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In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion

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IN "A HIGHER POWER" WE TRUST: ALCOHOLICS ANONYMOUS AS A CONDITION OF PROBATION AND ESTABLISHMENT OF RELIGION

INTRODUCTION

Alcoholics Anonymous ("AA") has become the standard for most alcohol rehabilitation programs.[1] This is due in no small part to imposition of attendance at AA meetings as a condition of probation for offenders convicted of driving while intoxicated and other alcohol related offenses, following a national trend toward rehabilitation and reintroduction of offenders into society.[2] Traditionally, these conditions were rarely questioned since probation itself was viewed as an

1. *See* Christopher K. Smith, Comment, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Probation*, 1 WM. & MARY BILL RTS. J. 299, 304 (1992). [hereinafter *Spiritual Revelation*]. *See also Burden of Proof* (CNN television broadcast, Dec. 31, 1996).

2. *See* Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 614 (1988).

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act of mercy by the court that the offender was free to reject.[3] However, recent court decisions have brought into question the constitutionality of imposing AA as a condition of probation.[4] This comment attempts to answer three pertinent questions posed by the imposition of AA as a condition of probation. First, is AA "religion" for purposes of the Establishment Clause? Second, what is the current constitutional standard to be applied to AA as a condition of probation under the Establishment Clause? Third, applying the current standard, does imposition of AA violate the Establishment Clause?

Part I of this comment discusses probation and the substance of AA, as well as touches on the Supreme Court's attempts to define religion. Part II seeks to discern the proper constitutional standard to be applied to AA as a condition of probation from Supreme Court cases. Part III concentrates on the lower courts' application of the elusive Establishment Clause test. Finally, Part IV briefly highlights the shortcomings of the standards currently being applied to AA as a condition of probation and proposes a solution designed to provide a simpler standard for lower courts to apply and clarify a confusing area of the law.

I. PROBATION AND SUBSTANCE OF AA

Probation is rapidly becoming the first choice for sentencing first-time offenders convicted of alcohol or drug related offenses.[5] There are many reasons for this increase. Prison and jail overcrowding is likely the chief contributor to this trend.[6] Another reason is the apparent failure of current incarceration methods in dealing with an ever-burgeoning crime problem.[7] In addition, jails and prisons fail to satisfy the traditional justifications for punishment.[8] Although they provide retribution and incapacitation for a specified length of time, the goal of rehabilitation is rarely attempted let alone achieved. Furthermore, the deterrent effect of prison has recently come under a barrage of attacks. Some commentators have found that incarceration has the exact opposite of its intended deterrent effect.[9] Clearly, these attacks are necessary and warranted. The rise in crime is proof that

3. *See* Jaime M. Levine, Comment, *Join The Sierra Club: Imposition of Ideology As A Condition of Probation*, 142 U. PA. L. REV. 1841 (May 1994) [hereinafter *Sierra Club*].

4. *See* Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996); Warner v. Orange County Dept. of Prob., 870 F. Supp. 69 (S.D.N.Y. 1994).

5. *See Burden of Proof*, *supra* note 1.

6. *See* Tavill, *supra* note 2, at 615.

7. *See id.*

8. *See* SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES, 1047-50 (4th ed. 1983) (discussing at least four justifications: rehabilitation, retribution, incapacitation, and deterrence).

9. *See* M. Frank, *The American Prison: The End of an Era*, 43 FED. PROB. 3, 7 (Sept. 1979).

the current penological system is failing and in need of drastic overhaul.

Amidst ever stricter sentencing statutes that tie the hands of judges and inflict stern sentences on many offenders,[10] legislatures have left all but undisturbed the judiciary's flexibility to impose alternatives to traditional sentencing of certain classes of offenders.[11] The statutes found in most states list a number of conditions that a judge may impose upon the offender along with a provision allowing the judge to impose any other reasonable conditions deemed necessary.[12] The probation condition most commonly placed on individuals convicted of driving while intoxicated is some type of rehabilitative or education program either prescribed or approved by the court.[13] Alcoholics Anonymous is by far the most likely program the probationer will attend[14] due to its reputation as an effective program for recovering alcoholics and the longevity of the program's existence.[15] Also, because AA is free to the individual and promotes a well known twelve-step program, proven to be one of the most effective means of treating alcoholism, it is almost inevitable that probationers required to attend a rehabilitative program as a condition of probation will end up at an AA meeting.[16]

Before determining whether AA as a condition of probation violates the Establishment Clause of the First Amendment,[17] the substance of AA must be analyzed to determine if it qualifies as "religion" as referred to therein. If the substance of AA is not a "religion" or sufficiently "religious," it may not trigger First Amendment scrutiny.[18]

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10. *See* Tavill, *supra* note 2, at 616-17 n.26.

11. *See id.* at 621.

12. *See Spiritual Revelation*, *supra* note 1, at 299 n.5.

13. *See id. See also* JAMES P. GOBERT & NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE 182 (1983).

14. *See Burden of Proof*, *supra* note 1. *See also* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 412 (1989) [hereinafter SPECIAL REPORT].

15. *See* SPECIAL REPORT, *supra* note 14, at 415 (with over 73,000 chapters worldwide, AA has helped thousands attain sobriety).

16. *See Burden of Proof*, *supra* note 1.

17. The First Amendment reads in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

18. Some commentators argue that any self-help group that compels belief, *e.g.*, that drinking alcohol is wrong, would trigger scrutiny under the free speech clause. This theory would treat compulsion of any belief, religious or secular, as violative of the First Amendment. Thus, even if AA was not considered "religious" for religion clause purposes, that would not end the constitutional inquiry. This comment will not address the freedom of belief theory that assumes any compelled self-help violates the First Amendment. *See generally Sierra Club*, *supra* note 3.

The AA "Big Book" sets out the tenets of AA.[19] It serves as the manual for AA by listing the "Twelve Steps" necessary to achieve recovery from alcoholism, and these steps serve as the foundation of the AA program.[20] However, despite the fact that these steps invoke God by name or reference in five separate instances,[21] courts are reluctant to find AA sufficiently religious to run afoul of the Religion Clauses.[22] This is more easily understood in light of the broad nature of AA's terms and phrases. Terms such as "God as we under[stand] him" and "higher power" are viewed as vague and ambiguous.[23] The AA organization advances a "spiritual" not a "religious" definition of itself.[24] Essentially, AA contends, these terms refer to a "power greater than themselves" and that reliance on this power is the key to recovery.[25] Therefore, according to AA, the program is spiritual, not religious.[26]

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19. ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS (3d ed. 1976) [hereinafter ALCOHOLICS ANONYMOUS].

20. *Id.* at 58. The twelve steps are designed to be recited by participants as follows: We

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

Id. at 59-60.

21. *See id.* (referring to AA steps 3, 5, 6, 7, and 11).

22. *See, e.g.*, Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991); Jones v. Smid, 1993 WL 719562 (S.D Iowa); People v. Hoy, 158 N.W.2d 436 (Mich. 1968).

23. *See* ALCOHOLICS ANONYMOUS, *supra* note 19, at xiv.

24. *See id.*; *Stafford*, 766 F. Supp. at 1016.

25. *See* ALCOHOLICS ANONYMOUS, *supra* note 19, at 569-70.

26. This distinction is only important if the First Amendment distinguishes between the two: the former being acceptable, while the latter is unacceptable.

The significance of the distinction between *religious* and *spiritual* rests largely on semantics.[27] AA implores the member to ask himself whether he is "willing to believe that there is a power greater than myself."[28] If the member answers yes, the means by which AA members are indoctrinated poses the question of whether government can compel such a forceful change or affirmation of the probationers beliefs.[29] Furthermore, those who object to the imposition of AA as a condition of probation point to the fact that attendees must tolerate the recitation of the Lord's Prayer and reading of Bible verses as part of the program, although AA tenets do not require they participate if this offends their own personal belief systems.[30] The Supreme Court has considered similar circumstances in a public school setting and placed special significance on prayer and Bible reading, holding both to be in violation of the Establishment Clause when conducted in a school context.[31] Furthermore, whether spiritual or religious, AA does not deny that in order to be successful the member must actually believe the tenets.[32] Moreover, if courts accept AA's self-definition as "spiritual" then the program is not considered religious.[33] If courts conduct their own inquiries they may still find AA is spiritual rather than religious. However, the definition of religion for purposes of the First Amendment does not lend itself to such a fine line.

To determine whether AA invokes Establishment Clause scrutiny, a workable definition of religion must be gleaned from Supreme Court decisions. The word "religion" appears only once in the First Amendment.[34] This is important when considering that the Framers intended religion under the Establishment Clause to be identical to religion for purposes of the Free Exercise Clause. Thus, in the Framers' view, religion is religion under the First Amendment. Justice Rutledge advanced this view most succinctly:

> 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guarantee, so that Congress,

27. *See Spiritual Revelation*, *supra* note 1, at 304.

28. *See* ALCOHOLICS ANONYMOUS, *supra* note 19, at 47.

29. For a thorough discussion of whether AA or the court is responsible for this compulsion see *Warner v. Orange County Department of Probation*, 115 F.3d 1068 (2d Cir. 1996).

30. *See* ALCOHOLICS ANONYMOUS, *supra* note 19, at 40-41.

31. *See* Abington v. Schemp, 374 U.S. 203, 210 (1963) (invalidating state statute requiring the Bible to be read in school even if objecting individuals could be excused).

32. *See* ALCOHOLICS ANONYMOUS, *supra* note 19, at 44.

33. *See Spiritual Revelation*, *supra* note 1, at 304.

34. U.S. CONST. amend. I. "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

> and now the states are as broadly restricted concerning the one as they are regarding the other.[35]

However, the Court has not wholly accepted this view of the First Amendment.

In *United States v. Seeger*,[36] the Court considered the breadth of religion under the Religion Clauses. Seeger opposed military service due to his belief in an ethical creed.[37] He did not believe in God except in the remotest sense.[38] The statute required belief in a "Supreme Being" in order to qualify for the conscientious objector exemption.[39] The Court decided that the test of whether a belief system merited protection under the Free Exercise Clause was not whether there was a belief in a Supreme Being, but "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[40] Therefore, to qualify as *religious* under the First Amendment, the beliefs must not necessarily comport with traditional notions of religion. In addition, due to the Court's affording non-religion the same protection as religion under the Free Exercise Clause, atheism is a protected belief.[41]

Most individuals raising a challenge to AA as a condition of probation allege their belief in atheism is offended by being forced to participate in the AA program.[42] Of course, it is important to point out that to state a claim under the Establishment Clause one's beliefs need not necessarily be offended.[43] The Establishment Clause is concerned with the tie between the state and religion regardless of the beliefs of the individual.[44] Thus, the probationer need only show that by forcing him to attend AA, the court is coercing him to participate

35. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting). *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-28 (1st ed. 1978) (arguing that there should be a dual definition of religion). "All that is arguably religious should be considered religious for free exercise analysis [and] anything arguably non-religious should not be considered religious in applying the establishment clause." *Id.* at 828.

36. 380 U.S. 163 (1965).

37. *See id.* at 170.

38. *See id.*

39. *See id.*

40. *Id.* at 173.

41. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state constitutional requirement of taking oath of belief in God in order to hold public office unconstitutional).

42. *See* Stafford v. Harrison, 766 F. Supp. 1014, 1017 (D. Kan. 1991); Jones v. Smid, 1993 WL 719562, at *1 (S.D. Iowa).

43. *See* Engel v. Vitale, 370 U.S. 421, 430 ("[T]he Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."). *But see* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

44. *See* Lee v. Weisman, 505 U.S. 577, 580 (1992).

in "religion," and that is in effect "establishing" a religion.[45] This includes a specific religion or religion in general.[46] The AA "Big Book" states, after explaining the way AA is designed to work, "We hope you are convinced now that God can remove whatever self-will has blocked you off from him."[47] That language must surely be considered as religious as *Seeger's* "ethical creed."[48] With this in mind, it is clear that at the very least, a probationer could make a legitimate claim that AA is religion for purposes of Establishment Clause analysis.[49]

II. THE ESTABLISHMENT CLAUSE

The Establishment Clause was once thought to prohibit the state from advancing one sect at the expense of another.[50] It is now clear that the Establishment Clause prohibits endorsement or promotion of religion generally over non-religion.[51] The Court has spent many pages in the reporters attempting to explain exactly what "establishment of religion" entails. These cases can be divided into five categories. The first two categories are (1) direct aid to religious institutions or activities[52] and (2) indirect aid to religious institutions or activities.[53] However, there are no allegations of any financial support, whether direct or indirect, flowing from the state to AA. Therefore, cases in the first two categories are only implicated in this inquiry where they may clarify the standard in relation to the other three categories. The remaining three categories of cases concern (3) laws enacted with an impermissible purpose,[54] (4) acts by the state that endorse one religion or religion in general,[55] and (5) acts by the state

45. Even if the probationer subscribed to the beliefs taught at AA meetings, he could still state a claim. The complaint is that the state is meddling in religion; it matters not whether it is his religion or another. *See id.* Whether the probationer has suffered the requisite injury required for standing is another question. *See* Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464 (1982) (holding requirements for Article III standing when bringing claim under Establishment Clause same as other constitutional protections).

46. *See* Lynch v. Donelly, 465 U.S. 668 (1984).

47. ALCOHOLICS ANONYMOUS, *supra* note 19, at 71.

48. *See* United States v. Seeger, 380 U.S. 163, 170 (1965).

49. The question now would focus on whether the state is establishing AA as a religion by compelling probationers to attend the meetings. That inquiry is discussed in Part II.

50. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

51. *See* Lee v. Weisman, 505 U.S. 577, 610 (1992); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

52. *See Everson*, 330 U.S. at 1.

53. *See* Mueller v. Allen, 463 U.S. 388 (1983); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

54. *See* Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Engel v. Vitale, 370 U.S. 421 (1962).

55. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

that coerce individuals toward a specific religion or religion in general.[56] Imposition of AA as a condition of probation arguably touches on one or more of these three areas.

In 1971, the Court decided *Lemon v. Kurtzman*.[57] In *Lemon*, two statutes were challenged as violating the Establishment Clause.[58] A Rhode Island statute and a Pennsylvania statute were both enacted to ease the financial burden on non-public schools by subsidizing school supplies and teachers' salaries.[59] Although the flow of financial assistance was involved, this was not the focus of the Court's analysis. The Court, while invalidating both statutes under earlier case precedent,[60] created a new test for the Establishment Clause based on "cumulative criteria developed by the Court over many years."[61] The Court constructed a three-part test stating, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[62] This test adopted the third category of cases, those involving laws enacted with an impermissible purpose, as prong number one, and combined categories (1), (2), and (4) to make up prong number two. Finally, the Court added the "entanglement" test from *Walz v. Tax Commission*[63] as prong number three.[64] Arguably, only category (5) was not included in the new test.[65] The Court used this test for the next twelve years.[66]

Then, in *Lynch v. Donelly*,[67] the Court noted that although it was useful to inquire into the three-part test laid down in *Lemon*, the Court had "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area."[68] This statement opened the door for the Court to apply various different approaches and standards to cases arising under the Establishment Clause.[69]

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56. *See Lee*, 505 U.S. at 585.

57. 403 U.S. 602 (1971).

58. *See id.* at 604.

59. *See id.* at 604-05.

60. The Court relied on its newly created test to invalidate the laws. However, this test was "gleaned" from precedent. *See id.* at 606.

61. *Id.*

62. *Id.* (citations omitted).

63. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

64. *See Lemon*, 403 U.S. at 606.

65. This makes sense because *Lee*, which applied the fifth category, was not decided until 1992. *Lemon* was decided in 1971.

66. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971); Wolman v. Walter, 433 U.S. 229 (1977); Mueller v. Allen, 463 U.S. 388 (1983).

67. 465 U.S. 668 (1984).

68. *Id.* at 672.

69. The Court did just that. The *Lemon* test has not been used by the Supreme Court to invalidate state action under the Establishment Clause since 1985. For more on this subject see WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT 927-52 (2d ed. 1995).

In *County of Allegheny v. ACLU*,[70] a majority of the Court, with hardly a mention of *Lemon*, adopted Justice O'Connor's "no endorsement" test as a guide in Establishment Clause cases.[71] Justice O'Connor's test could be viewed as similar to the second prong of the *Lemon* test. However, there exists a distinct difference. For a state action to run afoul of the Establishment Clause under *Lemon*, the "primary or principal effect" of the act had to be one that neither advanced nor inhibited religion.[72] Thus, by its own terms the *Lemon* test ruled out incidental or secondary effects that may happen to advance or inhibit religion.

The Court in *Lynch*, and later *Allegheny*, was more than ready to find certain state actions unconstitutional that *Lemon* would find incidental or trivial.[73] It is important to note that although the Supreme Court vacillates as to when or if it will apply *Lemon*, the lower courts have seen the Court's reluctance to overrule *Lemon* as a sign that the *Lemon* holding is still a viable standard.[74] To add to the confusion, the Court often cites *Lemon* even when not relying on its test.[75] In *Lamb's Chapel v. Center Moriches Union Free School District*,[76] Justice Scalia summed up the Court's recent treatment of *Lemon*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. . . .
> [T]he secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to

70. 492 U.S. 573, 601 (1989) (holding freestanding display of nativity scene in county courthouse unconstitutional because it "celebrate[d] Christmas in a way that has the effect of endorsing a patently Christian message").

71. Justice O'Connor first proposed this test in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984). According to Justice O'Connor, "[t]he proper inquiry under the purpose prong of *Lemon* [is] whether the government intends to convey a message of endorsement or disapproval of religion." *Id.*

72. *Lemon*, 403 U.S. at 606.

73. In *Lynch*, the Court stated that the benefit to religion by the public display of a creche was "indirect, remote and incidental." *Lynch*, 465 U.S. at 669. However, in *Allegheny* the Court stated that the display of the nativity scene "celebrated Christmas in a way that has the effect of endorsing a patently Christian message." *Allegheny*, 492 U.S. at 601.

74. Jones v. Smid, 1993 WL 719562, at *3; O'Connor v. California, 855 F. Supp. 303, 306 (C.D. Cal. 1994). *See also* Michael W. McConnell, *Stuck with a Lemon*, A.B.A. J. 46 (Feb. 1997).

75. *See* Rosenberger v. Rectors and Visitors of the Univ. of Va., __ U.S. __, 115 S. Ct. 2510 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Lee v. Weisman, 505 U.S. 577 (1992).

76. 508 U.S. 384 (1993).

> do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely[.] Sometimes we take a middlecourse, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[77]

Despite the criticism leveled at *Lemon*, lower courts are more reluctant to ignore a viable Supreme Court precedent than is the Supreme Court itself. Notwithstanding inconsistent application of *Lemon* by lower courts, one benefit of the *Lemon* test is that it identifies three areas with which the Establishment Clause is concerned. However, as discussed earlier, *Lynch* and *Allegheny* proved *Lemon* incomplete and modified it to include an endorsement prong.[78]

The final curve the Court threw at the lower courts, as well as others attempting to determine the applicable standard for Establishment Clause cases, was *Lee v. Weisman*.[79] In holding that school-sponsored prayer at graduation violated the Establishment Clause, the majority failed to mention the *Lemon* test, while it seemed to employ one, or possibly two, new standards under the Establishment Clause.[80] The *Lee* Court found that there was indirect coercion by the state to participate in the graduation prayer.[81] The Court also noted that although attendance at graduation was not mandatory, a student should not have to miss an event so important in her life just to avoid exposure to religion.[82] The Court seemed, however, to limit its holding to situations involving children,[83] allowing the Court to leave undisturbed its holding in *Marsh v. Chambers*.[84]

Marsh involved opening prayers given at the start of each session of the Nebraska legislature.[85] There, as were the graduates in *Lee*, the legislators were free to leave, thus avoiding unwelcome exposure or coercion.[86] Nonetheless, history and tradition were sufficient to overcome the Establishment Clause challenge.[87] However, the concurrence by Justice Souter in *Lee* downplayed the significance of *coercion* under the Establishment Clause.[88] He stated that coercion of reli-

77. *Id.* at 398-99 (Scalia, J., with whom Thomas, J., joins, concurring in the judgment) (citations omitted).

78. *See* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 336 (1996).

79. 505 U.S. 577 (1992).

80. *See id.* at 585, 593-94.

81. *See id.* at 594-95.

82. *See id.* at 595.

83. *See id.* at 593.

84. 463 U.S. 783 (1983).

85. *See id.* at 785.

86. *See id.* at 787.

87. *See id.* at 791.

88. *See Lee*, 505 U.S. at 621.

gious belief or exercise fits more neatly under the Free Exercise Clause.[89] Moreover, he contended that it is the symbolic union between the state and religion that produces a violation under the Establishment Clause.[90] To sum up, Justice Souter noted that there is no precedent to support the position that coercion is required to make a viable Establishment Clause claim.[91] Nevertheless, according to *Lee*, in addition to the practices forbidden by *Lemon* as modified by *Allegheny*, the Establishment Clause also prohibits direct or indirect coercion of individuals to participate in religion, as well as any tie between the state and religion that tends to convey the message of approval of religion.[92]

Against this backdrop, the following section examines recent courts' application of these standards to AA as a condition of probation and attempts to reconcile them.

III. APPLICATION

AA has been imposed as a condition of probation for over thirty-five years.[93] However, only recently have constitutional challenges to AA as a condition of probation been raised.[94] Furthermore, some of the cases concern prison inmates in addition to probationers. However, this distinction should not change the analysis under the Estab-

89. *See id.* It is important to note here that the author believes the Court has commingled the two clauses such that there is a drastic overlap in their protection. Not every establishment violation was a free exercise violation and vice versa. The holding in *Lee*, no matter how narrow it is perceived, has blurred the line between what constitutes a violation of the Establishment Clause or the Free Exercise Clause. For example, before *Lee*, the situation in *Marsh* could be characterized as a violation of the Establishment Clause because the prayer had a religious purpose that primarily advanced religion, and the state hired and paid the salary of the chaplain. Thus, it violated all three prongs of *Lemon*. If *Allegheny* is considered, then it could be perceived as endorsing religion, thus violating the rule adopted in that case as well. However, it can also be characterized as a free exercise violation. By attempting to coerce individuals, directly or indirectly, the state is prohibiting the free exercise of any atheistic legislators. What could be more prohibitive of free exercise than a state's constant barrage in an attempt to achieve conformation? Unless the legislator must wait until he succumbs to the coercion to raise a claim, the free exercise claim may be stated when the first act of coercion is attempted. Thus, coercive acts by the state fit better under a free exercise analysis, and acts by the state with an impermissible purpose or entanglement with religion under the Establishment Clause. *But see*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

90. *See Lee*, 505 U.S. at 618-19 (Souter, J., concurring).

91. *See id.* at 620.

92. *See id.* at 619. If the Court is in fact limiting this holding to situations involving children, then it has added little to the *Lemon* plus *Allegheny* formula employed previously, unless the Court's purpose is to read the Establishment Clause somewhat broader, as is the trend in free exercise cases. *See generally* Yahudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

93. *See Spiritual Revelation*, *supra* note 1, at 299 n.76.

94. The first federal case to address this issue was decided in 1991. *See* Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991).

lishment Clause.[95] Courts have used different analysis casting AA in varying lights. While some courts' decisions apply Supreme Court precedent to find that AA as a condition of probation *does not* violate the Establishment Clause, other courts applying the same precedent find that requiring AA as a condition of probation *does* violate the Establishment Clause.

A. *Lower Courts Finding No Violation*

1. *Stafford v. Harrison*—AA is not a Religion

In *Stafford v. Harrison*,[96] a federal district court first addressed whether requiring AA as a condition of probation violated the Establishment Clause.[97] Stafford was serving a seven-year sentence for aggravated assault.[98] He had numerous convictions for driving under the influence of alcohol.[99] Stafford appeared before the parole board, and the board decided he should remain in confinement until he completed an alcohol and drug abuse program.[100] Stafford brought an action alleging his First Amendment rights had been violated.[101] The court conceded that the program Stafford was required to attend was based on the AA twelve-step treatment program.[102] The court also accepted as fact that the twelve-step program does contain spiritual or religious overtones.[103] Stafford asserted that he did not believe in God.[104] Since AA requires an acknowledgment of a "higher power,"[105] Stafford claimed that the requirement of attending and participating in AA forced him to abandon his religion.[106]

The court began its analysis by distinguishing the terms "spiritual" and "religious."[107] The court used this distinction to avoid constitutional infirmity under the First Amendment Religion Clauses.[108] In addition, the court not only required the program to be religious in nature before it would find an Establishment Clause violation, but

95. However, one could advance the dubious argument that the special needs of penological administration relieve the state of its constitutional duty to refrain from establishing a religion. *See infra* Part IV.A.1.

96. 766 F. Supp. 1014 (D. Kan. 1991).

97. *See id.*

98. *See id.* at 1015.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 1016. It should be noted here that many of the programs at issue in this comment are not AA *per se*, but are based upon AA. However, most use the AA "Big Book" itself as a manual.

103. *See id.*

104. *See id.*

105. *See id.* at 1017.

106. *See id.* at 1016.

107. *See id.*

108. *See id.* at 1018.

also required that the program be characterized as a religion itself.[109] The court quickly rejected the contention that AA was itself a religion[110] and focused on the "higher power" concept contained in the AA recovery steps.[111] However, instead of using objective criteria as in *Seeger* to discern the nature of the AA program, the court deferred to the organization itself, accepting AA's own statement of its objectives and its self-definition.[112] Finally, the court examined whether AA's acknowledgment of a "Supreme Being" is sufficient in itself to categorize AA as a religion for First Amendment purposes.[113] The court held that it was not.[114] The language the court used in its decision is significant: "[W]hile the expression of the philosophy of Alcoholics Anonymous includes a reference to a Higher Power, this court cannot on that basis alone reasonably conclude that Alcoholics Anonymous constitutes *a religion* or that *a religion* was impermissibly thrust upon plaintiff. . . ."[115] In sum, the *Stafford* court clearly requires the challenged action to be *a religion* and not merely *religious.* In stark contrast to the stricter test applied by *Lee*,[116] the *Stafford* court concluded that because AA is not a religion *per se*, it does not offend the Establishment or Free Exercise Clause of the First Amendment.[117]

2. *Jones v. Smid—Lemon v. Kurtzman* Controlling

The next case decided in this area of jurisprudence was *Jones v. Smid*.[118] The *Jones* court separated the free exercise and establishment claims into two separate sections and used two separate tests.[119] This is in contrast to the *Stafford* court's treatment dismissing both claims together once it determined AA did not constitute a religion.[120]

In *Jones*, the defendant pleaded guilty to operating a motor vehicle while under the influence of alcohol.[121] As a result, he was sentenced to five years in prison. His sentence was suspended provided he re-

109. *See Stafford*, 766 F. Supp. at 1016.
110. *See id.* at 1017.
111. *See id.*
112. *See id.* The court relies on AA's use of the "Big Book" for its goals. "Willingness, honesty, and open mindedness are the essentials to recovery." ALCOHOLICS ANONYMOUS, *supra* note 19, at 569-72.
113. *Stafford*, 766 F. Supp. at 1017 (relying on United States v. Seeger, 380 U.S. 163 (1965) (Douglas, J., concurring) (holding that belief in a supreme being is not sufficient to define a religion)).
114. *See id.*
115. *Id.* (emphasis added).
116. The prayer in *Lee* could hardly be characterized as a religion. It was nonsectarian, designed not to offend the members of any particular faith. *See Lee*, 505 U.S. at 581-83.
117. *See id.*
118. 1993 WL 719562 (S.D. Iowa).
119. *See id.* at *3.
120. *See Stafford*, 766 F. Supp. at 1017.
121. *Jones*, 1993 WL 719562, at *1.

side at a correctional facility until the completion of the Operating While Intoxicated ("OWI") treatment program,[122] a program modeled using the twelve-step concept[123] made famous by AA.[124] Jones, who did not believe in God, told his counselor he could not repeat the promise required by the program.[125] Jones contended that this requirement violated his First Amendment right of free exercise[126] and freedom from establishment of religion.[127]

The court began its analysis by noting that a court has a role in reviewing sentences imposed by the prison board.[128] The court also noted that courts should not second guess an entity wholly responsible for the administration of a prison.[129] However, the court pointed out that this principle "does not preclude federal courts from discharging their duty to protect constitutional rights."[130] Clearly, the court concluded, inmates retain First Amendment protection.[131] It is significant that both Stafford and Jones were incarcerated at the time of the alleged constitutional violations. However, even though the *Jones* court mentioned Jones's incarceration, that fact never affected, nor seemed to enter into, the court's First Amendment analysis. The *Jones* court, citing *Pell v. Procunier*,[132] held that a prisoner retains all First Amendment rights that do not conflict with the goal of the penal system or the offender's status as a prisoner.[133] This provides some guidance in

122. *See id.*

123. *See Spiritual Revelation*, *supra* note 1, at 303 n.40.

124. *See Jones*, 1993 WL 719562, at *1.

125. *See id.* at *2. The promise, taken directly from the "Big Book," states:

> If we are painstaking about this phase of our development we will be amazed before we are halfway through. We are going to know a new freedom and a new happiness. We will not regret the past nor wish to shut the door on it. We will comprehend the word serenity and we will know peace. No matter how far down the scale we have gone, we will see how our experience can benefit others. That feeling of uselessness and self-pity will disappear. We will lose interest in selfish things and gain interest in our fellows. Self seeking will slip away. Our whole attitude and outlook upon life will change. Fear of people and of economic insecurity will leave us. We will intuitively know how to handle situations, which used to baffle us. We will suddenly realize that God is doing for us what we could not do for ourselves. Are these extravagant promises? We think not. They are being fulfilled among us—sometimes quickly, sometimes slowly. They will always materialize if we work for them.

Id.

126. The free exercise claim is not at issue here except to the extent that the lower court commingled the two protections.

127. *See Jones*, 1993 WL 719562, at *2.

128. *See id.* at *3.

129. *See id.* (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987)).

130. *Id.*

131. *See id.*

132. 417 U.S. 817 (1974).

133. *See id.* at 822. The question arises whether the Establishment Clause confers an individual right similar to free exercise and free speech. It is not easily read to do so. However, one can make the argument that the right conferred is the right to be

assessing the viability of sentences or conditions of probation that affect First Amendment rights. However, this standard leaves almost as much latitude for judges and sentencing boards as the test applied in *Stafford*.[134]

The *Jones* court then analyzed the Establishment Clause claim. The court balanced two key Supreme Court decisions, *Lemon* and *Lee* to reach its conclusion.[135] In *Lemon*, the Supreme Court laid down a three-part test to determine whether a state action violated the Establishment Clause.[136] The court determined that to be constitutional, the state's action must (1) have a secular purpose; (2) not have a primary effect of advancing or inhibiting religion; and (3) avoid excessive government entanglement with religion.[137] In *Lee* the test appears stricter. In *Lee*, the Court held that the practice of having a prayer at graduation violated the Establishment Clause because it "creat[ed] an identification of the state with a religion or religion in general."[138] Thus, the Idaho district court in *Jones* was forced to construct a holding that was consistent with both *Lemon* and *Lee* or distinguish one of the two precedents to render it inapplicable to the present case.

Relying on *Marsh v. Chambers*,[139] the *Jones* court distinguished the *Lee* decision.[140] In *Marsh*, the Court upheld the constitutionality of Nebraska's practice of opening each of its legislative sessions with a prayer against an Establishment Clause challenge.[141] The Supreme Court stated that this practice did not offend the Establishment Clause in part because of the longevity and unbroken tradition of the practice.[142] However, the Court in *Lee* distinguished *Marsh* by noting that the legislators were adults and were free to leave the floor in order to avoid the religious practice,[143] while the students in *Lee* were not.[144] The *Lee* Court appeared to limit its holding to situations in-

free from an establishment. More likely, the Framers were concerned that the government could still favor or support specific religions without violating the Free Exercise Clause. Thus, the Establishment Clause was added as a further restriction on government, not an extension of an individual right. For a thorough discussion of what an individual must show to state an Establishment Clause violation see *Valley Forge Christian College v. Americans United For Church and State*, 454 U.S. 464 (1982).

134. *See infra* Part IV.A.1.; Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991) (holding AA not a religion, therefore not subject to First Amendment scrutiny).

135. *See Jones*, 1993 WL 719562 at *3.

136. *See* Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).

137. *See id.*

138. *See* Lee v. Weisman, 505 U.S. 577, 585 (1992).

139. 463 U.S. 783 (1983).

140. *See Jones*, 1993 WL 719562, at *3.

141. *See Marsh*, 463 U.S. 783, 784 (1983).

142. *See id.* at 787.

143. *See Lee*, 505 U.S. at 594.

144. *See id.* at 595. The Court did not find the students were forced to attend graduation, only that they should not be forced to miss such an important event in their lives in order to avoid exposure to religion. *See id.* For Establishment Clause purposes, the author contends there is little, if any, difference between expecting a popu-

volving school-age children.[145] The *Jones* court found the distinction between adults and school children dispositive and found that Jones, as a prison inmate, was more comparable to the legislators in *Marsh* than to the students in *Lee*.[146] Thus, *Lee* was not controlling,[147] leaving the court poised to apply *Lemon* as controlling precedent.

Next, the *Jones* court cited *Stafford* in its analysis of the nature of the AA program.[148] The court agreed that AA was flexible with its requirements of members and ambiguous concerning its "religious components."[149] It, therefore, adopted the *Stafford* holding that AA is not a religion.[150] This raises the question why the court would apply *any* test under the Establishment Clause. If AA is not a religion for purposes of the Establishment Clause, Jones has no claim. Nevertheless, the court proceeded to apply the *Lemon* test.[151] With no discussion, in a single short paragraph, the court summarily decided that AA passes all three prongs of the *Lemon* test.[152]

Finally, the *Jones* court turned to the free exercise claim.[153] Although conditions imposed on prison inmates differ slightly from conditions imposed upon probationers, essentially, the same test has been used to determine the validity of a condition of probation.[154] It is important, therefore, to see how this standard is imposed. The standard requires that the condition or regulation be reasonably related to

larly elected representative to leave the floor of the legislature or Congress during the invocation and expecting a student attending graduation to do the same. The Court stated in *Lee* that the state "in effect required participation in a religious exercise." *Id.* at 594. If a non-sectarian prayer given as invocation of a graduation ceremony transforms graduation into a "religious exercise," why is a legislative session with a Christian opening prayer not similarly transformed? It seems clear that the Court's reasoning turns on the fact that school-age children are more vulnerable to coercion, no matter how subtle, than are adults. Thus, the Court has crafted a theory of the Establishment Clause in which the possibility of finding a violation increases in direct proportion to the government's probability of success in coercing an individual's religious belief or practice. This is in almost direct contradiction to what the opinions in *Lee* and *Allegeny* purported to hold, *i.e.*, if the practice "create[s] an identification of the state with a religion or religion in general[,]" it violates the Establishment Clause. *Id.* at 585.

145. *See id.* at 593.

146. *See Jones*, 1993 WL 719562, at *4.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* (citing Stafford v. Harrison, 766 F. Supp. 1014, 1017 (D. Kan. 1991)).

151. *See id.* at *5. Perhaps the *Jones* court is saying that even if AA is religion for First Amendment purposes, it passes the *Lemon* test.

152. *See id.* The court gives no analysis of any of the three prongs of the test, only stating that AA has a secular purpose, does not inhibit or advance religion, and does not involve excessive government entanglement.

153. *See id.* The free exercise claim is discussed here because it employs a test many courts also use in judging conditions of probation. *See Sierra Club*, *supra* note 3, at 1862.

154. *See* United States v. Schiff, 876 F.2d 272 (2d Cir. 1989); United States v. Beros, 833 F.2d 455 (3d Cir. 1987). *See also Sierra Club, supra* note 3, at 1861-62.

the purpose of probation.[155] In addition, it requires the condition itself to be reasonable.[156] In *Jones*, the court decided that the treatment program does serve the penological interest of rehabilitation and that it is reasonable.[157] However, many courts require an additional element to the test when concerned with the validity of prison regulations that affect First Amendment rights that most courts do not apply to conditions of probation. This additional element requires that there be a *reasonable alternative* available to the offender if it is feasible.[158] However, the *Jones* court refused to accept Jones' contention that the state is *required* to provide him a "secular" rehabilitation program.[159] The court instead placed the burden on Jones to point out an "easy and ready alternativ[e] to Alcoholics Anonymous' Twelve Steps that will fully accommodate his rights at only a de minimis cost to this valid penological interest."[160] The court concluded that because the AA program is flexible it did not require Jones to abandon his religious beliefs or impermissibly thrust religion upon Jones.[161] Therefore, the court found that the program did not violate his First Amendment rights.[162] In effect, the *Jones* court added its own requirement to Establishment Clause analysis requiring that the probationer be forced to abandon his beliefs in order to state an establishment claim. However, neither *Lemon* nor *Lee* required such an injury in order to state a claim under the Establishment Clause.

3. *O'Connor v. California*—Probationer Has Choice

The final case in this area refers to challenges, not to compulsory AA attendance, but to the state even allowing AA to be offered as one of many possible treatment programs. In *O'Connor v. California*,[163] O'Connor was convicted of driving while under the influence of alcohol.[164] He was found to be a multiple offender and was required to enroll in Orange County's alcohol education program.[165] This program was administered by the National Council on Drug and Alcohol Dependence. The council notified O'Connor that he was required to attend weekly "self-help" meetings of his choice in order to fulfill his requirements.[166] AA was on the list of programs.[167] O'Connor filed a

155. Turner v. Safley, 482 U.S. 78 (1987).
156. *See id.*
157. *See Jones*, 1993 WL 719562, at *8.
158. *See Turner*, 482 U.S. at 89.
159. *See Jones*, 1993 WL 719562, at *7.
160. *Id.*
161. *See id.* at *8. By flexible, the court was referring to the AA tradition of allowing members to decline to recite certain portions of the promise and to view the "higher power" in any way comfortable to the individual. *See id.*
162. *See id.*
163. 855 F. Supp. 303 (C.D. Cal. 1994).
164. *See id.* at 304.
165. *See id.*
166. *See id.*

motion requesting that AA be deleted from the list of programs that would satisfy his probation.[168] His motion was denied on the ground that there was an alternative program that he could attend.[169] In 1993, O'Connor filed suit alleging that the promotion of AA by the state violated the Establishment Clause of the First Amendment.[170]

The *O'Connor* court first addressed the tenets of AA, finding AA's Twelve Steps do contain a "spiritual element" and the acknowledgment of a "higher power."[171] However, as in *Stafford*, the court looked to AA's stated objective to determine AA's principle purpose: "To stay sober and help other alcoholics achieve sobriety."[172] The court noted that each individual meeting is conducted by a leader chosen from that group's membership for that meeting, who is assisted by other members, allowing for maximum flexibility in accommodating individual members' beliefs.[173]

The *O'Connor* court then analyzed the AA treatment program and its relationship to the state in light of current Supreme Court Establishment Clause jurisprudence. The court found the test laid down in *Lemon v. Kurtzman* was the appropriate standard.[174] Before applying the *Lemon* standard, the court tracked subsequent Supreme Court decisions that affected *Lemon*, noting that in *Allegheny v. ACLU*,[175] the Supreme Court refined the *Lemon* test by adding an "endorsement" element.[176] However, the *O'Connor* court also pointed out that in *Bowen v. Kendrick*,[177] the Supreme Court allowed a religious organization to participate in the implementation of a federal grant program aimed at reducing teenage sexual problems.[178] Finally, the *O'Connor* court noted the extremely fact-sensitive nature of recent Establishment Clause cases.[179] In *Lee v. Weisman*, the Court held that even indirect coercion that tends to endorse religion was violative of the First Amendment.[180] However, in this situation, O'Connor failed to claim that the state was endorsing the religious tenets of AA, a violation under *Allegheny*, or that the state was coercing him to participate

167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.* at 305.
171. *See id.* at 306.
172. *Id.*
173. *See id.*
174. *See id.*
175. 492 U.S. 573 (1989).
176. *See id.* at 601.
177. 487 U.S. 589 (1988).
178. *See O'Connor,* 855 F. Supp. at 307. *See also Bowen*, 487 U.S. at 599 (stating that First Amendment does not preclude religious involvement in publicly sponsored social programs).
179. *See O'Connor*, 855 F. Supp at 307.
180. *See Lee*, 505 U.S. at 603. However, as in *Jones v. Smid*, 1993 WL 719562 (S.D. Iowa), *Lee* can be distinguished using *Marsh*.

in AA, a violation under *Lee*. Thus, the court decided that, due to its fact-specific holding, *Lee* was not controlling.[181]

The *O'Connor* court then applied the *Lemon* test to the AA program.[182] Under the first prong the court held that "the principal and primary effect of encouraging participation in AA is not to advance religious belief but to treat substance abuse."[183] Because the state allowed O'Connor to choose the program he attended, the court held that the state was not endorsing the tenets of AA's philosophy, only the concept of self-help in general.[184] Under the entanglement prong of the *Lemon* test, the court looked for connections or cooperation between the state and AA.[185] It found the only connection between AA and the state was the county's advising O'Connor that AA would satisfy his probationary requirement.[186] The court held that "such arms-length involvement does not amount to 'entanglement' that offends the Establishment Clause."[187] Therefore, because there was a viable alternative, and because AA passed the *Lemon* test, the court found there was no Establishment Clause violation.[188]

There are common threads running through these cases. First, AA may be "spiritual" in nature, but its ambiguity and flexibility keep it outside the "religion" designation for First Amendment purposes.[189] Second, despite the criticism of *Lemon*, these courts have no problem applying *Lemon* as the appropriate Establishment Clause standard.[190] Finally, the cases do not expressly adopt the traditional rationale that convicted offenders, inmates, or probationers are entitled to lesser protection under the Establishment Clause due to their status.[191] These similarities show a desire to protect the offenders' rights, while allowing society to utilize the most effective means of rehabilitation available.[192]

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181. *See O'Connor*, 855 F. Supp. at 307. O'Connor based his claim on the broad statement in *Lee* that a violation occurs if state action "creates an identification with a religion or religion in general." *Lee*, 505 U.S. at 585.

182. *See O'Connor*, 855 F. Supp. at 307.

183. *Id.*

184. *See id.* at 308. Individuals who were not happy with the available programs were free to devise their own means of self-help and seek approval by the County. *See id.*

185. *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

186. *See O'Connor*, 855 F. Supp. at 308.

187. *Id.*

188. *See id.* at 304.

189. This distinction is dubious. The prayer in *Lee* was ambiguous, but still religious in general. The prohibition in *Allegheny* applied to a religion or religion in general. This seems to be directly on point. The flexibility aspect may go toward saving AA under free exercise analysis due to the programs willingness to mold itself, if you will, to individual beliefs.

190. *See generally* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos*, 70 NOTRE DAME L. REV. 581 (1995) (providing a general survey of Supreme Court Religion Clause jurisprudence).

191. *See Spiritual Revelation*, *supra* note 1, at 306-08.

192. *See id.*

B. *Lower Courts Holding AA a Violation*

The following cases all rely on a common principle: that no one can be forced by the state to participate in "religious" activities.[193] These cases also place more reliance on recent Establishment Clause precedent expanding the scope of protection under the First Amendment. Nonetheless, although relying on the same precedent, they reach a conclusion in direct opposition to the preceding cases. They hold that the imposition of AA, or programs based thereon, as a condition of probation or prison treatment program violates the Establishment Clause.

1. *Kerr v. Farrey*—AA Is Religious

In *Kerr v. Farrey*,[194] the defendant, Kerr, was an inmate at a state correctional institution.[195] Inmates with chemical dependence problems like Kerr were required to attend Narcotics Anonymous ("NA") as part of their rehabilitation program.[196] NA is modeled after AA's Twelve Step program.[197] However, NA omits the reference to a "higher power" included in AA's program.[198] Kerr objected to attending these meetings because they were offensive to his "personal religious beliefs."[199] Kerr was informed that the meetings were mandatory and that if he did not attend, he would be classified a higher security risk and possibly reassigned to a higher security prison.[200] The warden, Farrey, stated that NA attendance was not mandatory, but refusal to attend could have an adverse affect on an inmate's security risk evaluation and his possibility of parole.[201] Kerr filed suit alleging violation of his First Amendment rights.[202] The lower court applied the *Lemon* test and held that NA did not violate the Establishment Clause.[203] The appeals court, however, did not begin with *Lemon*. Instead, the Seventh Circuit panel began its analysis with *Lee*.[204] That fact alone is significant. *Of the cases reviewed here,* all which began their inquiry with *Lemon* found no violation. Those that began with *Lee* found a violation.

193. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984). In determining whether a religion is established, the Court emphasized that no distinct rule could or even should be drafted. *See id.* "The line between permissible relationships and those barred by the clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test." *Id.* at 678-79.
194. 95 F.3d 472 (7th Cir. 1996).
195. *See id.*
196. *See id.* at 474.
197. *See id.*
198. *See id.*
199. *Id.*
200. *See id.*
201. *See id.* at 475.
202. *See id.* at 473.
203. *See id.*
204. *See id.* at 475.

The court never applied *Lemon* to the facts. The only mention of *Lemon* was to instances where the Supreme Court has struck down statutes regarding financial assistance to religions[205] and in admonishing the lower court for not taking into account the substantial number of establishment cases the Supreme Court had decided since *Lemon*.[206] The court's analysis can be summed up as follows: because NA is religious and Kerr was forced to participate, the requirement is unconstitutional.[207] The court concluded by citing *Warner* and *O'Connor* approvingly. The court conveniently read *O'Connor* as stating that had there been no alternative, (there was only one *established* alternative) it would have been decided differently.[208] Nevertheless, the court considered its decision in line with Supreme Court precedent as well as lower courts that have decided this specific issue.[209] Although the court did cite cases where no violation was found,[210] nothing the court discussed after the first paragraph of its decision altered its analysis.[211] Moreover, the court failed to discuss why the test in *Turner v. Safley*,[212] considered by the lower court to be controlling, was incorrect or no longer applicable.[213] In contrast, the *Jones* court utilized essentially its entire opinion analyzing the prison-based program in question in light of *Turner*. Nevertheless, the Seventh Circuit seems to have developed its own test combining recent Supreme Court precedents.[214] Under this test, NA (based upon the tenets of AA) as a mandatory treatment program is unconstitutional.[215]

2. *Warner v. Orange County Dep't of Probation—Lee v. Weisman* Controlling

The first case in which a district court held that AA as a condition of probation violated the Establishment Clause was *Warner v. Orange County Dep't of Probation*.[216] Warner was convicted of his third

205. *See id.* at 478.
206. *See id.* at 479.
207. *See id.* at 479.
208. *See id.* at 480.
209. *See id.*
210. *See, e.g.*, Rosenberger v. Rector of Univ. of Va., __ U.S. __, 115 S. Ct. 2510 (1995); Widmar v. Vincent, 454 U.S. 263 (1981).
211. That is because every case cited after *Lee* relied on the same two cases, *Everson* and *Lynch*. Thus, the cases applying *Lemon* are left out of the mix.
212. 482 U.S. 78 (1987).
213. The lower court applied the "reasonableness standard" applicable to prison regulations laid down in *Turner* requiring only that a regulation be reasonably related to its goal and that the regulation itself be reasonable. *See Kerr*, 95 F.3d at 475 (citing Turner v. Safley, 482 U.S. 78, 84 (1987)).
214. *See Kerr*, 95 F.3d at 479. "[O]nly three points are crucial: first, has the state acted; second, does the action amount to coercion; third, was the object of the coercion religious or secular?" *Id.*
215. *See id.* at 480.
216. 870 F. Supp. 69 (S.D.N.Y. 1994).

DWI,[217] and the trial judge sentenced him to three years probation with six conditions.[218] The fifth condition stated: "That you will attend Alcoholics Anonymous at the direction of your probation officer."[219] Warner attended AA meetings from November 1990 through September 1992.[220] In January of 1991, Warner, an atheist, complained to his probation officer about the religious nature of AA.[221] The officer refused to excuse Warner, and Warner continued to attend.[222] Warner then brought suit in 1993, alleging that the required AA attendance violated the Establishment Clause. The court began by analyzing the substance of AA.[223] Regarding the nature of AA, where *Stafford* and *Jones* used the term "spiritual," the *Warner* court used the term "religious."[224] The court focused on the "higher power" concept and the fact the program invokes "God" by name four times. In addition, the court acknowledged the proliferation of prayer at these meetings.[225] These facts led the court to find these meetings were religious, placing "a heavy emphasis on spirituality and prayer."[226] Finally, the court stated that AA meetings "were the functional equivalent of religious exercise."[227]

After finding AA religious in nature, the *Warner* court began its Establishment Clause analysis with *Lee v. Weisman*. The court stated, "[t]he Establishment Clause means at a minimum that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[228] According to this court, the practice of requiring attendance by probationers at AA meetings failed both the participation and the establishment prohibition.[229]

Finally, the court determined that the fact the state was attempting to rehabilitate a convict through AA participation did not justify using religious principles to achieve this end.[230] The court failed to indicate how it would rule had the AA program been voluntary as in *O'Connor*.[231] It seems clear, however, this court took a broader view

217. *See id.* at 70.
218. *See id.*
219. *Id.*
220. *See id.*
221. *See id.*
222. *See id.*
223. *See id.*
224. *See id.* at 71.
225. *See id.*
226. *Id.*
227. *Id.* at 72.
228. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). *See also* Allegheny v. ACLU, 492 U.S. 573, 591 (quoting Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)).
229. *See Warner*, 870 F. Supp. at 72.
230. *See id.*
231. *See id.* However, the court did make reference to the *O'Connor* decision. *See id.* at 73.

of the Establishment Clause. In addition, it decided the issue without once referring to what the *Jones* and *O'Connor* courts considered controlling authority—*Lemon v. Kurtzman*. This fact underlies the present confusion in establishment jurisprudence. It is possible that, had the court found the *Lee* standard was not offended, it would have applied *Lemon*. However, nothing in the court's opinion seems to acknowledge *Lemon* as authoritative.[232]

C. Lemon *or* Lee: *Tale of Two Precedents*

Obviously there is confusion on at least two points. First, should AA be considered religion for purposes of the Establishment Clause? Second, what is the proper standard to apply to AA as a condition of probation? From the preceding cases it is unclear whether *Lemon* or *Lee* is the controlling authority.[233]

One reason some courts decline to apply *Lee* is that its holding is much broader and sweeps considerably more government action under the Establishment Clause than before.[234] Moreover, the obvious reason *Lemon* is so often ignored is the criticism it has received combined with the Supreme Court's vacillating application of the test.[235] If *Lemon* is no longer controlling, the Court should say so. If *Lemon* only applies to certain fact situations, the Court should delineate those situations. However, the Court has done exactly the opposite—propagated the confusion. It has remained silent as to *Lemon* and limited the holding of *Lee* to its facts.[236] Nonetheless, some lower courts acknowledge limitation in *Lee*, while others extend *Lee* to analyze AA as a condition of probation as well.

One aspect that the lower courts may be overlooking is that of religious accommodation. The long history of accommodation of religion where a program's purpose is primarily secular dates back to *Bradfield v. Roberts*[237] decided in 1899. In *Bradfield*, the Court affirmed a grant to a Catholic hospital stating that its religious character was

232. It is possible that this court has seen the writing on the wall—that *Lemon* is no longer controlling. A majority of justices sitting in 1996 have criticized *Lemon*. *See* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1547 (3d ed. 1996).

233. The Seventh Circuit advanced a novel theory that *Lemon* was designed to apply to those cases where the state was indirectly aiding religion, especially financially. Thus, it is not designed to address coercion. Therefore, *Lee* is the proper test for cases where AA attendance is mandatory. *See* Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996).

234. For example, in *Allegheny* the question was whether public display of a religious symbol amounted to endorsement. Under *Lee*, that question is irrelevant. The display, no matter what the intention, created an identification with religion in general. *See* Lee v. Weisman, 505 U.S. 577, 585 (1982).

235. *See* McConnell, *supra* note 74, at 46. *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

236. *See Lee*, 505 U.S. at 593.

237. 175 U.S. 291 (1899) (holding that a grant of United States funds to a Catholic hospital was not a violation of the Establishment Clause).

"wholly immaterial."[238] This approach can be seen in the more recent case of *Bowen v. Kendrick*.[239] In *Bowen*, the Court upheld a federal grant to churches and religious organizations to provide family planning counseling.[240] Chief Justice Rehnquist, writing for the Court, made it clear that the First Amendment does not prevent religious organizations from participating in publicly-sponsored social programs.[241] Here, the Court has sanctioned what *Lee* seems to forbid: identification with a religion or religion in general.[242] Even more important is the fact that the challenged statute in *Bowen* allowed the religious organization to actively participate in "life instruction" similar to the principles conveyed by AA.[243] Like the program at issue in *Bowen*, it is undisputed that AA has a secular purpose.[244] However, AA as a condition of probation is distinguishable from the *Bowen* decision, because AA is mandatory for many individuals seeking to satisfy their probation conditions. Nevertheless, the Court is not likely to prohibit AA, an arguably non-religious group, from participating in the rehabilitation of alcoholics with no state financial aid in tow after sanctioning direct financial aid to undeniably religious institutions in *Bowen*.[245] It is more likely that even if the Court further modifies or discards *Lemon*, *Lee* will remain limited to its facts. However, until then, courts should apply *Lemon* to an AA analysis. Using this test, the courts will correctly conclude that AA does not violate the Establishment Clause.[246] Thus, the answer to the third pertinent question posed by this article is that under current Establishment Clause jurisprudence,[247] AA as a prison program or a condition of probation does not violate the Establishment Clause.

IV. Analysis

It is clear that a reconciliation of the key cases in this area by the Supreme Court is necessary. Without a clear direction from the Court, lower courts must grapple with this dilemma. This section briefly explains why the various standards applied by lower courts to AA as a condition of probation when challenged under the Establishment Clause fail to produce either consistent or correct results, fol-

238. *See id.* at 299.
239. 487 U.S. 589 (1988):
240. *See id.*
241. *See id.* at 609.
242. *See Lee*, 505 U.S. at 593.
243. *Bowen*, 487 U.S. at 592.
244. Not one court applying prong one of the *Lemon* test failed to find this fact.
245. *See Spiritual Revelation*, *supra* note 1, at 314.
246. *See* Griffin v. Coughlin, 211 A.2d 187, 193 (N.Y. App. Div. 1995). "Although the district court . . . failed to apply the three-prong test established . . . in Lemon v. Kurtzman, the test is still considered by the New York Court of Appeals to be the governing precedent in the analysis of Establishment Clause violations." *Id.*
247. This entails treating *Lemon* as authoritative and limiting *Lee* to its facts.

lowed by proposed reforms designed to restore some order to this confusing area of the law.

A. *Current Standards Are Inadequate*

1. *Turner*'s Reasonableness Test

Some lower courts apply the test laid down in *Turner v. Safley*[248] to AA as a condition of probation.[249] The test was adopted in the context of prison regulations, but it lends itself to application to conditions of probation as well. The test contains two elements. It requires that the regulation be reasonably related to the penalogical interest at issue and that the condition itself be reasonable.[250] The "reasonableness" test in *Turner* is similar to an escape hatch. Under *Turner*, the right infringed upon by the regulation is irrelevant.[251] Therefore, no analysis under the Establishment or Free Exercise Clause is necessary. The court need only examine the regulation or condition to ascertain whether it furthers the penalogical interest at stake.[252] As to AA, courts should have no problem determining that mandating or recommending AA to a probationer is reasonably related to the goal of rehabilitation. In fact, it is the means most likely to succeed.[253] Furthermore, though courts have recently grappled with whether AA as a condition of probation violates the Establishment Clause, no court has maintained that AA was unreasonable.[254]

Although AA as a condition of probation seems to satisfy the *Turner* test, the test is not the standard most suited for the probation context for two reasons. First, probationers and prisoners are not similarly situated. In fact, other than conviction of a crime, they share few characteristics. Unlike prisoners, probationers continue to function in everyday life with the public at large. Furthermore, in the prison context, safety of guards and other prisoners, as well as inhibiting escape are strong interests and courts regularly defer to standards set by penal institutions.[255] Second, the standard is too lax, and allows for virtually unbridled legislative and judicial discretion in imposing conditions. Probationers already face a myriad of conditions, and under the "reasonableness" test, the list of possible conditions is endless, regardless of the rights at stake because the test is not con-

248. 482 U.S. 78 (1987).

249. *See* Jones v. Smid, 1993 WL 719562 (S.D. Iowa); Boyd v. Coughlin, 914 F. Supp. 828 (N.D.N.Y. 1996).

250. *See Turner*, 482 U.S. at 89.

251. *See id.*

252. *See id.*

253. *See Burden of Proof*, *supra* note 1.

254. *See, e.g.*, Jones v. Smid, 1993 WL 719562 (S.D. Iowa); O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994); Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991).

255. *See Turner*, 482 U.S. at 85. *See also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

cerned with the nature of the right being infringed.[256] This creates a scenario that is unwise at best and unconstitutional at worst.[257] Thus, even if courts are correct in applying the *Turner* test to conditions of probation, they should tread with caution lest probation be a harsher penalty than incarceration.[258]

2. *Lee*'s Identification Test

At the other end of the spectrum is the test laid down in *Lee v. Weisman*. This standard is broadened by many lower court's interpretations.[259] However, this test, much like that in *Turner*, is inappropriate in the context of conditions of probation for three reasons.

First, because *Lee* involved school-age children it is not easily translated to apply to a convicted adult offender. Despite the fact that the plaintiff's status is not relevant to an Establishment Clause challenge, courts, not surprisingly, have been reluctant to find *Lee* equally applicable to conditions of probation and graduation prayer.[260] Some courts interpret *Lee's* identification test as contradictory to *Marsh v. Chambers*,[261] as well as more recent decisions in which the majority failed to apply the "identification" test,[262] opting instead to intimate that the coercion in *Lee* was suspect because school-age children are more susceptible to state-sponsored coercion.[263] If the practice in *Lee* violated the Establishment Clause because it involved the indirect coercion of school-age children, then *Lee* is inapplicable to AA as a condition of probation unless the probationer is a school-aged child. Thus, courts may view *Lee* as limited to its facts and proceed to apply one of the other standards available including *Lemon v. Kurtzman*.[264] Also, there is the question of whether a probationer is being compelled to attend AA or is choosing to attend.[265] A probationer is free to reject AA, or any other rehabilitation program, on religious

256. *See Turner*, 482 U.S. at 89. The Court used the phrase "constitutional right" when describing the test without distinguishing between any rights. *Id.*

257. This scenario is unwise because it allows the court to relegate probationers to second class citizens making it harder for the probationer to adjust his conduct to suit society. It is unconstitutional because, as discussed herein, courts are not given carte blanche to impose conditions. *See Spiritual Revelation*, *supra* note 1, at 306-07.

258. *See generally*, Bruce J. Winick, *When Treatment Is Punishment: Eighth Amendment Limits on Mental Health and Correctional Therapy*, CRIMINAL LAW BULLETIN 211 (1996).

259. *See* Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996); Warner v. Orange County Dep't of Prob., 870 F. Supp. 69 (S.D.N.Y. 1994).

260. *See e.g., Jones*, 1993 WL 719562, at *4.

261. 463 U.S. 783 (1983) (holding state funded Christian chaplain who gave invocation at each legislative session did not violate Establishment Clause).

262. *See* Lee v. Weisman, 505 U.S. 577, 585 (1992).

263. *See e.g., Jones*, 1993 WL 719562, at *4.

264. *See id.*

265. *See* Griffin v. Coughlin, 673 N.E.2d 98, 112 (N.Y. 1996) (Bellacosa, J., dissenting), *cert. denied*, 117 S. Ct. 681 (1997).

grounds in favor of serving his sentence.[266] Second, the test in *Lee* adds a coercion element to Establishment Clause analysis. The Supreme Court has stated that "while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element under the Establishment Clause."[267] Thus, adding coercion to the Establishment Clause creates confusion because coercion is traditionally the hallmark of free exercise cases.[268] In addition, the test for burdens placed upon free exercise by the state have been clearly stated by the Court.[269] Finally, *Lee's* rigid approach fails to acknowledge the historical and unbreakable ties between the state and religion.[270] It is naive to maintain that recent opinions such as that in *Lee* can erase two hundred years of tradition. Many lower courts recognize this and attempt to find a mid-point between the simple "reasonableness" test in *Turner* and the ideological "bulldozer" in *Lee*.[271]

3. *Lemon*'s Middle Ground

Between the strict standard applied in *Lee,* and the near non-existent standard applied to prison regulations in *Turner* lies the three-pronged *Lemon* test.[272] This test generally has been applied to AA as a condition of probation. In each instance where the lower courts considered *Lemon* controlling, AA as a condition of probation was found not to violate the Establishment Clause.[273] This application, though arguably correct, creates some conflict. Two distinct problems are notable in the application of *Lemon* to AA as a condition of probation. First, the test was adopted in the context of a statute that

266. *See id.* at 117.

267. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 786 (1973). *See also* Engel v. Vitale, 370 U.S. 421, 430 (1962).

268. *See Nyquist*, 413 U.S. at 786.

269. *See* Employment Div. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (stating test for generally applicable neutral laws that burden religious practice); Church of The Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (stating test for laws not neutral under *Smith*); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (stating test for prison regulations that burden free exercise of religion). Probationers are the one group not covered by these cases. The Court has yet to place probationers under one of these standards or create a new standard. *But see* United States v. Schiff, 876 F.2d 272 (2d Cir. 1989); United States v. Beros, 833 F.2d 455 (3d Cir. 1987) (both cases holding *Turner* test applies to conditions of probation); Griffin v. Wisconsin, 483 U.S. 868 (1987) (subjecting probationers to lower standard under the Fourth Amendment). *See also Sierra Club, supra* note 3, at 1861-62.

270. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."). *See also* Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).

271. *Lee,* 505 U.S. at 639 (stating that the test employed in *Lee* would sweep or "bulldoze" many religious activities out of the public sphere that had previously been held constitutional).

272. *See* Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).

273. *See* O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994); Jones v. Smid, 1993 WL 719562 (S.D. Iowa); Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991).

provided indirect financial assistance to undeniably religious organizations.[274] Thus, situations such as a condition of an offender's probation do not fit squarely under this test. For example, any condition on probation has a secular purpose, either rehabilitation or public safety. The conditions may tend to advance or inhibit religion, but it can hardly be said that this is the primary purpose of the condition as required by *Lemon's* second prong. "[E]xcessive entanglement" is the final hurdle the condition must clear.[275] No court has held there is excessive entanglement between AA and the state.[276] Thus, *Lemon*, a more lenient standard than *Lee*, and somewhat stricter than *Turner*, is satisfied at least in probation-condition cases as long as the principal effect does not advance religion.

The chief question for lower courts to answer becomes whether or not the principal effect of requiring a convicted offender to attend AA to satisfy his probation advances religion. It is almost impossible to determine what the primary effect of AA is, save helping attendees achieve sobriety.[277] Secondly, because *Lemon* was decided twenty-six years ago, the test does not incorporate additions or modifications the Court has made to Establishment Clause analysis, most notably, *Lee* and *Allegheny*.[278] As discussed earlier, the inquiry in *Lee* is not only distinctively different than that of *Lemon*, the Court did not even pretend to acknowledge it in many cases subsequently decided.[279] In *Allegheny*, the court appeared to add an endorsement prong to the test, yet left *Lemon* intact. The question remains open whether the "endorsement" element in *Lynch* and *Allegheny* mirrors the no-advancement or inhibiting of religion prong of *Lemon*, or if one can exist without the other. Lower courts are left to ponder whether the *Lemon* test is the end of the inquiry or simply the first step in a long maze through the Court's recent Establishment Clause cases.[280]

274. *See Lemon*, 403 U.S. at 604.

275. *See O'Connor*, 855 F. Supp. at 308 (calling the entanglement between the state and AA "arms length involvement" at worst and noting that AA gets no money, materials, or input from the state or any religious groups or institutions).

276. *See id. See also Jones,* 1993 WL 719562, at *3.

277. Under *Lemon* it is possible, however unlikely, that AA has two primary effects: advancing religious principles and rehabilitating alcoholics. The author contends that AA's principles are but the means of achieving the desired effect, that is, rehabilitating alcoholics. Any additional religious conformation by the offender is incidental and not intended nor necessary for the program to succeed. If, for example, a probationer was required to attend church services as a condition of probation the court should find the inverse. The church's principal purpose would be to convert the offender to its religion, and any behavioral modifications would be purely incidental.

278. *See* Lee v. Weisman, 505 U.S. 577, 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

279. *See* Rosenberger v. Rectors of the Univ. of Va., __ U.S. __, 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Marsh v. Chambers, 463 U.S. 783 (1983).

280. *See* Esbeck, *supra* note 190.

Whether *Lemon* is still viable authority in Establishment Clause cases is the subject of much debate.[281] However, it is clear that the test is not as workable in the condition of probation context as it purports to be in theory.

B. *Resolution?*

1. Redefining Religion

There exists a myriad of problems in interpreting the Establishment Clause. Nevertheless, there are two actions the Court could take to clear up this area, at least in reference to AA as a condition of probation.

First, the Court should revisit its definition of religion. Defining religion is difficult, but no more so than defining "speech" in freedom of speech cases, or "unreasonable" in Fourth Amendment search and seizure cases. This would place AA clearly within or beyond the scrutiny of either of the religion clauses. A narrowing of the definition to include only more traditional belief systems would solve many problems. Of course, many would argue that this places less traditional belief systems outside constitutional scrutiny. This is only partially true. If the belief system can *fairly* be characterized as religion it should remain within the Religion Clauses. It is the inclusion of *avowedly non-religious* belief systems under the religion clauses that has created confusion. Atheism, as well as less traditional belief systems and their practices, could be fully protected under the Free Speech Clause without entangling the religion clauses.[282] The Court's definition of speech has expanded at a similar rate as the Court's definition of religion.[283] Hence, some traditional religious groups have even turned to the Free Speech Clause for protection where the Establishment Clause threatens to banish them from the public sphere.[284]

281. *See* McConnell, *supra* note 74. *See also supra* text accompanying note 77.

282. *See Sierra Club*, *supra* note 3 (arguing Free Speech Clause protects against governmental compulsion of any beliefs, religious or not). *See also* Wooley v. Maynard, 430 U.S. 705 (1977) (holding freedom of expression protected by First Amendment prohibited state from forcing drivers to place license plate stating "Live Free Or Die" on vehicle).

283. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that free speech protection has expanded beyond manageable limits). *But see* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 604 (1982) (arguing free speech not limited to political speech, but speech that aids "life-affecting decisionmaking").

284. *See* Jay Alan Sekulow, et al., *Religious Freedom and The First Self-Evident Truth: Equality As A Guiding Principle In Interpreting The Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (Summer 1995). *See also Lamb's Chapel*, 508 U.S. at 384; *Rosenberger*, 115 S. Ct. at 2510 (both holding the Free Speech Clause trumped a strict interpretation of the Establishment Clause).

Thus, individuals with religious beliefs, or the lack thereof, would be no less protected under a narrowed definition of religion.[285]

2. Reassessing the Standard

In the event the Court fails to narrow its designation of what is "religion" for purposes of the Religion Clauses and maintains the broad definition of religion adopted in *Seeger*, the Court should reevaluate the addition of the coercion element to Establishment Clause analysis it recognized in *Lee*.[286] The Court should leave state action that involves coercion of an individual under the free exercise umbrella for two reasons. First, although a sensitive area there is currently a bright line test for burdens on free exercise of religion.[287] Second, unlike claims under the Establishment Clause, the convicted offender's status is relevant as in claims concerning other constitutional rights such as free exercise,[288] speech,[289] search and seizure,[290] and voting.[291] Thus, courts can apply the same test to AA as a condition of probation as it does to all conditions of probation that infringe upon the constitutional rights of the offender.[292] This solves the problem of lower courts discerning the proper standard, and then attempting to apply it to prisoners and probationers—contexts in which neither the Free Exercise nor the Establishment Clause was designed to operate. Once standing is found to exist,[293] the Establishment Clause is not concerned with the individual as much as with the tie between the state and religion.[294] Under existing jurisprudence, the

285. *See* William P. Marshall, *Solving The Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1977) (arguing that close free exercise cases should be decided under the broader protection of freedom of expression).

286. *See Lee*, 505 U.S. at 594. *But see* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

287. *See* Employment Div. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (stating test for neutral generally-applicable laws that burden religious practice); Church of The Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (stating test for laws not neutral under *Smith*).

288. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding reasonableness test, not strict scrutiny, applies to prison regulations that infringe upon prisoners' free exercise of religion).

289. *See* Thornburgh v. Abbot, 490 U.S. 401 (1989) (holding reasonableness test, not strict scrutiny, applies to prison regulations that infringe upon prisoners' freedom of speech).

290. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987) (holding reasonable suspicion, not probable cause standard, applies to probationers for search and seizure purposes under the Fourth Amendment).

291. *See* Richardson v. Ramirez, 418 U.S. 868 (1974) (holding state not under constitutional duty to restore franchise to convicted felon who had completed sentence).

292. *See* Tavill, *supra* note 2, at 622.

293. *See* Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 472 (1982) (requiring the party who brings suit to show at a minimum that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant").

294. *See Lee*, 505 U.S. at 621 (Souter, J., concurring).

courts are forced to wrestle with an across-the-board rule, which is as impossible to ascertain as it is to apply. In addition, the *Lemon* test was not designed for cases in which coercion is a factor. *Lemon* deals almost exclusively with the relationship between the state and religion, instead of the individual and the state.[295] Once that relationship reaches the point where coercion is present or free exercise is burdened, the inquiry under *Lemon* should end, and scrutiny under the Free Exercise Clause should begin.[296] This would allow the inquiries under the two clauses to remain distinctly separate and alleviate much of the confusion faced by lower courts. Thus, the simplest solution is to clarify and narrow the definition of religion for purposes of the religion clauses and place cases in which the state coerces or compels religious belief or practice under the purview of the Free Exercise Clause.

CONCLUSION

The Supreme Court's Establishment Clause jurisprudence leaves much to be desired. As a result, the lower courts are split as to whether AA as a condition of probation violates the Establishment Clause. After careful consideration of existing Supreme Court precedent, it appears clear that the lower courts should continue to apply *Lemon v. Kurtzman* in establishment cases. Although *Lee v. Weisman* seems to command an opposite result in these cases, *Lee* can be distinguished using *Marsh v. Chambers*[297] and, therefore, *Lee* can be limited to its facts. In addition, lower courts can rely on *Bowen v. Kendrick*[298] to reinforce the proposition that the First Amendment does not preclude religious involvement in social programs. Lower courts applying *Lee* to these cases do so at their own peril. Because *Lee* adds a coercion test to establishment analysis, the two Religion Clauses are commingled.[299] Thus, probationers and prisoners may allege that AA violates the Free Exercise Clause or, in the alternative, the Establishment Clause. This does not follow from previous Supreme Court precedent which kept two distinctly separate yet equally important inquiries reserved for the two clauses.[300] The Supreme Court should take the next opportunity to resolve the issue by narrowing and clarifying the definition of religion, thereby placing avowedly non-religious belief systems under the adequate protection of free speech and by placing cases involving coercion under the Free Exercise Clause.

295. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

296. *See* Griffin v. Coughlin, 673 N.E.2d 98, 116-17 (N.Y. 1996) (Bellacosa, J., dissenting), *cert. denied*, 117 S. Ct. 681 (1997).

297. 463 U.S. 783 (1983).

298. 487 U.S. 589 (1988).

299. *See supra* note 89 and accompanying text.

300. *See* Everson v. Board of Educ., 330 U.S. 1 (1947). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1157 (4th ed. 1991).

Therefore, lower courts can apply a single standard that produces consistent results, and takes into account the difference between school-age children and prisoners, or legislators and probationers.[301] Until the Supreme Court takes such action, probationers in jurisdictions that apply *Lemon* will continue to be exposed to a "higher power," while those in other jurisdictions will not have to come to know "God as [they] understand him" in order to satisfy their probation condition. It is most likely, whatever test courts apply, that AA has a place in assisting the state in the treatment of drug and alcohol dependents while remaining within Establishment Clause limitations.[302]

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301. Subjecting coercive practices to free exercise analysis accomplishes this because the test for burdens on free exercise takes into account the status of the person being affected. *Compare* United States v. Seeger, 380 U.S. 163 (1965) (holding individual qualified for conscientious objector exemption because the individual's "ethical creed" qualified as religion under Free Exercise Clause), *with* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding burdens on prisoners' free exercise of religion controlled by "rational relationship" test due to prison constraints). For a thorough discussion of how incarceration affects religious freedom see MICHAEL MUSHLIN, RIGHTS OF PRISONERS, 254-312 (2d ed. 1993).

302. AA fits comfortably within the *Lemon* framework. That is a possible reason for adding the coercion test to *Lemon*. However, the Supreme Court must do so expressly, if it intends to, so that lower courts will know that *Lee* is applicable across the board and not just in school prayer cases.

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