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Paul E. Salamanca

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# Constitutional Protection For Conversations Between Therapists and Clients

*Paul E. Salamanca\**

And Saul, yet breathing out threatenings and slaughter against the disciples of the Lord, went unto the high priest, and desired of him letters to Damascus to the synagogues, that if he found any of this way, whether they were men or women, he might bring them bound unto Jerusalem. And as he journeyed, he came near Damascus: and suddenly there shined round about him a light from heaven: And he fell to the earth, and heard a voice saying unto him, Saul, Saul, why persecutest thou me?<sup>1</sup>

And Saul arose from the earth; and when his eyes were opened, he saw no man: but they led him by the hand, and brought him into Damascus.<sup>2</sup>

Three of young [Martin] Luther's contemporaries . . . report that sometime during his early or middle twenties, he suddenly fell to the ground in the choir of the monastery at Erfurt, "raved" like one possessed, and roared with the voice of a bull: "*Ich bin's nit! Ich bin's nit!*" or "*Non sum! Non sum!*"<sup>3</sup>

## I. INTRODUCTION

People have long perceived a connection between mental and even physical illness and spiritual anguish. Yet, modern culture tends to view both types of illness from an increasingly medical perspective, seeking a genetic or environmental explanation. In most cases, this "medical model" is probably the best approach, even if it is imperfect. First, the purely medical explanation may be accurate. Second, even if it is not accurate, treating the symptoms of a disease with a spiritual source is probably far easier than treating the source itself. Ultimately, however, we must take note that disease is often not the result of genetics or "environment" in the scientific sense. Otherwise, we will lose our

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\* Assistant Professor of Law, University of Kentucky College of Law. I would like to thank Richard Ausness, Michael Cox, Mike Healy, Jennifer Philpot, John Rogers and Peter Spiro for reading and commenting on drafts of this Article.

1. *Acts* 9:1-4 (King James).

2. *Acts* 9:8 (King James) (emphasis removed).

3. ERIK H. ERIKSON, *YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY* 23 (1958) (footnotes omitted). Erikson adds that the German words are best translated as "It isn't me!" (leaving the King's English aside) and the Latin as "I am not!" *Id.*

ability to adapt psychologically to new ways of life. Often, it is the individual suffering psychological anguish who accurately perceives the crises that will beset the culture as a whole a generation or more later. If the culture is to prepare for these crises, we must not categorically dismiss the psychological anguish of the individual as mere genetic or environmental defect. That person may be doing us a favor.<sup>4</sup>

One powerful example of the widespread acceptance of the medical model is the emergence of the Americans with Disabilities Act ("ADA")<sup>5</sup> as a means of limiting questions by public licensing authorities about mental illness. Before Congress enacted the ADA, authorities routinely asked applicants for licenses to disclose extensive information about mental illness, including such courses of treatment as counseling and hospitalization.<sup>6</sup> Since then, courts, advocates, and public officials have construed the ADA to prohibit or limit many of these questions. Although authorities continue to ask intrusive questions in many jurisdictions, the ADA has had an enormous salutary impact for people who have sought and obtained psychological treatment. Given this progress, advocates might understandably feel justified in challenging only those authorities who continue to ask intrusive questions and in not bothering to ask whether the end of excluding such questions from applications justifies the means presented by the ADA. But if the medical model upon which the ADA is based is flawed, as I suggest it might be, we should ask precisely that question. Moreover, if the medical model is a poor or incomplete justification for limiting these kinds of questions, we might also profitably ask whether there are other

4. As the prominent psychologist Erich Neumann notes:

It is not difficult to understand why positive attempts at a solution appear earlier and are more easily recognisable in the development of the individual than in that of the collective. The individual who is brought up against the overwhelming problem of evil and is shaken by it, and often driven by it right up to the brink of the abyss, naturally defends himself against destruction. In order to survive at all, he needs, not as a matter of arbitrary choice but of urgent necessity, the aid of forces of the deep unconscious; in them and in himself he may be able to find new ways, new forms of life, new values and new guiding symbols.

ERICH NEUMANN, *DEPTH PSYCHOLOGY AND A NEW ETHIC* 29 (Eugene Rolfe trans., 1969). This is not to say, however, that people suffering from mental illness or subject to unique pressures invariably present positive options for the culture. In fact, they may seriously endanger the culture. This is particularly true where such people obtain political power. See generally VOLODYMR WALTER ODAJNYK, *JUNG AND POLITICS: THE POLITICAL AND SOCIAL IDEAS OF C.G. JUNG* 22 (1976). Odajnyk writes: "In the realm of politics, the political leader who has inflated his personality through identification with his office, or who feels that he represents the collective will experiences a sense of self-confidence, omnipotence, and megalomania that borders on 'godlikeness.'" *Id.*

5. 42 U.S.C. §§ 12131-12180 (1994).

6. See *infra* notes 23-24 and accompanying text for an example of some of the questions typically asked.

justifications available for such limitations. In fact, such justifications are at least implicit in the federal Constitution's guarantees of due process,<sup>7</sup> free exercise of religion,<sup>8</sup> and freedom from unreasonable search and seizure.<sup>9</sup> The Supreme Court has held that the Due Process Clauses protect people from arbitrary intrusion into certain intensely private aspects of their lives.<sup>10</sup> Arguably, conversations between a patient and a therapist designed to alleviate mental illness should qualify for the protection of these clauses.<sup>11</sup> The First Amendment explicitly prohibits interference with the free exercise of religion. To the extent therapy replicates or facilitates traditional confessional relationships, it should qualify for some level of protection under this clause.<sup>12</sup> Finally, the Fourth Amendment prohibits "unreasonable" searches and seizures, providing further support for the argument that intrusive questions violate the Constitution.<sup>13</sup>

Admittedly, it is unrealistic to think that much litigation will occur in this area in the short term, given the wide impact of the ADA, and given the

7. The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV., § 1.

8. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Supreme Court has held that the Religion Clauses of the First Amendment apply to the states via the Due Process Clause of the Fourteenth Amendment. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

9. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Supreme Court has held that the Fourth Amendment applies to the states via the Due Process Clause of the Fourteenth Amendment. *See* *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

10. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing a right of married persons to use contraceptive devices); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465-67 (1958) (recognizing a right, in certain contexts, for an association to keep confidential the names of its members). *See infra* notes 131-61 and accompanying text for a more detailed discussion of these cases.

11. I use the word "therapist" as a generic term for a professional trained to treat the mentally ill. The focus of this Article is on therapists who treat their patients at least in part by engaging them in conversation.

12. *See infra* notes 162-97 and accompanying text.

13. *See infra* notes 198-234 and accompanying text.

Supreme Court's current reluctance to recognize new constitutional rights.<sup>14</sup> Nevertheless, and if only for hortatory reasons, we should criticize the ADA for its questionable premises and note that the Constitution might better protect the relationship between therapist and patient from unnecessary official scrutiny. Moreover, if licensing officials voluntarily limit questions about treatment for mental illness in light of constitutional principles, a precedent might be set for the long term. If, as jurists and commentators suggest, the Constitution comes to protect those rights widely valued in the culture, habitual non-judicial respect for the privacy of the therapeutic process will ultimately provide raw material for a judicial extension of constitutional protection to this process.<sup>15</sup>

In Part II of this Article, I will describe the dilemma licensing authorities pose for applicants by asking intrusive questions about treatment for mental illness.<sup>16</sup> In Part III, I will set forth the relevant provisions of the ADA<sup>17</sup> and discuss some of the more prominent cases<sup>18</sup> arising under the Act. In Part IV, I will discuss some weaknesses of the medical model upon which Congress has based the ADA.<sup>19</sup> Specifically, I will argue that the medical model potentially distorts experiences that may have religious importance and encourages trivialization of individual and religious growth. In Part V, I will discuss alternative, constitutional bases for protecting conversations between patients and therapists.<sup>20</sup> Finally, in Part VI, I will argue that, in light of judicial reluctance to recognize new areas of constitutional protection, non-judicial members of the government should voluntarily treat the interests I identify as having a constitutional dimension.<sup>21</sup>

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14. Two terms ago, the Supreme Court unanimously held that the Constitution does not protect the right of a terminally ill patient to obtain the assistance of a physician in committing suicide. *See* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2261 (1997). In the course of reaching this decision, the Court noted:

[W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

*Id.* at 2267-68 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

15. *See infra* notes 243-44 and accompanying text.

16. *See infra* notes 22-45 and accompanying text.

17. *See infra* notes 46-58 and accompanying text.

18. *See infra* notes 59-89 and accompanying text.

19. *See infra* notes 98-122 and accompanying text.

20. *See infra* notes 123-234 and accompanying text.

21. *See infra* notes 235-44 and accompanying text. An additional justification for noting possible constitutional limitations on the power of licensing officials to ask intrusive questions about treatment for mental illness lies in helping courts to identify the proper *reach* of the ADA. Over time, the Constitution and the ADA may come to be interpreted *in pari materia*.

## II. THE DILEMMA POSED BY INTRUSIVE QUESTIONS

Many licensing authorities, such as those charged with controlling admission to the bar or to the practice of medicine, routinely inquire about applicants' history of mental illness. To some extent this is understandable, given such authorities' obligation to protect the public from unqualified practitioners.<sup>22</sup> An example are the following two questions, which the New Jersey Board of Medical Examiners once asked as part of its initial and renewal licensing processes:

1. Have you ever been treated for alcohol or drug abuse?
2. Have you ever suffered from or been treated for any mental illness or psychiatric problems?<sup>23</sup>

Despite the ADA, such questions are common on applications to the bar and on forms used by other government agencies. There is also often a follow-up procedure as well, which can involve submission of records.<sup>24</sup>

Many applicants are understandably reluctant to answer these questions truthfully. Their reasons are both professional and personal. As a professional matter, they may fear that authorities will deny them a license or admission to the bar, or make their professional status contingent upon the performance of

22. See Florida Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 74 (Fla. 1994); *In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994). See generally Kelly R. Becton, Note, *Attorneys: The Americans with Disabilities Act Should Not Impair the Regulation of the Legal Profession Where Mental Health Is an Issue*, 49 OKLA. L. REV. 353, 355 (1996) ("The threat of attorney misconduct caused by mental illness is real. Bar examiners and courts must have the capacity to protect the public from such harm."). Becton argues that narrowly tailored questions concerning an applicant's current ability to practice law "are necessary to protect potential clients from incapable attorneys. Medical data provides that certain serious mental illnesses can reoccur over periods extending up to ten years. This information shows that treatment information concerning these chronic illnesses may very well serve to alert bar examiners of current and potential incapacity." *Id.* at 383-84.

23. See *Medical Soc'y v. Jacobs*, No. Civ. A. 93-3670 (WGB), 1993 WL 413016, at \*1 (D.N.J. Oct. 5, 1993). According to the court in *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 440 (E.D. Va. 1995), bar examiners in 18 jurisdictions were asking unlimited questions about mental illness in 1995. In Kentucky, for example, the examiners asked: "Have you ever been diagnosed or received regular treatment for amnesia, emotional disturbance, nervous or mental disorder?" *Id.* at 440 n.19.

24. See, e.g., *Jacobs*, 1993 WL 41306, at \*2 (noting that the Board required applicants to "explain [affirmative answers] on a separate sheet, including dates of all incidents"); *id.* at \*7 (noting that "those who provide[d] affirmative answers to the challenged questions [were] subject to further investigation"). See also *In re Applications of Underwood & Plano for Admission to the Bar*, 1993 WL 649283, at \*1 n.2 (Me. Dec. 7, 1993) (setting forth the text of release). See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 581, 582 (1985).

some undertaking.<sup>25</sup> As a personal matter, they may resist revealing embarrassing facts to strangers, or worse, to people with whom they expect to work.<sup>26</sup> Such resistance can arise from embarrassment about events of the past or it can arise from fear of releasing information about an ongoing course of treatment.

None of this should be particularly surprising. The community of mental health professionals has long recognized the role of confidentiality in effective treatment.<sup>27</sup> It is natural to think that exposing a private, subjective process to objective, external scrutiny might impair or calcify its progress. As the psychologist Walter Odajnyk has written:

All basic changes in the individual are the culmination of a natural process that begins with the personal encounter between man and man, and between the individual and his God. Jung insists that the only effective counterbalance to mass-mindedness, to the deindividualizing influence of the collective, and to the demoralizing effects of the dictatorial state is an individual inner transcendent experience. Only on the basis of such an experience can the individual resist the moral blandishments of the world and protect himself from an otherwise inevitable submersion in the mass.<sup>28</sup>

In a similar vein, the legal community has long noted, in widely varying contexts, the importance of confidentiality in intimate advisory or confessional relationships. Examples include the evidentiary privileges that protect the relationships between attorney and client, husband and wife, and clergy and penitent, to name three. In fact, the Supreme Court has used its discretion under Rule 501 of the Federal Rules of Evidence to recognize a privilege for conversations between psychologists and patients in federal court, noting that “[e]ffective psychotherapy . . . depends upon an atmosphere of trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.”<sup>29</sup> Indeed, many jurisdictions recognize a privilege for

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25. See *Clark*, 880 F. Supp. at 435 (noting the practice in some states of granting licenses to practice law upon the condition that applicants continue counseling or treatment for mental illness).

26. The problem can be particularly acute in states with a small, relatively cohesive bar. Although character committees may be well known for their probity, the chances are high in such states that applicants will practice with or before some of its members for a lifetime.

27. See generally Rhode, *supra* note 24, at 582-83.

28. ODAJNYK, *supra* note 5, at 60. If in fact individual psychological growth occurs in tension with the demands of the culture, it follows that there must be separation between the two.

29. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). Rule 501 provides in relevant part:

Except as otherwise required by the Constitution of the United States or <https://scholarship.law.missouri.edu/mlr/vol64/iss1/8>

conversations between physicians and patients or between therapists and patients.<sup>30</sup>

In another vein, many officials in the federal government enjoy privileges arising from the nature of their office. The Constitution itself supplies a legislative privilege for members of the House and Senate. This privilege, articulated in the Speech or Debate Clause,<sup>31</sup> protects members of Congress from liability arising from statements made in connection with the legislative process.<sup>32</sup> Although this clause typically protects statements made in full view of the public, in theory it would also shield members from inquiry into confidential communications.<sup>33</sup> More to the point of privacy, the Supreme Court recognized an executive privilege in dictum in *United States v. Nixon*.<sup>34</sup> In that case, the Court reviewed a claim by President Nixon that he should not have to comply with a subpoena *duces tecum* requiring him to produce certain

provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

30. See generally Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L.J. 473, 475 (1987) (noting that, although legislation in most states confers such protection, exceptions accumulate and swallow the rule). The Supreme Court has also suggested that a law that unduly interferes with the relationship between physician and patient might violate the First Amendment. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("It could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."); cf. *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975) (per curiam) (upholding a prohibition against the performance of abortions by non-physicians). The Court said in *Menillo*: "*Roe* teaches that a State cannot restrict a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester." *Id.* (emphasis added).

31. This Clause provides: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

32. Obviously, many of these conversations are public, and the Constitution only protects them in the sense that members of Congress need fear no exposure in court for their words. Nevertheless, the principle remains that the Constitution protects "the deliberative and communicative processes" by which Congress operates. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

33. Because the Speech or Debate Clause protects members of Congress and their aides from liability arising from what they say or to some extent do in connection with the legislative process, the clause in fact confers both immunity and a privilege. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 7.9, at 259 (5th ed. 1995).

34. 418 U.S. 683, 705-06, 708 (1974).



recordings of conversations that had occurred in the Oval Office. Nixon argued that release of the recordings would compromise the President's ability to gather truthful yet sensitive information.<sup>35</sup> Although the Court ruled against the President,<sup>36</sup> it did not reject out of hand his argument that some privilege attaches to the office of the President. In fact, it described the need for protecting "communications between high Government officials and those who advise and assist them in the performance of their manifold duties" as "too plain to require further discussion."<sup>37</sup> The Court went on, however, to hold that an across-the-board claim of executive privilege, such as the claim Nixon had asserted, had to give way to a specific, demonstrated need in an ongoing criminal prosecution.<sup>38</sup> The Court's reasoning in that case is instructive: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."<sup>39</sup> Given our recognition of evidentiary and political privileges in such a wide variety of contexts, we should not be surprised that people are reluctant to answer questions about treatment for mental illness on applications for licenses.

Notwithstanding the usefulness of withholding information about treatment for mental illness, however, such a route is not easy to take. First, one hopes that few people aspiring to be lawyers or members of another profession are comfortable disobeying the law.<sup>40</sup> Moreover, as a practical matter, an applicant exposes him or herself to significant liability by lying in response to questions like those posed by New Jersey's medical examiners.<sup>41</sup> Lying in a material way to the federal government, for instance, is a violation of federal law and can carry a fine of up to ten thousand dollars and up to five years' imprisonment.<sup>42</sup>

35. *Id.* at 705.

36. *Id.* at 713-14.

37. *Id.* at 705.

38. *Id.* at 713.

39. *Id.* at 705.

40. Empirical evidence suggests, however, that many people do lie on such applications. See *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 437 (E.D. Va. 1995) (noting the wide discrepancy between the number of people suffering from "some form of mental or emotional disorder at any given time" and the number of people admitting to having obtained treatment for such disorders in response to a question posed by bar examiners).

41. See *supra* text accompanying note 23.

42. See 18 U.S.C. § 1001 (1994). This Section provides in relevant part as follows: [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme or device a material fact; (2) or makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1994). The Supreme Court has recently held that Section 1001 means <https://scholarship.law.missouri.edu/mlr/vol64/iss1/8>

Moreover, lying on an application for a license or a job can lead to revocation of the license or loss of the position.<sup>43</sup> Accordingly, people for whom a factually correct answer to these questions is “yes” must choose between telling the truth and taking their chances (which may be the best thing to do in most circumstances),<sup>44</sup> lying and taking their chances (which many do),<sup>45</sup> or challenging officials’ authority to ask intrusive questions at all. Armed with the ADA, many have recently, and successfully, chosen the last course of action.

### III. THE AMERICANS WITH DISABILITIES ACT

The ADA essentially establishes “disability” as a suspect classification and warrants heightened judicial review of any law that tends to sort people out on the basis of disability.<sup>46</sup> Several plaintiffs or groups of plaintiffs have challenged intrusive questions about mental illness under this Act. Noting that mental illness, addiction to drugs, and alcoholism can all be disabilities within the meaning of the ADA,<sup>47</sup> they have argued that at least some questions about treatment unlawfully discriminate against them because of their disabilities. These arguments have met with considerable success through litigation and the threat of litigation.

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exactly what it says. *See Brogan v. United States*, 118 S. Ct. 805, 811-12 (1998).

43. *See, e.g., Medical Soc’y v. Jacobs*, No. Civ. A. 93-3670 (WGB), 1993 WL 413016, at \*2 (D.N.J. Oct. 5, 1993).

44. *See infra* notes 94-97 and accompanying text.

45. *See Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430, 437 (E.D. Va. 1995).

46. *See* 42 U.S.C. § 12101(a)(7) (1994). This paragraph provides in part: “[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” 42 U.S.C. § 12101(a)(7) (1994). Historically, the judiciary, not Congress, decided which groups qualified for heightened protection under the Constitution. In fact, the language quoted above tracks the language of the famous footnote four of the Supreme Court’s decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Such legislation as the ADA reflects Congress’ increasing assumption of this role.

Although the Court did not explicitly refer to the Equal Protection Clause of the Fourteenth Amendment in footnote four of *Carolene Products*, laws and policies that distinguish between people without sufficient justification—or that, in some cases, fail to take into account important difference—implicate the Equal Protection Clause. That Clause provides: “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

47. *See* 28 C.F.R. § 35.104 (1998).

### A. The ADA and Its Implementing Regulations

Congress enacted the ADA for the purpose of “providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>48</sup> Title II of the ADA<sup>49</sup> governs entities in the public sector.<sup>50</sup> Section 202 generally prohibits the discriminatory denial of public benefits to a “qualified individual with a disability.”<sup>51</sup> Regulations promulgated by the Attorney General to implement Title II in turn prohibit public entities from using discriminatory criteria or methods of discrimination,<sup>52</sup> from discriminating in connection with a license or certification,<sup>53</sup> and from setting criteria that have the effect of screening out qualified disabled individuals from the full and equal enjoyment of public programs.<sup>54</sup> These regulations further provide that a “physical or mental impairment” includes a broad range of diseases and conditions, including addiction to drugs or alcoholism.<sup>55</sup> For

48. 42 U.S.C. § 12101(b)(1) (1994).

49. *See* 42 U.S.C. §§ 12131-12150 (1994).

50. The ADA explicitly applies to instrumentalities of the states. *See* 42 U.S.C. § 12131(1)(A), (B) (1994). Although the Act does not explicitly include licensing authorities within the definition of a public entity, implementing regulations promulgated by the Department of Justice do. *See* 28 C.F.R. § 35.130(b)(6) (1998).

51. 42 U.S.C. § 12132 (1994). The Act defines a “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2)(A)-(C) (1994). Title II of the Act defines “qualified individual with a disability” as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2) (1994).

52. 28 C.F.R. § 35.130(b)(3)(i) (1998) provides as follows: “(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”

53. 28 C.F.R. § 35.130(b)(6) (1998) provides in pertinent part as follows:

A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

54. 28 C.F.R. § 35.130(b)(8) (1998) provides as follows:

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

55. 28 C.F.R. § 35.104 (1998). *See generally* *Medical Soc’y v. Jacobs*, No. Civ. A.

purposes of this Article, the gravamen of the ADA appears to be that licensing authorities may not impose an unnecessary burden, such as denial of a license or an obligation to release medical records, upon a qualified individual with a disability.<sup>56</sup> On the other hand, a person with a disability is not “qualified” under the Act if he or she “poses a direct threat to the health or safety of others.”<sup>57</sup> But the implementing regulations are quick to add that:

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.<sup>58</sup>

The ADA thus authorizes courts to evaluate, ad hoc, the pros and cons of subjecting people who have received treatment for mental illness to additional burdens in connection with public licensing procedures. The Act presents an impressive array of weapons to challenge intrusive questions about mental health.

### *B. Litigation Under the ADA*

Armed with this battery of statutes and regulations, many people have succeeded in getting licensing officials to change or limit the scope of intrusive questions about mental illness. By late 1997, cases had been decided in numerous jurisdictions, including Florida, Maine, Minnesota, New Jersey, Rhode Island, Virginia, and Texas,<sup>59</sup> and administrative resolutions had been

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93-3670 (WGB), 1993 WL 413016, at \*5 (D.N.J. Oct. 5, 1993).

56. See *Jacobs*, 1993 WL 413016, at \*7.

57. 28 C.F.R. pt. 35, app. A, at 444 (1998). This appendix defines a “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” 28 C.F.R. pt. 35, app. A, at 444 (1998).

58. 28 C.F.R. pt. 35, app. A, at 444 (1998). The appendix attributes this test to the Supreme Court’s decision in *Nassau County v. Arline*, 480 U.S. 273 (1987), in which, say the regulations, the Court “recognized . . . a need to balance the interests of people with disabilities against legitimate concerns for public safety.” 28 C.F.R. pt. 35, app. A, at 444 (1998).

59. See *Doe v. Judicial Nominating Comm’n for the Fifteenth Judicial Circuit*, 906 F. Supp. 1534 (S.D. Fla. 1995) (regarding nominations for the bench); *Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430 (E.D. Va. 1995) (regarding admission to the bar);

reached in many jurisdictions. In all but one of the reported decisions,<sup>60</sup> the courts ruled or at least indicated that questions had to be modified or eliminated. The trend seems to be toward limiting authorities to questions about relatively recent and decidedly serious mental illness. Although the courts interpreting and applying the ADA have differed somewhat in their approaches, the opinions follow roughly similar patterns, and I will discuss only three representative cases.

### 1. *Medical Society v. Jacobs*

One of the first reported decisions involving licensing procedures and the ADA, although it resolved only an application for a preliminary injunction, was *Medical Society v. Jacobs*.<sup>61</sup> At issue in *Jacobs* were several questions about mental illness that the New Jersey State Board of Medical Examiners put to applicants for initial or renewal licenses. The Board asked applicants for initial licenses, among other things, the following questions:

1. Have you ever been treated for alcohol or drug abuse?
2. Have you ever suffered from or been treated for any mental illness or psychiatric problems?<sup>62</sup>

If an applicant answered either of these questions in the affirmative, he or she was required to have any "treating physicians . . . submit directly to the Board Office, a summary of the [relevant] diagnosis, treatment, and prognosis."<sup>63</sup>

*Applicants v. Texas State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994) (regarding admission to the bar); *Ellen S. v. Florida Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994) (regarding admission to the bar); *In re Underwood*, 1993 WL 649283 (Me. Dec. 7, 1993) (regarding admission to the bar); *Medical Soc'y v. Jacobs*, No. Civ. A. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993) (regarding medical licensing); *In re Frickey*, 515 N.W.2d 741 (Minn. 1994) (regarding admission to the bar); *In re* Petition & Questionnaire for Admission to the Rhode Island Bar, 683 A.2d 1333 (R.I. 1996) (regarding admission to the bar).

60. In *Applicants v. Texas State Board of Law Examiners*, the court upheld questions that had been redrawn in anticipation of challenge under the Act. *Texas Applicants*, 1994 WL 923404, at \*1. See *infra* notes 84-89 and accompanying text for a discussion of this case.

61. No. Civ. A. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993).

62. *Id.* at \*1. The plaintiffs in the case also challenged a question relating to dependence on alcohol or "Controlled Dangerous Substances" and another question relating to physical disabilities. *Id.*

63. *Id.* at \*1-2. The Board put similar questions to applicants for renewal licenses, although applicants answering "yes" to such questions were only required to explain their answers "in detail on a separate sheet, including dates of all incidents." *Id.* at \*2.

In an opinion that gave little weight to information that the state might obtain only by asking these types of questions,<sup>64</sup> the court held that the plaintiffs were likely to succeed on the merits of their challenge. The court reasoned that the “vast majority” of applicants who would answer the challenged questions in the affirmative were “nevertheless qualified” to hold a medical license “by reason of [their] character, training, and experience.”<sup>65</sup> Because the Board subjected these applicants to further investigation, and because the Board could ask non-intrusive questions relating solely to conduct and performance on the job, the court concluded that the questions probably violated the ADA.<sup>66</sup> The court went on to refuse the preliminary injunction, however, on the grounds that the plaintiffs had not shown danger of immediate and irreparable harm.<sup>67</sup> The litigants ultimately settled the lawsuit when the licensing authority agreed to limit the questions asked.<sup>68</sup>

## 2. *Clark v. Virginia Board of Bar Examiners*

In a later case in Virginia, a court used the ADA to strike down a similar question. Julie Ann Clark suffered from a condition diagnosed as “major depression, recurrent.”<sup>69</sup> When applying for admission to the Virginia Bar, she

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64. Licensing authorities have argued that, because these types of questions seek objectively verifiable information, applicants have less discretion to decide on their own how much information to disclose. See *infra* note 66 for further discussion of this point.

65. *Jacobs*, 1993 WL 413016, at \*6.

66. *Id.* at \*6-7. The court suggested that inquiry into applicants’ unreliability, neglect of work or failure to live up to responsibilities were valid inquiries into past behavior, but that inquiries concerning the mental health per se of applicants was not permissible. *Id.* at \*7. The court also noted that the Board could obtain information from such other sources as patients’ complaints and references. *Id.*

Although it is outside the scope of this Article, one weakness in the court’s consulatory advice to the Board is that a licensing authority would arguably have great, if not insuperable, difficulty in proving that an applicant lied about his or her “failure to live up to responsibilities,” given the malleable character of that phrase. Whether the applicant obtained treatment for a mental illness is objectively verifiable—the applicant’s insurer, for one, would probably know—and therefore not something about which an applicant could safely lie. See *Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430, 436 (E.D. Va. 1995) (relating the testimony of Dr. Charles B. Mutter). According to the court in *Clark*, Dr. Mutter testified: “Broad mental health questions are essential for collecting complete information regarding applicants’ fitness to practice law. Narrower mental health questions . . . are inadequate because they allow applicants to filter their responses and provide self-promoting answers.” *Id.*

67. *Applicants v. Texas State Bd. of Law Examiners*, No. A 93 CA 740 SS, 1994 WL 923404, at \*11 (W.D. Tex. Oct. 11, 1994).

68. Maureen Castellano, *Increase in Licensing Fees for Doctors Is Called Retaliation*, N.J. L.J., Aug. 28, 1995, at 8.

69. *Clark*, 880 F. Supp. at 432.

refused to answer Question 20(b) of the Virginia Board of Bar Examiners' questionnaire relating to character and fitness.<sup>70</sup> This question asked whether she had received any treatment or counseling for a mental, emotional, or nervous disorder within the previous five years.<sup>71</sup> She also refused to comply with Question 21, which called for an explanation of an affirmative answer to Question 20(b).<sup>72</sup> Such an explanation would have included specific information about treatment and counseling, including names of attending physicians, counselors, and health care providers and descriptions of diagnosis, treatment, prognosis, and "other relevant facts."<sup>73</sup> The Board indicated that it would not grant Clark a license to practice unless she completed the questionnaire.<sup>74</sup>

In an opinion considerably more elaborate and nuanced than that rendered in *Jacobs*, the court concluded that Question 20(b) was too broad to survive challenge under the ADA and ordered the Board to eliminate it from the application.<sup>75</sup> Specifically, the court credited the testimony of Dr. Howard V. Zonana, an expert witness who testified that the challenged question would furnish little or no useful information about applicants' current or future capacity to practice law.<sup>76</sup> The court also noted that the American Psychiatric Association had taken the position that past psychiatric treatment is not, by itself, indicative of current impairment.<sup>77</sup> The court found the testimony of the Board's expert witness relatively less persuasive and credible than that of Dr. Zonana.<sup>78</sup>

Dr. Zonana did not suggest, however, that inquiries about mental health could never be relevant to applicants' fitness to practice law. Instead, he testified that such inquiries may be necessary as a secondary means of ascertaining applicants' fitness, asked of applicants only after their initial responses suggest the presence of a mental disorder.<sup>79</sup> In light of this testimony, the court deferred deciding whether questions about mental health might ever be

70. *Id.* at 433.

71. *Id.* at 431.

72. *Id.* at 433.

73. *Id.*

74. *Id.*

75. *Id.* at 446.

76. *Id.* at 435. According to the court, Dr. Zonana testified that "there is little evidence to support the ability of bar examiners, or even mental health professionals, to predict inappropriate or irresponsible future behavior based on a person's history of mental health treatment." *Id.*

77. *Id.*

78. *Id.* at 436.

79. *Id.* at 436 & n.9. Dr. Zonana's support for intrusive questioning about mental illness in the event of a particularized concern reflects the language of the Fourth Amendment, which prohibits "unreasonable" searches and seizures and which forbids warrants not predicated on probable cause and not particularly describing the things to be seized. See U.S. CONST. amend. IV.

put to applicants without violating the ADA.<sup>80</sup> After finding Clark eligible for protection under the ADA because of her disability or record of impairment,<sup>81</sup> the court went on to conclude that the Board had failed to demonstrate that all or most of the applicants who had received treatment for mental illness would “affirmatively threaten the health or safety of the public.”<sup>82</sup> The court then went on to find, like the court in *Jacobs*, that Question 20(b) unnecessarily discriminated on the basis of a disability by imposing an extra burden upon persons with mental disabilities and therefore violated the ADA.<sup>83</sup> Also like the court in *Jacobs*, the *Clark* court suggested throughout its opinion that questions about performance on the job would not violate the Act.

### 3. *Applicants v. Texas State Board of Law Examiners*

The decision in *Applicants v. Texas State Board of Law Examiners*,<sup>84</sup> which preceded the decision in *Clark*, probably represents the most favorable result for which a licensing authority can realistically hope. In anticipation of a challenge under the Act, Texas’s examiners changed their questions, limiting their scope to recent events and such serious mental illness as bipolar disorder, schizophrenia, paranoia, and other psychotic disorders.<sup>85</sup> When the challenge

80. *Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430, 437 n.10 (E.D. Va. 1995).

81. *Id.* at 441.

82. *Id.* at 442. In addition to the testimony that information about mental illness was not predictive of ability to practice law, the court also based its decision on the following: First, empirical evidence suggested that many people failed to acknowledge to the Board that they had received treatment. *Id.* at 437. Second, the Board had never denied a license because of past treatment. *Id.* Third, the questions deterred individuals from seeking treatment. *Id.* at 437-38. Fourth, many states and the National Conference of Bar Examiners had altered their questions concerning mental illness in light of the ADA, and the American Bar Association had recommended that examiners limit their questions about mental health. *Id.* at 438-41.

83. *Id.* at 446.

84. No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994).

85. *Id.* at \*2-3 & nn.3-5. The question at issue, Question 11, asked:

(a) Within the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

(b) Have you, since attaining the age of eighteen or within the last ten years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

*Id.* at \*2 n.5. The Board also asked for supplemental information regarding any affirmative answer to Question 11. *Id.* at \*2. This information included dates of diagnosis or treatment, a description of the course of treatment, and a description of present condition. *Id.*



came, the district court, exposed to the same arguments as those presented in *Jacobs* and *Clark*, held that the examiners had eliminated the overinclusiveness of the original questions and that their new questions conformed to the requirements of the ADA.<sup>86</sup> Specifically, and somewhat contrary to the decision in *Clark*, the court concluded that Texas had drawn its questions in the “least intrusive, least discriminatory manner possible.”<sup>87</sup> Nor, concluded the court, did the investigation that would follow an affirmative answer to the questions at issue impose an unnecessary burden under the ADA.<sup>88</sup> Instead, the court reasoned that the investigation served the two purposes of protecting the bar and public, and of providing an opportunity to the applicant to demonstrate present fitness.<sup>89</sup>

#### 4. The Impact of the ADA

The ADA has had a significant impact on questions asked by licensing authorities regarding mental health. According to the court in *Clark*, bar examiners in at least eight states—Connecticut, Florida, Maine, Minnesota, New York, Pennsylvania, Rhode Island, and Texas—had changed their questions because of, or in anticipation of, litigation under the ADA by the time the court rendered its decision in that case.<sup>90</sup> The court in *Clark* also reported that four additional states—Hawaii, Illinois, New Mexico, and Utah—had recently stricken questions about mental illness.<sup>91</sup> Furthermore, the legal press regularly reports additional jurisdictions paring questions in light of the ADA. Nor has the Act merely had a wide geographic impact; it also has fomented substantial changes in the questions typically asked. Comparing the results in *Jacobs*, *Clark*, and *Texas State Board of Law Examiners*, the emerging rule appears to be that the ADA will allow, aside from questions about performance on the job, at most, only questions about relatively recent treatment for decidedly serious mental illness.<sup>92</sup>

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86. *Id.* at \*9.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430, 440 (E.D. Va. 1995).

91. *Id.* at 438.

92. *See, e.g., Applicants v. Texas State Bd. of Bar Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at \*1 (W.D. Tex. Oct. 11, 1994) (upholding “narrowly focused inquiries and investigation into the mental fitness of applicants . . . who have been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder”).

### C. *Telling the Truth*

In light of the enormous impact of the ADA on questions asked about mental health by licensing authorities, the option of simply telling the truth has lost much of its significance. If authorities eliminate or limit questions, applicants will have fewer affirmative answers to give. But many jurisdictions still ask intrusive or relatively intrusive questions, and people seeking a license in such places will face the dilemma described earlier.<sup>93</sup>

But this is only a dilemma if the applicant truly cannot bear the consequences of revealing the information requested. In many instances, a straightforward, workable course of action is for the applicant simply to answer the questions truthfully, place trust in the probity of public officials, and move on. The state does have a legitimate interest in protecting the public against unqualified practitioners, and some licensing authorities defend questions about mental illness as the most effective way of obtaining information about applicants' fitness.<sup>94</sup> Moreover, empirical evidence suggests that officials tend to use the information responsibly. For example, the executive director of the Texas Board of Law Examiners told the *National Law Journal* that the Board had turned down only one applicant to the bar on the basis of one of its questions about mental health, and that applicant had applied while confined in a mental institution following law school.<sup>95</sup> Similarly, before the decision in *Clark*, Virginia's Board had turned away none of the forty-seven people who had answered the Board's question about treatment for mental illness in the affirmative.<sup>96</sup> Nevertheless, although answering questions truthfully and trusting public officials may be the practical answer in many cases, there may be instances in which it is not,<sup>97</sup> and ADA suits are brought as a result. Moreover,

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93. See *supra* notes 44-45 and accompanying text.

94. See, e.g., *Texas Applicants*, 1994 WL 923404, at \*7 (noting that "self-disclosure-type questions" suffer from the defect that many will answer untruthfully or fail to "recognize or understand the nature and extent of their illness").

95. Gary Taylor, *Suits Hit Mental Health Histories*, NAT'L L.J., Nov. 22, 1993, at 3.

96. *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 437 n.12 (E.D. Va. 1995).

97. The level of intrusion presented by licensing authorities can vary widely. According to the court in *Clark*, bar examiners in some states asked no questions at all about mental health at the time that court rendered its decision. See *id.* at 438. Similarly, as we have seen in *Texas Applicants*, Texas asks only about recent, serious mental illness, and requires only summary supplementary information. See *supra* note 85 and accompanying text. Other authorities, however, have been known to ask about a wide variety of mental illnesses. See generally *Clark*, 880 F. Supp. at 439-40 (noting that, as of 1995, bar examiners in 32 states asked "broad questions concerning treatment or counseling for mental and emotional disorder or illness"). Perhaps the most potentially intrusive practice of licensing authorities is to require the release of medical records. The *Request for Preparation of a Character Report* published by the National Conference of

as the analysis in the preceding subpart illustrates, suits under the ADA often prove successful in the sense that people are not required to answer questions that they consider intrusive about mental illness. But these victories might prove Pyrrhic in the long run, owing to the price our entire culture may have to pay for the benefits of the ADA.

#### IV. WEAKNESSES OF THE MEDICAL MODEL

The ADA's approach to mental illness is an example of the "medical model" for human suffering. Under this model, unusual, improper, or undesirable attributes in a human being are ascribed to a *defect*—a chemical imbalance, for instance, or a bad gene. In light of the very longstanding perception that spiritual anguish can have mental and physical manifestations, however, we should at least hold the medical model suspect. Arguably, it is not perfectly accurate nor perfectly suited to human nature.<sup>98</sup> I propose that we adopt a model based upon privacy and similar constitutional considerations as an additional, and perhaps alternative, justification for limiting questions about mental illness. I make this proposal because declaring oneself mentally

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Bar Examiners, upon which some states rely, includes such a release. See NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT 12 (1997) (requiring applicants who answer a question relating to mental illness in the affirmative to complete Form 16, which releases medical records). As I argue throughout this Article, this can constitute an unnecessary and severe interference with both the therapeutic process and fundamental notions of privacy and human dignity.

98. For one thing, the analysis supporting the medical model necessarily rests on science. Thus, to the extent scientists can attribute alcoholism, addiction to drugs and other mental illnesses to immutable physiological characteristics, the categorization of individuals suffering from these conditions as "disabled" is valid. If not, however, the categorization is only administratively convenient, and perhaps convenient as a working classification for a person suffering from mental illness, but inadequate as a means for identifying the proper response if we want to address the illness at its source.

Our penchant for the medical model has two related foundations. First, we typically reject spiritual explanations for phenomena. Second, we are comfortable and skilled in studying, understanding, and mastering physical phenomena. Neumann wrote:

The modern age is an epoch in human history in which science and technology are demonstrating beyond doubt the capacity of the conscious mind to deal with physical nature and to master it to a very large extent . . . .

But it is also an epoch in which man's incapacity to deal with psychic nature, with the human soul, has become more appallingly obvious than ever before.

NEUMANN, *supra* note 4, at 25 (footnote omitted). Cf. ODAJNYK, *supra* note 4, at 40 ("[T]he Enlightenment view of the psyche as tabula rasa logically demands that mankind seek the source of all good and evil in the objective environment. Therefore, even when problems are clearly psychological in origin, the cry still goes up for political and environmental change to solve them.").

disabled, although perhaps accurate and although perhaps also a noble act of humility,<sup>99</sup> has philosophical or theological disadvantages.

### *A. Conflicting Perspectives*

As a philosophical or theological matter, the choice presented by the ADA compels individuals to place themselves in a category that is predicated on a confession of defect that excuses but that also appears to eliminate all but medical explanations for the condition. This way of looking at mental illness trivializes our moral responsibility to ourselves and to our culture to grow and adapt, particularly in those instances where mental illness is symptomatic of legitimate uncertainty about who we are and what our role in the world should be. As the psychiatrist Erich Neumann wrote, it is by looking at the individual who faces a crisis long before his or her culture that one can best explore the basis for responding to that crisis:

The study in depth of the psychological development of the individual in whom the problem of evil becomes manifest is in a much better position than any research into collective events to detect those first attempts at a synthesis which are the basic elements of a new ethic. This is due to the fact that external collective developments are decades behind the development of the individual, which is like a kind of *avant-garde* of the collective and is concerned at a far earlier stage with the problems which subsequently catch the attention of the collective as a whole.<sup>100</sup>

Although Neumann's argument does not explain why psychoanalysis should be protected from public scrutiny—in fact, it seems to suggest that it should be publicized—it does explain why mental illness should not be considered pathological in the sense of the medical model.

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99. Humility can certainly be identified as a condition of a healthy psyche. See EDWARD F. EDINGER, *EGO AND ARCHETYPE: INDIVIDUATION AND THE RELIGIOUS FUNCTION OF THE PSYCHE* 137 (1972) (discussing the first Beatitude: "Blessed are the poor in spirit: for theirs is the kingdom of heaven" *Matt.* 5:3 (King James) (emphasis removed)). Edinger comments: "Understood psychologically, the meaning [of this Beatitude] would be: The ego which is aware of its own emptiness of spirit (life meaning) is in a fortunate position because it is now open to the unconscious and has the possibility of experiencing the archetypal psyche (the kingdom of heaven)." *Id.*

The question the ADA does not answer, however, is whether the humility associated with identifying oneself as "disabled" is an instance of humility in the sense Edinger uses the word, or simply an excuse for failure to heed a call to undertake a particular moral responsibility.

100. NEUMANN, *supra* note 4, at 29.

Theological and historical illustrations of Neumann's point abound. There is, for example, the story of Jonah. The Lord called upon Jonah to judge the people of Nineveh,<sup>101</sup> but he resisted and attempted to flee by ship to no avail. The Lord then stirred up a fierce storm, causing the sailors to ask: "Why hast thou done this? For the men knew that he fled from the presence of the Lord."<sup>102</sup> There is also the story of the conversion of St. Paul, whose persecution of Christians and conversion, according to the Bible, ended in a single, literally blinding stroke.<sup>103</sup> And, in the historical era, there is the story of Martin Luther's "fit in the choir," interpreted by psychologist Erik Erikson as a manifestation of a profound inability to reconcile inner tension with the Roman Catholicism of his day.<sup>104</sup> These stories suggest that our predecessors associated such myriad experiences as bad weather, strokes, and fits with spiritual anguish, and not purely with physical origins.

In contrast with this rich, deep tradition of attributing illness to inner spiritual turmoil, we have the medical model, which attributes illness solely to bad genes or a harmful environment. The option proffered by the ADA thus reduces a panoply of theological or psychological principles (e.g., "wandering the desert") into medical categories (e.g., depression), which may be helpful in justifying a diagnosis or prescription, but which ignore the moral imperative that may be lurking behind the illness. As the psychiatrist Edwin Edinger wrote:

Modern existentialism can be considered as symptomatic of the collective alienated state. Many current novels and plays depict lost, meaningless lives. The modern artist seems forced to depict again and again, to bring home to all of us, the experience of meaninglessness. However this need not be considered a totally negative phenomenon. Alienation is not a dead end. Hopefully it can lead to a greater awareness of the heights and depths of life.<sup>105</sup>

The expression of weakness required by the ADA potentially trivializes the process through which human beings naturally go. Thus, the option of identifying oneself as mentally disabled in order to obtain privacy for one's treatment for mental illness may be seen as an unwise solution. Although it will fit in many instances, in the aggregate it will dissuade people from taking their distinct psychological make-up seriously. This is not to suggest that psychiatry, psychology, and 12-step support groups, many of which are at least partly predicated on the medical model, are illegitimate substitutes for traditional

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101. "Arise, go to Nineveh, that great city, and cry against it; for their wickedness is come up before me." *Jonah* 1:2.

102. *Jonah* 1:10.

103. *Acts* 9:1-4, 8. See *supra* text accompanying notes 1-2 for excerpts from this passage.

104. See *infra* notes 109-17 and accompanying text.

105. EDINGER, *supra* note 99, at 48.

<https://scholarship.law.missouri.edu/mlr/vol64/iss1/8>

religion. In fact, these processes may have more in common with traditional religion than in contrast. The medical model simply may not be perfectly adapted to human nature.

### B. *The Argument ad Hominem*

Another way of describing the inadequacy of the medical model is by noting that it ignores the fact that the source of illness may itself be legitimate, in the sense that it conveys a message that needs to be heeded. By defining an illness as pathological in an environmental or genetic sense, the medical model excludes the possibility that the illness has a moral basis that someone should heed. This, in turn, can justify a type of argument *ad hominem*.<sup>106</sup> That argument runs as follows: because one is ill, one cannot be correct. Thus, the medical model facilitates a species of argument whereby one can describe a person's convictions, including one's own, as attributable to a defect without facing the merits of those convictions. It is always possible to tell someone with whom one disagrees with respect to a matter of dogma that his or her argument is based upon an infirmity in his or her nature rather than upon a flaw in the argument itself. Against this type of argument there is no response other than to deny the existence of the infirmity or to deny the connection between the infirmity and the argument. In fact, the exchange of arguments between many Christian heresies and the Roman Catholic Church, as well as many aspects of the Reformation and Counter-Reformation, can be understood in roughly these terms.<sup>107</sup> Consequently, it is helpful to consider the case of one of the first Protestants, Martin Luther.

### C. *Martin Luther*

Martin Luther was born in 1483, the son of Hans Luder, a miner, and his wife, Margerete. Desperately in search of a way to reconcile his faith with other

106. Judge Aldisert writes that the fallacy of the argumentum ad hominem "shifts an argument from the point being discussed (*ad rem*) to irrelevant personal characteristics of an opponent (*ad hominem*). Instead of addressing the issue presented by an opponent, this argument makes the opponent the issue." RUGIERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 182 (3d ed. 1997).

107. See generally IAN KER, *JOHN HENRY NEWMAN: A BIOGRAPHY 177-78* (1988) (recounting Newman's argument that the schisms of early Catholicism had more in common than in contrast with religious debates of the sixteenth and nineteenth centuries). Newman noted in his famous biography his initial appreciation of the means by which the Roman Catholic Church had responded to heresies. See JOHN HENRY CARDINAL NEWMAN, *APOLOGIA PRO VITA SUA* 98-99 (David J. DeLaura ed., 1968). In this passage, he notes with approval St. Augustine's statement in an epistle against a particular heresy that "[t]he world judges with assurance that they are not good men who, in whatever part of the world, separate themselves from the rest of the world." *Id.* at 98 n.5.

imperatives instilled in him by his family and his culture, Luther became an Augustinian monk and later brought himself and countless others out of the fold of the Roman Catholic Church.<sup>108</sup> In 1958, Erik Erikson published a psychological biography of Martin Luther as a young man. Erikson used, as a springboard for his analysis, an incident that occurred when Luther was a monk. In the middle of a reading, wrote Erikson, Luther

suddenly fell down to the ground in the choir of the monastery at Erfurt, “raved” like one possessed, and roared with the voice of a bull: “*Ich bin’s nit! Ich bin’s nit!*” or “*Non sum! Non sum!*”<sup>109</sup>

Erikson then identified several interpretations of the so-called “fit in the choir,” describing the three most prominent of them as those of “the professor [of Protestant theology],” who interpreted Luther’s upsets as coming “straight down from heaven,”<sup>110</sup> of “the priest,” who ascribed Luther’s fits to the work of the devil,<sup>111</sup> and of “the psychiatrist,” who classified the fit as “a matter of severest psychopathology.”<sup>112</sup>

Erikson’s discussion of the priest’s<sup>113</sup> interpretation of the fit relates to this Article. Luther argued that his own religious convictions forced him to challenge certain basic dogma of the Roman Catholic Church.<sup>114</sup> The priest’s

108. See generally Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1049-51 (1996) (discussing the beginnings of Lutheranism).

109. ERIKSON, *supra* note 3, at 23 (footnotes removed). Erikson adds: “The German version is best translated with ‘It isn’t me!’ [and] the Latin one with ‘I am *not!*’” ERIKSON, *supra* note 3, at 23. According to Erikson, the chroniclers of the event agreed that the text of the reading was Mark 9:17: “And one of the multitude answered and said, Master, I have brought unto thee my son, which hath a dumb spirit.” ERIKSON, *supra* note 3, at 23.

110. ERIKSON, *supra* note 3, at 25-26 (emphasis removed).

111. ERIKSON, *supra* note 3, at 26-27 (emphasis removed).

112. ERIKSON, *supra* note 3, at 27-28 (emphasis removed).

113. The “priest” himself was a Dominican monk, Heinrich Denifle, Sub-Archivar of the Holy See in Rome. ERIKSON, *supra* note 3, at 26.

114. ERIKSON, *supra* note 3, at 26. About Luther’s trip to speak before the Diet of Worms, Erikson writes the following:

At Worms Luther faced ostracism and death, not for the sake of an established creed or ties of ancestry and tradition; he did so because of *personal* conflict, derived from inner conflict and still subject to further conflict. The conscience he spoke of was not an inner sediment of a formalized morality; it was the best a *single man* between heaven, hell, and earth could know. If Luther did not really say the words which became most famous: “Here I stand,” legend again rose to the occasion; for this new credo was for men whose identity was derived from their determination to stand on their own feet, not only spiritually, but politically, economically, and intellectually.

response to his arguments was that the devil possessed Luther, and that neither Luther nor any of his listeners could rely on anything he believed.<sup>115</sup> The devil, the priest argued, was stronger than Luther and could cause Luther to believe and spout heresy. Luther could only respond to the priest by taking his chances that he (Luther) was right, that the Church would not be able to persecute him, and that he would not forfeit his soul for his arguments.

The priest's argument is logically coherent, provided one accepts certain assumptions. If the devil exists, he may have caused Luther to make his arguments, and Luther may be damned for the things he said and did. There is no fool-proof defense to the priest's claims, provided one accepts his premises.<sup>116</sup>

But the modern world is substantially based upon Luther's arguments. As Erikson has argued, Luther completed the work of the Renaissance by freeing the modern psyche from dogmatic thought.<sup>117</sup> Certainly, Luther's liberation has

ERIKSON, *supra* note 3, at 231.

115. Erikson writes:

For [Denifle] such events as the fit in the choir have only an inner cause, which in no way means a decent conflict or even an honest affliction, but solely an abysmal depravity of character. To him, Luther is too much of a psychopath to be credited with honest mental or spiritual suffering. It is only the Bad One who speaks through Luther. It is, it must be, Denifle's primary ideological premise, that nothing, neither mere pathological fits, nor the later revelations which set Luther on the path to reformation, had anything whatsoever to do with divine interference. "Who," Denifle asks, in referring to the thunderstorm [that convinced Luther to seek Holy Orders], "can prove, for himself, not to speak of others, that the alleged inspiration through the Holy Ghost really came from above . . . and that it was not the play of conscious or unconscious self-delusion?" Lutheranism, he fears (and hopes to demonstrate) has tried to lift to the height of dogma the phantasies of a most fallible mind.

With his suspicion that Luther's whole career may have been inspired by the devil, Denifle puts his finger on the sorest spot in Luther's whole spiritual and psychological make-up.

ERIKSON, *supra* note 3, at 26.

116. Arguably, this form of "argument" has the positive aspect of preserving widely shared values against transitory or unfounded objections. It is always possible when one takes a position distinct from others that one's decision to do so is based purely on ego and not designed to promote anyone's welfare in a meaningful sense. Encouraging adherence to the main has the independent value of discouraging ideas that are different but not helpful. Of course, it is not easy to tell one kind of idea from another, nor is it easy to distinguish responses based on inertia or reactionism from responses based on a theological form of *stare decisis*. Ultimately, an idea's appeal to others, or lack thereof, will validate it or ensure its demise.

117. ERIKSON, *supra* note 3, at 194-95. Erikson argues as follows:

[O]ne could make a case that Martin, even as he hiked back [from Rome] to Erfurt [the location of his monastery], was preparing himself to do the dirty



not lacked a cost, but we have—a great many of us, anyway—taken an irrevocable step in his direction. If the modern world rejects the priest's interpretation of Luther's fit, it must choose between attributing it solely to a "bug" or accepting that mental and physical torment can have a legitimate spiritual origin.

#### D. Back to the ADA

Requiring people who suffer from mental illness to obtain protection from intrusive official questions by claiming status as genetically or environmentally different re-enacts the problem presented by Erikson's priest. If mental illness arises from a formal distinguishing characteristic, persons suffering from such illness and everyone else can dismiss their plight as symptomatic of an abnormality. In fact, persons "suffering the illness" may have a message for all of us; there may be no pathology. They may simply suffer what Luther suffered—the intense discomfort of finding fault with a prevailing state of affairs. The medical model, to its disadvantage, is based on an odd concept of a platonic "person," whose genes are unobjectionable and who has no

work of the Renaissance, by applying some of the individualistic principles immanent in the Renaissance to the Church's still highly fortified homeground—the conscience of ordinary man. The Renaissance created ample leeway for those in art and science who had their work confirmed by its fruits, that is, by aesthetic, logical, and mathematical verification. It freed the visualizer and the talker, the scholar and the builder—without, however, establishing either a truly new and sturdy style of life, or a new and workable morality. The great progress in pictorialization, verbalization, and material construction left, for most the people, something undone on an inner frontier. We should not forget that on his deathbed Lorenzo the Magnificent, who died so young and so pitifully soon after he had withdrawn to the country to devote the rest of his life to the "enjoyment of leisure with dignity," sent for Savonarola [a noted cleric]. Only the most strongly principled among Lorenzo's spiritual critics would do as his last confessor.

ERIKSON, *supra* note 3, at 194. Erikson writes shortly afterward:

Hans' son was made for a job on this frontier [left open by the Renaissance]. But he did not create the job; it originated in the hypertrophy of the negative conscience inherent in our whole Judeo-Christian heritage in which, as Luther put it: "Christ becomes more formidable a tyrant and a judge than was Moses." But the negative conscience can become hypertrophied only when man hungers for his identity.

We must accept this universal, if weird, frontier of the negative conscience as the circumscribed *locus* of Luther's work. If we do, we will be able to see that the tools he used were those of the Renaissance: fervent return to the original texts; determined anthropocentrism (if in Christocentric form); and the affirmation of his own organ of genius and of craftsmanship, namely, the voice of the vernacular.

predisposition toward addiction or mental illness.<sup>118</sup> But if the perfect person is invariably someone who adjusts easily to life and the world as he or she finds them (*i.e.*, someone unlike Martin Luther), our world is unlikely ever to change. There would be no prophets calling us to our better selves.<sup>119</sup>

This does not mean, of course, that people cannot be mentally ill. They certainly can be, in the sense that one can point to objective manifestations of mental illness, as identified by common sense or by the professional community. Nor does it mean that mental illness cannot have genetic or physical explanations. Moreover, no matter what the source of mental illness, its only effective *treatment* may often be medical. But experience suggests that not every instance of what we would now call mental illness ought to be ascribed to a physical defect for which its sufferer has no responsibility. Instead, in some instances we should look upon mental illness as an instruction to its sufferer to make waves, or to learn to live with a personality that defies generally accepted

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118. Cf. ODAJNYK, *supra* note 4, at 37-38. Odajnyk writes:

Jung argues that it is an error to follow the rationalistic principles of the Enlightenment to their logical conclusion and attempt to subject all personal and social phenomena to a rational will. He thinks that it has never been shown that life and the world are rational; on the contrary, there are "good grounds for supposing that they are irrational, or rather than in the last resort they are grounded beyond human reason. . . . Hence reason and the will that is grounded in reason are valid only up to a point." Beyond that point, reason excludes the irrational possibilities of life, thus engendering distortions, and then is surprised and overpowered by the compensations that such distortions beget.

ODAJNYK, *supra* note 4, at 37-38 (footnote omitted).

119. William James wrote:

[R]eligious geniuses have often shown symptoms of nervous instability. Even more perhaps than other kinds of genius, religious leaders have been subject to abnormal psychical visitations. Invariably they have been creatures of exalted emotional sensibility. Often they have led a discordant inner life, and had melancholy during part of their career. They have known no measure, been liable to obsessions and fixed ideas; and frequently they have fallen into trances, heard voices, seen visions, and presented all sorts of peculiarities which are ordinarily classed as pathological.

WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 6-7 (32d ed. 1920). Neumann noted the importance of individual growth to the development of the collective as follows:

From one point of view, the new ethic is an individual ethic . . . . It formulates a unique task of each individual . . . , which is to grapple with his own specific moral problems as they arise out of his own psycho-social constitution and destiny. But the other aspect of the new ethic . . . is precisely the collective significance of the individual which it entails. What we spoke of as the stability of the psychic structure is . . . most vitally relevant to the collective.

NEUMANN, *supra* note 4, at 128.

categories.<sup>120</sup> By basing limitations on intrusive questions about mental health on principles divorced from any concept of “disability,” we preserve the power of people to argue that their problems are not categorically distinct from everyone else’s.<sup>121</sup> We should not cast aside thousands of years of explaining mental illness in terms of religion, or more recently, psychology, with the sudden emergence of the medical model, particularly where we can defer the issue by resort to constitutionally protected rights.<sup>122</sup>

120. See NEUMANN, *supra* note 4, at 80-81 (“In the end, the individual is brought face to face with the necessity for ‘accepting’ his own evil.”).

121. Concededly, this is a very difficult argument to make, for just as we may have legitimate contributions to make to our culture, so too we are called not to be egocentric or solipsistic. We are all flawed, and the greatest flaw of all is the inability to admit that we have one. As psychologist Edwin Edinger wrote:

The Greeks had a tremendous fear of what they called *hybris*. In original usage this term meant wanton violence or passion arising from pride. It is synonymous with one aspect of [what Edinger calls] inflation. *Hybris* is the human arrogance that appropriates to man what belongs to the gods. It is the transcending of proper human limits.

EDINGER, *supra* note 99, at 31. Similarly, writing about the myth of Daedalus and Icarus, Edinger observes:

In this myth the dangerous aspect of inflation is emphasized. Although there are times when an inflated act is necessary to achieve a new level of consciousness, there are other times when it is foolhardy and disastrous. . . . As Nietzsche said, “Many a one hath cast away his final worth when he hath cast away his servitude.”

EDINGER, *supra* note 99, at 27 (quoting Friedrich W. Nietzsche, *Thus Spake Zarathustra*, in *THE PHILOSOPHY OF NIETZSCHE* 65 (1942)). As Edinger suggests, however, some emergence of the ego is necessary for psychological health. EDINGER, *supra* note 99, at 26. The matter is not easy. Again Edinger:

These two myths [of the Garden of Eden and of Prometheus] say essentially the same thing because they are expressing the archetypal reality of the psyche and its course of development. The acquisition of consciousness is a crime, an act of *hybris* against the powers-that-be; but it is a necessary crime, leading to a necessary alienation from the natural unconscious state of wholeness. If we are going to hold any loyalty to the development of consciousness, we must consider it a necessary crime. It is better to be conscious than to remain in the animal state. But in order to emerge at all, the ego is obliged to set itself up against the unconscious out of which it came and assert its relative autonomy by an inflated act.

EDINGER, *supra* note 99, at 25.

122. Although it would be well beyond the scope of this Article, another potential danger of the ADA and its dependence upon the medical model is the model’s tendency to put people in groups based on characteristics, and then to set them against each other. Odajnyk writes:

[A]lthough they may alleviate certain pressing problems, political movements do not really solve them, and in fact, have a number of pernicious effects. For instance, by uniting individuals into groups, political movements constellate

## V. CONSTITUTIONAL BASES FOR LIMITING QUESTIONS ABOUT MENTAL HEALTH

Protection against intrusive questions about treatment for mental illness can find roots in several provisions of the federal Constitution, particularly the Due Process Clauses of the Fifth and Fourteenth Amendments, the Free Exercise Clause of the First Amendment, and the Search and Seizure Clause of the Fourth Amendment.

### A. Substantive Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from depriving any person of life, liberty, or property, without due process of law.<sup>123</sup> Since the nineteenth century, courts have interpreted these clauses to include a so-called “substantive” component, pursuant to which governments are barred from acting arbitrarily—in the constitutional sense of the word—no matter how correct the “process” by which they effect the deprivation.<sup>124</sup> In the constitutional sense, the government acts arbitrarily and therefore without due process when it pursues illegitimate ends, when it pursues legitimate ends by means that will not promote that end, and when, in the pursuit of a legitimate end, it unnecessarily tramples rights widely and deeply valued in the culture. Over time, courts have recognized dozens of rights entitled to this extra level of protection from “arbitrary” legislation.<sup>125</sup>

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the forces of the collective unconscious and produce the harmful effects associated with psychic inflation.

ODAJNYK, *supra* note 4, at 41.

123. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

124. See *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986). As Justice Rehnquist wrote in that case: “[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being used for purposes of oppression.” *Id.* (citations and internal quotation marks omitted). See generally Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 322-23 (1993).

125. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384-87 (1978) (recognizing right to marry); *Roe v. Wade*, 410 U.S. 113, 164-66 (1973) (recognizing right to procure an abortion during the first two trimesters of pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (suggesting, if not recognizing, a right of a single person to obtain contraceptive drugs or devices); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing right of a married person to use a contraceptive device); *Rochin v. California*, 342 U.S. 165, 172-74 (1952) (recognizing right not to have one’s stomach pumped to remove swallowed pills); cf. *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990) (strongly suggesting a right of a competent person to refuse unwanted life-sustaining medical treatment).

One particular kind of legislation that courts will subject to close scrutiny is legislation that intrudes upon privacy, either individual or associational. This protection of privacy has taken two distinct forms. First, it has come to protect certain personal decisions from official interference, no matter how publicly these decisions might have to be carried out. An example of this would be a woman's decision to abort a pregnancy, to which the Supreme Court has extended a significant amount of constitutional protection.<sup>126</sup> However privately or publicly a woman deliberates over her decision to have an abortion, the Constitution protects not so much those deliberations as the relatively public procedures that would be used to carry it out. In fact, the Court suggested at one time that the decision to terminate a pregnancy inheres in a woman together with her doctor, and not merely in her alone.<sup>127</sup> Similarly, the Court has often upheld laws requiring minors to obtain parental or judicial permission before procuring an abortion.<sup>128</sup> This language and these holdings are inconsistent with protecting the privacy of deliberations per se. Instead, they function as a cognate of the non-justiciability doctrine. Just as the Supreme Court will decline to resolve an issue that the Constitution explicitly calls upon another branch of the federal government to decide,<sup>129</sup> so the Court has withdrawn from all governmental officials general authority to prohibit abortion.

For the most part, however, this is not the type of privacy that would protect conversations between the mentally ill and therapists, because there would almost certainly be no decision at issue that the government could second-guess. Instead, one might look to the second aspect of constitutional privacy. In giving shape to this second aspect of privacy, the Court has interpreted the Constitution to protect certain domains from public scrutiny, some individual, others associational, without regard to things caused by or affected by events or decisions in that domain. The best example of this aspect of privacy is presented by *Griswold v. Connecticut*,<sup>130</sup> a case involving marital privacy.

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126. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (recognizing a constitutionally protected right, in most instances, of a woman to abort a pregnancy before the fetus becomes viable); see also *Roe*, 410 U.S. at 164-66 (originally identifying such a right).

127. *Roe*, 410 U.S. at 165-66.

128. See, e.g., *Planned Parenthood*, 505 U.S. at 899.

129. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In *Baker*, the Court noted that one justification for a court to dismiss a case as presenting a non-justiciable political question is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.*

130. 381 U.S. 479 (1965).  
<https://scholarship.law.missouri.edu/mlr/vol64/iss1/8>

1. *Griswold v. Connecticut*

At issue in *Griswold* was a Connecticut statute that punished the use of any contraceptive drug or device.<sup>131</sup> Griswold, the executive director of the Planned Parenthood League of Connecticut, and Buxton, medical director at one of the League's offices,<sup>132</sup> gave medical advice to "married persons as to the means of preventing conception."<sup>133</sup> They also examined married women and prescribed the appropriate contraceptive devices for their use.<sup>134</sup> The state obtained convictions against Griswold and Buxton for assisting couples in the use of a contraceptive device, and the state appellate courts affirmed their convictions.<sup>135</sup> By a 7-2 vote, the Supreme Court reversed.

Justice Douglas's opinion for the Court was brief, yet memorable. In that opinion, he described a universe of unenumerated constitutional rights emanating from and adding depth to the explicit guarantees of the document. His argument was partly logical and partly historical. First, he noted that the Court had recognized a number of rights not protected by the text of the Constitution, yet flowing from its explicit provisions.<sup>136</sup> For example, he noted that the Constitution itself does not confer a general right of association, right to educate one's child at the school of one's choice, or right to have one's children study a particular subject or learn a particular foreign language.<sup>137</sup> Yet, he observed, the Court had recognized each of these rights in cases construing the First Amendment.<sup>138</sup> This led him to conclude that the specific guarantees in the Bill of Rights have "penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>139</sup> Thus, he said, the various guarantees explicitly set forth in the Constitution create "zones of privacy."<sup>140</sup> Moving away from the First Amendment, he speculated that many of the provisions of the Bill of Rights—the Third and Fourth Amendments, the Fifth

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131. *Id.* at 480 (quoting CONN. GEN. STAT. § 53-32 (1958)).

132. *Id.*

133. *Id.* (emphasis removed).

134. *Id.*

135. *See id.*

136. *Id.* at 482.

137. *Id.*

138. *See id.* at 482-83 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (recognizing a general right to association arising from the First Amendment's guarantee of free speech)); *see also Meyer v. Nebraska*, 262 U.S. 390 (1925) (recognizing a right to have one's children taught in German); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923) (recognizing a right to send one's children to parochial school).

139. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing *Poe v. Ullman*, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)).

140. *Id.*

Amendment's privilege against self-incrimination, and the Ninth Amendment—create their own zones of privacy.<sup>141</sup>

Applying this reasoning to the case at hand, Justice Douglas suggested that the right to privacy included the right of a married couple to use a contraceptive device free from official scrutiny.<sup>142</sup> But he did not couch his argument in such specific terms. Rather, he focused on the nature of the relationship between husband and wife, suggesting that its deliberations or transactions simply were none of the government's business, at least barring an overwhelming need to intrude.<sup>143</sup>

By focusing on the value of marital privacy, however that privacy is used, Justice Douglas's basis for deciding *Griswold* added a significant dimension to the constitutional right to privacy. Although the effect of the Court's decision in that case was to enable married couples to use contraceptives, the Court's decision appeared to rest much less on this type of "privacy" than on the idea of protecting the marital relationship from official scrutiny. Justice Douglas described this relationship as a source of strength and a matrix for development:

Marriage is the coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>144</sup>

The approach to privacy articulated in the *ratio decidendi* of *Griswold* strongly supports the argument that the Constitution protects conversations between therapists and their patients. If we accept the premise that the "penumbras" and "emanations" of the specific provisions of the Bill of Rights protect relationships that facilitate the building of character from external scrutiny, it follows that we should protect the privacy of the therapeutic process. Although *Griswold* best supports this argument, the Court has decided other supporting cases.

## 2. *NAACP v. Alabama ex rel. Patterson*

In *NAACP v. Alabama ex rel. Patterson*, the Court addressed the question whether, consistently with the First Amendment, the State of Alabama could compel the NAACP to reveal the names and addresses of its members within the

141. *Id.*

142. *Id.* at 485-86.

143. *Id.*

144. *Id.* at 486.

state.<sup>145</sup> Although the First Amendment protects neither public nor secret association expressly, the Court decided that Alabama could not compel production of the names in the circumstances presented.<sup>146</sup>

The case began when the Attorney General brought a suit in equity in state court to establish, among other things, that the NAACP was a foreign corporation doing business in Alabama without complying with the state's requirements for such corporations.<sup>147</sup> To support this contention, the state sought the names of the NAACP's members and "agents" living in the state.<sup>148</sup> The judge ordered the NAACP to produce the names.<sup>149</sup> The NAACP refused to comply on the grounds that disclosure of its members' names would subject many of them to harassment and retaliation.<sup>150</sup> Eventually the NAACP agreed to register as a foreign corporation, but not before the state court held it in contempt for failing to produce the list of its members.<sup>151</sup> The case reached the Supreme Court on the NAACP's petition for review by certiorari of this judgment of contempt.

In a carefully written opinion, Justice Harlan concluded that Alabama could not constitutionally compel disclosure of the names of the NAACP's members.<sup>152</sup> He began by observing that the First Amendment protects not only the right to speak freely, but also the right to associate.<sup>153</sup> He then reasoned that government need not intend to interfere with association for a constitutional violation to occur.<sup>154</sup> Instead, he noted, courts would subject an official action that has the "effect of curtailing the freedom to associate" to "the closest scrutiny."<sup>155</sup> He found such an effect here. Privacy, he reasoned, is often vital to association.<sup>156</sup> Justice Harlan wrote: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."<sup>157</sup> Having concluded, therefore, that the Court should subject Alabama's order to the closest scrutiny, Justice Harlan then asked whether Alabama's purpose in requiring production of the members' names would satisfy this level of scrutiny.<sup>158</sup> By that time, the NAACP had admitted its presence in the state and

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145. *Id.* at 451.

146. *Id.* at 465-66.

147. *Id.* at 451-52.

148. *Id.* at 453.

149. *Id.*

150. *See id.* at 462.

151. *Id.* at 453-54.

152. *Id.* at 466.

153. *Griswold*, 381 U.S. at 460.

154. *Id.* at 461-62.

155. *Id.* at 460-61.

156. *Id.* at 462.

157. *Id.*

158. *Id.* at 463.



had agreed to comply with the state's requirements.<sup>159</sup> Consequently, he reasoned, the state had no continuing interest in the names sufficient to justify the deterrent effect their disclosure would have upon the members' right to associate freely.<sup>160</sup>

Like *Griswold*, which the Court would decide seven years later, *Patterson* supports the argument that privacy in a relationship can be integral to the exercise of rights specifically embraced by the First Amendment. Although the "relationships" at issue in *Patterson* were neither intimate nor comprehensive, they nevertheless facilitated the development and expression of ideas, thereby implicating the First Amendment. By extending constitutional protection to these relationships, the *Patterson* Court recognized that association can be a fertile source of new ideas. This supports the argument that the Constitution should protect the relationship between therapist and patient.<sup>161</sup>

159. *Id.* at 464-65.

160. *Id.* at 466.

161. The Supreme Court has never expressly held that due process forbids the collection of patient-specific information relating to mental illness. It has noted, however, that official collection of medical information relating to individuals at least implicates due process. In *Whalen v. Roe*, 429 U.S. 589, 591 (1977), the Court reviewed New York's practice of recording the names of all those for whom a doctor had prescribed certain drugs for which an unlawful market existed. Although the Court appeared to assume that, in the proper case, due process could block the state from obtaining this kind of information, it nevertheless upheld the practice in light of the state's concern about the illegal traffic in drugs and in light of the relatively minor and speculative nature of the intrusion into patients' lives. *Id.* at 598-604. Concurring, Justice Brennan argued that technical developments in the ability to store information could necessitate revisiting the issues presented in the case. *Id.* at 607 (Brennan, J., concurring).

Building on *Whalen*, other courts have held that due process protects the confidentiality of records relating to mental illness, at least to some extent. In *Hawaii Psychiatric Society v. Ariyoshi*, 481 F. Supp. 1028, 1052 (D. Hawaii 1979), for example, the court issued a preliminary injunction forbidding the State of Hawaii from issuing "administrative inspection warrants" for the mental health records of recipients of Medicaid. The court expressly based its opinion on the right to privacy, among other things. *Id.* at 1038-39, 1043. In *Ariyoshi*, the state asserted an interest in protecting its Medicaid program from fraud. *Id.* at 1041. Although the court credited the state's interest, it nevertheless concluded that inspection of patients' records was unnecessary to promote this interest. *Id.* at 1041, 1045. Other courts have permitted official access to information about mental illness while noting that such access at least implicates due process. In *Caesar v. Mountanos*, 542 F.2d 1064 (1976), *cert. denied*, 430 U.S. 954 (1977), for instance, the Ninth Circuit recognized that due process protects the confidentiality of communications between therapist and patient at least somewhat, *see id.* at 1067-68, but went on to uphold a district court's denial of a writ of habeas corpus to a therapist who had refused to disclose information about a patient. *Id.* at 1070. Although the Ninth Circuit recognized that requiring the disclosure threatened constitutionally protected rights, the court concluded that the state's interest in obtaining

But substantive due process is not the only constitutional doctrine that potentially offers such protection. Because of the close affinity between religious confessional relationships and the therapeutic process, the Free Exercise Clause of the First Amendment may also offer such protection.

### B. Free Exercise of Religion

Although religion and psychology are arguably discrete phenomena, they partake of the same process—that of helping the individual to find some sort of peace with him or herself. In fact, Carl Jung described human beings' religious nature as an empirically verifiable aspect of the psyche.<sup>162</sup> He suggested that a psychiatrist can consider his or her job done when a patient “quietly slip[s] back to the order of the Church,” provided the religion fits.<sup>163</sup> Similarly, the

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evidence outweighed the patient's interest in that case in keeping the information confidential. *Id.* Finally, in a fairly recent opinion, the United States Court of Appeals for the District of Columbia refused to enjoin a series of questions that the Department of Defense posed to its civilian personnel. *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 295 (1993). One of these questions solicited a complete history of employees' mental health and use of drugs and alcohol, and required disclosure of any counseling received from a mental health professional. *Id.* at 287. Although the court seemed to recognize a vague constitutional right at stake, *id.* at 293-94, it vacated the preliminary injunction issued by the district court forbidding the Department to compel employees to answer the questions. *Id.* at 295. The circuit court reasoned that the plaintiffs were unlikely to prevail in showing that their interest in privacy outweighed the government's interest in a functional, trustworthy military. *See id.* at 294-95.

These decisions demonstrate that courts are aware that intrusive questions about treatment for mental illness may implicate due process, even though they may give such implications scant consideration. *See generally* Smith, *supra* note 30, at 495-502. They also reflect the generally intelligent approach to the issue of comparing the government's needs against those of the individual. In particular, these cases indicate that courts will look skeptically at official questions about treatment for mental illness that do not arise from an activity involving a high degree of responsibility to the public or some form of particularized concern. A court applying the general reasoning of these cases to the issues presented in this article could well come to the conclusion that I advocate. But such issues are no longer likely to come to the fore, given the ADA.

162. *See, e.g.*, 18 C.G. JUNG, THE COLLECTED WORKS OF C.G. JUNG ¶ 692, at 289 (Sir Herbert Read et al. eds., 1955) (“Science has to consider what there is. There is religion, and it is one of the most essential manifestations of the human mind.”).

163. *Id.* ¶ 671, at 285. Noted Jung:

[I]t must be something that has substance and form. It is by no means true that when one analyses somebody he necessarily jumps into the future. He is perhaps meant for a church, and if he can go back into a church, perhaps that is best thing that can happen. [If he cannot,] [t]hen there is trouble; then he has to go on the Quest; then he has to find out what his soul says; then he has to go through the solitude of land that is not created.

*Id.*

psychiatrist Edwin Edinger argued that individuation, the process by which people come to accept themselves in a profound sense, potentially substitutes for the right relationship of the ego to the "Self" that religion effects in a cohesive traditional society.<sup>164</sup> As Edinger wrote:

If when the individual is thrown back on himself through the loss of a projected religious value, he is able to confront the ultimate questions of life that are posed for him, he may be able to use this opportunity for a decisive development in consciousness. If he is able to work consciously and responsibly with the activation of the unconscious he may discover the lost value, the god-image, within the psyche . . . . The connection between ego and Self is now consciously realized. In this case the loss of a religious projection has served a salutary purpose; it has been the stimulus which leads to the development of an individuated personality.<sup>165</sup>

Given this professional testimony that individuation can substitute for or facilitate religious development, it should follow that the values animating the Free Exercise Clause should extend to protect the relationship between patient and therapist. In fact, the Supreme Court laid some of the groundwork for this argument over thirty years ago in *United States v. Seeger*,<sup>166</sup> when it first indicated a receptiveness to a functional definition of religion. In *Seeger*, the Court considered several draftees' claims that they were entitled to statutory exemptions from combat as conscientious objectors even though they were not adherents of any "religion" in the traditional sense of the word. The statute at issue, the Universal Military Training and Service Act, exempted from combat "those persons who by reason of their religious training and belief [were] conscientiously opposed to participation in war in any form."<sup>167</sup> It further defined the term "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."<sup>168</sup>

Seeger's difficulty lay in the fact that he was unsure about the existence of a "Supreme Being," but espoused a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."<sup>169</sup> The Court, nevertheless, held that Seeger qualified for the exemption.<sup>170</sup> After

164. EDINGER, *supra* note 99, at 68.

165. EDINGER, *supra* note 99, at 68.

166. 380 U.S. 163 (1965).

167. *Id.* at 164-65 (quoting Section 6(j) of the Universal Military Training and Service Act, codified at 50 U.S.C. § 456(j) (1958)).

168. *Id.* at 165 (alteration in original).

169. *Id.* at 166.

170. *Id.* at 187.

examining the history of the statute and its predecessors, the Court concluded that, in defining "religious training and belief" to require "relation to a Supreme Being," Congress had meant only to clarify that the exemption did not include those whose opposition to fighting was based on ephemeral or elective views.<sup>171</sup> Instead, the Court reasoned, a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."<sup>172</sup>

The reasoning of *Seeger* supports the argument that the Constitution should protect people's religious activities as they actually take place, and not solely as they might occur in the context of a traditional church. Although the polity could not afford to protect every conceivable activity that profoundly contributes to the development of the psyche,<sup>173</sup> we can look to what we already protect as integral to religion and ask what quasi-confessional relationships should qualify for similar protection.<sup>174</sup> Every jurisdiction in the United States currently extends an evidentiary privilege to conversations between clergy and the penitent.<sup>175</sup> Presumably, no licensing authority would require applicants to release the records of a classic confessional relationship.<sup>176</sup> It is simply one step

171. *Id.* at 165.

172. *Id.* at 176.

173. See *infra* note 196 and accompanying text.

174. Although the Supreme Court has largely abandoned the project of relieving religious free exercise from incidental yet substantial burdens, see *Employment Div. v. Smith*, 494 U.S. 872, 883-85, 890 (1990), legislators and licensing officials are still at liberty to take such matters into account, barring establishment of religion. Moreover, the Court itself expressed a willingness to make exactly such decisions before *Smith*. See *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963) (concluding that denying unemployment benefits to a person who could not work on Saturdays for religious reasons imposed a burden upon her exercise of religion). Moreover, the Court has routinely demonstrated a willingness to assess burdens on the exercise of other fundamental rights, such as the right to procure an abortion, see *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality opinion), or the right to associate for the purpose of expression, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958).

175. Chad Horner, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 703-04 (1997).

176. It is unclear, however, whether the Constitution would forbid such a requirement. See *infra* notes 181-85 and accompanying text for a discussion of *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1992) (holding that the Free Exercise Clause does not generally require a state to create exemptions from neutral, generally applicable laws). On the other hand, some members of the Supreme Court have criticized *Smith* and the decision does recognize exceptions. See *infra* notes 191-95 and accompanying text.

from this to a general rule requiring some form of particularized concern before an applicant must release records of treatment for mental illness.<sup>177</sup>

This state of affairs, in which licensing authorities can inquire into a functionally confessional relationship between therapist and patient, arguably implicates the Free Exercise Clause. Asking a person to reveal conversations between him or herself and a therapist arguably threatens fundamental precepts of religious or quasi-religious growth. Such matters are intimate, personal, and often highly subjective. Their exposure to external scrutiny could jeopardize the process.

There are, however, at least two potential glitches in this argument. First, relatively recent case law suggests that the Free Exercise Clause might not bar the application of a general requirement that applicants release records of therapeutic or even confessional relationships to licensing authorities.<sup>178</sup> Second, there must be practical limits to what the clause protects, lest anyone with a fundamental personal objection to a law or policy might qualify for distinct treatment, hardly a condition of a society governed by law.<sup>179</sup>

The Free Exercise Clause has enjoyed, or suffered through, a remarkable ride over the last decade or so. Until 1990, case law arising under the clause suggested that neither the states nor the federal government could impose a substantial burden upon the free exercise of religion unless such imposition was necessary to promote a compelling public interest.<sup>180</sup> In 1990, in *Employment Division v. Smith*,<sup>181</sup> the Supreme Court either clarified or limited this precedent, holding that uniform laws of general applicability that impose an incidental burden on the exercise of religion do not violate the First Amendment.<sup>182</sup> In *Smith*, Native American employees of a rehabilitation program were laid off for

177. Many jurisdictions, including the federal courts, also recognize an evidentiary privilege for conversations between therapists and their patients. See, e.g., *Jaffe v. Redmond*, 518 U.S. 1, 15-17 (1996) (recognizing a federal evidentiary privilege). But neither the priest-penitent nor the therapist-patient privilege would likely protect applicants from intrusive questions about mental health. First, these privileges typically extend only to "testimony," which would not include answers to administrative questions or releases of records for administrative review. Second, in most states the privilege only permits the patient or penitent to bind the therapist or clergyman, not vice versa. See Horner, *supra* note 175, at 704. Third, even where the privilege does run both ways, it might well be that only the therapist or clergyman can bind the patient or penitent. See, e.g., N.Y. C.P.L.R. § 4505 (McKinney 1992).

178. See *infra* notes 180-95 and accompanying text.

179. See *infra* note 196 and accompanying text.

180. See *Wisconsin v. Yoder*, 406 U.S. 205, 213-15, 227 (1972) (allowing people of a certain religious sect to remove their children from school after the eighth grade); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (requiring a state unemployment commission to pay benefits to a person who could not accept work on Saturdays because of her religion).

181. 494 U.S. 872 (1990).

182. *Id.* at 881-82.

ingesting peyote in connection with their religion.<sup>183</sup> The state denied them unemployment relief on the grounds that Oregon punished the use of peyote.<sup>184</sup> The Supreme Court rejected the workers' challenge to the denial on the basis of the Free Exercise Clause.<sup>185</sup>

For a period of time after *Smith*, the Religious Freedom Restoration Act ("RFRA"),<sup>186</sup> purportedly enacted pursuant to Congress's powers under Section 5 of the Fourteenth Amendment,<sup>187</sup> prohibited states from imposing substantial obstacles upon religious practices. Specifically, RFRA provided that no "government," including both the states and the federal government, could "substantially burden" free exercise, even if the burden resulted from a rule of general applicability, unless that burden promoted a compelling public interest and was the least restrictive means of doing so.<sup>188</sup> Because official inquiries about treatment for a mental illness might intrude upon a confessional relationship between clergy and penitent, or, as I note, upon a quasi-confessional relationship between therapist and patient, RFRA might have limited such inquiries. The Supreme Court declared the Act unconstitutional, however, in *City of Boerne v. Flores*,<sup>189</sup> concluding that Congress lacked power under Section 5 to enact legislation not "proportionate" to perceived violations of the substantive provisions of the Fourteenth Amendment.<sup>190</sup> Because the Supreme Court struck down RFRA, the protection I advocate would depend on broad interpretation of the exceptions to *Smith*,<sup>191</sup> or abandonment of that decision by the Court.<sup>192</sup>

There is at least one exception to *Smith*'s basic rule that might support the position I advocate. In his opinion for the Court in *Smith*, Justice Scalia

183. *Id.* at 872.

184. *Id.* at 874-76. In fact, the state first determined that the employees were ineligible for benefits because of "work-related misconduct." *Id.* at 874. The state later argued that the denial of benefits was permissible because the ingesting of peyote was a crime. *Id.* at 875.

185. *Id.* at 882.

186. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1448 (1993) (codified at 42 U.S.C. § 2000bb (1994)).

187. Section 5 of the Fourteenth Amendment confers upon Congress power to enforce the substantive provisions of the amendment. U.S. CONST. amend. XIV, § 5. These substantive provisions include the Due Process Clause, which the Supreme Court has held incorporates the Free Exercise Clause. See *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

188. 42 U.S.C. §§ 2000bb-1(a), -1(b), -2(1) (1994).

189. 117 S. Ct. 2157, 2172 (1997).

190. *Id.* at 2171 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.").

191. See *infra* notes 193-95 and accompanying text.

192. At least two justices have expressed dissatisfaction with *Smith*. See *Flores*, 117 S. Ct. at 2157, 2176 (O'Connor, J., dissenting); *id.* at 2186 (Souter, J., dissenting).  
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distinguished the case before him from a situation implicating “hybrid” rights, which draw strength from the Free Exercise Clause as well as at least one other provision of the Constitution.<sup>193</sup> He gave as examples the conjunction of free exercise with freedom of the press or with the prerogatives of parenthood.<sup>194</sup> Most importantly, however, he gave as an example the conjunction of free exercise with freedom of association.<sup>195</sup> With this in mind, one could argue that the association of therapist and patient, like the association of clergy and penitent, merits heightened protection under the Constitution.

Of course, there must be limits to what the Free Exercise Clause can protect; otherwise we could hardly say that we live in a society governed by law.<sup>196</sup> Moreover, secularists might understandably object when they are asked to bear a burden from which the law relieves others because of their asserted religious beliefs. But the less parochially we define religion the less likely it would be that such an objection would arise. Moreover, neither *Smith* nor any limitation inherent in the Free Exercise Clause prevents licensing authorities from unilaterally modifying their questions in light of the concerns I am raising. Furthermore, any rule as broad as the one I advocate would not appear to implicate the Establishment Clause.<sup>197</sup>

So far, I have tried to identify two possible constitutional bases for limiting intrusive questions about treatment for mental illness: a logical extension of substantive due process and a “functional” application of the Free Exercise Clause. I will now seek to identify a third, based upon the Fourth Amendment.

### C. *The Fourth Amendment*

As a matter of plain text, perhaps the most obvious constitutional protection from intrusive questions about treatment for mental illness lies in the Search and

193. *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990).

194. *Id.* at 881.

195. *Id.* at 882 (“[I]t is easy to envision a case in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise Clause concerns.”).

196. As Justice Scalia argued for the Court in *Smith*:

[I]f “compelling interest” really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

*Id.* at 888 (emphasis added) (internal citation and quotation marks omitted).

197. See *Walz v. Tax Comm’n*, 397 U.S. 664, 672-73 (1970) (upholding New York’s practice of exempting churches from property taxes because it also exempted several categories of nonprofit groups).

Seizure Clause of the Fourth Amendment.<sup>198</sup> At least to a modern ear, this clause speaks directly in terms of privacy, offering “security” in one’s “person, house, papers, and effects.”<sup>199</sup> Although these nouns all refer to tangible things, a modern reader of the clause would most likely discern an underlying intention to protect those physical aspects of a person’s life most closely associated with psychic privacy. If so, one could persuasively argue that a request for detailed information about one’s conversations with a therapist, absent particularized concern,<sup>200</sup> constitutes an “unreasonable” search or seizure.

There are, however, at least three potential objections to this argument. First, one could argue from text that the framers of the Fourth Amendment intended to limit the clause’s scope to official searches and seizures of tangible property. Surely eighteenth-century thinkers, imbued with the spirit of John Locke, would have concerned themselves primarily with protecting such property.<sup>201</sup> Second, one could argue that licensing authorities do not literally require applicants to discuss or release information about their conversations with therapists. They merely make such discussion or release a prerequisite to acquiring a license.<sup>202</sup> Finally, one could argue that, although the Fourth Amendment might apply to the practices of licensing authorities, it would not bar such practices.<sup>203</sup> Closer examination of these objections, however, reveals that none is cogent.

The objection that the Fourth Amendment applies only to searches and seizures of tangible property is not persuasive for two reasons. First, it is beside the point. In the ordinary course of events, licensing authorities will almost certainly require an applicant who has received treatment for mental illness to submit at least some tangible item, typically a release of records in the

198. The Clause provides, in part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

199. U.S. CONST. amend. IV.

200. In numerous cases arising under the Fourth Amendment, the Supreme Court has worked out the concept of “particularized” concern. Typically, this concern refers to an articulable reason why an officer believes he or she should stop a specific person for brief questioning. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”). The Fourth Amendment, which requires that warrants rest upon “probable cause, . . . particularly describing the place to be searched and the persons or items to be seized,” U.S. CONST. amend. IV, reflects this same approach, albeit with a higher standard than that required in *Terry*. See generally *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining probable cause as whether, given all the information presented to the issuing authority by way of affidavit, there is a “fair probability that contraband or evidence of a crime will be found in a particular place”).

201. See *infra* notes 204-07 and accompanying text.

202. See *infra* notes 208-19 and accompanying text.

203. See *infra* notes 220-34 and accompanying text.



possession of third parties.<sup>204</sup> Second, and far more importantly, the Supreme Court has rejected any requirement that the Fourth Amendment governs only the seizure of tangible items.<sup>205</sup> Consequently, a requirement that applicants submit *words* in response to their questions would trigger the clause. As the Supreme Court held in *Katz v. United States*,<sup>206</sup> a seminal decision regarding the scope of the Fourth Amendment, the Search and Seizure Clause protects people in those places in which they have a reasonable expectation of privacy.<sup>207</sup>

The objection that licensing authorities do not force applicants to release private information, but merely require them to do so in exchange for a license is not forcibly persuasive because, if true, it proves too much. The Supreme Court has struck down many similar requirements as imposing “unconstitutional conditions” upon the exercise of a privilege, although admittedly it has upheld others. In *Federal Communications Commission v. League of Women Voters*,<sup>208</sup> for example, the Court held that a federal regulation requiring public broadcasters who received certain grants to refrain from editorializing on the air violated the First Amendment, notwithstanding the fact that the government had no pre-existing obligation to make the grants available.<sup>209</sup> In that case, the Court held that the government’s interest in not paying for the expression of private views with public money was insufficient to justify a flat ban on editorials by broadcasters receiving the grants, given the relatively small amount of money

204. See *supra* note 24 and accompanying text. The Supreme Court has interpreted the Clause to apply to the search or seizure of many forms of property other than the paradigmatic search of a dwelling for a bloody knife. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (citing *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 325, 33-37 (1985)) (urine); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (dried blood scraped from underneath a fingernail); *Katz v. United States*, 389 U.S. 347, 353 (1967) (oral statements); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood). Needless to say, any request for or seizure of “papers” would fall squarely within the text of the Clause.

205. See *Katz*, 389 U.S. at 353 (“[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements.”).

206. 389 U.S. 347 (1967).

207. *Id.* at 351-52. In *Katz*, federal agents tapped a public telephone booth and eavesdropped on *Katz* as he placed bets over the phone. *Id.* at 348. The Court ordered the suppression of the fruits of the wiretap, reasoning that, by shutting the door of the phone booth, *Katz* had manifested an expectation of privacy that society was prepared to respect. *Id.* at 352.

Before *Katz*, a “search,” for purposes of the Fourth Amendment, had to involve what a court would have considered a “trespass” at common law. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 464, 466 (1928) (refusing to find a search where federal agents tapped the wires running to *Olmstead*’s telephone without trespassing on his property). The Supreme Court declined to follow *Olmstead* in *Katz*. See *Katz*, 389 U.S. at 353.

208. 468 U.S. 364 (1984).

209. *Id.* at 402.

the government made available.<sup>210</sup> Similarly, in *Sherbert v. Verner*,<sup>211</sup> a case arising under the Free Exercise Clause, the Court held that South Carolina could not make the receipt of unemployment benefits contingent upon a would-be recipient's willingness to forego religious scruples and work on Saturdays, particularly where the burden upon the state of making individual exceptions would be light.<sup>212</sup> Decisions such as *League of Women Voters* and *Sherbert* demonstrate that the government may not categorically justify infringing upon a constitutional right on the grounds that it confers a voluntary benefit or privilege in exchange. Instead, the government must justify the infringement in context. And in fact it has on many occasions. In *Vernonia School District 47J v. Acton*,<sup>213</sup> for example, the Supreme Court upheld a school district's requirement that all participants in the district's athletics program submit to random urinalysis for evidence of the use of illegal drugs.<sup>214</sup> Similarly, in *Snepp v. United States*,<sup>215</sup> the Court held that the Central Intelligence Agency could regulate speech by its employees concerning their work for the Agency.<sup>216</sup>

The cases discussed in the previous paragraph suggest that courts will require some proportionality and relation between a condition imposed and a benefit or privilege conferred.<sup>217</sup> The standard tests for due process, however, require the courts to ask roughly the same questions.<sup>218</sup> Consequently, the constitutionality of a "condition" to the receipt of a benefit or privilege turns on many of the same factors as the constitutionality of a coercive requirement.<sup>219</sup> I will now turn to that question.

The third potential objection to my argument is that, however broad the scope of the Fourth Amendment, it does not bar licensing authorities from asking intrusive questions about treatment for mental illness because such

210. *Id.* at 400-02.

211. 374 U.S. 398 (1963).

212. *Id.* at 410.

213. 515 U.S. 646 (1995).

214. *Id.* at 664-65.

215. 444 U.S. 507 (1980).

216. *Id.* at 510.

217. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 608 (1990) (criticizing the doctrine of unconstitutional conditions, and noting that "[i]t would be far more straightforward to ask whether the government has available to it distinctive justifications because of the context in which the relevant burden is imposed").

218. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973). The Court wrote: "Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (citations and internal quotation marks omitted).

219. See Sunstein, *supra* note 217, at 603.

questions are reasonable. This objection implicates an essentially empirical comparison of costs and benefits and hence cannot be resolved as a matter of pure logic. As the Court noted in *Vernonia*, the “ultimate measure” of the constitutionality of a search or seizure by public officials is its “reasonableness.”<sup>220</sup> Moreover, the Court added, whether a particular search or seizure qualifies as “reasonable” depends upon a comparison of the degree to which it intrudes upon an interest protected by the Fourth Amendment with the degree to which it promotes a legitimate governmental interest.<sup>221</sup> Where the government seeks to obtain evidence to support a criminal prosecution, ordinarily a search or seizure will not be “reasonable” absent a warrant supported by probable cause.<sup>222</sup> In other contexts, however, a search or seizure can satisfy the requirements of the Fourth Amendment without resting upon probable cause when, as the Court noted in *Vernonia*, “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>223</sup> In *Vernonia*, the Court identified the public schools as one context in which such “special needs” are present. In another case, *Skinner v. Railway Labor Executives Ass’n*,<sup>224</sup> the Court allowed the Federal Railroad Administration to require workers potentially responsible for serious accidents on the railways to submit samples of urine and blood to be tested for the presence of illegal drugs and alcohol, even in the absence of particularized suspicion or probable cause, given the high level of public concern for the safe operation of trains.<sup>225</sup> The Court upheld a similar requirement for employees of the United States Customs Service who seek a transfer or promotion to a position directly involving the interdiction of illegal drugs or requiring the carrying of a firearm in *National Treasury Employees Union v. Von Raab*.<sup>226</sup> In each of these cases, the Court engaged in an explicit balancing test, comparing the imposition on privacy against the public interest promoted. In *Vernonia*, the Court identified three factors in its analysis of the school district’s requirement that students participating in its athletics program submit to random urinalysis drug testing. These were: (1) “the nature of the privacy interest upon which the search . . . intrudes”;<sup>227</sup> (2) “the character of the intrusion . . . complained of”;<sup>228</sup> and (3) “the nature and immediacy of the

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220. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

221. *Id.* at 652-53 (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989)).

222. *Id.* at 653.

223. *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (internal quotation omitted).

224. 489 U.S. 602 (1989).

225. *Id.* at 633-34.

226. 489 U.S. 656, 677 (1989).

227. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

228. *Id.* at 658.

governmental concern at issue . . . and the efficacy of [the means chosen] for meeting it."<sup>229</sup>

Given the nature of the test for "reasonableness" under the Fourth Amendment, it is impossible to state definitively that licensing authorities' non-particularized intrusive questions about treatment for mental illness violate the Constitution. But it is possible to adduce a few factors in support of such an argument. First, the interest upon which licensing authorities' questions intrude, although not one of physical integrity, is one of an intensely personal nature. As the Supreme Court noted recently in *Jaffee v. Redmond*,<sup>230</sup> effective psychotherapy requires open, honest, and frank discussion of matters of deep personal concern.<sup>231</sup> Second, requiring applicants to release the records of conversations with therapists opens every aspect of the therapeutic relationship to potential review by a third party. Third, the government does not clearly promote the integrity of the professions by requiring such releases in all instances. In fact, asking applicants to answer intrusive questions and to execute releases might dissuade some from seeking help and recovering their mental health at all. Moreover, there is significant evidence that licensing authorities rarely, if ever, use the information they obtain to deny a license.<sup>232</sup> Consequently, the argument that licensing authorities should limit their questions to serious mental illness in light of the Fourth Amendment is persuasive. Finally, I do not argue that licensing authorities should never be able to obtain precise information from third parties about the mental health of applicants. I only advocate that we should require some form of particularized suspicion.<sup>233</sup>

In addition, review of the facts of *Vernonia*, *Skinner*, and *Von Raab* indicates a basis for distinguishing these cases from the situation posed by licensing authorities' questions. Use of the kinds of drugs at issue in these cases (except alcohol, for which the railroads also tested in *Skinner*), is both elective and illegal. Suffering from mental illness, if elective, is barely so, and certainly is not illegal. Similarly, seeking professional help for mental illness is both legal and desirable from a social standpoint, although elective. Second, as I have attempted to argue throughout this Article, interference with the process of therapy is likely to distort or destroy the process. By contrast, requiring athletes and workers in sensitive or dangerous industries to submit urine samples,

229. *Id.* at 660.

230. 518 U.S. 1 (1996).

231. *Id.* at 10.

232. See *supra* notes 95-96 and accompanying text.

233. One could also argue, in theory, that the Fourth Amendment applies only to searches or seizures that facilitate official efforts to fight crime or quasi-criminal activities. Certainly this is the Amendment's classic application. But the Supreme Court has held that the Fourth Amendment protects people who are not suspected of criminal activity, as well as people who are. See *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

although invasive of bodily privacy, arguably does not impede physiological or psychological function. The government's need for information to carry out its legitimate business must give way at some point to the individual's strong interest in privacy and personal growth.<sup>234</sup>

## VI. ALTERNATIVES TO JUDICIAL REVIEW

The gravamen of the preceding three parts of this Article, discussing substantive due process,<sup>235</sup> free exercise,<sup>236</sup> and the Fourth Amendment,<sup>237</sup> is that the Constitution does not permit licensing authorities to require applicants to answer intrusive questions about treatment for mental illness and to release records relating to such treatment in all instances. As I have noted, however, the current Supreme Court has been profoundly reluctant to expand the scope of the Constitution in any material way, preferring instead to leave such decisions to the elective branches.<sup>238</sup>

So be it. There are legitimate concerns about the scope of judicial review regardless of whether the Constitution supports the judiciary's decisions. Judges are not elected, nor (at the highest level) are their decisions subject to effective short-term review. As a democracy, we should seek to minimize the instances in which courts second-guess the decisions of elective departments of our government.<sup>239</sup>

Nevertheless, we are not a nation of parliamentary sovereignty. Our Constitution does set forth many principles that protect individuals from official overreaching, and we are generally committed to the concept of judicial review.

234. A fourth constitutional basis for limiting intrusive questions about treatment for mental illness lies in the Fifth Amendment's privilege against self-incrimination. Although this provision does not offer explicit protection to conversations between therapists and their patients, it does underscore the importance our Constitution places on psychological protection of thoughts and expressive activity from unnecessary official scrutiny. See generally *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). The Court wrote in *Miranda*: "As a 'noble principle often transcends its origins,' the privilege has come right-fully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of democracy.'" *Id.* (quoting *United States v. Grunewald*, 233 F.2d 556, 579, 581-82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

The Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Supreme Court has held that this Clause applies to the states via the Due Process Clause of the Fourteenth Amendment. See *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964).

235. See *supra* notes 123-61 and accompanying text.

236. See *supra* notes 162-97 and accompanying text.

237. See *supra* notes 198-234 and accompanying text.

238. See *supra* note 14 and accompanying text.

239. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 18 (1962).

We are thus committed both to the idea of majoritarian democracy and to the concept of constitutional limitations on the power of the elective branches of government.

As Professor Robert Burt argued in his monograph *The Constitution in Conflict*,<sup>240</sup> this does not put us in an impossible position. Judicial review, Burt argues, addresses the contradiction inherent in the democratic principles of rule by the majority and equal self-determination.<sup>241</sup> As Burt notes, if we allow absolute rule by the majority, the majority can trample the rights of dissenters. The alternative of vesting a veto in the minority, however, is equally unappealing. According to Burt, judicial review is a “logical response to an internal contradiction in democratic theory” rather than a “deviation” from that theory.<sup>242</sup> Nevertheless, it is strong medicine. Moreover, it is unnecessary medicine when parties can settle their differences short of litigation.

Such an opportunity is present here. In light of the arguments I have made in this Article, licensing authorities can choose to limit questions they ask and records they require in accordance with their own duty to uphold the Constitution. In doing so, they can take up the slack of protecting rights of privacy that courts intelligently put aside. In fact, were legislators to undertake this task, we would find ourselves in the best of all possible situations: we would have decision-making by elected departments of the government and continued fidelity to constitutional principles. Moreover, a pattern of legislative, executive, and administrative recognition of such concerns could eventually provide the foundation for judicial recognition of similar concerns. The Supreme Court has often described substantive due process as an evolutionary concept.<sup>243</sup> Finally, if over time authorities proved incapable or unwilling to recognize the need to keep conversations relating to mental illness fairly confidential, courts then could step into the breach, as a last resort, using the

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240. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

241. *Id.* at 29.

242. *Id.*

243. *See, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833, 847-50 (1992). As Justice Harlan wrote in a separate opinion in *Poe v. Ullman*:

Due process has not been reduced to any formula . . . . The best that can be said is that through the course of the Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

constitutional provisions I have identified in this Article.<sup>244</sup> But such a step should be a last resort.

## VII. CONCLUSION

Courts and administrators have limited intrusive questions asked by licensing authorities about treatment for mental illness on the strength of the Americans with Disabilities Act. This Act, although salutary in many respects, reflects the medical model, which seeks to explain all illness, both physical and mental, in strictly medical or scientific terms. This rationale puts people who have obtained treatment for mental illness and who want to avoid answering intrusive questions about their treatment in the awkward position of having to assert a disability with a medical origin. In fact, however, their condition may reflect the ordinary operation of their psyche. The history of religion suggests that mental illness often is not purely pathological in the medical sense of the word. The Constitution offers more solid protection for conversations between therapists and patients. The Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to protect certain intimate relationships. The Court has also suggested that the Free Exercise Clause of the First Amendment protects what is functionally religious, as well as what is literally so. The relationship between therapist and patient may facilitate or even replicate precisely the process by which people grow religiously. Finally, the Fourth Amendment protects people against unreasonable searches and seizures: a request for information about treatment for mental illness, absent particularized suspicion, arguably constitutes an unreasonable search or seizure.

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244. See generally BURT, *supra* note 240, at 3 (describing the Supreme Court as an equal, not superior, player in the development of constitutional law).