of private school classrooms for remedial education failed Lemon test because teachers might engage in religious indoctrination of children and a symbolic church-state link was created).

[76] *Marsh v. Chambers*, 463 U.S. 783 (1983) (validated practice of opening Nebraska legislative sessions with prayer, appealing to long historical tradition and rejecting the Court of Appeals' *Lemon*-based analysis despite vocal objections of Justices Brennan, Marshall, and Stevens); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) (Washington refused state assistance to blind man enrolling in a Christian college on basis of *Lemon* test, but Supreme Court reversed because the incidental advancement religion resulted from the voluntary choice of a private citizen); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (Court of Appeals' application of *Lemon* test was rejected when the Court allowed public funding of sign language interpreter for deaf student attending private religious high school; benefits under Individuals with Disabilities Education Act were widely available on a neutral basis to handicapped students, so the funding did not "advance" religion).

[77] Respect for the state's valid purpose will be discussed more thoroughly in the Free Exercise section when we review the "compelling state interest" and "least restrictive means" tests for that clause. Both religion clauses consider state interests, although from different angles. It is certainly easier to find "a" secular purpose than to sustain an interest "compelling" enough to infringe the right of religious liberty.

[78] O'Connor, *supra* note 16, at 307.

offenders as a legitimate state interest and acknowledged that its ruling disrupted the achievement of that purpose.[79]

The *Griffin* court has more discussion concerning the state's secular purpose in terms of battling alcohol and drug addiction. The dissent argues that ASAT is "overwhelming secular." However, the court cannot subjectively quantify the religious and secular aspects in this manner. Even where a law has some primary effect of achieving a legitimate state interest, it is subject to further evaluation to determine whether it *also* advances religion.[80] The dissent would nevertheless render ASAT a "rationally justified and voluntary means of serving the important and predominantly secular State goal of treating and reducing inmate substance abuse."[81] It appears, however, that this dissenting judge applies a lower level of scrutiny than courts normally utilize in cases involving such fundamental constitutional rights as the free exercise of religion.

It seems sufficiently clear that when a government requires an inmate to enter some type of program to facilitate his rehabilitation, a valid secular purpose exists. The state has a duty to exercise great care in releasing an inmate who has committed serious crimes which he might repeat. Mere assertion of a religious conversion is not likely to satisfy the state that its interest has been protected. The Christian prisoner should heartily agree that the state has a valid interest in his rehabilitation, which the Bible calls sanctification,[82] while vigorously maintaining his First Amendment right to employ means that are consistent with his religious convictions.

The Second *Lemon* Prong: Neither Advances nor Inhibits Religion

A strong case can be made that psychotherapy and 12-step recovery programs are essentially religious in nature, such that state coercion would constitute a forbidden advancing of

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[79] Warner, *supra* note 22, at 73.

[80] *Id.* at 109.

[81] *Id.* at 112.

[82] Romans 13:1-7 outlines the believer's proper relationship and submission to the civil government, which is called a "minister of God" in this passage. 1 Peter 2:13-17 contains similar exhortations. The state has a valid role in the restraint and punishment of evil which the Christian should rightly recognize and assist.

religion (secular humanism). We can also set forth a case, based on the character of modern psychology and its proponents, that psychotherapy inhibits the practice of Christianity.

Advancing religion, but not Christianity. Our AA cases give us a preview as to how a court might view our prisoner's case. *Griffin* noted that although AA declares itself "against sectarian preference," the Establishment Clause does not merely bar state preference for a particular sect.[83] It prohibits coercing a citizen to engage in a religious exercise contrary to his beliefs:

> "Here, the State...has exercised coercive power to advance religion by denying benefits of eligibility for the Family Reunion Program to atheist and agnostic inmates who object and refuse to participate in religious activity which is an inextricable part of the ASAT program."[84]

Dismissal of Griffin's case by the Appellate Division at the pleading stage was based on AA writings that "suggest a toleration of belief in a 'God' as merely some 'Higher Power' without any religious content."[85] However, even if AA *permits* such a construction, actual practice *favors* a religious interpretation,[86] so that the Establishment Clause is violated due to lack of government neutrality.[87] Even if a law is not intended to promote religion, if its inevitable effect is to do so, it violates this second prong of the *Lemon* test. Government may not convey a message favoring either a particular religious belief or religion in general,[88] nor may religion be made relevant to a person's standing in the community.[89] In the coercive environment of a prison, inmates would undoubtedly

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[83] Griffin, *supra* note 37, at 104.

[84] *Id.* at 105. As noted in the Torcaso case, a state may not constitutionally force a person to profess either belief or disbelief in any religion.

[85] 211 A.D.2d, at 189-190.

[86] AA meetings typically include the Serenity Prayer and close with the Lord's Prayer. Griffin, *supra* note 37, at 107.

[87] Griffin, *supra* note 37, at 106.

[88] Wallace v. Jaffree, *supra* note 75, at 70; cited in Griffin, *supra* note 37, at 108.

[89] Allegheny County v. ACLU, *supra* note 70, at 594, Lynch v. Donnelly, 465 U.S. 668, 687; cited in Griffin, *supra* note 37, at 108.

perceive the mandated treatment program as state endorsement of the religious aspects of that program.[90] In a similar vein, Brennan's concurring opinion in *McDaniel v. Paty* notes that government cannot use religion as a classification for duties, penalties, *privileges*, or benefits.[91] The court rejects reasoning expressed in the dissent that the prisoner was not coerced into participating in the Family Reunion Program.[92] In *Torcaso*, the individual was not compelled to hold public office, but the court invalidated a religious condition for public office mandated by the Maryland State Constitution. Courts have protected the voluntary nature of religious exercise against even subtle government pressures.

The *Griffin* dissent would consider any advancement of religion through "the religious aspects of AA transmuted into ASAT" to be "indirect, remote and incidental, and neither compulsory nor mandatory," because AA has "a concededly spiritually accented landscape, but not a constitutionally objectionable religious core."[93] *Wisconsin v. Yoder* is cited for the observation that an Establishment Clause challenge must rest on religious convictions rather than on the "subjective evaluation and rejection of the contemporary secular values."[94] The lengthy dissent also discusses the perception of a government action, either as approval (by adherents) or disapproval (by nonadherents).[95] Mere *exposure* to religious ideas is not sufficient to constitute an endorsement or advancement of religion, and not every personal offense invalidates a state action. Individuals cannot require a public program to be tailored to individual preferences.[96] It appears that the dissent would uphold a state action that has a "sufficiently secular effect" that is *separable* from "any

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[90] *Id.* at 108.

[91] 435 U.S. 618, 639-640 (1978); cited in Griffin, *supra* note 37, at 110.

[92] Griffin, *supra* note 37, at 111.

[93] *Id.* at 114.

[94] Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972); cited in Griffin, *supra* note 37, at 114.

[95] Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985); cited in Griffin, *supra* 37, at 117.

[96] Griffin, *supra* note 37, at 117.

conceivable religious impact."[97] In order to render Griffin's state-coerced program invalid under the Establishment Clause, the dissent would evidently require advancement of religion as ASAT's *primary* and principal purpose. However, as the majority indicates, that is not the standard for this second *Lemon* prong. While some judicial balancing is undoubtedly involved, because church and state will inevitability brush against one another at times, the government simply cannot wield its power to coerce an offensive religious exercise. In addition, the parole decision we are examining is by nature an individualized matter where exceptions are easily carved out with no undue burden to the state. This is not a matter where a lone range citizen insists that a public program be tailored to his individual religious scruples.

In *Warner*, the government had no *intention* of establishing religion when AA meetings were mandated for Warner, but the practical *effect* was to do so,[98] because the meetings were the "functional equivalent of a religious exercise" for the plaintiff.[99]

The *O'Connor* court went the opposite direction in its decision, but its reasoning hinges on the plaintiff's free access to programs other than AA:

> "...the fact that the concept of God is incorporated in a program in which the State encourages participation does not in itself violate the Establishment Clause. More state involvement--whether it is called 'entanglement' or 'endorsement'--is required than has been shown here. Significant to this Court's decision is that the individual has a *choice* over what program to attend."[100]

Our prisoner has been given *no such choice*. State *encouragement* does not violate the Establishment or Free Exercise Clauses, but *mandated* AA attendance does. The distinction between encouragement and coercion, as evidenced in *O'Connor*, is critical to our analysis.

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[97] Griffin, *supra* note 37, at 119.

[98] Warner, *supra* note 22, at 73.

[99] *Id.* at 72.

[100] O'Connor, *supra* note 16, at 308.

In addition to the AA cases, one prisoner plaintiff voiced objections to the religious content of an "Emotional Maturity Instruction" program required as a condition for his parole, raising concerns about the biblical content of the accompanying oral instruction.[101] The Court stated clearly that "a condition of probation which requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion" violates the First Amendment.[102] However, the Court indicated that rehabilitation efforts may "encourage lawful conduct by an appeal to morality and the benefits of moral conduct to the life of the probationer," a task admittedly difficult to accomplish "without reference to religion."[103] It will be critical for our prisoner to establish the link between psychology and religion, and to articulate specifically the anti-biblical nature of psychological values.

The *Warner* court notes the trend toward a stricter construction of the Establishment Clause than would have ever been envisioned by the framers, due to consideration for the rights of atheists and non-Christians in this century.[104] Although Christians are rightly concerned about their increasing marginalization in American culture, this reading of the Establishment Clause, coupled with the Court's expanding definition of religion, can be utilized to great advantage when considering government-mandated programs such as we address here.

Inhibiting religion: Christianity. "Inhibition" is conceptually similar to the Free Exercise Clause. No statute may prohibit the free exercise of religion. Similarly, a law violates the Establishment Clause if it inhibits religion. Valid arguments were put forth by Christian parents challenging certain public school texts as not only establishing the religion of secular humanism, but also inhibiting Christianity.[105]

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[101] Owens v. Kelley, 681 F.2d 1362 (1982).

[102] *Id.* at 1365.

[103] *Id.* at 1365, 1366.

[104] Warner, *supra* note 22, at 73.

[105] Smith, *supra* note 47, at 688. "Appellees filed a position statement in which they asserted, inter alia, that the curriculum in the Mobile County School System unconstitutionally advanced the religion of Humanism and unconstitutionally inhibited Christianity, and that the exclusion from the curriculum of 'the existence, history, contributions and role of Christianity in the United States and the world' violated their constitutional rights to

Their arguments revolved largely around *omissions* in school texts about the role of religion in our nation's history. They did not prevail because teachers allegedly could supplement the written texts. Our prisoner should be able to advance a far stronger argument for inhibition, because psychotherapy advocates values diametrically opposed to the Bible.

In another case, inhibition was expressed in terms of perception by religious adherents. The Court must consider "whether challenged government action is sufficiently likely to be perceived by adherents of controlling denominations as endorsement, and by nonadherents as disapproval, of their individual religious choices."[106] The hostility of our prisoner's parole officer, who has explicitly stated that *Jesus Christ and the Bible* are not enough, is highly likely to be perceived by Christians as exactly such "disapproval."

The Third *Lemon* Prong: Excessive Entanglement

Counseling is intimately concerned with matters related to an individual's religious beliefs and practices. Any state involvement in monitoring a parolee's counseling will necessitate some degree of entanglement with religious doctrine.

The *Griffin* decision observed excessive entanglement in that some of the state's discretionary power had been delegated to AA volunteers who were committed to the program's spirituality. Delegation of state power to a religious entity has been deemed unconstitutional in other cases.[107] The dissent disagreed with the conclusion that state discretionary power was improperly delegated, finding no evidentiary support in the record that any AA volunteers had engaged in proselytizing or religious indoctrination.[108]

In *O'Connor*, the court viewed entanglement in terms of financial support, noting that AA receives no money or materials from the state. Information regarding AA meetings was provided

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equal protection, teacher and student free speech, the student's right to receive information, and the teacher and student free exercise of religion."

[106] Grand Rapids, *supra* note 95, at 390.

[107] Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994). A special school district had been carved out that was coterminous with an area populated by a Jewish sect. Cited in Griffin, *supra* note 37, at 107.

[108] Griffin, *supra* note 37, at 122.

to the plaintiff as one means of fulfilling a drunk driver's mandate to attend weekly self-help meetings.[109]

In our prisoner's case, care must be taken to avoid state entanglement with religion in the biblical alternative proposed to the court. The state would be providing no funds to his church or pastor and would not direct the content of the biblical counseling provided. A forbidden delegation of state power might be argued, but sometimes minimal church-state interaction is necessary to properly accommodate a free exercise claim. Additionally, since the teachings of modern psychology are not widely recognized as "religious doctrine" that might foster excessive entanglement under the *Lemon* test, church-state relations in our prisoner's case are best addressed in conjunction with his free exercise claim. In a free exercise case where Amish parents successfully challenged a compulsory education requirement for their children, the Court noted the necessity for some "repeated scrutiny of religious practices" in order to carve out their religious exemption from the last two years of secondary education:

> "But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise neutral program instituted to foster some permissible, non-religious state objective."[110]

Similarly, a minimal scrutiny of our prisoner's religious counseling program should be permissible in order to accommodate his constitutional right to free religious exercise, to which we now turn our attention.

Free Exercise of Religion
"...or prohibiting the free exercise thereof"

The Free Exercise Clause is implicated when some government mandate substantially burdens a sincerely held religious belief. Generally, courts have required the government to demonstrate a compelling state interest in order to infringe this basic liberty, coupled with a requirement that the law be the least restrictive means of achieving such interest. There are variations on this basic theme in the prison setting, and the waters have been muddied in the past decade by the troubling

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[109] O'Connor, *supra* note 16, at 308.

[110] Yoder, *supra* note 94, 240-241 (1972).

case of *Employment Division of Oregon v. Smith*.[111] A careful examination will be necessary in order to prepare our case.

Free Exercise: Sincerely Held Religious Belief

Courts have routinely required that free exercise claims be grounded in beliefs that meet two basic requirements. First, the beliefs must be religious in nature rather than purely personal or philosophical. Second, the belief must be "sincerely held," not a sham designed to escape the requirements of the law.[112]

The requirement that a belief be religious rather than philosophical is best stated in *Yoder*, where Amish parents successfully challenged a Wisconsin law requiring children to attend school through age 16. These parents were willing to send their children to elementary public school but objected to the last two years of secondary education, because the contemporary values advocated in that setting opposed their religious convictions. Here is what the Court said:

> "In evaluating those claims [Amish secondary education] we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and independent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; *to have the protection of the Religion Clauses, the claims must be rooted in religious belief.* Although a determination of what is 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their *subjective evaluation and rejection of the contemporary secular values accepted by the majority*, much as Thoreau rejected the

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[111] 494 U.S. 872 (1990).

[112] This is perhaps nowhere more evident than in the numerous "churches" and mail-order "ordinations" that have plagued the Internal Revenue Service over the years. While there are legitimate non-traditional churches, there have also been many frivolous schemes designed solely to achieve tax benefits and exemptions reserved for religious organizations and ministers. A full discussion is far beyond the scope of this paper, but the point is well illustrated by noting this phenomenon.

> social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was *philosophical and personal* rather than religious, and such belief does not rise to the demands of the Religion Clauses." (emphasis added)[113]

Our prisoner's objections to psychotherapy are definitely grounded in religious convictions. His rejection of the "contemporary secular values" advocated by modern psychotherapy is based on his study and sincere understanding of Scripture. At the same time, since *Yoder* the Court has expanded the boundaries of "religion" to a point where what was once deemed "philosophical and personal" might now constitute "religion."

The requirement of sincerity is a tough issue for courts to tackle because it involves an inquiry into the internal state of a person's mind. In a case involving use of mail to solicit donations for a seemingly questionable religious cause, the Court would not consider the truth or falsity of religious belief, but only whether it was sincerely held.[114]

Our prisoner should be able to successfully marshal evidence of sincerity, in that he is ready and willing to conform to the high standards of Scripture and submit himself to the ecclesiastical authority of a local church and its leaders. He is willing to be accountable and to follow through on an intense program of *biblical* counseling. If his beliefs were a mere sham to escape the state's mandate that he seek counsel to avoid repetition of his crimes, he would not be likely to exhibit such readiness.

Finally, it is important to note that there is no legal requirement of membership in an official group that teaches the particular religious conviction that is advanced in support of a

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[112] Yoder, *supra* note 94, at 215-216.

[114] U.S. v. Ballard, 322 U.S. 78 (1944). Organizers of the "I am" religious movement were charged with mail fraud because of their representations of supernatural powers (healing), coupled with solicitations for money. The trial judge instructed the jury to consider whether Ballards sincerely *believed* their religious claims to be true, rather than whether the claims were *actually* true. They were convicted at the trial court level (District Court). The Court of Appeals held that the truth of the representations should have been submitted to the jury (it was not). The Supreme Court agreed with the District Court in withholding from the jury the question of truth or falsity of Ballards' religious beliefs. The jury need only consider whether a knowing, willful misrepresentation was made. The *sincerity* of religious beliefs, not the *accuracy*, was properly before the Court.

free exercise claim. Two successful free exercise claims illustrate the significance of this point.

In *Thomas v. Review Board of Indiana Employment Security Division*,[115] a Jehovah's Witness voluntarily quit his job because of religious objections to the production of armaments for war, then was denied unemployment benefits for quitting without "good cause." Although not all within his religious community would voice exactly the same concerns, lack of an official position did not hinder the favorable outcome of his case:

> "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.... Intrafaith differences of that kind [what is 'scripturally' acceptable] are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses...the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[116]

In another unemployment benefits case, *Frazee v. Illinois Dept. of Employment*,[117] benefits were initially denied to a Christian employee who would not work on the Lord's day, because the Board of Review required that such religious beliefs be based on the tenets or dogma of an established sect.[118] The Court refused to hold that against the plaintiff, observing that in earlier cases involving similar unemployment benefits claims, the court had never considered official dogma an essential element for a "sincerely held" religious belief, although "purely secular" beliefs are inadequate:

> "Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[119]

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[115] 450 U.S. 707 (1981).

[116] *Id.* at 715-716.

[117] 489 U.S. 829 (1989).

[118] *Id.* at 830.

[119] *Id.* at 833.

Psychotherapy is a deeply controversial subject among Christians today. There are numerous popular authors promoting the integration of psychology and the Bible,[120] in addition to huge psychiatric clinics that tag themselves "Christian."[121] There are also a few voices "crying in the wilderness" against the integration of such opposing worldviews,[122] and a few organizations founded to combat the psychological trend and provide education to the Christian community.[123]

Free Exercise: The "Substantial Burden"

In evaluating of a free exercise claim, the Court must consider whether a challenged regulation imposes a burden on the exercise of religion,[124] and the magnitude of that burden must be weighed against the asserted interests of the state. In the case where Amish parents objected to a compulsory secondary education requirements, the substantiality of the burden was expressly stated in that "...Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[125] Criminal penalties for compliance with a person's religion undoubtedly meet the requirement that a burden be "substantial."

Not all substantial burdens automatically qualify, however. In a controversial case involving government-owned land, a national forest had been utilized by Native Americans for a variety of religious exercises. When government plans for the land threatened extinction of this religion, a legal challenge

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[120] To name a few: Steve Arterburn, Frank Minirth, Paul Meier, Neil Anderson, Dan Allender, David Seamands, Henry Cloud, John Townsend, Keith Miller, Rich Buhler, David Stoop, Larry Crabb, Gary Collins.

[121] New Life Treatment Centers, directed by Steve Arterburn, is one of the largest and best known.

[122] Martin and Deidre Bobgan; Jay Adams (pastor who has authored many books); Ed Bulkley (pastor-author); Dave Hunt (publisher of *Berean Call* newsletter); Drs. Gary and Carol Almy; Deborah Dewart (Discernment Publications).

[123] Institute for Biblical Counseling and Discipleship (San Diego, CA); Psychoheresy Awareness Ministries (Santa Barbara, CA); National Association of Nouthetic Counselors (Lafayette, IN); Biblical Counseling Foundation (Palm Desert, CA); Christian Counseling and Educational Foundation (Glenside, PA).

[124] Sherbert v. Verner, 374 U.S. 398 (1963).

[125] Yoder, *supra* note 94, at 218.

ensued.[126] As in *Bowen*, however, the Court drew a line where individuals were seeking to dictate the conduct of government in relation to its own resources. Here, the government owned the land in question. Had the case involved an eminent domain action concerning land owned by the Native American plaintiffs, the results might have been quite opposite. Throughout the case, several key words emerge: "coerce," "prohibit," "penalty." The Constitution forbids the government to *prohibit* the free exercise of religion, and governmental generally may not *coerce* conduct contrary to religious belief or extract a *penalty* for religious exercise. However, that does not mean that the state may not establish internal procedures and make decisions regarding government-owned assets that happen to clash with an individual or group's religious exercises. The Free Exercise Clause involves restraints on state power in terms of what it may or may not do to the individual, *not* what an individual or group may extract from or do to the government.

Some substantial burdens have qualified for relief even though indirect in nature. The *Yoder* court recognized the burden on Amish parents imposed by an apparently neutral educational statute:

> "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[127]

Other cases contain similar language:

> "[w]hile the compulsion [upon an individual to modify his religious beliefs to receive benefits] may be indirect, the infringement upon free exercise is nonetheless substantial."[128]

It is important to recognize, however, that indirect burdens are not always deemed sufficiently burdensome. Opposite decisions have been reached in cases where individuals have raised religious objections to obtaining social security numbers.[129] An

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[126] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

[127] Yoder, *supra* note 94, at 220.

[128] Thomas, *supra* note 115, at 718.

indirect burden is not automatically disqualified for consideration, but it may require more vigorous argumentation to persuade the Court as to the gravity of the burden.

It is particularly crucial to a successful case that allegations of "substantial burden" be expressed in specific terms:

> "Its purpose [the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent--a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[130]

Lack of specificity has resulted in unfavorable decisions in First Amendment cases lacking an independent Establishment Clause claim. The *Griffin* dissent observes that "this petitioner's entire claim is predicated on the Establishment of Religion Clause. He makes no complaint whatsoever of restriction of his freedom to exercise religion or nonreligion."[131] However, that case succeeded on its Establishment Clause claim. The dissent appears to confuse the criteria required for the two religion clauses. One of the other AA cases failed on the basis of generalized allegations. The convicted drunk driver asserted a claim rooted solely in the Free Exercise Clause:

> "In this action, plaintiff asserts he was improperly obligated to abandon his own religion and adhere to the principles of Alcoholics Anonymous."[132]

He failed, however, to explain exactly *how* the AA principles interfered with his own religion:

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[129] Callahan v. Woods, 736 F.2d 1269 (1984), ruled in favor of a family who quoted Scripture to object to such numbers. Two years later, the Supreme Court reached an opposite conclusion. Bowen v. Roy 476 U.S. 693 (1986).

[130] Abington v. Schempp, *supra* note 68, at 223 (1963).

[131] Griffin, *supra* note 37, at 115.

[132] Stafford, *supra* note 19, at 1016.

> "There is no evidence that any practice or ritual central to plaintiff's religion was implicated by the requirement that he undergo substance abuse treatment, nor does this court perceive any real incompatibility between plaintiff's religion and the program...plaintiff has not shown the program caused him to abandon or contravene any tenet of his faith."[133]

Similarly, when California parents brought a Free Exercise case against their school district for injunctive relief against a sex education program, denial was based in part on their failure to be specific:

> "There are only the general allegations of interference with First Amendment freedoms. Nor are there any specific allegations indicating what portions of the program are hostile to the beliefs of the parents."[134]

Successful Amish parents in *Yoder*, by contrast, persuaded the Court that their religion specifically requires a separation from the world and its values: "In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God."[135] In *Callahan*, the successful challenge to social security numbers was specifically grounded in quotations from the biblical book of Revelation.[136]

Our prisoner's Establishment Clause claim must be accompanied by plausible evidence that modern psychology can be deemed a "religion" under the First Amendment. To sustain his Free Exercise claim, however, the Court must be persuaded that coerced psychotherapy imposes a specific burden on the exercise of the plaintiff's Christian faith. We turn next to a consideration of the conflict between psychology and the Bible, in order to construct our argument on a scriptural basis.

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[133] *Id.* at 1018.

[134] Citizens v. San Mateo, 51 Cal. App. 3d 1 (1975).

[135] Yoder, *supra* note 94, at 212. There are texts of Scripture that Christians might cite as the basis for this proposition (1 Peter 1:14-15; Leviticus 11:44)

[136] Callahan, supra note 129, at 1271. The Book of Revelation is cited (13:16-18 is quoted in footnote) as condemning "the use of a universal number to designate a human being because such a number is the 'mark of the beast' through which the Antichrist seeks to control mankind."

The "Substantial Burden"
Modern Psychology v. the Bible

The Scripture is asserted by our prisoner to be the sole and final authority with reference to the burden psychotherapy imposes on his exercise of Christianity. The Bible claims to be breathed out by God so as to equip man for *every* good work (2 Timothy 3:16-17). It is eternal (Psalm 119:89-90; 1 Peter 1:24-25; Isaiah 40:6-8), perfect (Psalm 19:7), infallible and pure (Psalm 19:8-9), true (Psalm 119:160), and able to discern man's innermost thoughts and intentions (Hebrews 4:12). Those who serve God are to delight in His law and forsake the counsel of the ungodly (Psalm 1:1-2). Those who forsake God's counsel in favor of worldly wisdom are described as "rebellious" (Isaiah 30:1). Scripture warns against either addition or subtraction to God's sufficient Word (Proverbs 30:5-6). Believers are exhorted not to fall prey to the empty philosophies of the world (Colossians 2:8). Scripture is not only authoritative but also sufficient to address every counseling matter (2 Peter 1:3-4).

Counseling is an activity that addresses the fundamental problems of everyday living. It is inherently religious, because to give counsel necessitates an underlying system of values to guide decisions as to what to believe and how to conduct one's life. The Bible teaches that man has been created by God (Genesis 2:7) in His image to live in covenantal fellowship with Him (Genesis 1:27). It is sin, not psychological "disorder" or "dysfunction," that separates man from God (Isaiah 59:2). Man's sin is at the root of all the misery and crime in this world (Romans 1:18-31, 3:10-18, 5:12-21). To counsel man, *who is the image of God*, the counselor must turn to God and His Word. Whenever a system of counseling fails to acknowledge God's authority and seek reconciliation between man and God, the *Christian* must object. When *godless* counseling is mandated by the state, the Christian has a valid Free Exercise claim.

However, we must go further. These initial observations about the authority and sufficiency of Scripture are merely the beginning of our case. A brief sketch of major psychological theorists will illustrate the points that could be made at trial in more elaborate detail.

Sigmund Freud, founder of modern psychoanalysis, has achieved a major impact on counseling and culture over the past century. One of his early books, *Totem and Taboo*, attempts to explain the origins of religion (specifically Christianity) in

terms of the supposed practices of savages.[137] Closer to the end of his career, *The Future of an Illusion* builds Freud's case for the total removal of religious beliefs from society.[138] His last book, *Moses and Monotheism*, attempts to discredit the biblical Exodus account as a "pious myth" best discarded by modern man.[139] These books are not religiously neutral theories about the nature of man and how to help people change, but vicious attacks on the Christian faith. Freud's methods and theories rest on the presupposition of atheism.

Freud's successor, Carl Jung, develops a diabolical theology that is equally offensive to Christianity although not explicitly grounded in atheism per se. In *Answer to Job*, Jung mutilates biblical truth by accusing God of injustice, tyranny, and other sins against mankind.[140] In another well-known writing, Jung openly admits to demonic inspiration for his twisted theories about man.[141] Elsewhere, Jung writes specifically about psychology *and religion;* seeking truth in the "unconscious" rather than divine revelation, he replaces the Trinity with a "quarternity," adding a "feminine element" to the godhead.[142]

The mere title of Erich Fromm's book, *You Shall Be As Gods*, reveals its author's inverted view of man's fall.[143] Fromm justifies his atheism by the assertion that "God" is a mere concept rather than a Person. He openly advocates a "humanistic" religion[144] and a radical freedom from any power

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[137] SIGMUND FREUD, TOTEM AND TABOO (1950). It would be difficult to imagine a more blasphemous attack on the Christian faith. For example, the Lord's Supper is explained away in terms of a cannibalistic identification ritual. Freud's contempt for religion in general, and Christianity in particular, was no secret.

[138] SIGMUND FREUD, THE FUTURE OF AN ILLUSION (1961). The very existence of God is to Freud an "illusion" which he would excise as a "neurotic relic" of man's past history.

[139] SIGMUND FREUD, MOSES AND MONOTHEISM (1967).

[140] CARL JUNG, ANSWER TO JOB (1958).

[141] CARL JUNG, MEMORIES, DREAMS, AND REFLECTIONS 177, 178, 182, 356 (1961).

[142] CARL JUNG, PSYCHOLOGY AND RELIGION 76-77 (1938).

[143] ERICH FROMM, YOU SHALL BE AS GODS (1966).

[144] ERICH FROMM, PSYCHOANALYSIS AND RELIGION 37 (1950).

beyond humanity.[145] In writing *The Dogma of Christ*, Fromm views Christianity as "an expression of hostility to the father" corresponding to the "obsessional" or "irrational compulsive" thinking of the individual "neurotic."[146]

Albert Ellis, founder of Rational-Emotive-Behavior Therapy, focuses his attention on human thinking but presupposes that *religion* is fundamentally irrational. His booklet, *The Case Against Religion*, reeks with hatred for God and those who serve Him.[147] Atheism is equated with mental *health*, while religion is deemed synonymous with mental *illness*.

Yet another major theorist, Erik Erikson, clashes with Christianity when he explains away the entire Protestant Reformation in *Young Man Luther* as the "identity crisis" of its author, Martin Luther.[148]

New age theology emerges in the religious agenda of Abraham Maslow, who proposes a "religious-surrogate" in his hierarchy of human needs culminating in self-actualization.[149] His infamous "peak experience" is described as "wonder, awe, reverence, humility, surrender, and *even worship*."[150]

Still another widely known theorist, Carl Rogers, presupposes the inherent goodness of man, an assumption that clashes head-on with the biblical view of sin. His method of "counseling," to use the term as an oxymoron, is merely to nod approval of anything and everything proposed by the person being "counseled." (The government's legitimate interest in the deterrence of crime is hardly served by such an approach.) His late-life journey into the religious occult is documented in his own writings.[151]

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[145] ERICH FROMM, MAN FOR HIMSELF (1964).

[146] ERICH FROMM, THE DOGMA OF CHRIST 85 (1963).

[147] ALBERT ELLIS, THE CASE AGAINST RELIGION.

[148] ERIK ERIKSON, YOUNG MAN LUTHER (1958).

[149] ABRAHAM MASLOW, THE PSYCHOLOGY OF BEING iv (1968).

[150] ABRAHAM MASLOW, RELIGION, VALUES, AND PEAK-EXPERIENCES 65 (1964).

[151] CARL ROGERS, A WAY OF BEING.

In general, modern psychology appears to be a massive attempt to accomplish certain religious objectives. One of these is to divorce man from God. Another is to "explain" why man persists in the practice of religion in this "enlightened" modern age. Christianity is blasted and radical autonomy upheld as the substitute for an allegedly liberated humanity. There is not even one major modern theorist allied with biblical Christianity.[152] The major twentieth century psychoanalysts are pillars of modern atheism. The preceding is a bare sketch[153] of the many blasphemies that permeate the writings of modern psychologists, who cannot refrain from extensive discussions of religion. *Psychology emerges as a substitute for traditional religious faith*, wherein man usurps the throne of God. The psychotherapist replaces the pastor. In view of our nation's history of religious freedom, once grounded in liberty for different *Christian* denominations, it would be shocking for an American court to require any Christian believer to submit to counsel founded on the speculations of any of these ungodly modern psychologists. Such state action ventures into forbidden Establishment Clause territory by coercing adherence to a system that is on *religious* territory, and it impedes the free exercise of Christianity.

Free Exercise: The "Compelling State Interest"

Religious freedom is a precious liberty that dates back to the founding of our country. It is so fundamental and highly treasured that only the most compelling concerns of the government may justify intrusion:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' *Thomas v. Collins*."[154]

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[152] This is reminiscent of Romans 3:10-11, Psalm 14:1-3 (there is *none* righteous, not even *one*).

[153] If this matter went to trial, far more extensive documentation would be presented to the court. These extremely brief excerpts give the reader some idea as to the inherently religious nature of psychotherapy as well as its anti-Christian themes.

[154] Sherbert v. Verner, *supra* note 124, at 406 (1963).

Similarly, when the State of Wisconsin asserted that its interest in compulsory education was "so compelling that even the established religious practices of the Amish must give way,"[155] the Supreme Court refused to budge:

> "...only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[156]

An interesting judicial shift occurred in two Jehovah's Witness cases concerning an elementary flag salute requirement. In 1940, the Supreme Court upheld a state statute that required elementary school children to salute the flag contrary to their sincerely held religious beliefs. The decision was based on an alleged "clear and present danger" to national security, apparently a compelling state interest, although the link between school children saluting the flag and a "clearly present danger" is anything but obvious.[157] This case was soon reversed, when three years later a more "compelling" interest ("grave and immediate danger") was required and found to be lacking. The state's valid interest in national unity could be achieved through means not coercing an expression of belief contrary to religious convictions.[158]

The question we naturally face is: Exactly *how* compelling is the government's interest? There is no mathematical formula, but it is instructive to review several cases where the state succeeded in persuading the Court that such an interest existed. In such cases, what typically emerges is a neutral, generally applicable law that does not target religious practices.

Some of the Court's decisions have involved minority religions (Mormons and Jehovah's Witnesses) with unusual religious practices. An early Mormon case involved the Court's upholding the conviction of a Mormon man for violation of a state criminal statute prohibiting polygamy, even though his religion required polygamy as a religious duty.[159] In *Jones v.*

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[155] Yoder, *supra* at note 94, 221.

[156] *Id.* at 215.

[157] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[158] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[159] Reynolds v. United States, 98 U.S. 145 (1879). At this time, the Court remained committed to the core values of Christianity, including the

Opeklika,[160] a city ordinance requiring the payment of a license tax on the distribution of literature was valid, even as applied to Jehovah's Witness book sales, as a "nondiscriminatory regulation of operations incidental to the exercise of religion." This decision was explicitly overruled the next year, when the Court invalidated another allegedly "non-discriminatory" license fee applied to Jehovah's Witness canvassing activities.[161] Met with another challenge from the same religious group, the Court upheld a state law requiring notice and a permit in order to hold a parade or procession on public streets.[162] Jehovah's Witnesses were prosecuted for failure to comply, but the restriction was reasonable to maintain public order and ensure sufficient police protection. This church lost again, when in *Prince v. Massachusetts*[163] the Court refused to exempt a 9-year-old Jehovah's Witness and her aunt from a child labor law that infringed on their distribution and sale of religious literature. The state's interest in protecting children from physical harm was deemed sufficiently compelling to validate this restriction on religious liberty. The law applied uniformly to all children, whether or not engaged in activities related to their religion.

An Amish case involved a farm employer of Amish workers who raised religious objections to the social security system. Although self-employed Amish were eligible for an exemption,[164] employers and employees did not qualify. The Court concluded that it would have unduly interfered with the functioning of the Social Security program, and undermined its financial integrity, to carve out an exemption under the circumstances. This case concerned religious objections to a nationwide program involving huge dollar amounts and cumbersome administration. Carving out a religious exemption would have necessitated a significant administrative burden on the government, particularly if it were faced with many similar exemption claims. Certainly, good

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integrity of the family. In the current climate, where rights to abortion and homosexuality are so strongly affirmed, we might wonder how such a case might be decided if it were brought before the Supreme Court today.

[160] 316 U.S. 584, 596 (1942).

[161] Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[162] Cox v. New Hampshire, 312 U.S. 569 (1941).

[163] 321 U.S. 158 (1944).

[164] United States v. Lee, 455 U. S. 252 (1982); exemption for self-employed workers granted pursuant to 26 U.S.C. 1402(g).

arguments can be made in favor of granting the exemption to an established, easily identified religious community such as the Amish. Our prisoner, however, is requesting an alternative to a program that is by nature highly individualized. Each prisoner eligible for parole is assigned an individual parole officer to monitor his case.

Another government victory occurred when one man raised religious objections to obtaining a social security number for his daughter:

> "The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable.... Decisions rejecting religious-based challenges have often recited the fact that a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty."[165]

This regulation was not directed against any specific religious belief. Therefore, the Court concludes:

> "Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[166]

Also germane to the decision was the indirect, incidental nature of the requirement, which did not explicitly compel the litigant to engage in religiously forbidden conduct:

> "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a government benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religious inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[167]

Justice O'Connor criticized the majority for its departure from the normal "compelling state interest" and "least restrictive

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[165] Bowen, *supra* note 129, at 703.

[166] *Id.* at 707, 708.

[167] *Id.* at 706.

means" requirements applied in previous cases. The welfare benefits at issue here are a matter of *statutory entitlement*, not merely a "privilege."[168]

Similarly, our prisoner would be eligible for parole at this time in his sentence, aside from the mandated psychotherapy. Counseling, however, is not "wholly neutral in religious terms" like a social security number, but is an inherently religious activity involving the basic values that guide an individual's life. Nor is the therapy requirement, by its nature, "uniformly applicable." Individual counseling needs vary from person to person depending on many factors. Furthermore, the prison's therapy mandate arguably compels conduct that is highly offensive to the prisoner's religious convictions. If our prisoner *ever* wants to see the outside world, he must submit to a counseling system that is anathema to his religion. He is faced with two choices: (1) Faithfulness to God and His Word while remaining in prison, or (2) disobedience to God in order to secure a life outside the prison walls. Does our First Amendment really authorize the state to compel such a choice?

In a landmark 1990 decision, the state's authority to enforce valid laws of "general applicability," even where religious exercise is substantially burdened, reached a climax.[169] This decision has stirred such controversy[170] that it will be necessary to devote a special section of this paper to a careful consideration of how that case can be distinguished from the case we are building for our prisoner.

Free Exercise: The "Legitimate Penological Interest"

In a prison setting, the "compelling state interest" standard is subject to variation. In certain highly structured settings that serve special government interests, such as the

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[168] *Id.* at 731.

[169] Employment Division v. Smith, *supra* note 111.

[170] Congress enacted the Religious Freedom and Restoration Act of 1993 in response, attempting to resurrect the previous judicial tests applied in Free Exercise cases.

military[171] and prisons, standards for religious freedom are somewhat modified. The Court tends to defer to the professional judgment of the officials charged with care and control of these institutions.

A Kansas inmate, serving a two to seven-year term for aggravated assault, was required to participate in an alcohol rehabilitation program (Chemical Dependency Recovery Program, administered by the Kansas Department of Social Services) modeled on AA precepts.[172] The Court significantly lowered the "compelling interest" burden normally imposed on the state:

> "Where a challenged prison policy impinges on an inmate's constitutional rights, the policy is valid if it is reasonably related to legitimate penological interests."[173]

Similarly, the dissent in *Griffin* observes that lawful incarceration justifies the restriction of privileges that would otherwise be enjoyed, and that deterrence of crime and rehabilitation of prisoners may justify limitations on the exercise of constitutional rights.[174] *Stafford* and *Griffin* differ in their outcomes, however, because Griffin based his claim on an Establishment Clause violation whereas Stafford relied on Free Exercise.

The comments in *Stafford* and the *Griffin* dissent both make reference to *O'Lone v. Estate of Shabazz*,[175] a case where the Court refused to grant a Muslim prisoner's request that the

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[171] In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court sustained a regulation which forbid an ordained rabbi to wear a religious head covering (yarmulke), extending a high level of deference to military judgment. Prison regulations might be accorded a similar level of deference due to the restrictive nature of the environment and its purposes. This decision was a close one (5 to 4), with two lengthy, well reasoned dissents. Brennan and Marshall criticize the majority for their absolute, uncritical deference to military judgment, despite the lack of a credible explanation as to how this small head covering would actually interfere with military discipline and order. In fact, that head covering was tolerated without comment until the Goldman testified against a defense witness in a court martial hearing; the complaint subsequently filed against him appears to have been vindictive in nature. The Supreme Court's decision seems arbitrary and is hardly consistent with normal free exercise jurisprudence.

[172] Stafford, supra note 19.

[173] *Id.* at 1017.

[174] Griffin, *supra* note 37, at 120.

[175] 482 U.S. 342 (1987).

prison accommodate his attendance at a Friday worship service central to the observance of his religion. Incarceration does not entail the forfeiture of all constitutional rights, but certain limitations are imposed.[176] The Court explained its deference to the judgment of prison officials in maintaining prison security:

> "To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."[177]

This relaxed standard was applied in another First Amendment challenge to prison regulations, this time prohibiting inmates from receiving hardback books unless mailed directly from a publisher. The restriction was deemed a "rational response" to a clear security problem.[178]

Although this deferential standard of review renders challenges more difficult to sustain, it has been refined in later cases. *Turner v. Safley*[179] involved the rights of prisoners to send and receive mail as well as to marry other inmates. The "legitimate penological interest" standard was set forth in terms of four criteria:

> "(a) whether there is a 'valid, rational connection' between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational;
>
> (b) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates,

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[176] *Id.* at 348.

[177] *Id.* at 349. The "reasonableness" test here requires a reasonable relationship to a legitimate penological interest. This is similar to the low level scrutiny, or "rational basis," level of review applied in equal protection cases that do not involve invidious discrimination against a "suspect" class of persons. Such levels of judicial review tend to result in validation of the government law or action that has been challenged.

[178] Bell v. Wolfish, 441 U.S. 520 (1979).

[179] 482 U.S. 78 (1987).

which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise;

(c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and

(d) whether the regulation represents an 'exaggerated response' to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at de minimus costs to valid penological interests being evidence of unreasonableness."[180]

Applying these criteria to our prisoner's scenario, the following arguments could be presented in response:

1. There is a logical connection between certain government interests (deterrence of crime, rehabilitation of prisoners) and requiring prisoners to engage in some program of counseling to reorient their lives. However, the specific requirement for *psychotherapy*, rather than *Christianity* (practiced through pastoral counseling, Bible study, prayer, and worship), is not logically connected to that interest. Psychotherapy is not the sole means by which the government's legitimate purpose can be achieved. (There seems to be a more obviously "logical" relationship between AA and deterrence of crimes related to alcohol. Psychotherapy is broader in the range of "disorders" it claims to treat. Whether or not alcohol is implicated, a *biblical* plan for counseling can be tailored for the particular prisoner seeking parole.)

2. This question is not entirely applicable because the prisoner is being *coerced* into psychotherapy, contrary to religious convictions. He can still attend church or otherwise practice Christianity, but he is compelled to engage in a method of sanctification that is directly contrary to his religious faith. Forced psychotherapy may be deeply confusing to a new Christian who desires to live in accordance with Scripture.

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[180] *Id.* at 78-79.

3. There would be little impact. The prisoner's particular parole officer would need to be aware of his church-related alternative counseling, but there would be no other burden, financial or otherwise, on the state. Other inmates would not be involved.

4. Institutional concerns here would not be within the prison system (as in *O'Lone*) but rather in the community to which the paroled prisoner would be released. Such concerns are very real, in that some ex-offenders repeat their crimes, but psychotherapy is by no means the only way the state can protect against such recidivism. The existence of a church-based alternative is evidence that the psychotherapy requirement is not reasonable.

When faced with free exercise claims in a prison setting, creative legal thinking is well worth the effort. The litigant who can conceive of a valid alternative to the regulation, taking into consideration the legitimate interests of the institution, may succeed in court:

> "...if inmate [who challenges prison regulation as violation of constitutional rights] can point to an alternative [regulation] that would fully accommodate prisoner's rights at de minimis cost to valid penological interest, the court may consider this as evidence that regulation does not satisfy the reasonable relationship standard."[181]

Just as the state's interest in a prison setting need not be "compelling," the standard is also far more relaxed in terms of the normal "least restrictive means" test: "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[182] But while the officials need not engage in an exhaustive search for alternatives, the claimant who does so has a better chance of judicial success. Our prisoner is prepared to honor the state's legitimate interest in crime prevention and rehabilitation, and he is prepared to present an alternative system of counsel and accountability that accommodates his religious liberty at no cost to the government.

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[181] *Id.* at 90.

[182] *Id.* at 90-91.

Although it is important to prepare for the "legitimate penological interest" standard, ultimately it might not be necessary. The regulations interfering with Muslim prisoners' attendance at their Friday services, and the regulations concerning prisoner rights to marry and receive mail, all concern the *internal* functioning of the prison system. That special, highly structured environment involves judgments of prison officials to which the court must be sensitive. There are risks and security concerns not present in other settings. Our prisoner, however, is in the process of qualifying for parole, which by definition occurs *outside* the prison. The standard of review applied to internal prison regulations, wherein a rational relationship to a "legitimate penological interest" is required, should not necessarily apply to a parole qualification process. It is well worth noting the *Warner* court's expression as to how the religious liberty of potential parolees should be respected:

> "The defendant's actions are not justified by the fact that it was attempting to rehabilitate a person convicted of a serious offense, rather than dealing with an ordinary citizen. It would be ironic and self-defeating if in the attempt to restore offenders to full membership in our society, the state were to ignore the Constitution, our society's foremost legal statement of our values."[183]

Free Exercise: The "Least Restrictive Means"

In addition to requiring a "compelling state interest," Free Exercise cases have normally inquired as to whether the regulation in question is the "least restrictive means" of achieving such interest. Is it possible for the government to accommodate a citizen's religious exercise without sacrificing the accomplishment of its legitimate, compelling goal? Our prisoner will argue that psychotherapy is not the only means by which the state can guard against the repetition of crimes by parolees. Nor is it the "least restrictive means," because a satisfactory alternative will be presented that harmonizes with the prisoner's exercise of his Christian faith.

An expression of this basic principle occurred many years ago in *Pierce v. Society of Sisters*.[184] This case affirmed the rights of parents to choose private *religious* schools for their

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[183] Warner, *supra* note 22, at 73.

[184] 268 U.S. 510 (1925).

children, in spite of Oregon Compulsory Education Act adopted in 1992 that required *public* school attendance. The state has a valid interest in the education of its citizens, but parents may lawfully fulfill the state's mandate in a religious environment of their choice.

Pierce was cited in the *Yoder* case nearly half a century later, parental rights to private education were once again before the Court. Parents retain the right to provide an "equivalent education in a privately operated system."[185] The Court explained that "...while a State may posit such [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools."[186] Rejecting the State's argument concerning their compelling interest in compulsory secondary education, the Court recognized the valid, less religiously restrictive means the Amish already had in place within their religious community:

> "To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal' vocational education for their children in the adolescent years."[187]

This case is a significant one for the "least restrictive means" aspect of Free Exercise cases. The Court recognized that the Amish parents in this case "have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education."[188]

Our prisoner, similarly, should be able to carry this "more difficult burden" by presenting to the court a biblically based alternative, so as to respect and protect the legitimate state interest of deterring crime and preventing its recurrence when

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[185] Yoder, *supra* note 94, at 213.

[186] *Id.* at 239.

[187] *Id.* at 224.

[188] *Id.* at 235.

inmates are paroled.[189] We can further note that the fundamental rights of parents, to place their children in a private religious school rather than the public system, is comparable to the right of our prisoner to participate in a church-based, religious system of counseling rather than state-mandated therapy that is so abhorrent to his sincerely held beliefs. Counseling is a form of education and training. Just as parents may choose to educate their children in a religious context, adult parole applicants should be free to select a religious environment to educate and equip them for life outside the prison.

Several years after *Yoder*, the Ninth Circuit noted that "the purpose of almost any law...can be traced to a fundamental concern of government" which on balancing often appears to outweigh a single individual's religious concerns. Thus the court must take the inquiry to the next step, asking whether a particular requirement is the least restrictive means by which the government can achieve its purpose. The court must consider "the marginal benefit of applying it to *all individuals*, rather than to all individuals *except* those holding a conflicting religious conviction" (emphasis added).[190] Three factors are identified in *Callahan* that refine the definition of "least restrictive means":

> "[1] Magnitude of the state's impact upon the exercise of the religious belief.
>
> [2] The existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and
>
> [3] The extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."[191]

The Court of Appeals' thoughtful analysis overturned the decision of the District Court, which had granted summary judgment against Callahan *twice*. The District Court reasoned that the burden on Callahan's religious freedom was justified by

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[189] As previously discussed (note 82), Christians should be the first to acknowledge and respect the state's role in the restraint of sin, a biblical expression for the state's interest in the deterrence of crime.

[190] Callahan, *supra* note 129, at 1272.

[191] *Id.* at 1273.

"the government's compelling interest in having aid recipients classified by [social security] number, and that the number requirement was the least restrictive means of administering the AFDC program."[192] On initial remand, the District Court was to consider the extent to which Callahan's religious beliefs were burdened, and whether the number was indeed the least restrictive means of achieving the government's interest. Although the burden was concededly significant, it was deemed outweighed by the government's interest in efficient administration of an "enormous social welfare program."[193] Although a similar case heard two years later by the Supreme Court resulted in an adverse decision,[194] the refinement of "least restrictive means" is well worth consideration in our analysis. Callahan cited specific Scripture to support his case; so will our prisoner. In addition, our prisoner will present a less restrictive means imposing no significant on the state, something Callahan was unable to do in a context involving huge numbers of people.

In addition, the *Callahan* court cited the need for judicial review of the importance of the government value underlying a challenged regulation, plus the proximity between the value and that regulation. Would the government's interest be impeded by carving out an exemption, and to what extent? Is the specific regulation actually *necessary* to achieve a compelling state interest? In *Callahan*, the Court rejected the government's argument that it would cost 900 million dollars to convert its entire system to a non-numerical system. Such a massive conversion is hardly necessary to accommodate a few isolated religious exemptions, and it would be speculative to estimate how many other applicants would raise similar objections to the social security number requirement. In our case, the government value is one of prime importance. Our society must be protected against the recurrence of crime wherever possible. The proximity between crime prevention and psychotherapy, however, is tenuous. Studies about the effectiveness of therapy are conflicting and confused at best.[195] The state cannot prove that therapy, rather than faithfulness to religious doctrine, is the

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[192] *Id.* at 1271.

[193] *Id.* at 1272.

[194] Bowen v. Roy, *supra* note 129.

[195] Evidentiary support is beyond the scope of this paper, but if this matter actually went to trial, such support is available. See, e.g., MARTIN AND DEIDRE BOBGAN, THE END OF "CHRISTIAN PSYCHOLOGY" (1997).

answer to our culture's crime waves. Certainly it cannot prove that psychotherapy, either in addition to or as a substitute for religion, is the sole and essential means for rehabilitation of prisoners.

One of our AA cases illustrates how alternative means can be made available in a fact pattern such as we are considering. Plaintiff O'Connor complained to the Court that while there were hundreds of AA meetings available every week, only two secular meetings were offered ("Rational Recovery"). However, the individual had responsibility for finding a program that complied with the county's regulations. AA and Rational Recovery were pre-approved programs *but not the only options*. This sort of flexible regulation would leave room for the individual church-based alternative our prisoner proposes.

Finally, an encouraging recent case acknowledges that religious organizations may contribute to solving secular societal problems without entailing an Establishment Clause violation. *Bowen v. Kendrick*[196] involved a constitutional challenge to the Adolescent Family Life Act of 1981. That Act provided health care for pregnant teenagers, including both "care services" as well as "prevention services" that encouraged teens to abstain from sex. The Act's goals were implemented through grants to both public and private agencies, *including religious care providers*. Grantees were not permitted to advocate or encourage abortion, and were required to show how they would involve families and voluntary associations, including religious organizations. A government program is not invalid merely because some religious doctrine happens to coincide with a secular purpose. In this case, the state had a valid interest in decreasing teenage pregnancy and solving related problems. It was possible for religious organizations to contribute to the solutions sought by the state without deconstructing the "wall of separation" so jealously guarded by the Court. Similarly, it should be possible for our prisoner to propose a program of counseling and accountability that involves his local church. Other parolees are free to select other programs consistent with their own religious beliefs. The church may contribute to the reduction of crime in our society by assisting in the rehabilitation of a parolee. As this occurs, the state's legitimate interest will be furthered by a

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[196] 487 U.S. 589 (1988). Although this case addressed an *Establishment Clause* concern, there is a relevant analogy. When a litigant proposes a "less restrictive means" to accomplish the state's goal, such means may be *religious* without triggering an Establishment Clause violation.

means that accommodates and respects the religious freedom of a former convict who is now a Christian believer.

Free Exercise: Condition for a Government Benefit

A number of free exercise cases have considered whether a condition may be attached to the receipt of some important state benefit in such a manner as to compel a choice between religion and participation in an otherwise available government program.

Several decisions have been made in the context of eligibility for unemployment benefits. Applicants for such benefits have sometimes terminated employment, either voluntarily or involuntarily, because the job required conduct conflicting with religious convictions. Often the refusal to work on a chosen Sabbath is the specific issue. A Seventh Day Adventist achieved victory in the landmark *Sherbert* case. There the Court rejected the state's reasoning that because unemployment benefits are a "privilege" rather than a "right," the Employment Board's denial of the claim was justified:

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.... To condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[197]

In a similar unemployment benefits case, the Court looked back to *Everson* for the proposition that generally available state benefits may not hinge on a citizen's foregoing the exercise of his religion:

> "More than 30 years ago, the Court held 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."[198]

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[197] Sherbert, *supra* note 124, at 404.

[198] Thomas, *supra* note 115, at 716.

The *Thomas* Court described such conditioning of a state benefit as substantially burdensome to religion, even though the burden is indirect:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[199]

In a different fact pattern, the Court looked at the significance of religious *conduct* as compared to *belief*.[200] This case also evaluated whether civil and religious rights may be mutually exclusive, such that a citizen may exercise one or the other but not both. A Baptist minister was unable to simultaneously exercise his civic right to seek public office and his First Amendment right to enter the ministry, due to a state law that prohibited ordained ministers from running for office. The Court held the restriction invalid. The majority considered the *Torcaso* case but did not find it controlling, because that case involved belief (a notary oath) rather than conduct.[201] Concurring justices Brennan and Stewart refused to distinguish *Torcaso;* they would not make the "sophistic distinction" between belief and action.[202] Either way, the Court refused to validate religion as a basis for granting or withholding state benefits:

> "...government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."[203]

Similarly, our prisoner has been classified as ineligible for parole solely because his religious convictions prohibit psychotherapy.

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[199] *Id.* at 717, 718.

[200] McDaniel v. Paty, 435 U.S. 618 (1978).

[201] *Id.* at 626, 627.

[202] *Id.* at 634.

[203] *Id.* at 639.

Other cases consider Free Exercise claims that would dictate internal government procedures or other decisions.[204] Challenges to social security number requirements are a key example. Although the Ninth Circuit *Callahan* case resulted in victory for the plaintiff, an adverse decision was made in a similar Supreme Court case two years later:

> "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[205]

Our prisoner is not requiring that the "Government *itself*" behave in a particular manner. He is requesting a biblically oriented counseling program as an alternative to the psychotherapy mandated by the state which is grounded in secular humanism, contrary to his faith. Unlike the social security number exemption in *Bowen*, his request does not alter the internal administrative functioning of the state in any respect.

The *Bowen* Court also notes the distinction expressed in previous cases between a government *compulsion* and *conditions* to obtaining of a government benefit. In *West Virginia Board v. Barnette*,[206] the Court sustained a challenge to the flag salute required of elementary school children, because the state's requirements *compelled* them to profess a belief directly contrary to their religious convictions. In *Hamilton v. Regents*,[207] the Court upheld a public university's curriculum requirements, even though particular courses violated the religious convictions of certain students. *Barnette* involved young children subject to compulsory education laws, while *Hamilton* plaintiffs were young adults who enrolled voluntarily and could have chosen another educational route.[208]

Our case, while involving a condition (psychotherapy) for obtaining a state benefit (parole) is significantly different.

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[204] Lyng, *supra* note 126, involved the government's decision regarding the use of its own land. This case does not involve any condition for a state benefit but it does involve the *internal* working of government.

[205] Bowen, *supra* note 129, at 699.

[206] Barnette, *supra* note 158.

[207] 293 U.S. 245 (1934).

[208] Bowen, *supra* note 129, at 705.

Our prisoner did not "voluntarily enroll" at the state prison. The "benefit" to be obtained is his *liberty*, a normal constitutional right temporarily removed through due process of law. If this man is otherwise eligible for parole, he should not be compelled to violate his deepest religious convictions in order to qualify.

Bob Jones University v. United States[209] involved a common, significant government benefit: the granting of tax-exempt status by the Internal Revenue Service. This unfavorable decision requires careful analysis, as it may signal a trend toward stifling of free exercise claims. The University interpreted the Bible to forbid interracial dating, and its school policies reflected that understanding. Because of such racially discriminatory practices in the admission and oversight of students, IRS tax exemption was denied. However much we may disagree with such a biblical exegesis, this case involves a sincerely held *religious* belief that disqualified an organization for an important state benefit. The particular values of the culture at any given time may play a role in the Court's decisions. Elimination of racial discrimination has been a volatile issue for more than a century and a high judicial priority in recent decades. Whereas sincere religious belief might not otherwise be questioned and a tax exemption denied based on the particular content or viewpoint, in this case it was. In this respect it is similar to the controversial *Smith* case, where the sacramental use of illegal drugs failed to arouse judicial sympathy. Considering the cultural "war on drugs" and "war" on racial bias, it is perhaps no wonder that the Court turns a deaf ear to religious claims that might contribute in a negative way to serious social problems.

A case significantly similar to ours is the favorable *Griffin* decision considered earlier, where the plaintiff prisoner objected to a substance abuse program mandated as a condition to his eligibility for a family visitation plan. The dissent argued that Griffin had no unqualified right to this program, which is described as "heavily discretionary," holding out a mere possibility of family visits. Each visit pursuant to the program was subject to a separate, highly discretionary review. Dissenting judges found this case analogous to the military course requirements in *Hamilton v. Regents*.[210] Hamilton litigants were not required to attend the state university, just

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[209] 461 U.S. 475 (1983).

[210] Griffin, *supra* note 37, at 120.

as Griffin was not required to participate in the family visitation program. The university required military courses contrary to the students' religious views, while the prison required Griffin's attendance at AA meetings contrary to his atheism. However, if the military courses in *Hamilton* had contained *religious* content, and if that case had been litigated on the Establishment Clause rather than Free Exercise, an opposite outcome might have ensued.

Our prisoner's case definitely involves the conditioning of a state benefit (parole) on conduct (psychotherapy) that would violate his deepest religious convictions. As in *McDaniel*, he must choose between the free exercise of religion and a right or benefit otherwise available. The choice he faces is serious, because it involves his basic liberty to live in the community.[211] The privilege-right distinction noted by the *Sherbert* court could be significant, because parole prior to serving of the full sentence might be deemed a "privilege." However, if *Sherbert's* reasoning is followed, the difference should not impact the court's decision.

Litigation involving government benefits received a jolt in the past decade in a landmark case, to which we now turn our attention.

Free Exercise: Post-*Smith* Considerations

The 1990 decision rendered in *Employment Division v. Smith*[212] was something of a judicial earthquake in free exercise jurisprudence. This case ruffled religious feathers across the country, and Congress responded with the Religious Freedom and Restoration Act of 1993.[213] That Act prohibits the government from "substantially burdening" the exercise of religious freedom, even if that burden results from a law of "general applicability," unless the law furthers a compelling governmental interest and is the least restrictive means of

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[211] Our case thus differs significantly from a case such as Braunfeld v. Brown, *supra* note 72, where Jewish merchants challenged Sunday closing laws that indirectly forced them to close on both Saturday and Sunday. Such economic losses from a private business generally do qualify for constitutional protection. No direct state benefit or privilege was at issue.

[212] Employment Division v. Smith, *supra* note 111.

[213] 107 Stat. 1488, 42 U.S.C. 2000bb et seq.

furthering such interest. This is essentially the test articulated in *Sherbert*[214] and severely curtailed in *Smith*.

Smith involved two members of the Native American Church (Galen Black and Alfred Smith) who ingested peyote for sacramental purposes. They were employed by a private alcohol/drug rehabilitation nonprofit organization which discharged them because of the peyote. Unemployment was denied because the peyote use was deemed "misconduct." The Oregon Supreme Court reversed the denial of benefits, based on *Sherbert's* "compelling state interest" test. They reasoned that the criminality of peyote use was irrelevant to the constitutional issue, and that the state's purpose (preservation of the unemployment compensation fund's integrity) did not justify the burden on free exercise that would be imposed by disqualification. This case came to the Supreme Court twice. Initially, the Court vacated and remanded the state's decision due to the uncertainty about whether religious use of peyote was illegal under Oregon law. The Oregon Supreme Court agreed that it was illegal but concluded that such prohibition violated the First Amendment. In a second round with the Supreme Court, the issue was defined as "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[215] In other words, does the U.S. Constitution mandate carving out a religious exemption to a generally applicable, facially neutral law? It is instructive to take a brief detour of American history to consider how the framers might have answered such a question.

Post-*Smith* Considerations: Historical Background

An extensive analysis of religious exemptions was undertaken the same year *Smith* was decided, when law professor Michael McConnell reviewed Free Exercise history to determine whether that clause requires the granting of religious exemptions from generally applicable laws with secular

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[214] Sherbert, *supra* note 124.

[215] Employment Division v. Smith, *supra* note 111, at 874.

purposes.[216] His conclusion, which admittedly differs from that of other commentators, is that such exemptions were indeed within the contemplation of the framers and consistent with an early American understanding of the nature of religious liberty.[217] These citizens understood that God was sovereign and human government therefore limited.[218] According to McConnell, the conflict between generally applicable law and religious conscience is one that mandates carving out religious exemptions. This interpretation, however, was not put into judicial practice until the Warren Court. *Sherbert*, for example, required that unemployment benefits not be withheld from a Seventh Day Adventist claimant whose unavailability for work stemmed from religious objections to working on the Sabbath.[219]

McConnell examines and compares two opposite perspectives on religious exemptions. Those who would mandate exemptions envision the purpose of the Free Exercise Clause as preventing the government from singling out religious practice for peculiar disability. Under this view, facially neutral legislation cannot be challenged no matter how burdensome it may be to religious exercise. "Neutrality" is present if a law makes no reference to religion and has *some* secular justification other than the suppression of religion. The contrary view is that the Free Exercise Clause protects against even the incidental, unintended effects of government action. Religion is protected not only against purposeful discrimination or hostility, but also against indifference. "Neutrality" is defined, not from the state's perspective, but as viewed by a religious claimant. A law neutral to the majority may be anything but neutral to a minority religious believer.[220] *Sherbert* upholds this latter view, while *Smith* favors the "no exemptions" position. The difference can radically impact the outcome of a Free Exercise case.

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[216] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[217] *Id.* at 1410.

[218] *Id.* at 1415.

[219] *Id.* at 1412, 1413. However, mandated constitutional exemptions were not grounded on an analysis of American history, either in *Sherbert* or similar decisions.

[220] *Id.* at 1418, 1419.

The recognition of a "higher duty" undergirds religious liberty in early America. Madison's view was that duty to God precedes the claims of the civil government.[221] The people voluntarily delivered over some of their rights to the American government they created, but they reserved the right to freely exercise their religion in accordance with the dictates of conscience: "A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible."[222] "Free exercise" is a recognition of the limitation of civil government over the lives of the people. An admission that divine authority exists, or may exist, means the state's claims to obedience are partial rather than absolute.[223] Such an understanding coincides with the view that religious exemptions are mandated when civil law clashes with religious duty. However, the religious context of early America was much different than what exists today. At that time, "generally applicable law" normally harmonized with the moral standards of Protestant Christianity. Absent the religious plurality of the late twentieth century, clashes between God's law and man's law were rare. It would be unusual under these circumstances to claim exemption from a generally applicable law.[224] Today, however, Christianity is increasingly marginalized. Even *within* the Christian community, religion may be compartmentalized. God has one day in seven, but the other six are given to worldly wisdom. The believer who wants to be faithful to Scripture in all aspects of life may face legal challenges. Our now-Christian prisoner certainly faces such a challenge in his desire to receive counsel that is wholly grounded in God's Word.

Early state constitutions typically defined free exercise in terms of lawful religiously motivated actions that did not breach the peace. Even under the "no-exemptions" view, otherwise legal conduct, engaged in for religious reasons, is

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[221] *Id.* at 1446.

[222] *Id.* at 1512.

[223] *Id.* at 1516.

[224] It would certainly be unusual for a *Christian* to claim an exemption. The Court tackled one claim for exemption in the Reynolds decision, *supra* note 158, where a Mormon litigant was unable to secure a religious exemption from law that prohibited polygamy. Religion was legally defined as the *Christian* religion, and free exercise as the practice of Christianity. With the ever expanding judicial definition of "religion," the matter of exemptions is enormously complicated.

not proscribed. Probably, McConnell claims, early free exercise provisions protected religious exercise up to the point where conduct would breach the public peace or safety.[225]

This view is critically analyzed by another free exercise commentator, who insists that early state governments were permitted to deny religious freedom whenever an activity was merely illegal, whether or not it breached the peace.[226] Even ideas might be regulated, as some early Americans believed that government should be able to "discourage dangerous beliefs."[227] Where state constitutions contained disturb-the-peace provisions regarding religious conduct, such language "...specified the circumstances in which state governments could deny religious liberty; such caveats related to the availability rather than the extent of religious freedom and do not evince a right of exemption from civil law."[228] Additionally, religious minorities were most likely concerned about ending state establishments of religion rather than carving out special exemptions.[229] Exemptions may have been understood as forbidden establishments, creating precisely the "unequal civil rights" that early Americans wanted to abolish.[230] Finally, Hamburger argues that the "...jurisdiction of civil government and the authority of religion were frequently considered distinguishable."[231] If these two authorities operated in different spheres of life, one temporal and the other spiritual, there would be little intersection and the concept of "exemption" from civil law would rarely apply.

There is some merit in Hamburger's position, because early American law was generally founded on the moral values of the Protestants who dominated colonial politics. The granting of an exemption from generally applicable law in this setting would be the near equivalent of also granting an exemption from *God's*

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[225] McConnell, *supra* note 216, at 1462.

[226] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 919 (1992).

[227] *Id.* at 922.

[228] *Id.* at 948.

[229] *Id.* at 946.

[230] *Id.* at 933.

[231] *Id.* at 937.

law. In addition, *state* religious establishments persisted into the early nineteenth century. America had not come to the point where religion was severed from *all* civil government. The decree of divorce between church and state was not yet final.

Post-*Smith* Considerations: Generally Applicable Law

The illegality of the religiously motivated conduct was deemed relevant to resolution of the constitutional claim concerning denial of unemployment. If the criminal law was not violated by Oregon's failure to carve out a religious exemption for peyote use, then the lesser burden (denial of employment benefits) could also be imposed.[232] The Court specifically distinguishes this case from *Sherbert v. Verner, Thomas v. Review Board, Indiana Employment Security Division*, and *Hobbie v. Unemployment Appeals Commission of Florida*, unemployment benefit cases that all challenged the denial of benefits because religious convictions had motivated an employee's separation from a particular job. None of these cases involved religious conduct that the state had defined as illegal, unlike the peyote use implicated in *Smith*.[233] The Court evidently does not view this decision as a departure from previous jurisprudence, explaining that:

> "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[234]

A distinction is made between *formal* neutrality and *substantive* neutrality. Formal neutrality would only bar laws that purposefully discriminate against religion. Oregon's law regarding use of controlled substances would violate the Free Exercise Clause only if the legislature sought to ban solely the use of substances for religious purposes. Substantive neutrality would require government to accommodate religious differences by exempting religious practices from laws that are formally neutral. The *Smith* court selected formal neutrality to guide its decision, and in doing so claimed to be in line with previous opinions. Other cases are cited where the Court failed to excuse litigants from compliance with generally applicable

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[232] Employment Division v. Smith, *supra* note 111, at 875.

[233] *Id.* at 876.

[234] *Id.* at 878, 879.

law.[235] Only where *other* treasured freedoms are at stake will this Court exempt religious believers from the law:

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as free of speech and of the press."[236]

Otherwise, the Court warns, there would be no end to the confusion that would ensue. Every man would be a law unto himself. The majority journeys back a century to find judicial concurrence:

> "To make an individual's obligation to obey such a law [criminal] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'--permitting him, by virtue of his beliefs, 'to become a law unto himself,' *Reynolds v. United States*--contradicts both constitutional tradition and common sense.... The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind...."[237]

The unemployment benefits arena, in which *Sherbert* was decided, is a context that this Court would distinguish from other fact scenarios. According to the majority, the *Sherbert* "compelling state interest" criteria applies only in such a setting, because "...a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's employment."[238]

Concurring justices would have reached the same result, not by rejecting the "compelling state interest" criteria, but

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[235] Lee, *supra* note 164; Prince, *supra* note 163.

[236] Employment Division, *supra* note 111, at 881. Included on this list are the Pierce (*supra* note 184) and Yoder (*supra* note 94) decisions, recognizing parental rights to religious education of their children.

[237] *Id.* at 885, 888.

[238] *Id.* at 884.

rather by applying it.[239] They chastise the majority for its sweeping conclusion that government may utilize a "generally applicable" law to justify attaching criminal penalties to religiously required actions.[240] The First Amendment does not draw a bright line between laws that expressly discriminate against religion and those that are "generally applicable."[241] It is unreasonable to presume that our cherished tradition of religious liberty does not at least sometimes require the government to grant limited exemptions from civil law.[242]

The dissent goes even further, charging the majority with judicial apostasy that abandons historical notions of how the Free Exercise Clause applies:

> "This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.'"[243]

Furthermore, based on a careful analysis of the facts, dissenting justices conclude that the state has not carried its burden as to the "compelling interest" required to justify its intrusion on religious exercise. Oregon has not even prosecuted Native Americans who ingest peyote in religious exercises.

Post-*Smith* Considerations: Legislative and Judicial Aftershocks

Congress did not sit still in the aftermath of *Smith*. As noted earlier, its passage of the Religious Freedom and Restoration Act of 1993 (RFRA) was intended to restore pre-*Smith* criteria for free exercise, similar to what was articulated thirty years earlier in *Sherbert*. In 1997, a case hit the Court which caused it to consider the constitutionality of that Act.[244] The original facts involved a zoning law wherein a church was

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[239] *Id.* at 905.

[240] *Id.* 893, 898, 899.

[241] *Id.* at 894.

[242] *Id.* 900.

[243] *Id.* at 908.

[244] City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

denied a permit needed to expand its facilities. The church was located in an area that the city wanted to preserve because of its many historical buildings. The law was not targeted toward religion, but rather was generally applicable. The church's inability to expand was deemed by the lower courts a "substantial burden" on its free exercise of religion, based on RFRA standards.

The Supreme Court considered whether Congress, when it enacted RFRA, had overstepped its legislative powers, pursuant to Sect. 5 of the Fourteenth Amendment, to "enforce" by "appropriate legislation" the due process and equal protection guarantees of that Amendment. Congress may exercise such power where necessary as a remedial measure to correct a pattern of abuses. The Court concluded that Congress had engaged in a forbidden function by altering the meaning of the Free Exercise Clause, rather than merely *enforcing* constitutional protections. Congress also invaded *judicial* territory in its attempt to interpret the Constitution. In addition, states were burdened with the heavy costs of litigation and a restriction in their general regulatory powers. The holding in the case thus turned primarily on two distinct violations: (1) the separation of powers inherent in our judicial system and (2) the allocation of powers between federal and state governments.[245] Not everyone has understood the basis underlying this religiously controversial decision. Certainly, we do want to preserve the separation of powers in our government, along with what remains of state authority free from federal invasion. However, it will require more litigation to resurrect pre-*Smith* criteria, which apparently cannot be altered through the political process.

Post-*Smith* Considerations and Distinctions

Despite the ominous *Smith* tone that echoes down judicial halls, there are significant observations and distinctions to be made. *Smith* does not sound the death knell for our case.

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[245] It is important to understand this decision in the context of a resurgence of federalism occurring in several 1990's Supreme Court cases, including: Printz v. United States, 117 S. Ct. 2365 (1997) (Brady Handgun Violence Prevention Act, restricting gun purchases, was invalidated because federal government coerced state officials into execution of federal law); United States v. Lopez, 115 S. Ct. 1624 (1995) (Gun-Free School Zones Act of 1990, prohibiting the knowing possession of a firearm in a school zone, was not a valid exercise of congressional power to regular interstate commerce).

Illegality/Criminality of Religiously Mandated Conduct. The litigants in *Smith* belonged to a religion that required conduct (peyote ingestion) deemed criminal under Oregon state law. Our prisoner wishes to engage in conduct (receiving biblical counseling) that is by no means illegal and to abstain from action (psychotherapy) on which his parole is conditioned, but which is not generally required of all citizens.

In *Smith*, the state *prohibited* conduct (peyote ingestion) that a certain religion *required*. The reverse is true in our case: Government *requires* conduct (psychotherapy) that our prisoner's Christian faith *prohibits*. *Smith* asks whether government can forbid religiously required action, while we ask whether government can mandate religiously prohibited conduct.[246]

Generally applicable law: Is it neutral? Based on the concurrent Establishment Clause claim of our prisoner, wherein he will marshal evidence regarding the anti-religious content of modern psychology, the alleged "neutrality" of the psychotherapy requirement is questionable at best. Our conjunction of Free Exercise and Establishment Clause claims may render *Smith* less relevant than if we staked our claim solely on free exercise.

Social Concerns. Illegal drug use has reached epidemic proportions and an all-out "war" has been declared. Current cultural values no doubt play at least some role in judicial decisions. Excusing compliance with illegal drug use laws could wreak havoc in the "war on drugs," particularly since the Supreme Court's definition of religion apparently knows no limits. Every sort of "religious" drug user could conceivably cry out for judicial relief. Such concerns may well be overstated but they are not entirely irrelevant. Justices live in the real world and no doubt take society's pressing concerns into consideration.[247]

We must note, however, that violent crime is also a pressing societal concern. We must build a strong case to persuade the Court that biblical, pastoral counseling addresses

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[246] Theoretically, our prisoner could exercise his religious freedom by seeking pastoral counsel, and "go through the motions" of psychotherapy. Because of the massive confusion that would engender for a relatively new Christian seeking to forsake his past criminal history, it is important that we argue vigorously for his right to substitute religiously acceptable counseling.

[247] Note how the Court has caved in to popular demand on the abortion issue. Popular cultural values have most certainly overridden faithfulness to judicial precedent and the traditional values of our nation.

that concern while accommodating our prisoner's religious freedom.

Other Constitutional Rights. The *Smith* Court expressed its willingness to carve out religious exemptions in cases where other fundamental liberties were also implicated. Its citing of *Pierce* and *Yoder* in this respect is significant. Both cases involved parental rights to select a religious alternative to comply with state compulsory education laws. Similarly, our prisoner seeks a religious alternative to mandated counseling as a condition for his parole. As in *Yoder*, that alternative considers the state's valid interest and seeks to fulfill the government's goal in a manner that also fully accommodates religious concerns.

Individualized Context. The justices in *Smith* considered the unemployment benefits to be unique in that government decisions involved consideration of individual circumstances. Similarly, the state has broad discretion in parole decisions, which are just as highly individualized (if not more so). Our prisoner's proposal for pastoral counseling does not necessitate any disruption of the normal parole procedures, nor does it involve his being excused from a statute that applies generally to all citizens.

On the whole, the preceding considerations suggest that while *Smith* gives us reason to pause, it does not obliterate our case. Our position remains strong and constitutionally valid.

Conclusions

Our prisoner faces a tough legal challenge, but it is not insurmountable. Perhaps his biggest hurdle is surmounting the Establishment Clause claim he advances, because he must demonstrate that modern psychology has sufficient religious components to bar state-coerced counseling.[248] However, the

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[248] The implications are staggering. Another author writing to prove that psychology is religion has stated it well: "That Christians are taxed to support large-scale programs which regularly teach anti-Christian theories is not just a serious case of intellectual misrepresentation, it has become a grave violation of the constitutional separation of church and state. Violation of this separation in the past typically has come from undue religious involvement in secular functions. It should come as no surprise that with the massive growth of government the situation is now reversed: the secular system which intrudes into all aspects of life has been using government-funded and controlled programs for propagating its own faith." PAUL C. VITZ, PSYCHOLOGY AS RELIGION 111 (1977).

precedents set by challenges to mandated AA meetings are encouraging, since an emerging consensus recognizes that program as a religion for First Amendment purposes. The Supreme Court's ever expanding definition of "religion," in general, creates an umbrella under which modern psychology easily fits. The occasional acknowledgement of Secular Humanism as a religion helps sustain our position.

Our case is strengthened by joining both Establishment Clause *and* Free Exercise claims. The belief our prisoner holds is sincerely held, as evidenced by his willingness to submit to the authority and counsel of local church leadership. If an atheist can make a case that excuses him from mandated recovery meetings, surely the Court should approve the plan of a believer who respects the state's "compelling interest" and articulates a religious alternative in line with that purpose.

Finally, the *Christian* roots of our nation support our claim. Many modern citizens may wish to forcibly yank those roots from our foundation, but God and His Word are eternal and two hundred years of American history are not easily overlooked. Surely, the Court ought to turn its ear toward a prisoner who now devotes his life to the God revered and worshipped by our nation's founding fathers.