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Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment

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PRAYER OR PRISON:
THE UNCONSTITUTIONALITY OF MANDATORY
FAITH-BASED SUBSTANCE ABUSE TREATMENT

CHRISTOPHER M. MEISSNER*

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I. INTRODUCTION

In February 2001, Joseph Raymond Hanas, a nineteen-year-old Michigan resident, was charged with possession of marijuana with intent to deliver.¹ He pled guilty to the charge in exchange for a drug court referral.² The Genesee County Drug Court placed Hanas on probation, which he violated in January 2003 when he was ticketed for underage possession of alcohol.³ As a condition of remaining in the drug court's deferred sentencing program, he was ordered into a long-term residential drug and alcohol treatment program called "Inner City Christian Outreach."⁴ His only alternative to this placement was imprisonment.⁵ Just prior to taking up residence at Christian Outreach, Hanas was admonished by his probation officer: "Remember, the rules of [Christian Outreach] are the rules of the court."⁶

Christian Outreach was unlike anything Hanas expected.⁷ There were no substance abuse counselors on staff.⁸ Indeed, Hanas was even forbidden to attend Alcoholics Anonymous (A.A.)⁹ meetings.¹⁰ He quickly realized that the program

¹Petition for Writ of Certiorari at 4, *Hanas v. Michigan*, 545 U.S. 1135 (2005) (No. 04-1461), 2005 WL 1060940. The Supreme Court denied the petition for the writ of certiorari; to date, no written opinion has been published in this case at any level.

²*Id.*

³*Id.*

⁴*Id.*

⁵*Id.*

⁶Memorandum in Support of Petition for Writ of Habeas Corpus at 12, *Hanas v. Genesee County Adult Prob. Dep't*, No. 05-CV-74612 (E.D. Mich. Dec. 6, 2005), *available at* <http://www.aclumich.org/pdf/briefs/Hanashabeasbrief.pdf>. The probation officer's comment was recorded in the hearing's transcript.

⁷*See id.* at 2.

⁸*Id.* at 3 n.3.

⁹Alcoholics Anonymous represents itself as follows in the preamble read before most A.A. meetings:

Alcoholics Anonymous® is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from alcoholism. The only requirement for membership is a desire to stop drinking. There are no dues or fees for A.A. membership; we are self-supporting through our own contributions. A.A. is not allied with any sect, denomination, politics, organization or institution; does not wish to engage in any controversy, neither endorses nor opposes any causes. Our primary purpose is to stay sober and help other alcoholics to achieve sobriety.

was pervasively religious; the staff seemed much more focused on converting him to the Pentecostal faith than on helping him overcome his addiction.¹¹ Staff members mocked Hanas's Catholic beliefs, calling his faith a form of witchcraft.¹² His rosary and prayer book, which his mother had given to him, were confiscated.¹³ Instead, he was given a Pentecostal bible and instructed to read it for seven hours every day.¹⁴ He was also forced to regularly attend Pentecostal religious services¹⁵ and was given tests on Pentecostal principles.¹⁶ His mother, his aunt, and Catholic priests and deacons whom Hanas had requested to see were barred from visiting him at the facility.¹⁷ When Hanas's aunt called to protest, she was told by Christian Outreach's director, Pastor Rottier, that Hanas "gave up his right to freedom of religion when he was placed in this program."¹⁸

After unwittingly violating one of the center's rules, Hanas was forced into a three-day "word fast" during which time he was required to remain silent and read the Bible continuously.¹⁹ Rottier informed Hanas that in order to graduate from his program, he would have to proceed up to the altar with the other residents and proclaim that he had been "saved."²⁰ Hanas was repeatedly threatened that he would be "washed of the program" and sent to prison if he failed to obey Rottier's orders.²¹ "I needed help," said Hanas. "Instead I was forced to practice someone else's religion."²²

Alcoholics Anonymous: Information on A.A., http://aa.org/en_information_aa.cfm (last visited May 28, 2006). Alcoholics Anonymous is the original twelve-step program upon which many others have been founded.

¹⁰Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 3 n.3. Under Christian Outreach's policy, residents were not allowed to attend A.A. meetings until they had been at the facility for ten months. *Id.*

¹¹*See id.* at 2-4.

¹²*Id.* at 3.

¹³*Id.* at 1; *see also* Defendant's Application for Leave to Appeal at 4, *People v. Hanas*, 691 N.W.2d 456 (Mich. 2005) (No. 126595) (on file with author) (court denied application).

¹⁴Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 3.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 1.

¹⁸*Id.* at 3; *see also* Defendant's Application for Leave to Appeal, *supra* note 13, at 4.

¹⁹Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 3.

²⁰*Id.* at 3-4.

²¹Defendant's Delayed Application for Leave to Appeal at 5, *People v. Hanas*, No. 254434 (Mich. Ct. App. Mar. 15, 2004) (on file with author) (court denied application). The aforementioned facts of Hanas's ongoing case, averred in several different motions, were supported by sworn affidavits and were never disputed at hearing. Petition for Writ of Certiorari, *supra* note 1, at 5 n.4.

²²Press Release, American Civil Liberties Union, Michigan Court Punishes Catholic Man for Refusing Conversion to Pentecostal Faith in Drug Rehab Program (July 20, 2004), available at <http://www.aclu.org/religion/frb/16354prs20040720.html?ht=>.

Most treatment centers perform admirable work, and some legitimately claim impressive rates of success.²³ Nonetheless, there are others that harbor ulterior motives and engage in what some critics have called “stealth evangelism.”²⁴ Specifically, some religious and quasi-religious groups have seen and taken advantage of an opportunity to attempt to convert troubled young men and women to their faiths at a time when these youths may be at the most vulnerable points of their lives.²⁵ Other treatment centers’ administrators have pure motives for wanting to impart their faith to their residents, and see no harm in doing so.²⁶ While there is nothing inherently wrong with turning to spiritual guidance for help in overcoming addiction,²⁷ the existence of such facilities as Christian Outreach and their ability to receive federal funds or contract with local government presents important constitutional questions.

Whether faith-based substance abuse treatments are effective²⁸ is certainly a valid question in its rightful place, but it is not the inquiry pursued here. Rather, this Note argues that a drug court’s act of assigning unwilling offenders to twelve-step²⁹ or

²³National Institute on Alcohol Abuse and Alcoholism of the National Institutes of Health, Does Alcoholism Treatment Work?, <http://www.niaaa.nih.gov/FAQs/General-English/FAQ7.htm> (last visited May 28, 2006).

²⁴Telephone interview by Kathiann M. Kowalski with Steven Freeman, Legal Director, Anti-Defamation League, in New York, NY (Dec. 2, 2003) (on file with author).

²⁵See *Constitutional Role of Faith-Based Organizations in Competitions for Fed. Social Service Funds: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 46-47, 54-55 (2001), available at <http://judiciary.house.gov/media/pdfs/printers/107th/72981.pdf> [hereinafter *Hearing*] (comments of Rep. Jerrold Nadler, Ranking Member, House Subcomm. on the Constitution, and Rep. Barney Frank, Member, House Subcomm. on the Constitution).

²⁶See *id.* at 42 (comment of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution, and testimony of Mr. Ira C. Lupu, Louis Harkey Mayo Research Professor of Law, The George Washington School of Law).

²⁷To the contrary—spiritual help has been instrumental in achieving sobriety for millions of people worldwide. See, e.g., Kawanza L. Griffin et al., *Faith Can Help Fight Drug Abuse, Study Suggests; Research Says the Religious are Less Likely to Drink, Use Illicit Substances*, MILWAUKEE J. SENTINEL, Nov. 17, 2001, at 01B, available at <http://www.jsonline.com/lifestyle/religion/nov01/drugs17111601.asp>. The current membership of Alcoholics Anonymous alone is presently estimated at over two million. Alcoholics Anonymous: A.A. at a Glance, http://www.aa.org/en_information_aa.cfm?PageID=10 (last visited May 28, 2006).

²⁸For what it’s worth, your author believes they are, in fact, quite effective.

²⁹In the highest courts at which the issue has been decided, twelve-step treatment programs and groups (i.e., A.A., N.A., C.A., etc.) have been determined to be religious activities that the State cannot legally compel individuals to attend. In other words, requiring participation in a twelve-step group is an establishment of religion prohibited by the First Amendment. See, e.g., *Rausser v. Horn*, 241 F.3d 330, 332-33 (3d Cir. 2001) (holding that A.A./N.A. parole requirements violate the Establishment Clause as a matter of law); *Warner v. Orange County Dep’t of Prob.*, 173 F.3d 120 (2d Cir. 1999) (requiring A.A. meeting attendance as a condition of probation is unconstitutional); *Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996) (holding prison policy unconstitutional where nonattendance at N.A. meetings is penalized with a higher security risk classification and parole eligibility is negatively affected); *Turner v. Hickman*, 342 F. Supp. 2d 887, 895-97 (E.D. Cal. 2004) (holding that

otherwise religiously-based residential treatment centers violates the Establishment Clause guarantee. Specifically, such centers regulate the offenders' beliefs and compel them to affirm whatever tenets are professed at the individual treatment center. Moreover, a court's subsequent act of threatening or actually imposing criminal sanctions upon offenders for refusing to complete such treatment programs constitutes punishment for refusing to be religiously indoctrinated by a program mandated by the state. Regulations currently imposed upon federally funded faith-based treatment centers³⁰ adequately safeguard offenders' First Amendment rights in these respects, but those regulations must be made applicable to all treatment centers that accept offenders from any court across the country.³¹

parole eligibility conditioned upon N.A. participation is unconstitutional); *Ross v. Keelings*, 2 F. Supp. 2d 810, 817-18 (E.D. Va. 1998) (applying the "per se rule adopted by the Second and Seventh Circuits" in *Warner and Kerr*); *Griffin v. Coughlin*, 673 N.E.2d 98, 106 (N.Y. Ct. App. 1996) (holding that family visitation privileges cannot be withheld for failure to attend twelve-step-based group); *Evans v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 483-84 (Tenn. 1997) (holding that parole eligibility conditioned upon A.A. participation is unconstitutional). *But see* *Boyd v. Coughlin*, 914 F. Supp. 828, 833 (N.D.N.Y. 1996) ("A.A. . . . references to a 'God' or 'higher power' . . . do not reflect any concept of organized religion, but rather, reflect a belief that some form of spirituality is necessary to recovery. [Because no] controlling decision . . . equates spirituality with religion, [there is no violation of] the First Amendment."); *Feasel v. Willis*, 904 F. Supp. 582, 583 (N.D. Tex. 1995) (requiring A.A. participation during imprisonment is permissible because there is no established legal principle that A.A. is a forced indoctrination of religion); *O'Connor v. California*, 855 F. Supp. 303, 304 (C.D. Cal. 1994) (holding that required self-help program attendance for persons convicted of drunk driving, where A.A. is the principal program available, does not violate the Establishment Clause). The United States Supreme Court has yet to rule on this critical issue, and it has passed up several opportunities to do so in the above-cited cases. For excellent discussions on this topic, see Max Dehn, *How it Works: Sobriety, Sentencing, the Constitution, and Alcoholics Anonymous—A Perspective from AA's Founding Community*, 10 MICH. ST. U. J. MED. & L. 255 (2006); Byron K. Henry, Note & Comment, In "A Higher Power" We Trust: *Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443 (1997); Michael G. Honeymar, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does it Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437 (1997).

³⁰Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants and/or Projects for Assistance in Transition from Homelessness Grants, 42 C.F.R. §§ 54.1-13 (2006); Charitable Choice Regulations Applicable to States, Local Governments, and Religious Organizations Receiving Discretionary Funding Under Title V of the Public Health Service Act, 42 U.S.C. §§ 290aa, et seq., for Substance Abuse Prevention and Treatment Services, 42 C.F.R. §§ 54a.1-13 (2006).

³¹To illustrate, St. Christopher's Halfway House, <http://www.stchris-br.com> (last visited May 28, 2006), in Baton Rouge, La., is a twelve-step-based treatment facility, costing \$3,000 per month. It receives no governmental aid, but does contract with the local drug court for client referrals. Although not anywhere close to being as pervasively religious as an institution as Christian Outreach, St. Christopher's use of the twelve-step approach is sufficient to subject it to Establishment Clause scrutiny. See cases cited *supra* note 29. Although St. Christopher's is actually eligible to receive governmental aid, its administrators have chosen not to pursue that avenue, because doing so would mean they might have to alter their treatment approach to conform to the Charitable Choice regulations currently applicable only to federally funded treatment centers. See C.F.R. sections cited *supra* note 30; Telephone interview with Preston W. Elder, Board-Certified Substance Abuse and Addiction Counselor

Genesee County's drug court is one of over 1,600 similar specialty courts across the country that aim to stop the substance abuse presumed to be a root cause of much criminal activity.³² Drug courts generally require a defendant to plead guilty to the criminal charge, or the court defers the charge pending treatment.³³ In exchange for successfully completing a treatment regimen, such as attending twelve-step meetings, providing urinalysis samples, and reporting frequently³⁴ to the court or a probation officer for a period of time (usually around twelve to eighteen months),³⁵ the court usually dismisses the original charge or sets aside the sentence.³⁶

When an offender falls short of meeting his or her obligations under the drug court agreement, the judge has the discretion to order the offender into residential treatment.³⁷ The treatment programs into which these offenders are ordered vary widely.³⁸ The vast majority, however, employ a twelve-step treatment method or are faith-based to at least some extent.³⁹ Many offenders do not object to such programs, especially where they are consistent with the defendant's own religious traditions.⁴⁰

& Program Director, St. Christopher's Halfway House (Jan. 31, 2006) [hereinafter Interview with Preston W. Elder]. This Note argues that, at a minimum, institutions like St. Christopher's should be made to comply with those regulations. That is, regardless of whether a facility receives governmental aid, the fact that a facility accepts drug court clients sentenced to residential treatment is sufficient to mandate that residents' First Amendment rights be protected.

³²Criminal Justice Policy Coalition, Mental Health and Drug Court, http://www.cjpc.org/hocr_menhealth_drugcourts.htm (last visited May 28, 2006); see also Donald P. Lay, *Rehab Justice*, N.Y. TIMES, Nov. 18, 2004, at A2.

³³Emily M. Gallas, Comment, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U. L. REV. 1063, 1069 (2004).

³⁴Depending on their progress, offenders may be required to report as often as every week or as rarely as every month. Telephone interview with Jesslyn Wilson, Co-director, Greater Cleveland Drug Court Program (Jan. 23, 2006) [hereinafter Interview with Jesslyn Wilson].

³⁵JOHN S. GOLDKAMP, MICHAEL D. WHITE, & JENNIFER B. ROBINSON, AN HONEST CHANCE: PERSPECTIVES ON DRUG COURTS (2002), available at <http://www.ncjrs.org/html/bja/honestchance/index.html> (follow "Court Responses" hyperlink).

³⁶Gallas, *supra* note 33, at 1069.

³⁷*Id.* at 1069-70. Sentencing offenders to substance abuse treatment facilities and twelve-step group meetings is not unique to drug courts; regular criminal courts occasionally engage in such sentencing practices in a variety of situations (e.g., domestic violence cases and probation or parole violations). JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 148 (2001); Interview with Jesslyn Wilson, *supra* note 34. The vast majority of treatment referrals, however, come from drug courts. *Id.*

³⁸Jeffrey A. Eisenach & Andrew J. Cowin, The Heritage Foundation, The Case Against More Funds for Drug Treatment (May 17, 1991), <http://heritage.org/Research/Budget/BG829.cfm>.

³⁹STANTON PEELE, CHARLES BUFE, & ARCHIE BRODSKY, RESISTING TWELVE-STEP COERCION: HOW TO FIGHT FORCED PARTICIPATION IN AA, NA, OR 12-STEP TREATMENT 22 (2000). "A large, recent survey of alcohol treatment providers reported that 93% of the 450 facilities it surveyed utilized the twelve-step approach." *Id.*

⁴⁰See Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 787 (1998).

For others who do not share those beliefs or who seek a secular solution to their substance abuse, however, such sentencing practices present a legal dilemma, especially for indigent defendants who cannot afford alternative treatment facilities.⁴¹ Usually offenders are given some degree of choice with regard to the program they will ultimately enter.⁴² However, Hanas had no funds to pay for treatment.⁴³ Christian Outreach was available free of charge, and, as such, it was the only option the judge presented to him.⁴⁴

This Note analyzes the constitutionality of ordering an offender into a long-term residential twelve-step or otherwise faith-based alcohol and drug rehabilitation program, regardless of whether the offender objects to the religious nature of the program. Part II reviews the history of America's drug courts and their affiliated rehabilitation centers and offers the reader a glimpse inside a typical facility. Part III presents an introductory overview of the Free Exercise and Establishment Clauses, the constitutional passages most often implicated in cases dealing with twelve-step or faith-based treatment centers. Special attention is given to the Establishment Clause and the various tests the Supreme Court uses to adjudicate church-and-state matters. Part IV examines the several recent cases dealing with faith-based treatment centers. Part V offers some practical suggestions on how drug courts may properly direct offenders into residential treatment while complying with constitutional mandates.

II. THE INTERACTION BETWEEN DRUG COURTS AND TREATMENT CENTERS

A. *The History and Efficacy of Drug Courts in the United States*

At their most fundamental level, drug courts offer offenders the option of court-monitored substance abuse treatment as an alternative to the normal adjudicative process.⁴⁵ These specialty courts combine the close supervision and structure of the judicial process with the resources of substance abuse treatment services.⁴⁶ Today's drug courts owe their existence primarily to the crack-cocaine epidemic of the 1980s

⁴¹As one court-ordered treatment center resident expressed herself, "I find it unconscionable that the criminal justice system has the power to coerce American citizens to accept ideas that are anathema to them." PEELE ET AL., *supra* note 39, at 42.

⁴²Gallas, *supra* note 33, at 1083-84.

⁴³Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 2.

⁴⁴*Id.* At Hanas's hearing, the only program suggested as having space available was the Inner City Christian Outreach Residential Program. *Id.* Judge Ransom subsequently explained that, although other residential programs might have been available, they all charged fees that Hanas could not afford: "He could get into [Christian Outreach] without any money. There were other options, but he didn't have any money. He couldn't pay—he couldn't pay the fee. One of the programs is a \$300 fee. He couldn't come up with the \$300." *Id.* at 2 n.1.

⁴⁵NOLAN, *supra* note 37, at 39.

⁴⁶*See generally* Gallas, *supra* note 33, at 1067-72; Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, SENT'G & CORRECTIONS: ISSUES FOR 21ST CENTURY, May 2000, at 1-7, available at <http://www.ncjrs.org/pdffiles1/nij/181412.pdf> (published by the U.S. Dep't of Justice, Office of Justice Programs and National Institute of Justice).

that flooded the nation's courts, jails, and prisons.⁴⁷ The first drug court emerged in Dade County, Florida in 1989 and emphasized "drug treatment, responsibility, and accountability."⁴⁸ The judicially led grassroots movement first spread to California and then across the nation, and it has since turned international.⁴⁹

Drug courts fundamentally alter the traditional adjudicative process as well as the relationships among the typical actors.⁵⁰ Attorneys no longer operate within an adversarial context.⁵¹ Rather, both the prosecuting and defense lawyers are expected to work together in a "team approach."⁵² Defendants (usually referred to as "clients" of the drug court) often address the judge directly rather than through their attorneys.⁵³ Sometimes, the lawyers do not even appear in court.⁵⁴

Despite a lack of uniform national standards and practices for drug courts, numerous studies indicate lower recidivism and greater success with sobriety for drug court participants compared with similar offenders who proceed through the normal criminal adjudicative process.⁵⁵ Drug court graduates are also much more likely to secure employment,⁵⁶ and female participants are more likely to give birth

⁴⁷Andrew Armstrong, Comment, *Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133, 139 (2003); see also NOLAN, *supra* note 37, at 44, 46. As one drug court judge explains, "Drug offenders were being repeatedly recycled through the criminal justice system—a system, as the judges see it, that did nothing to rehabilitate offenders of their root problem. What we were doing before simply was not working." *Id.* at 106.

⁴⁸Gallas, *supra* note 33, at 1067.

⁴⁹UNITED NATIONS OFFICE ON DRUGS AND CRIME, DRUG TREATMENT COURTS WORK! (2005), available at http://www.unodc.org/pdf/cnd_dtc_flyer.pdf; OFFICE OF JUSTICE PROGRAMS, DRUG COURTS PROGRAM OFFICE, FACT SHEET (1995), available at <http://www.ncjrs.gov/pdffiles/drugfact.pdf>.

⁵⁰NOLAN, *supra* note 37, at 79.

⁵¹*Id.* at 72. As one drug court judge observed, "There is little or no place for the normal adversarial lawyer in [the drug court] context." *Id.* The radically redefined roles among the actors have led to problems in implementing drug courts in several jurisdictions, but are typically overcome through experience. *Id.*

⁵²*Id.* at 72. Some observers fear that the absence of the traditional defense role may imperil defendants' rights or put them at a disadvantage in future cases. *Id.*

⁵³*Id.*

⁵⁴*Id.* at 40.

⁵⁵Across numerous studies, drug court participants consistently recidivate at lower rates than offenders who proceed through the normal criminal adjudicative process. For a small sampling of such studies, see National Drug Court Institute, Drug Court Research, <http://www.ndci.org/research.html> (last visited May 28, 2006); see also NOLAN, *supra* note 37, at 128-30; STEVEN BELENKO, THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW: 2001 UPDATE (2001), available at <http://www.drugpolicy.org/docUploads/2001drugcourts.pdf>.

⁵⁶Press Release, Judicial Council of California, New Report Shows Drug Courts Are Cost-Effective, Help Rebuild Lives (Apr. 15, 2003), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR26-03.HTM>.

to drug-free babies.⁵⁷ Besides achieving their social goals, drug courts have also been found to be cost-effective alternatives to incarceration.⁵⁸

B. Procedural Matters Related to Drug Courts

Most jurisdictions employ a two-step screening process shortly after arrest to determine if an offender is eligible for drug court.⁵⁹ The first step involves a judicial screening to determine if the arrestee meets the eligibility requirements set by the court.⁶⁰ Eligibility criteria include factors such as criminal history, severity of chemical dependency, and gravity of the current criminal charge.⁶¹ Violent or repeat offenders and high-level traffickers are routinely excluded from drug courts.⁶² Other precluding factors include gang membership, multiple concurrent charges, additional pending cases, and out-of-county residence.⁶³ The second part of the screening process involves a clinical assessment to determine if the arrestee actually has an addiction or substance abuse problem that is likely to benefit from treatment.⁶⁴

Once an offender passes both steps and confirms his or her desire to enter the drug court docket, a written plan is drawn up with input from the judge, prosecutor, defense attorney, and other drug court personnel.⁶⁵ Typical agreements include numerous stipulations.⁶⁶ Among other things, the defendant usually must agree to submit to any rehabilitative treatment program as directed by the court.⁶⁷

⁵⁷*Id.*

⁵⁸*Id.* The California study discussed in this press release revealed that criminal justice costs that were avoided averaged approximately \$200,000 annually per court for each 100 participants. *Id.* Based on this data, with ninety adult drug courts operating statewide as of 2002 and an estimated 100 participants in each court annually, adult drug courts may be saving up to \$18 million every year in California's criminal justice system alone. *Id.* Notwithstanding the movement's apparent success, drug courts do have their detractors: "Drug courts are just the latest Band-Aid™ we have tried to apply over the deep wound of our schizophrenia about drugs," says Denver, Colorado Judge Morris B. Hoffman; "Drug courts themselves have become a kind of institutional narcotic upon which the entire criminal justice system is becoming increasingly dependent." Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1441, 1533 (2000).

⁵⁹Gallas, *supra* note 33, at 1070.

⁶⁰*Id.*

⁶¹*Id.*

⁶²John Feinblatt, Greg Berman, & Aubrey Fox, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 283 (2000).

⁶³NOLAN, *supra* note 37, at 41.

⁶⁴Gallas, *supra* note 33, at 1070-71.

⁶⁵Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003). Typically these personnel involve professionals who work in the substance abuse treatment field. *Id.*

⁶⁶Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1220 (2002); NOLAN, *supra* note 37, at 199. To view one such agreement, visit the web page of retired State of California Superior Court Judge Peggy Fulton Hora, <http://www.judgehora.com/contract.html> (last visited May 28, 2006). Judge Hora is a prominent figure in the drug court movement. Another agreement is available on Sebastian

Both outpatient and residential treatment services are available to the courts.⁶⁸ Over half of drug courts contract for treatment services with local community-based or private treatment organizations.⁶⁹ Another fourteen percent use county health departments for treatment purposes.⁷⁰ Approximately twenty percent of drug courts have obtained some form of supplementary private funding toward this end.⁷¹ Courts most often employ residential treatment facilities when offenders repeatedly fail to meet their responsibilities and obligations under the drug court agreement (e.g., multiple positive urinalysis screens).⁷² Residential treatment programs typically last anywhere from three months to one year.⁷³

County, Arkansas's web page, Sebastian County Online, [http://www.sebastiancountyonline.com/sebhome.nsf/25438994ffb303d688256b1a00669191/\\$FILE/Terms.pdf](http://www.sebastiancountyonline.com/sebhome.nsf/25438994ffb303d688256b1a00669191/$FILE/Terms.pdf) (last visited May 28, 2006). Of particular interest is condition #17:

The Defendant understands that he will not change, engage in, or pursue any new romantic or sexual relationship, romantically fraternize with any person in or outside of Drug Court, for a period of one year or longer, or upon completion of Drug Court mandated treatment care, whichever may come first.

Id. This proviso has its basis in twelve-step conventional wisdom that it is inadvisable to engage in intimate relationships during the first year of sobriety (or to make any significant life changes, for that matter—so, yes, there are “exceptions” for married newcomers, or for those already in committed relationships). A commonly heard gag around the “rooms of A.A.” is that “you can have all the sex you want during the first year of sobriety. After that, a partner can join in.” While your author has observed that this is generally sound advice, such a government-promulgated stipulation raises obvious constitutional (i.e., freedom of association) concerns regarding the permissible reach of drug courts.

⁶⁷Rosenblum, *supra* note 66, at 1234-35.

⁶⁸John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 935 (2000); PAUL M. ROMAN ET AL., NATIONAL TREATMENT CENTER STUDY SUMMARY REPORT: PUBLIC TREATMENT CENTERS 12 (2004), available at <http://www.uga.edu/ntcs/PB%20W4%20Summary%20Report.pdf> (“A comprehensive report detailing the findings of the first wave of on-site interviews with a nationally representative sample of publicly funded drug and alcohol treatment programs participating in the National Treatment Center Study conducted by the Institute for Behavioral Research, University of Georgia.”).

⁶⁹NOLAN, *supra* note 37, at 41.

⁷⁰*Id.*

⁷¹*Id.* at 97. A number of judges have engaged in private fundraising to benefit their drug courts. This has raised the eyebrows of some observers who question the propriety of privately funding such a basic governmental function as the judicial process. *Id.*

⁷²Rosenblum, *supra* note 66, at 1226-27. Other commonly imposed sanctions for not following the drug court treatment plan include the following: mandated increased participation in twelve-step groups, community service, a day or two of sitting in the jury box during drug court sessions, or short stints in the county jail (usually lasting several days to two weeks). NOLAN, *supra* note 37, at 40; Interview with Jesslyn Wilson, *supra* note 34. The first raises constitutional issues. See cases cited *supra* note 29.

⁷³Office of National Drug Control Policy, Executive Office of the President, Types of Treatment, <http://www.whitehousedrugpolicy.gov/treat/treatment.html> (last visited May 28, 2006). Some programs are as short as one month, see, e.g., The Right Step, Treatment Customized for You, <http://www.rightstep.com/index.php/programs/alcohol-treatment> (last

C. Day-to-Day Life at a Modern Substance Abuse Treatment Center

While it is impossible to generalize about the “average” experience inside a treatment center, some practices are prevalent enough to allow for discussion.⁷⁴ Early rising times and morning prayer or meditative readings are common.⁷⁵ Residents are typically required to either attend school or secure employment soon after taking up residence.⁷⁶ Twelve-step meeting quotas (usually between three and five per week) are enforced.⁷⁷ Center staff hold weekly individual counseling sessions and bi-weekly group meetings to discuss residents’ progress.⁷⁸ Isolation in one’s room is frowned upon, if not explicitly forbidden.⁷⁹

Strict rules and regulations are the norm,⁸⁰ and residents are monitored closely and held accountable for their actions.⁸¹ Questioning of, or resistance to, any of the

visited May 28, 2006), while others last as long as two years, *see, e.g.*, Cenikor, Recovery Services, <http://www.cenikor.org/content.aspx?cat=treatment&page=treatment> (last visited May 28, 2006).

⁷⁴Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see generally* PEELE ET AL., *supra* note 39, at 38-43. For an example of one treatment center’s handbook, including its rules, *see* TEEN RANCH, PRIVATE RESIDENTIAL CARE YOUTH AND PARENT HANDBOOK (2004), *available at* http://www.teenranch.com/youth_handbook.pdf. Teen Ranch was involved in a 2005 lawsuit primarily because it incorporated religious practices into its treatment approach. *See* discussion *infra* Part IV; *see also* sources cited, *supra* notes 31, 73 (treatment center web pages).

⁷⁵Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40.

⁷⁶Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31. Many treatment centers require residents without high school diplomas to earn a G.E.D. *Id.*

⁷⁷Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39-42; ROMAN ET AL., *supra* note 68, at 21. In this study, more than 64% of publicly funded substance abuse treatment centers reported that attendance at twelve-step meetings during the course of treatment is a requirement. *Id.*

⁷⁸Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39-40 & n.9. These “house meetings” are often of a confrontational nature. Author’s personal observations and conversations with individuals in recovery; *see also* PEELE ET AL., *supra* note 39, at 40 n.9.

⁷⁹Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40.

⁸⁰Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see generally* PEELE ET AL., *supra* note 39, at 38-43.

⁸¹Author’s personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40-41.

established rules leads to sanctions.⁸² These rules are often arbitrary and are imposed to break entrenched patterns of thinking.⁸³ Every resident is expected to be at all meals exactly on time and to actively participate in all scheduled events.⁸⁴ Telephone contact with the outside world is limited.⁸⁵

At many facilities, most groups, meetings, lectures, and meals begin and end with prayer.⁸⁶ A.A. or Narcotics Anonymous (N.A.)⁸⁷ members often visit and speak

⁸²Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40. Punishments might include having to wake up a half-hour earlier than normal (e.g., 6:00 a.m. instead of 6:30 a.m.), being assigned an unpopular cleaning duty, writing a lengthy paper, waiting to serve oneself food until the rest of the residents have received their meals, having one's telephone privileges revoked or restricted, being forced to remain silent for a day or more, and being prohibited from attending twelve-step meetings. Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40. The last sanction is particularly troubling to your author. For most treatment center residents, twelve-step meeting attendance is not a privilege, but is instead serious, meaningful therapy. Meeting attendance should not be withheld under any circumstances.

⁸³Author's personal observations and conversations with individuals in recovery; *see also* PEELE ET AL., *supra* note 39, at 40. For example, St. Christopher's Halfway House, *supra* note 31, enforces the following dietary restrictions on its residents: no caffeine, no sugar, no white bread (including pastas), and no potatoes. The stated rationale is that some alcoholics may crave sugars as their bodies adjust to the absence of alcohol or that some addicts may have done too much damage to their bodies with drugs to tolerate these foods well. Amy B. Beason, Nutritional Consultant, St. Christopher's Halfway House, Informal Address to Residents (Sept. 2002). Nonetheless, such restrictions appear arbitrary to residents who do not fall into those groups. One resident was overheard saying, "I came here to learn how to quit drinking—not how to eat like a diabetic." Author's personal observations and conversations with individuals in recovery. Another quipped, "I've never heard of anybody getting loaded off a loaf of Wonder®." *Id.* Especially during early recovery, one's thinking is often presumed to be "sick." For example, a resident who fails to meet his weekly A.A. meeting quota, saying he "felt fine," might be accused of having "stinkin' thinkin'" or be admonished, "That's your disease talking." Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31.

⁸⁴Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40-41.

⁸⁵Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40.

⁸⁶Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 40. The Serenity prayer and the Lord's prayer are hallmarks of the recovery field. Author's personal observations and conversations with individuals in recovery.

⁸⁷Narcotics Anonymous, <http://www.na.org> (last visited May 28, 2006). Other twelve-step organizations, such as Marijuana Anonymous, <http://www.marijuana-anonymous.org> (last visited May 28, 2006) (M.A.), and Cocaine Anonymous, <http://www.ca.org> (last visited May 28, 2006) (C.A.), also exist, as do others. All are modeled after A.A.

about their personal experiences.⁸⁸ Key personnel positions are frequently held by recovering alcoholics or addicts themselves.⁸⁹ Some are doctors, psychologists, nurses, and particularly, so-called substance abuse counselors, the latter possessing varying degrees of formal training.⁹⁰ During the course of the program, a resident

⁸⁸Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39-40. A.A. meetings are sometimes held within the institution itself, and local members and "graduates" of the facility often attend. Staff members are typically forbidden to attend these meetings so the residents may share honestly and openly without fear of reprisal. Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; ROMAN ET AL., *supra* note 68, at 21. Twelve-step meetings were held on-site at 59.7% of the publicly funded centers in the Roman study. *Id.*

⁸⁹Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39, 42; ROMAN ET AL., *supra* note 68, at 8. Twelve-step groups do not run treatment centers themselves because that would be against their traditions. A.A. discovered during its formative years (1935-1945) that

certain group attitudes and principles were particularly valuable in assuring survival of the informal structure of the Fellowship. In 1946, . . . these principles were reduced to writing by the founders and early members as the Twelve Traditions of Alcoholics Anonymous. . . .

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

Alcoholics Anonymous, A.A. Traditions, http://aa.org/en_information_aa.cfm?PageID=2&SubPage=52 (last visited May 28, 2006). "While the Twelve Traditions are not specifically binding on any group or groups, an overwhelming majority of members have adopted them as the basis for A.A.'s expanding 'internal' and public relationships." *Id.*

⁹⁰Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39,

typically completes the first four to five steps of A.A. or N.A.⁹¹ A prevalent philosophy is that institutional twelve-step treatment is merely an introduction to A.A. or N.A., where the real recovery should take place.⁹²

Life inside one of these facilities is not easy.⁹³ Nevertheless, many offenders opt into these programs as an alternative to prison.⁹⁴ Some observers have questioned whether certain common practices violate residents' rights.⁹⁵

42; ROMAN ET AL., *supra* note 68, at 8. According to the Roman study, over half (56.8%) of counselors at publicly funded treatment centers were certified substance abuse counselors. *Id.* at 9. In less than one-quarter of centers (23.9%) were all employed counselors certified, while fully 6.8% of centers employed no certified substance abuse counselors. *Id.*

⁹¹Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 39. The twelve steps of A.A. are as follows:

1. We admitted we were powerless over alcohol—that our lives had 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 had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take 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 the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

ALCOHOLICS ANONYMOUS 59-60 (4th ed. 2001) (1939), *available at* http://www.aa.org/bigbookonline/en_tableofcnt.cfm (follow "5 How It Works" hyperlink) (commonly referred to as the "Big Book").

⁹²Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see also* PEELE ET AL., *supra* note 39, at 38-43. A commonly heard clever maxim goes, "Treatment is for discovery; A.A. is for recovery." Author's personal observations and conversations with individuals in recovery.

⁹³Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31; *see generally* PEELE ET AL., *supra* note 39, at 38-43.

⁹⁴Author's personal observations and conversations with individuals in recovery; *see also* PEELE ET AL., *supra* note 39, at 107.

⁹⁵*See, e.g.*, PEELE ET AL., *supra* note 39.

III. ESTABLISHMENT AND FREE EXERCISE CLAUSE JURISPRUDENCE

A. Introduction to the "Religion Clauses"

The first provision of the First Amendment⁹⁶ has traditionally been split into the Establishment⁹⁷ and Free Exercise⁹⁸ Clauses for purposes of analysis. Each clause represents a separate guarantee.⁹⁹ "The Establishment Clause is a restriction on government that prevents the founding of a state or national religion, the endorsement of any one religion over another, and the preference of religion over secularism."¹⁰⁰ It prohibits "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."¹⁰¹

The Free Exercise Clause is "a guarantee of the people's right to practice any religion they choose without governmental interference or consequence."¹⁰² It means "first and foremost, the right to believe and profess whatever religious doctrine one desires."¹⁰³ It also prohibits the government from punishing people on the basis of their religious views or religious status.¹⁰⁴ Furthermore, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."¹⁰⁵

The two Clauses "are frequently in tension."¹⁰⁶ For example, "some people might suggest that providing a military chaplain for troops stationed overseas violates the Establishment Clause, while others might suggest that *failing to provide* a chaplain violates the Free Exercise Clause rights of the same troops."¹⁰⁷ The

⁹⁶"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

⁹⁷"Congress shall make no law respecting an establishment of religion . . ." *Id.* The Establishment Clause was expressly incorporated into the Fourteenth Amendment in 1947, thereby making it applicable to the states. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

⁹⁸"Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The Free Exercise Clause was expressly incorporated into the Fourteenth Amendment, thereby making it applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁹⁹Douglas Roy, Note, *Doin' Time in God's House: Why Faith-Based Rehabilitation Programs Violate the Establishment Clause*, 78 S. CAL. L. REV. 795, 806 (2005).

¹⁰⁰*Id.*

¹⁰¹*Everson*, 330 U.S. at 15-16.

¹⁰²ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1200 (2d ed. 2002).

¹⁰³*Employment Div. v. Smith*, 494 U.S. 872, 876-77 (1990).

¹⁰⁴*Id.*

¹⁰⁵*Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

¹⁰⁶*Locke v. Davey*, 540 U.S. 712, 718 (2004).

¹⁰⁷Doug Linder, *Exploring Constitutional Conflicts: Introduction to the Establishment Clause*, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/estabinto.htm> (last visited

tension stems from a fundamental opposition: the Establishment Clause requires governmental neutrality, and the Free Exercise Clause demands that the government accommodate some religious practices.¹⁰⁸ As Justice Douglas noted in 1961, “The reverse side of an ‘establishment’ is a burden on the ‘free exercise’ of religion.”¹⁰⁹ “The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”¹¹⁰ Yet the Court has long said that “there is room for play in the joints” between the two clauses.¹¹¹ In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. Governmental funding of faith-based treatment centers falls into just such a category.¹¹²

Sometimes, as in *Hanas’s* case, it can be difficult to discern among all the egregious conduct just which of the Clauses is being violated. In addition to being in tension with each other, the two Clauses also overlap at times:¹¹³

Courts and commentators often refer to these as two separate religion clauses—nonestablishment and free exercise—and analyze cases as falling under one clause or the other. But other commentators argue that the two clauses must be read in light of each other rather than in isolation, to harmonize rather than conflict; after all, the clauses were enacted simultaneously as a single statement about church and state.¹¹⁴

Successful Free Exercise claims are rare.¹¹⁵ To run afoul of the Free Exercise Clause, government action must rise to such a level that an individual is affirmatively prevented from practicing his or her own religion.¹¹⁶ As Justice Kennedy observed in a 1993 case, “The principle that government may not enact laws that suppress religious belief or practice is so well-understood that few violations are recorded in our opinions.”¹¹⁷

May 28, 2006). In *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985), a federal court of appeals ruled that paid military chaplains do not violate the Establishment Clause.

¹⁰⁸See discussion *infra* Part IV.

¹⁰⁹*McGowan v. Maryland*, 366 U.S. 420, 578 (1961) (Douglas, J., dissenting).

¹¹⁰*Waltz v. Tax Comm’n*, 397 U.S. 664, 668-69 (1970).

¹¹¹*Id.* at 669.

¹¹²See generally *Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005).

¹¹³Perhaps this is why they are so often simply referred to as the “Religion Clauses” in tandem or, simply, “First Amendment rights” in case law and scholarly literature.

¹¹⁴THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 5-6 (1998).

¹¹⁵See Supryia M. Ray, *Paternalism, Hostility, and Concern for the Slippery Slope: Factors in Judicial Decision-Making When Religion and Regulation Collide*, <http://leda.law.harvard.edu/leda/data/184/sray.html> (last visited May 28, 2006) (Part II. Overview).

¹¹⁶See MARGARET C. JASPER, *RELIGION AND THE LAW* 3 (1998).

¹¹⁷*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Thus, those actions attributable to the government that directly interfere with an individual's ability to practice his own religion fall under the Free Exercise Clause. Other activities—even those closely related, such as coercion to follow a specific religion or religion in general—fall under the Establishment Clause. Therefore, absent the (hopefully) extremely rare conduct displayed in Hanas's case, most legal actions involving mandatory faith-based substance abuse treatment will implicate the Establishment Clause as opposed to the Free Exercise Clause. Furthermore, the vast majority of Free Exercise cases deal with questions different, at least in their formulation and emphasis, from the issue here.¹¹⁸ Therefore, while it is possible for faith-based treatment to violate the Free Exercise Clause in extreme circumstances, the balance of this Note will focus on violation of the Establishment Clause in these situations.

B. Modern Establishment Clause Jurisprudence

Since the Supreme Court began modern Establishment Clause interpretation back in 1947 with *Everson v. Board of Education*,¹¹⁹ four different and (at times) conflicting views regarding the Establishment Clause have emerged: (1) separation, (2) coercion, (3) endorsement, and (4) neutrality.¹²⁰ Tests unique to each of these views have also developed.¹²¹ Each of the approaches reflect different values regarding the relationship between church and state. The Court continues to waver between these different values. For a number of years, it gave primary attention to separation; but more recently, it has emphasized equality and choice more frequently in accordance with the neutrality test.¹²² Despite this trend toward neutrality, however, Establishment Clause jurisprudence ultimately remains unsettled as Justices form shifting majorities around one or another of the four views.¹²³

1. Separation

Some people believe that there should be no relationship at all between religion and government and advocate the so-called "wall of separation" between church and state. This "separationist" view developed directly from *Everson*¹²⁴ and has evolved into what is today commonly referred to as the *Lemon/Agostini* test. The *Lemon/Agostini* test was first expressed in three parts as the *Lemon* test in 1973 in

¹¹⁸See generally Thomas Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 307 (Edwin Meese III et al. eds., 2005).

¹¹⁹*Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹²⁰See generally John Baker, *Establishment of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 118, at 302; see also First Amendment Center, Religious Liberty in Public Life: Establishment Clause, http://www.firstamendmentcenter.org/rel_liberty/establishment/index.aspx (last visited May 28, 2006).

¹²¹See generally Baker, *supra* note 120; see also First Amendment Center, *supra* note 120.

¹²²BERG, *supra* note 114, at 158.

¹²³Baker, *supra* note 120, at 306.

¹²⁴*Everson*, 330 U.S. at 16. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

Lemon v. Kurtzman,¹²⁵ and modified to a two-pronged inquiry articulated in *Agostini v. Felton*¹²⁶ in 1997. The *Lemon/Agostini* test asks whether (1) the state action was undertaken with the intent of impacting religion and (2) whether the primary effect of the state action is to advance or inhibit religion.¹²⁷

To determine whether a primary effect of the state action advances or inhibits religion, courts examine three factors: (1) the presence of religious indoctrination attributable to the government, (2) the definition of government aid recipients by reference to religion, and (3) the creation of excessive entanglement between government and religion.¹²⁸ The Supreme Court has recently departed somewhat from its reliance upon the *Lemon/Agostini* test.¹²⁹ Nevertheless, it remains at the forefront of Establishment Clause analysis in lower courts¹³⁰ and has been used to analyze the recent cases on treatment centers that will be examined in the next section.

Several Justices, as well as many legal commentators, became dissatisfied with this test.¹³¹ Among other things, the test was seen as hostile to religious exercise and to historic traditions of religious involvement in public life.¹³² While the Court has not officially rejected the test, it has increasingly looked to alternatives.¹³³

2. Coercion

While some groups want strict separation between church and state, others feel government should be more accommodating to religion. If the first group is referred to as “separationists,” the latter may be called “accommodationists.”¹³⁴ Accommodationists believe a “wall of separation” “is neither practical nor desirable.”¹³⁵ With the Establishment Clause, “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. [T]he line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular

¹²⁵*Lemon v. Kurtzman*, 411 U.S. 192 (1973).

¹²⁶*Agostini v. Felton*, 521 U.S. 203 (1997).

¹²⁷*Id.*; see also Dehn, *supra* note 29, at 287.

¹²⁸*Agostini*, 521 U.S. at 218.

¹²⁹Baker, *supra* note 120, at 304. “A major historical challenge to the separationist position emerged in the dissent written by (then) Justice William H. Rehnquist in *Wallace v. Jaffree* in 1985. Rehnquist argued that the original meaning of the Establishment of Religion Clause only ‘forbade establishment of a national religion, and forbade preference among religious sects or denominations.’” *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985)).

¹³⁰See discussion *infra* Part IV.

¹³¹BERG, *supra* note 114, at 29.

¹³²*Id.* at 29-30.

¹³³See discussion *infra* Part IV.

¹³⁴KATHIANN M. KOWALSKI, *LEMON V. KURTZMAN AND THE SEPARATION OF CHURCH AND STATE DEBATE* 91 (2005); see also Baker, *supra* note 120, at 305.

¹³⁵KOWALSKI, *supra* note 134, at 45.

relationship.”¹³⁶ The “wall of separation” metaphor “is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”¹³⁷

Accommodationists propose allowing more government support for religion than the *Lemon/Agostini* test allows. They support the adoption of the “coercion test” outlined by Justice Anthony Kennedy in his dissent in *County of Allegheny v. ACLU*.¹³⁸ Under this test, the government does not violate the Establishment Clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church or (2) coerces people to support or participate in religion against their will.¹³⁹ Justice Scalia is a chief proponent of the coercion test, and has argued that the Establishment Clause should be limited to coercion “by force of law [or] threat of penalty.”¹⁴⁰ Early cases using this test focused on the critical distinction between “direct” and “indirect” aid and what constitutes each.¹⁴¹ More recent cases have recognized that all governmental aid is in some way fungible (i.e., if a religious school receives free math texts from the state, then the money the school would have spent on secular texts can now be spent on religious material).¹⁴² This realization refocused the Court’s attention on who received and controlled the aid, versus the specific type of aid that was provided.¹⁴³ Courts also examined whether the aid was the result of a “true, private choice” of the beneficiary (for purposes of this Note, a criminal offender sentenced to treatment).¹⁴⁴ If a beneficiary freely chose a faith-based treatment center at which to serve his sentence, that independent choice effectively acted as a “circuit breaker” between the funds and the government, since any indoctrination would not be attributed to the state, but rather, to the individual’s election to attend that particular facility.¹⁴⁵ Thus, the beneficiary’s choice achieved a greater symbolic separation between church and state by interposing the action of a private citizen.

The Seventh Circuit developed its own coercion test in 1996 in *Kerr v. Farrey*,¹⁴⁶ where a prison inmate was required to participate specifically in N.A. to gain parole eligibility. The court propounded a simple three-part inquiry: (1) Has the state acted,

¹³⁶*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (citation omitted); *see also* N.Y. State Employment Relations Bd. v. Christ the King Reg’l High Sch., 682 N.E.2d 960, 965 (N.Y. 1997).

¹³⁷KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1583 (15th ed. 2004).

¹³⁸*County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹³⁹First Amendment Center, *supra* note 120.

¹⁴⁰*Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis omitted).

¹⁴¹*See* discussion *infra* Part IV.

¹⁴²First Amendment Center, *supra* note 120.

¹⁴³*Id.*

¹⁴⁴*See* discussion *infra* Part IV.

¹⁴⁵*See, e.g., Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 834 (W.D. Mich. 2005).

¹⁴⁶*Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

(2) Does the action amount to coercion, (3) If so, is the object of the coercion religious or secular?¹⁴⁷ Courts usually infer coercion where a defendant is required to choose between incarceration or loss of privilege and participation in twelve-step groups.¹⁴⁸ In effect, the inherent negative consequences of refusing to participate in the twelve-step group eliminates the presence of “true, private choice.”¹⁴⁹

Aside from lingering separationist hostility to the coercion test, opponents of the test argue that to limit the Establishment Clause to cases of coercion would render the Clause redundant, since the Free Exercise Clause already prohibits government from forcing anyone to practice or not practice a religion.¹⁵⁰ Nevertheless, the coercion test has gained support from several justices¹⁵¹ and has been used in a variety of contexts in recent cases.¹⁵² Moreover, if courts are more likely to consider challenges under the Establishment Clause, the coercion test analysis offers another way to protect the Free Exercise rights of defendants referred to treatment centers.

3. Endorsement

The Supreme Court has made clear since its 1947 decision in *Everson v. Board of Education*¹⁵³ that the First Amendment requires that the state be neutral in its relations with groups of religious believers and non-believers.¹⁵⁴ This philosophy is reflected in Justice Sandra Day O’Connor’s endorsement test.

Government cannot favor certain religions over others.¹⁵⁵ Reflective of this policy, Justice O’Connor developed the endorsement test as an alternative to both the strict separationist view (usually represented by the *Lemon/Agostini* test), and the “no coercion” principle (reflected in the coercion test).¹⁵⁶ The endorsement test forbids government from sending a message that religious beliefs are endorsed or

¹⁴⁷*Id.* at 479.

¹⁴⁸Dehn, *supra* note 29, at 291.

¹⁴⁹*Id.*

¹⁵⁰BERG, *supra* note 114, at 33. This is one example of how the two Clauses can overlap; apparently, coercing someone to follow a specific religion, or religion in general, can fall under either of the two Clauses.

¹⁵¹Justices using the coercion test in their opinions—or who have joined such opinions—include Scalia, Kennedy, Blackmun, White, Stevens, and O’Connor. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989). Different results have been reached by different justices when applying the test, however. *See, e.g.,* Lee, 505 U.S. at 599. Justices Blackmun, Stevens, and O’Connor expressed in their *Lee* concurrence that, although proof of government coercion is sufficient to prove a violation of the Establishment Clause, government endorsement or sponsorship of religion and the government’s active involvement in religion are similarly prohibited, regardless of whether citizens are coerced to conform. *Id.*

¹⁵²*See* cases cited *supra* note 29; *see also* discussion *infra* Part IV.

¹⁵³*Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹⁵⁴*Id.* at 18.

¹⁵⁵*McCreary County v. ACLU*, 125 S. Ct. 2722, 2742 (2005).

¹⁵⁶*Baker, supra* note 120, at 305.

opposed by the government and asks whether an objective, reasonable observer would see the state action as sending “a message to nonadherents that they are . . . not full members of the political community.”¹⁵⁷

O’Connor’s endorsement test has increasingly been subsumed into the *Lemon/Agostini* test in the lower courts.¹⁵⁸ Judges have simply incorporated it into the first two prongs of *Lemon/Agostini* by asking if the challenged government act has the purpose or effect of advancing *or endorsing* religion.¹⁵⁹ The endorsement test is most often invoked in situations where the government is engaged in expressive activities.¹⁶⁰ Therefore, cases involving such issues as graduation prayers, religious displays on government property, and religion in the curriculum will usually be examined in light of this test.¹⁶¹ However, the endorsement test has also been used, in addition to the *Lemon/Agostini* and coercion tests, in faith-based treatment facility cases.¹⁶²

4. Neutrality

Finally, recent Establishment Clause decisions have increasingly focused on a test of “neutrality.” This test has been especially visible in decisions upholding various forms of government aid provided to religious organizations as long as such aid is provided equally to comparable organizations.¹⁶³ Sometimes the interests of government and those of religious groups incidentally coincide. Such is the case with religiously run hospitals, childcare centers, homeless shelters, schools, and addiction treatment centers. Justice Brennan observed back in 1987 that what the government characterizes as social services, religious organizations view as the fulfillment of duty, as service in grateful response to unmerited favor, as good works that give definition and focus to the community, and as a visible witness and example to society.¹⁶⁴

Although neutrality was noted as a guiding principle in *Everson*, it takes on a different meaning in the modern neutrality test. Today, neutrality means evenhandedness in terms of who may receive aid.¹⁶⁵ Under this test, the government must treat religious groups the same as other similarly situated groups:

[I]n commanding neutrality, the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is

¹⁵⁷Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

¹⁵⁸See cases cited *supra* note 29; see also discussion *infra* Part IV.

¹⁵⁹See cases cited *supra* note 29; see also discussion *infra* Part IV.

¹⁶⁰First Amendment Center, *supra* note 120.

¹⁶¹*Id.*

¹⁶²See discussion *infra* Part IV.

¹⁶³BERG, *supra* note 114, at 34.

¹⁶⁴See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342-44 (Brennan, J., concurring).

¹⁶⁵See *Zelman v. Simmons-Harris*, 536 U.S. 639, 696 (2002).

“ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’”¹⁶⁶

In 1996, Congress adopted this philosophy by enacting Charitable Choice.¹⁶⁷

a. Charitable Choice and Faith-Based Substance Abuse Treatment Centers

Charitable Choice began its role in federal law as part of a welfare reform act, and it was expanded to include substance abuse treatment in 2000.¹⁶⁸ The provision allows religious groups access to federal funds without having to establish a secular service-provider component.¹⁶⁹ Charitable Choice also allows religious groups to incorporate their religious messages into programs and to consider applicants’ religion in hiring practices.¹⁷⁰

Charitable Choice encourages states to involve community and faith-based organizations in providing federally funded services. With respect to treatment centers, Charitable Choice makes it possible for the government to contract with both religious and secular providers, as long as those providers offer effective help and follow certain rules about accountability and respect for clients:

Although religious organizations have been eligible to receive government aid under certain government programs for many years, [C]haritable [C]hoice is unique in that it does not require participating faith-based organizations to “secularize” themselves as a condition to receiving public funds. To the contrary, the [C]haritable [C]hoice statute allows publicly funded religious organizations to retain their religious character and to employ their religious faith in carrying out secular social service programs, as long as the programs are administered in conformance with the [E]stablishment [C]lause of the First Amendment.¹⁷¹

The legislative provisions contain explicit requirements: providers cannot discriminate against recipients on the basis of their religion or lack thereof; providers cannot force recipients to take part in religious activities such as worship, prayer, or

¹⁶⁶*Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994) (quoting *Amos*, 483 U.S. at 334).

¹⁶⁷Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604a (2006). Even prior to Charitable Choice, billions of governmental funds were spent on social services delivered through religious providers through contracts and grants. *Hearing, supra* note 25, at 9-10, 40-41 (prepared statements of Mr. Carl H. Esbeck, Senior Counsel to the Deputy Attorney General, United States Department of Justice, and Ira C. Lupo, Louis Harkey Mayo Research Professor of Law, The George Washington University School of Law).

¹⁶⁸*See* 42 U.S.C. §§ 290kk to kk-3 (2006).

¹⁶⁹The Center for Public Justice, *A Guide to Charitable Choice: Questions and Answers*, <http://www.cpjustice.org/charitablechoice/guide/qanda> (last visited May 28, 2006).

¹⁷⁰*Id.*

¹⁷¹*Freedom from Religion Found. v. McCallum*, 179 F. Supp. 2d 950, 982 (W.D. Wis. 2002), *judgment as a matter of law granted by* 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003).

Bible study; and the government must be prepared to offer a secular alternative if a recipient does not want to receive services from a religious provider.¹⁷² Charitable Choice has greatly expanded the breadth of service providers with which the government may contract.¹⁷³ The program has also relieved, to some extent, the degree of monitoring of providers required by the government, thereby effectively eliminating the risk of government's becoming "excessively entangled" in religious matters under the *Lemon/Agostini* test.¹⁷⁴ Government's primary concern (and the concern of taxpayers) is that the services be effective, that full secular value for the funding is realized, and that the rights of recipients be protected.¹⁷⁵

C. Summary of Advanced Establishment Clause Jurisprudence

Although the Supreme Court has struggled for more than a century to translate the few words comprising the Establishment Clause into concrete rules and doctrine, courts have "found [themselves] 'compelled' by 'candor' to 'acknowledge[] that [it] can only dimly perceive the boundaries of permissible government activity in this sensitive area.'"¹⁷⁶ The values reflected in each of the four approaches discussed above often clash, at least if each is pursued to its logical conclusion.¹⁷⁷ However, lower courts have successfully applied each test to various recent faith-based treatment decisions.¹⁷⁸

IV. THE TESTS AT WORK: FAITH-BASED TREATMENT CENTER CASE LAW

Establishment Clause cases dealing with treatment centers can be divided into two broad categories.¹⁷⁹ In the first group are those cases alleging government efforts to coerce someone to support or participate in religion or its exercise.¹⁸⁰ In these cases, "the essence of the complaint is that the state is somehow forcing a person who does not subscribe to the religious tenets at issue to support them or to participate in observing them."¹⁸¹ These cases are sometimes referred to as the

¹⁷²See 42 U.S.C. §§ 290kk to kk-3.

¹⁷³See generally Carl H. Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. ANN. SURV. AM. L. 17 (2000).

¹⁷⁴Most notably, government is no longer obligated to ensure that treatment center administrators are only spending the funds on approved (i.e., purely secular) activities. Because the degree of administrative oversight required is diminished to such a substantial extent, one would be hard-pressed to envision a Charitable-Choice-compliant facility that would fail the excessive entanglement prong of the *Lemon/Agostini* test.

¹⁷⁵See 42 U.S.C. §§ 290kk to kk-3; 42 C.F.R. §§ 54.1-.13, 54a.1-.13 (2006).

¹⁷⁶*Destefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001) (quoting *Mitchell v. Helms*, 530 U.S. 793, 807 (1971) (plurality opinion) (second and third alterations in original)).

¹⁷⁷BERG, *supra* note 114, at 22.

¹⁷⁸See discussion *infra* Part IV.

¹⁷⁹*Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996).

¹⁸⁰*Id.*

¹⁸¹*Id.*

“outsider” cases, where the state is imposing religion on an unwilling individual as an “outsider.”¹⁸² The second group of cases has inspired more controversy within the Supreme Court.¹⁸³ “These are the cases in which existing religious groups seek some benefit from the state, or in which the state wishes to confer a benefit on such a group (or groups).”¹⁸⁴ These are sometimes referred to as the “insider” cases, and they deal with how far the state may go in helping religious “insiders.”¹⁸⁵ While most cases fall neatly into one or the other of these two categories, cases dealing with mandatory faith-based substance abuse treatment fall into both when the offender objects to the sentence on religious grounds. Consequently, two legal questions are raised simultaneously: (1) May the state place an offender into a faith-based facility in the first place, and (2) May the government fund that same facility? In order to answer these questions, it is necessary to “plunge into the thicket”¹⁸⁶ of Establishment Clause case law in this area. When we emerge, we find that “yes” is the answer to the second question; “yes, but...” to the first.

Most cases in the substance abuse rehabilitation arena have addressed the constitutionality of court-mandated attendance at twelve-step meetings.¹⁸⁷ Although related in many important respects, cases dealing with governmentally funded faith-based treatment centers are fundamentally different from those cases. Twelve-step groups receive no governmental monetary support (and would refuse it, even if it were offered).¹⁸⁸ In contrast, the residential treatment facilities in these cases do receive such aid, either by federal or local government funding or through both mechanisms.¹⁸⁹ To date, the application of the indoctrination question contained in the “purpose and effect” prong of the *Lemon/Agostini* test has been reserved for instances where the state actually provides direct or indirect financial support to a religious organization that is furthering a permissible public objective.¹⁹⁰ A few

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Destefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 402 (2d Cir. 2001).

¹⁸⁷*See cases cited supra* note 29.

¹⁸⁸In fact, A.A. adheres to a strict policy of refusing donations from all but its members pursuant to its Seventh Tradition. *See supra* note 89. Attempted donations from nonmembers are politely returned with an explanation. Conversely, A.A. makes no donations to any outside organization or cause, “no matter how worthy.” A.A. GUIDELINES: FINANCE (2005), available at http://aa.org/en_pdfs/mg-15_finance.pdf. Even member contributions are capped at an annual amount. For years, the maximum allowable donation was \$1000, but that limit was recently doubled. The vast majority of members, however, come nowhere close to contributing this amount. Most devout A.A.s (as they are called) usually only put a dollar or two in the basket passed around at meetings. *Id.*; author’s personal observations and conversations with individuals in recovery. Members usually attend an average of two A.A. meetings per week. ALCOHOLICS ANONYMOUS, 2004 MEMBERSHIP SURVEY (2005), available at http://aa.org/en_pdfs/p-48_04survey.pdf.

¹⁸⁹ROMAN ET AL., *supra* note 68, at 27.

¹⁹⁰Dehn, *supra* note 29, at 293.

cases have dealt specifically with the issue of faith-based treatment centers and the Establishment Clause. Except for Hanas's case, however, all of them have been civil rights lawsuits.¹⁹¹

A. *Bausch v. Sumiec (2001)*¹⁹²

Bausch was the first Establishment Clause case to address substance abuse treatment centers, as opposed to court-mandated twelve-step meeting attendance. Relying on those recent twelve-step meeting attendance cases,¹⁹³ District Judge Adelman held that the state may "condition parole on participation in a religiously-oriented treatment alternative to revocation only if the religiously-oriented alternative is not 'the only choice available.'"¹⁹⁴ In other words, offenders may attend a religiously oriented treatment program if they so choose, but the state cannot compel it, and a meaningful¹⁹⁵ non-religious alternative must be offered regardless of whether the offender specifically requests it.

John Bausch was a former Wisconsin prisoner and parolee.¹⁹⁶ He brought this civil rights lawsuit against his former parole officer and the Wisconsin Department of Corrections alleging violations of the Establishment Clause by their compelling his participation in a religiously oriented substance abuse residential treatment program (Exodus House¹⁹⁷).¹⁹⁸ Bausch stated in an affidavit that he was an atheist and had objections to the religious nature of Exodus House, but he nevertheless participated in the program, believing it was the only way he could avoid having his parole revoked.¹⁹⁹

Judge Adelman applied a barrage of tests to the facts, including the original *Lemon* test,²⁰⁰ Justice O'Connor's endorsement test,²⁰¹ and the Seventh Circuit's

¹⁹¹Every one of the cases discussed in this section (save Hanas's) were filed under 42 U.S.C. § 1983 (2000) (various editions of the code). Judging by Hanas's progress through the courts, his case may well become a civil rights suit at some point in the near future.

¹⁹²*Bausch v. Sumiec*, 139 F. Supp. 2d 1029 (E.D. Wis. 2001).

¹⁹³See cases cited *supra* note 29.

¹⁹⁴*Bausch*, 139 F. Supp. 2d at 1033 (quoting *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996)).

¹⁹⁵That is, more than "available in name only." *Id.*

¹⁹⁶*Id.* at 1031.

¹⁹⁷Exodus House Transitional Care Facility, <http://www.hnet.net/good/charity/exodus.htm> (last visited May 28, 2006). Although not evident from its web site, "The Exodus House program is based on the principles of [A.A. and N.A.] and has a substantial religious component." *Bausch*, 139 F. Supp. 2d at 1031. It is unclear from the opinion or the website whether Exodus House received then or receives today any governmental aid aside from the support provided by court referrals.

¹⁹⁸*Bausch*, 139 F. Supp. 2d at 1031.

¹⁹⁹*Id.*

²⁰⁰*Id.* at 1035. This author can only surmise that Judge Adelman (or her clerk) was unaware that the *Lemon* test had since been refined to the two-pronged *Lemon/Agostini* inquiry.

²⁰¹*Bausch*, 139 F. Supp. 2d at 1035.

coercion test.²⁰² Drawing many similarities between Bausch's case and recent twelve-step sentencing cases,²⁰³ Judge Adelman found that the State failed all three tests.²⁰⁴ Wisconsin's assertion that Bausch needed only to have requested a secular alternative was swiftly rejected: "[I]t is government's obligation always to comply with the Constitution, rather than to do so only upon request."²⁰⁵

*B. Destefano v. Emergency Housing Group (2001)*²⁰⁶

Less than two weeks after Judge Adelman handed down her decision in *Bausch*,²⁰⁷ Judge Sack ruled in the second Establishment Clause treatment center case, *Destefano*. Writing for the Second Circuit, Judge Sack held that involvement of A.A. as part of a state-funded treatment approach is "not in itself constitutionally impermissible";²⁰⁸ indeed, even "strong, urging, and active encouragement"²⁰⁹ of clients' participation in A.A. by the facility's staff did not run afoul of the Establishment Clause.²¹⁰ Direct staff participation in indoctrinating clients with A.A. views was, however, unconstitutional.²¹¹

Joseph M. Destefano was the mayor of Middletown, New York.²¹² He brought this civil rights lawsuit against state defendants and a treatment facility (the Middletown Alcohol Crisis Center (MACC), one of four different programs the Emergency Housing Group operated), claiming that allocation of state tax revenues to a private alcoholic treatment facility that included A.A. in its program violated the Establishment Clause.²¹³

Destefano was unique in that neither courts, state employees, nor agencies sent offenders to the facility.²¹⁴ Instead, clients would simply walk in "off the street," so to speak.²¹⁵ All clients were at the MACC of their own volition and could leave at

²⁰²*Id.* at 1033.

²⁰³See cases cited *supra* note 29.

²⁰⁴*Bausch*, 139 F. Supp. 2d at 1033-37.

²⁰⁵*Id.* at 1035. Judge Adelman was particularly persuaded by Derek Apanovich's argument suggesting that few defendants would be brazen enough to assert their rights while under criminal justice supervision, and thus, most individuals would either just resign themselves to the court's order or assume that they have no choice other than compliance. *Id.*; see also Apanovich, *supra* note 40, at 850.

²⁰⁶*Destefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397 (2d Cir. 2001).

²⁰⁷*Bausch*, 139 F. Supp. 2d 1029, was decided on April 10, 2001. *Destefano*, 247 F.3d 397 was decided ten days later on April 20, 2001.

²⁰⁸*Destefano*, 247 F.3d at 410.

²⁰⁹*Id.*

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.* at 401.

²¹³*Id.*

²¹⁴*Id.* at 402.

²¹⁵*Id.*

any time.²¹⁶ Clients were not compelled to attend the A.A. meetings held within the facility, although they were encouraged to do so by MACC staff.²¹⁷ The Center operated primarily as a “non-medical, short-term alcohol detoxification and treatment facility,”²¹⁸ and provided its clients with “supervision during the sobering-up phase, alcoholism counseling, rap groups,²¹⁹ educational films, participation in A.A., recreational activities, meals, and assessments and referrals for continuing treatment.”²²⁰ Although it was undisputed that A.A. and its twelve-step program played a central role in the MACC’s overall treatment approach, the precise nature of this role was unclear.²²¹

At the time of this case, the United States Supreme Court had no precedent for the use of public funds to finance religious activities, at least not in situations analogous to this one, where the Center’s clients chose to participate in such activities.²²² As such, the court noted that state funding of a clinic that encourages people to engage in religious activities “falls within the zone of constitutionally questionable and unresolved conduct.”²²³ Applying the *Lemon/Agostini*/endorsement test, Judge Sack affirmed most of the New York Southern District’s decision, holding that there was no constitutional problem as long as the facility’s staff did not coerce clients to attend A.A. sessions and as long as staff did not themselves directly indoctrinate clients with A.A. principles.²²⁴ Allegations were also made that staff engaged in nightly readings of A.A. literature, discussion of A.A. at the facility’s events, and played videotapes that focused on the twelve steps.²²⁵ Regarding these types of activities, the court held that “[d]irect state funding of persons who actively inculcate religious beliefs crosses the vague but palpable line between permissible and impermissible government action under the [Establishment Clause].”²²⁶

²¹⁶*Id.*

²¹⁷*Id.* at 403.

²¹⁸*Id.* at 402.

²¹⁹This presumably means discussion groups, as opposed to visiting hip-hop posses entertaining the clients.

²²⁰*Id.* at 402. Such facilities are rare today. They are commonly referred to as “drying-out places” in A.A. parlance and literature.

²²¹*Id.* at 402-03.

²²²*Id.* at 419.

²²³*Id.* at 411.

²²⁴*Id.* at 410, 416.

²²⁵*Id.* at 403. “In one such program entitled ‘The Twelve Steps of Alcoholics Anonymous,’ a priest named Father Martin stands before an assemblage of people and advises them that ‘the prayer of the drunk is the prayer of a soul in pain, and those are the souls that God loves best.’” *Id.* at 419. Father Martin is a well-known figure within the substance abuse treatment and recovery field. If someone mentions “Father Martin tapes” in an A.A. meeting, most people will understand the reference. In his videos, he essentially mixes education about the disease with spirituality. Your author has screened all of his films and gives them two enthusiastic thumbs up.

²²⁶*Id.* at 408. The court relied heavily on *Bowen v. Kendrick*, 487 U.S. 589 (1988) (authorizing federal grants to religious institutions is not inherently unconstitutional), in

C. Freedom from Religion Found. v. McCallum (2003)²²⁷

McCallum underscored the importance of providing parolees with treatment options. Writing for the Seventh Circuit, Judge Posner held that it did not violate the Establishment Clause for Wisconsin to pay for rehabilitative services at a Christian-oriented halfway house or for parole officers to recommend that halfway house, along with secular options, to parolees.²²⁸ Plaintiffs challenged defendants' use of a faith-based rehabilitation program (Faith Works) as an alternative for offenders under the supervision of the Department of Corrections.²²⁹ Once again, the pertinent question was whether offenders who participated in the Faith Works program did so of their own independent, private choice.²³⁰

Judge Posner, working under no particular test,²³¹ again distinguished sharply between government programs that provide support directly to a religious entity (as in *Destefano*) and those programs that provide benefits to individuals who, in turn, choose to confer that benefit on a religious institution.²³² Key to Posner's decision was the fact that parole officers took great pains to explain to their parolees that their suggestions were just that—non-binding recommendations.²³³ Further, parolees were always informed that Faith Works was a Christian institution and that its program had a significant Christian element.²³⁴ Finally, Judge Posner declared that “[t]he U.S. Supreme Court will not allow a public agency to force religion on people even if the agency honestly or even correctly believes that it is the best way of achieving a secular end that is within government's constitutional authority to promote.”²³⁵

D. Teen Ranch v. Udow (2005)²³⁶

The most recent decision in this arena, *Teen Ranch*, expertly addressed the issues relevant to court-mandated faith-based treatment. *Teen Ranch* held that referral of troubled teens to a religious residential program violated the Establishment Clause even where participants were later given the option of leaving the program and selecting another institution, because the initial referral did not allow the choice of a

determining that inclusion of A.A. as one element in the program's treatment plan was permissible.

²²⁷Freedom from Religion Found. v. McCallum, 324 F.3d 880 (7th Cir. 2003).

²²⁸*Id.* at 881-82.

²²⁹*Id.* at 881.

²³⁰*Id.* at 883-84.

²³¹It may have gone without saying; the district court applied the *Lemon/Agostini* and endorsement tests in *McCallum*. See Freedom from Religion Found. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002), *judgment as a matter of law granted by* 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003).

²³²*McCallum*, 324 F.3d at 882.

²³³*Id.* at 883. “Suggestion is not a synonym for coercion.” *Id.*

²³⁴*Id.* at 881.

²³⁵*Id.* at 882.

²³⁶*Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005).

secular program.²³⁷ Teen Ranch, a non-denominational Christian residential facility for “disadvantaged youth,”²³⁸ sued the Family Independence Agency (FIA), a Michigan state government department responsible for administering the state’s public assistance, child, and family welfare programs.²³⁹ The agency is particularly responsible for providing care and supervision to abused, neglected, and delinquent children who have been committed to or placed in the care of the FIA through the state courts.²⁴⁰ Teen Ranch was one of the private facilities with which the FIA contracted.²⁴¹ Thus, if a child was adjudicated delinquent in a Michigan juvenile court, the judge might place that child with the FIA for care and supervision, and that child might end up at Teen Ranch.²⁴² Most of Teen Ranch’s residents were state placements.²⁴³ Teen Ranch was suing because the FIA had imposed a moratorium on further placements at the facility due to the FIA’s concerns over Teen Ranch’s incorporation of religious practices into programming there.²⁴⁴ Teen Ranch believed, among other things, that the moratorium violated the center’s right to the free exercise of religion.²⁴⁵

The court quickly and correctly noted that this case was essentially about the tension between the Free Exercise and Establishment Clauses.²⁴⁶ Specifically, Teen Ranch wanted “to be free to exercise its religious faith without interference from the State, and the FIA want[ed] to avoid violating the Establishment Clause by subsidizing a particular religious viewpoint.”²⁴⁷ Judge Bell began by analyzing the facts under the *Lemon/Agostini*/endorsement test. He noted that the analysis was necessarily guided by a state statute²⁴⁸ prohibiting funds provided directly to institutions like Teen Ranch from being “used or expended for any sectarian activity

²³⁷*Id.* at 836.

²³⁸Teen Ranch Inc., <http://www.teenranch.com> (last visited May 28, 2006). Interestingly, the corporation posted its reaction to the ruling in this case (as well as its own interpretation of the applicable law) online. Teen Ranch Inc., Teen Ranch and the FIA: The Truth, http://teenranch.com/teenranch_and_fia.asp (last visited May 28, 2006).

²³⁹*Teen Ranch*, 389 F. Supp. 2d at 829.

²⁴⁰*Id.*

²⁴¹*Id.*

²⁴²*See id.*

²⁴³*Id.* at 830. Because most of Teen Ranch’s residents were state placements, the FIA’s moratorium on further referrals had a profound economic impact on the institution. *Id.* Between the time of the moratorium’s enactment and these legal proceedings, Teen Ranch had to close several of its programs and was forced to sell half of its residential facilities. *Id.*

²⁴⁴*Id.*

²⁴⁵*Id.*

²⁴⁶*Id.* at 831.

²⁴⁷*Id.*

²⁴⁸*See* Act effective Sept. 29, 2004, No. 344, § 220(1), 2004 Mich. Pub. Acts 1182, 1192 (2004).

including sectarian worship, instruction, or proselytization.”²⁴⁹ A federal Charitable Choice statute essentially saying the same thing was also implicated.²⁵⁰ Both these statutes make important distinctions between “direct” and “indirect” funding, and the court acknowledged that if Teen Ranch’s funding was indirect, then the State was not permitted to condition funding on Teen Ranch eliminating its religious practices.²⁵¹ The court recognized, consistent with the discussion in the previous section, that “although previous cases had emphasized the distinction between direct and indirect aid, more recent cases have addressed the purpose of preventing subsidization of religion by focusing on the principle of ‘private choice.’”²⁵² Judge Bell pointed out that the Supreme Court has “repeatedly upheld programs against Establishment Clause challenges where the state funding of the programs arose out of ‘true, private choice’ or the ‘genuine and independent choices of private individuals.’”²⁵³ In other words, private choice “transforms constitutionally troublesome ‘direct’ funding into constitutionally permissible ‘indirect’ funding.”²⁵⁴ Thus, the real issue in this case was whether being able to “opt-out” after being placed at Teen Ranch was “enough of a choice” to render the governmental aid indirect rather than direct and thereby avoid offending the Establishment Clause.²⁵⁵

The Court concluded that this was insufficient.²⁵⁶ First, children were unable to choose where they would initially be placed.²⁵⁷ Second, “[r]egardless of whether state wards are particularly vulnerable [and thus, presumably too shy or fearful to reject placement at Teen Ranch], they are children.”²⁵⁸ Third, and perhaps most importantly, all of the preceding cases upholding the importance of private choice had involved a variety of options presented to the offender.²⁵⁹ All of these factors combined to result in failure of the endorsement test.²⁶⁰

With regard to Teen Ranch’s Free Exercise claim, the court held that “[u]nlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit. [T]he State [cannot] be required under the

²⁴⁹*Id.*

²⁵⁰*See* 42 U.S.C. § 604a (2006).

²⁵¹*Teen Ranch*, 389 F. Supp. 2d at 833.

²⁵²*Id.* at 834 (quoting *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion)).

²⁵³*Id.* (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

²⁵⁴*Id.*

²⁵⁵*Id.* at 834-35.

²⁵⁶*Id.* at 836.

²⁵⁷*Id.* at 829, 835.

²⁵⁸*Id.* at 835. The court mentioned that “[t]here are no cases regarding the sufficiency of an adult’s ability to opt-out, much less a case about children.” *Id.* at 836. Therefore, it is at least possible that such a policy might survive scrutiny if adults were involved instead of children.

²⁵⁹*Id.* at 835. *See, e.g.*, cases discussed *supra* Part IV.

²⁶⁰*Id.* at 836.

Free Exercise Clause to contract with a religious organization.”²⁶¹ The court analogized to the related school funding issue, observing that “there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis.”²⁶² Thus, the suit was dismissed in its entirety.²⁶³

*E. Hanas v. Genesee County Adult Prob. Dep’t (pending)*²⁶⁴

Although the courts in the previous cases predominantly used the *Lemon/Agostini*/endorsement test, some scholars argue that different tests are appropriate for different factual circumstances. For example, commentator Emily M. Gallas has argued that Justice O’Connor’s endorsement test is the correct one to apply for drug court cases.²⁶⁵ She points out that by virtue of electing to participate in the drug court in the first place, the offender is not, as a practical matter, being “coerced” into a treatment center.²⁶⁶ After all, the worst that could happen is that the offender would be terminated from the drug court docket and sentenced according to the normal adjudicative process.²⁶⁷ Hanas’s lead counsel, American Civil Liberties Union (ACLU) attorney Michael Steinberg, disagrees vehemently with this argument. In his view, “An offender may indeed give up *some* rights upon entering a drug court program,²⁶⁸ but such a fundamental right as the freedom of religion is not one of them.”²⁶⁹

The Michigan appellate courts, as well as the United States Supreme Court, may have disagreed. After seven weeks of receiving no drug treatment whatsoever and growing weary of Pastor Rottier’s continuing attempts to convert him to the Pentecostal faith, Hanas returned to the Drug Court to request reassignment to a secular program.²⁷⁰ Judge Ransom responded by removing Hanas from the Drug Court docket and sentencing him to six months in either jail or “boot camp” and four

²⁶¹*Id.* at 838.

²⁶²*Id.* at 838 (quoting *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21 (1st Cir. 2004)).

²⁶³*Id.* at 842.

²⁶⁴*Hanas v. Genesee County Adult Prob. Dep’t*, No. 05-CV-74612 (E.D. Mich. filed Dec. 6, 2005), *request to hold case in abeyance granted*, 2006 U.S. Dist. LEXIS 65614 (E.D. Mich. Sept. 14, 2006).

²⁶⁵Gallas, *supra* note 33, at 1094-95.

²⁶⁶*Id.* at 1084-85.

²⁶⁷That being said, Gallas also insists on secular options being presented alongside faith-based options. *Id.* at 1094-95.

²⁶⁸Indeed, in many drug court agreements, offenders specifically waive certain constitutional rights. *See supra* note 66 and accompanying text.

²⁶⁹Telephone interview with Michael J. Steinberg, Legal Director, American Civil Liberties Union of Michigan. (Sep. 27, 2005) [hereinafter Interview with Michael J. Steinberg]. Gallas’s proposal would also theoretically require having two different standards for those sentenced to substance abuse treatment in a regular criminal court and those so sentenced in a drug court. *See Gallas, supra* note 33.

²⁷⁰Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 4.

years' probation.²⁷¹ The sentencing order also provided that after completion of jail or boot camp, Hanas would be released to a secular drug treatment program called "New Paths."²⁷² Judge Ransom left open the possibility that he would consider re-admitting Hanas back into the Drug Court (and consequently having his plea vacated) if he successfully completed jail or boot camp and the first sixty days at New Paths.²⁷³

Ultimately, however, despite exemplary records of behavior at both boot camp and New Paths, Judge Ransom denied Hanas's request to re-enter the Drug Court docket and have his guilty plea vacated.²⁷⁴ Judge Ransom did note at that hearing, nonetheless, that he was no longer making any referrals to Christian Outreach.²⁷⁵ The ACLU then intervened on Hanas's behalf, seeking review in the Michigan Court of Appeals, alleging violations of both the Free Exercise and Establishment Clauses.²⁷⁶ According to the ACLU, Hanas's Free Exercise rights were violated when he was denied the use of his rosary and prayer book, barred from seeing his priest and deacon, and by having his faith denounced as witchcraft.²⁷⁷ Additionally, the ACLU argued that Hanas's Establishment Clause rights were violated through his involuntarily indoctrination into the Pentecostal faith through forced scriptural study, examination on Pentecostal tenets, and mandatory attendance at religious services.²⁷⁸

On May 26, 2004, the Court of Appeals denied the application for leave to appeal in a one-sentence order.²⁷⁹ Hanas next sought review in the Michigan Supreme Court.²⁸⁰ On January 27, 2005, the Michigan Supreme Court, by a 4-3 vote, denied the application for leave to appeal.²⁸¹ Hanas then filed a Petition for Writ of Certiorari in the United States Supreme Court on April 26, 2005.²⁸² The Petition was

²⁷¹*Id.* at 4-5. Had Hanas not objected to the religious indoctrination at Christian Outreach, it appears very likely that he would have successfully completed the program and avoided a sentence. Despite Hanas's disagreements with Christian Outreach's "treatment approach," Pastor Rottier stated on the record that Hanas had "done good" while he was a resident there. *Id.* at 5 n.5.

²⁷²*Id.* at 5.

²⁷³*Id.*

²⁷⁴*Id.*

²⁷⁵*Id.*

²⁷⁶See Defendant's Delayed Application for Leave to Appeal, *supra* note 21.

²⁷⁷See *id.* at 4. ACLU attorneys argued that the actions of Christian Outreach staff were imputed to the government by (1) the fact that he was sentenced there in the first place and (2) the statement of the probation officer at the hearing: "And remember, the rules of Pastor Rottier's program are the rules of the court." Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 12.

²⁷⁸Defendant's Delayed Application for Leave to Appeal, *supra* note 21.

²⁷⁹Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 6.

²⁸⁰*Id.*

²⁸¹*Id.*

²⁸²*Id.*

denied on June 20, 2005.²⁸³ On December 6, 2005, Hanas filed a Petition for Writ of Habeas Corpus in the Southern Division of the Eastern District Court of Michigan.²⁸⁴ On September 14, 2006, the court granted a request to hold the case in abeyance pending resolution of Hanas's civil rights case.²⁸⁵ Until his probation ends on March 13, 2007, Joseph Hanas remains under the supervision of the Genesee County Adult Probation Department.²⁸⁶ It remains uncertain whether he or others in similar straits will soon be afforded the relief they seek—suing over forced participation in a faith-based treatment model is indeed “an arduous and time-consuming procedure.”²⁸⁷

F. Summary of the Case Law

The common denominator among the four adjudicated cases is the importance of “true, private choice” in evaluating both secular and faith-based options presented to the offender. Although courts may offer and even encourage participation in a faith-based residential treatment center, they must provide meaningful secular alternatives to survive Establishment Clause scrutiny.

These cases make clear that directly funded faith-based treatment centers may not use religious or twelve-step tenets in their approaches or engage in religious practices. What remains unclear is the extent to which indirectly funded treatment centers may do so. For example, *DeStefano*, which involved direct funding, showed that facility staff members may not coerce clients to attend A.A. meetings and cannot push specifically religious or twelve-step principles. *Teen Ranch*, however, showed that a facility's religious practices are permissible as long as the funding remains “indirect,” whether through a voucher system where the beneficiary voluntarily confers the funds on a religious institution or where the offender verbally acknowledges his desire to enter a faith-based institution instead of a secular one. Thus, the prohibited activities in *Destefano* (nightly staff readings of A.A. literature, discussion of A.A. at the facility's events, playing videotapes focusing on the twelve steps, etc.) would presumably be permissible at an indirectly funded facility where the offender freely chooses to be there, having passed over equivalent secular facilities.

V. PRESCRIPTIVE ANALYSIS AND SUGGESTED SOLUTIONS

Religious organizations play an important role in reducing substance abuse problems. Indeed, many faith-based organizations run excellent addiction treatment and prevention programs. Additionally, spirituality is a key aspect of prominent and well-respected twelve-step groups that have helped millions of people achieve

²⁸³*Id.*

²⁸⁴*Id.* at 17.

²⁸⁵*Hanas v. Genesee County Adult Prob. Dep't*, No. 05-CV-74612, 2006 U.S. Dist. LEXIS 65614 (E.D. Mich. Sept. 14, 2006).

²⁸⁶Memorandum in Support of Petition for Writ of Habeas Corpus, *supra* note 6, at 5.

²⁸⁷PEELE ET AL., *supra* note 39, at 126.

lasting sobriety since their inception.²⁸⁸ The people whom these programs help most, though, are those that voluntarily seek them out.²⁸⁹

Regardless of whether faith-based treatments are the most effective way to combat substance abuse, the fact remains that a certain percentage of offenders will not respond favorably to such religious messages. There are those who argue that such objectors are simply in denial and are unwilling to accept that a religious (or spiritual) program may be the answer to their problems. While that may well be true for some offenders, others are genuinely offended by the prospect of bringing God into the realm of addiction. In any event, the question is inapposite—the authenticity of individuals' private religious beliefs is an area into which the government may not inquire.²⁹⁰

Our government has a significant interest in arresting the addictions of all people—not just those who will subscribe to a faith-based approach. Essential to an alcoholic or addict's recovery is his or her “buying into” the program that is offered.²⁹¹ Those “who are personally invested in their recovery achieve better results. Thus, programs that alienate participants, or pressure an unwanted belief system on them are unlikely to assist individuals in overcoming their addiction.”²⁹² Protecting the First Amendment rights of all offenders sentenced to residential treatment will not only help ensure the best chance of aiding the recovery of as many alcoholics and addicts as possible, but will also go a long way toward preventing lawsuits of the kind discussed in this Note from ever being filed.

Unfortunately, utter confusion currently reigns in this area of law. Many probation and parole officers, treatment center administrators, and even seasoned members of the judiciary remain unaware of what constitutes acceptable sentencing practices and the types of practices in which treatment centers may engage.²⁹³ Hanas's case effectively illustrates the disturbing consequences of this ignorance. Regrettably, his case is not an isolated incident.²⁹⁴ Anecdotal evidence suggests that

²⁸⁸See *supra* note 27.

²⁸⁹Rudolf H. Moos & Bernice S. Moos, *Paths of Entry Into Alcoholics Anonymous: Consequences for Participation and Remission*, 29 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1858 (2005). Granted, there are individuals who would not otherwise have explored options such as A.A. and who give substantial credit to their sentencing judge for the introduction to the fellowship (affectionately referred to as the “nudge from the judge” in A.A. circles). However, just because *some* people are able to “see the light” and be helped “against their will” does not necessarily imply that such “nudging” is good policy. Regardless, this Note argues that imposing such sentences is constitutionally impermissible.

²⁹⁰*United States v. Seeger*, 380 U.S. 163, 184 (1965).

²⁹¹See Gallas, *supra* note 33, at 1100-01; Dehn, *supra* note 29; author's personal observations and conversations with individuals in recovery.

²⁹²Gallas, *supra* note 33, at 1098. Further, taxpayers do not want to see governmental funds expended for no benefit.

²⁹³Ronald D. Hester, *Spirituality and Faith-Based Organizations: Their Role in Substance Abuse Treatment*, 30 ADMIN. & POL'Y MENTAL HEALTH 173 (2002); Telephone interview with Max Dehn, Associate, Cavitch, Familo, Durkin & Frutkin (Oct. 10, 2005) [hereinafter Interview with Max Dehn]. See also Dehn, *supra* note 29.

²⁹⁴See, e.g., Editorial, *Keeping the Faith; Even Best Government Programs Cannot be Allowed to Preach Religion*, COLUMBUS DISPATCH, July 1, 2003, at 8A (questioning the

even in the states and jurisdictions covered by the decisions discussed above, probation and parole officers appear reluctant to accept those rulings and continue to refer offenders solely to twelve-step or religiously based treatments.²⁹⁵ Judges across the country persist in sentencing offenders to A.A., N.A., and faith-based treatments with little or no consideration given to the constitutional implications that such sentencing practices raise.²⁹⁶ A certain few judges may be seriously disregarding current law because they truly believe that twelve-step or faith-based treatments are in the best interests of the offenders.²⁹⁷ Given the overwhelming prevalence of twelve-step-based treatment sentences, it is imperative that the Supreme Court grant certiorari to one of these cases in order to resolve the conflict among the Circuits with regard to A.A.'s status as a religion vis-à-vis the Establishment Clause. The High Court also has yet to delineate the precise boundaries within which drug courts may operate.

Administrators of substance abuse treatment facilities rarely possess law degrees. They typically do not have constitutional scholars on staff. Although the motives and intentions of the vast majority of administrators are presumably pure, seemingly innocent missteps across Establishment Clause boundaries can result in profound consequences of liability, as seen in the cases above. Offering training programs and Continuing Legal Education (CLE) seminars with extended Q&A sessions where members of the bar (particularly drug court judges) could learn about recent decisions in this arena, acceptable sentencing schemes, and permissible conduct within the walls of treatment centers would greatly improve the current state of ignorance that pervades this area of law. Similar programs would be highly advisable for treatment center administrators as well. Board-Certified Substance Abuse Counselors (BCSACs) are, like members of the legal profession, obligated to

constitutionality of forcing prisoners at the Franklin County Work Release Facility to attend a weekly program that uses a faith-based approach to conquering drug and alcohol addiction (also run by members of the Pentecostal faith)); Catherine Gabe, *Agnostic Questions if AA is the Way; He Challenges Order to Attend Meetings or Face Jail for DUI*, PLAIN DEALER (Clev.), Jan. 6, 2003, at A1 (recounting the story of a man who chose to spend thirty days in jail rather than attend A.A. meetings).

²⁹⁵PEELE ET AL., *supra* note 39, at 126; Interview with Max Dehn, *supra* note 293; *see also* sources cited *supra* note 294.

²⁹⁶PEELE ET AL., *supra* note 39, at 126; Interview with Max Dehn, *supra* note 293; *see also* sources cited *supra* note 294.

²⁹⁷PEELE ET AL., *supra* note 39, at 126; *see also* sources cited *supra* note 294. Again, these judges may be absolutely correct. *See supra* note 289; *see also supra* text accompanying note 235. Nevertheless, such a judicial philosophy can have unconstitutional effects. It also strikes your author as rather egotistical and contrary to the judicial oath. *See* 28 U.S.C. § 453 (2006).

satisfy continuing professional education requirements.²⁹⁸ These seminars present an ideal opportunity to discuss recent relevant legal developments.²⁹⁹

Before addressing what measures should be taken to protect drug and alcohol offenders' First Amendment rights, it is well to keep in mind the words of Judge Stanley Goldstein, the country's very first drug court judge:

Don't lose sight of the objective. We are [in this] to get these people off of drugs, to retrain them, to rehabilitate them . . . [and to] let them become tax-paying citizens. We are not there to fast-track them into jail, to trick them, or to play games. We are there for specific purposes.³⁰⁰

However, judges' motives and intentions need not be wholly altruistic. Successful drug court interventions also place less of a strain on limited budgets and stem criminal activity in general, improving the quality of life for the community. Any prescriptive suggestions should, therefore, be geared toward all these objectives.

Although current statutes impose fairly well-defined regulations and programmatic safeguards³⁰¹ regarding federally funded treatment centers, the statutes do not apply to treatment centers not receiving federal funds.³⁰² The Charitable Choice regulations³⁰³ already applicable to federally funded facilities provide a good jumping-off point for discussing potential regulation of treatment centers not currently subject to those rules. Various municipalities' policies and directives can be instructive as well.

When the decision is made to enroll an offender in a residential substance abuse treatment program, several things need to happen in order to ensure First Amendment compliance. Other measures, while perhaps not constitutionally mandated, are also recommended with an eye toward policy. First, the offender should be presented with genuine options: some offenders may in fact desire a

²⁹⁸International Certification & Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc., Standards for Certified AODA Counselors, http://www.icrcaoda.org/standards_for_certified_aoda_cou.htm (last visited May 28, 2006). Each state has its own re-certification standards that substance abuse counselors must meet. However, fully 6.8% of publicly funded treatment centers do not employ any certified substance abuse counselors. ROMAN ET AL., *supra* note 68, at 9. States should require counselors at publicly funded treatment centers to be properly certified.

²⁹⁹Some may already do so. It would be advisable, in any event, to bring in an informed judge or a constitutional scholar knowledgeable on the issue. For an instructive pamphlet, see JOHN B. ORR, USC CENTER FOR RELIGION AND CIVIC CULTURE, A PRIMER FOR FAITH-BASED ORGANIZATIONS (n.d.), *available at* <http://www.usc.edu/schools/college/crcc/private/docs/publications/primer.pdf> (last visited May 28, 2006).

³⁰⁰NOLAN, *supra* note 37, at 106.

³⁰¹*See supra* notes 30, 167, 168.

³⁰²Some treatment center administrators deliberately forgo federal funding because doing so would mean they might have to alter their treatment approach to conform to the Charitable Choice regulations currently applicable only to federally funded treatment centers. *See supra* notes 30, 31.

³⁰³*See supra* note 30.

religious or spiritual approach,³⁰⁴ while others will find it aversive. “Some people in need respond to religious messages but not secular ones, and other people in need respond to secular messages but not religious ones. The only way to help both groups is to make available both religious and secular providers.”³⁰⁵ Toward this end, offenders should receive as much information about available facilities as possible (e.g., brochures, websites, program literature, and interviews with facility administrators, other staff, and previous residents). Both secular and religious alternatives should be clearly identified on this menu of options. Offenders should be given a reasonable period of time³⁰⁶ during which they could review their options and select their preferred institution.³⁰⁷

In *McCallum*, the Division of Community Corrections had in place an administrative directive reminiscent of the “informed consent” doctrine. That directive “required probation and parole agents to inform offenders of the religious content of the treatment program [being suggested], to obtain the offender’s consent to participate in the program, and to document the offender’s choice to participate.”³⁰⁸ Although this is an admirable policy, it could go further to ensure offenders enter a faith-based treatment center with “eyes wide open.” Offenders should be informed about the *specific* religious nature of the program³⁰⁹ and told exactly what will be expected of them. Instead of hearing about the program through a probation or parole officer, or through another drug court “team member,”

³⁰⁴While nothing prohibits a judge from sentencing an offender to a purely secular facility (and, in fact, it presumably would not offend the Free Exercise Clause for a drug court judge to sentence offenders *solely* to secular facilities), this author is aware of at least a handful of drug court participants who specifically desired to attend a twelve-step-based facility. If reaching the objectives just spoken of is our goal, then good policy suggests that a menu with both secular and faith-based/twelve-step facilities should always be offered.

³⁰⁵*Hearing, supra* note 25, at 25 (prepared statement of Mr. Douglas Laycock, Associate Dean for Research and Alice McKean Young Regents Chair in Law, The University of Texas Law School). Given that offering options to the offender has been a key issue in the civil rights lawsuits discussed in Part IV, courts would be well-advised to document in their journal entries that both twelve-step/faith-based and secular options were, in fact, presented to the offender.

³⁰⁶A week should be a reasonable time for an offender to review his or her options, place the appropriate phone calls and e-mails, and make an informed decision as to which treatment center would be the best match.

³⁰⁷Granted, a certain portion of offenders have no desire to rid themselves of their addiction and are merely looking to escape the shackles of the criminal justice system as quickly as possible. However, if the judge has already determined that a residential treatment sentence is appropriate and all the facilities listed on the court’s “menu” are duly licensed and have valid contracts with the court, the offender will not really be “getting away” with anything—and he may even end up learning something in the process.

³⁰⁸*Freedom from Religion Found. v. McCallum*, 214 F. Supp. 2d 905, 910 (W.D. Wis. 2002), *aff’d*, 324 F.3d 880 (7th Cir. 2003). A later policy directive mandated that a secular alternative had to be presented alongside the faith-based option. *Id.* at 912.

³⁰⁹Offenders should be informed, for example, if the treatment center adopts the beliefs or tenets of a particular faith, if it is strictly twelve-step-based, or if the twelve steps are ignored altogether.

offenders should be able to communicate directly with an administrator at the facility. This would greatly aid them in making a truly informed decision.

Alternatively, a judge may order an offender to enroll in a state-licensed residential treatment program of his or her own choice without naming any *specific* program, and extend to the offender a voucher redeemable at that facility.³¹⁰ Never should lack of funds be an obstacle to matching an offender with the most appropriate treatment facility.³¹¹ Freedom of religion ought not come with a price tag. Next, if the offender chooses a twelve-step or faith-based facility, he must be informed in writing that he has the right to request a timely transfer to a comparable facility if, after a reasonable period of time³¹² after taking up residence, he finds the religious philosophy or religious practices of the treatment center objectionable.³¹³ The alternative provider need not be a secular organization. It must simply be a provider to which the recipient has no religious objection. A judge should not, in any way, penalize an offender for exercising his right to that end.

Offenders should be informed that they are under no obligation to participate in prayer or other religious activities, and that there will be no consequences for refusing to do so.³¹⁴ Courts should announce that they will not enforce the acceptance of religious beliefs or practices, and that offenders are free to accept or reject the entirety of any treatment program, including the tenets and beliefs professed therein. While *McCallum* held that parole officers may recommend a particular faith-based treatment center to their parolees, it remains questionable whether a judge could do so. Regardless of the constitutionality of such a practice, it is inadvisable.³¹⁵ Officers of the court should stop well short of encouraging the embrace of religious beliefs professed at a treatment facility.³¹⁶ One of the goals here

³¹⁰This author is aware of at least one judge, Kathleen Ann Sutula of the Cuyahoga County Common Pleas Court in Cleveland, Ohio, who takes this approach.

³¹¹This is easier said than done, of course. Governmental budgetary constraints are perpetual.

³¹²Two to three weeks would probably be sufficient time to be able to make an informed decision on this matter.

³¹³A sample notice to individuals receiving substance abuse services may be found at 42 C.F.R. pt. 54a app. (2006). The notice used in the *McCallum* case is in the published opinion. See *Freedom from Religion Found. v. McCallum*, 214 F. Supp. 2d 905, 913 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). Of course, problems could theoretically arise if a belligerent offender repeatedly requested transfers. After a second or third transfer request, when the judge has good reason to believe the offender is just being obstinate, that judge should have the discretion to then simply order the offender into a purely secular facility. Your author doubts this would be a real problem, though. While some offenders may abuse the system while *in* treatment, repeatedly requesting transfers would only prolong the individual's institutionalization.

³¹⁴Aside from judicially imposed consequences, treatment centers often impose their own. See discussion *supra* Part II.C. Choosing not to participate in religious activities (i.e., saying the Serenity prayer before a morning meditation) must not be allowed to have any negative repercussions—either in court or within the facility itself.

³¹⁵Such a practice would come dangerously close to failing the endorsement test.

³¹⁶For example, explicitly recommending a particular faith-based treatment center would essentially have the effect of placing the imprimatur of government on a specific religion.

is to separate the private religious choices and commitments of offenders from government influence. Courts have long acknowledged the importance of autonomy in shaping personal religious views.³¹⁷

Any treatment center contracting with a court to receive offenders should, at a minimum, follow the guidelines laid out in the relevant Charitable Choice sections of the Code of Federal Regulations.³¹⁸ These guidelines include a prohibition on spending governmental funds on inherently religious activities, such as worship, religious instruction, or proselytization.³¹⁹ Although a facility may offer such activities, it must offer them separately in time or location from the programs or services for which it receives governmental funds, and participation must be strictly voluntary. Facilities must not be permitted to discriminate in any way against referred offenders on the basis of religion, religious belief, refusal to hold a religious belief, or a refusal to participate in a religious practice. Public money comes from every American taxpayer regardless of race, religion, creed, national origin, disability, sexual orientation, or identity. Accordingly, treatment centers benefiting from those funds must conform to principles of tolerance and inclusiveness.

Finally, all contracting facilities must be held accountable to established standards of care, performance, and licensure so that residents are able to recover from their addictions with dignity, accompanied by all the rights to which they are entitled. Just as with health and medical care for other illnesses, states must have the power to require uniform licensing or certification for all addiction treatment programs (and particularly their counseling personnel) to maximize the life-saving power of these services. Indeed, many faith-based programs around the country currently operate effectively while being held accountable to such standards. To ask that the remainder conform to these preexisting standards in order to receive government funding and court referrals is not unreasonable.

Each of these requirements should be written into every contract between a court and a treatment center accepting that court's offenders. Failure to abide by such requirements should be grounds for contract termination, as it is principally those failures that invite civil rights lawsuits. Thus, judges should be well-acquainted with the administrators, philosophy, and daily routines at the facilities with which their courts contract. Adopting these measures will go a long way toward ensuring that a judge's overall sentencing scheme will survive constitutional challenge.

³¹⁷See generally *Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon v. Kurtzman*, 411 U.S. 192 (1973); see also *Dehn*, *supra* note 29.

³¹⁸See *supra* note 30.

³¹⁹See 42 C.F.R. §§ 54.4, 54a.4 (2006). There exists an important distinction between a center that adopts a religious philosophy and one that engages in actual religious practices. For example, St. Christopher's Halfway House, *supra* note 31, is based primarily on a twelve-step approach. Residents are permitted to attend weekend religious services of their choice, but are in no way required to do so, and no consequences, real or intangible, are attached to a decision not to attend. See discussion *supra* notes 31, 83. Most residents, in fact, do not attend. Author's personal observations and conversations with individuals in recovery; Interview with Preston W. Elder, *supra* note 31.

VI. CONCLUSION

Treatment for petty drug and alcohol offenses in lieu of ordinary prosecution is rapidly becoming the contemporary standard. Government is also increasingly subsidizing faith-based substance abuse treatment centers. Throughout our history, faith-based organizations have made impressive and deeply important contributions to social well-being in America. Twelve-step and faith-based substance abuse treatment centers are no exception. These organizations and institutions have garnered the respect and approval of the citizenry. Nevertheless, among the many faith-based treatment centers that are performing admirable work within the confines of the Establishment and Free Exercise Clauses, there are still those that harbor ulterior motives and intentions. As Joseph Hanas's case and others illustrate, offenders are still being sentenced to such facilities. These sentencing practices raise serious constitutional issues.

Drug courts are the chief referrers of offenders to residential treatment programs. Characterized by collaborative links between the courts, prosecutors, public defenders, law enforcement, treatment providers, and social service agencies, these specialty courts have exploded in growth since their inception in 1989. Although they have their critics, drug courts have proven to be an effective tool in combating both individual offenders' addictions and their attendant societal consequences.

Life inside a typical treatment center is not easy. Residents can expect a rigid structure applied to their lives, along with strict rules, regulations, and accountability. Many treatment centers incorporate elements of twelve-step groups such as A.A. into their teachings and philosophy. Others adopt the beliefs and tenets of specific organized religions.

The Free Exercise and Establishment Clauses of the First Amendment govern the types of conduct that are permissible at these facilities. The two Clauses are frequently in tension and occasionally overlap in the case law. Although both Clauses state important rights, the Establishment Clause is most often implicated in cases involving allegations of improper religious conduct at treatment centers.

The Supreme Court has not settled upon a one-size-fits-all Establishment Clause test. Instead, four different approaches to the Establishment Clause have emerged: separation, coercion, endorsement, and neutrality. Each approach has its own corresponding test. Recently, the Supreme Court has somewhat departed from the *Lemon/Agostini* test, reflective of the separationist view, and appears to be increasingly moving toward the neutrality approach.

Consistent with the neutrality view of the Establishment Clause, Congress enacted Charitable Choice in 1996 and expanded the legislation to include substance abuse treatment in 2001. Although faith-based organizations had long been able to receive governmental funds for providing social services, Charitable Choice made it significantly easier for them to do so. With regard to substance abuse treatment centers, Charitable Choice laid down several fundamental guidelines designed to protect residents' First Amendment rights that continue to be enforced today at federally funded facilities.

Since Charitable Choice's enactment, five cases have directly addressed faith-based substance abuse treatment centers. The four adjudicated civil rights lawsuits illustrate the importance of providing offenders "true, private choice" in deciding where they will take up residence. The cases also draw an important distinction between directly and indirectly funded facilities. The former receive governmental aid as a matter of course, independent of residents' choices to be there. The latter

receive governmental aid only when an individual specifically chooses that facility in a voucher-like system.³²⁰ Courts have held that where an offender independently chooses to confer a governmental benefit upon a faith-based institution, that individual's choice effectively acts as a "circuit breaker" between the government and religion. Any resultant religious or spiritual teachings that occur within that facility's walls can, therefore, be attributed to the individual's choice instead of the government's.

Despite these rulings, many lawyers, judges, probation and parole officers, and treatment center administrators remain confused or ignorant about the current state of the law in this arena. The Supreme Court has been less than helpful by refusing to review cases involving these important issues. Consequently, many courts and treatment centers operate in a sort of 'no man's land,' devoid of any concrete laws regulating permissible judicial sentencing schemes or defining allowable conduct within treatment centers themselves. While Charitable Choice regulations provide guidance for those facilities that are federally funded, many other treatment centers receive no federal funding and are, therefore, "outside the law."

A fairly common saying heard within the rooms of Alcoholics Anonymous is that "A.A. is not for those who need it. It's for those who want it."³²¹ The same philosophy should apply to twelve-step and faith-based treatment centers. Spiritual approaches to battling addiction have been around for hundreds of years,³²² but they only work if treated persons "buy into" such a philosophy. Government has an interest in seeing *all* people afflicted with addiction recover. Thus, both twelve-step/faith-based and secular options should be presented to all individuals sentenced to residential treatment. Offenders should be given ample time to explore and research all their available options before selecting the institution they believe will offer them the maximum benefit. Further, judges should make clear to offenders that the court does not endorse and will not require acceptance of any of the beliefs or tenets professed at any treatment center. The current applicable Charitable Choice regulations³²³ should be incorporated into every contract between treatment centers and courts, regardless of a treatment center's sources of funding. Finally, states must have the power to ensure that every contracted treatment center, along with its staff, is fully accredited, licensed, and compliant with regulations protecting residents' religious rights.³²⁴

³²⁰It is important to note that it is not necessary for the funds to pass directly through the beneficiary's hands in the form of a tangible, paper voucher. *See, e.g.,* Teen Ranch v. Udow, 389 F. Supp. 2d 827, 834 (W.D. Mich. 2005). A verbal choice is sufficient, but such an acknowledgement must have the same symbolic purpose and effect as a voucher. *See id.*

³²¹Author's personal observations and conversations with individuals in recovery.

³²²*See, e.g.,* WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 268 (Prometheus Books 2002) (1911).

³²³*See supra* note 30.

³²⁴Thirteen percent of the 362 publicly funded treatment centers surveyed in the Roman study were accredited by the Joint Commission on the Accreditation of Health Care Organizations (JCAHO). Similarly, 15.6% of the public centers were accredited by the Rehabilitation Accreditation Commission (CARF). Nearly 2% of the public centers were accredited by both JCAHO and CARF. Seventy-two percent of the centers held neither JCAHO nor CARF accreditation. While only a small proportion of the public centers were

Implementing these measures will ensure the constitutionality of a court's sentencing scheme and decrease the probability of civil rights lawsuits. Just as importantly, however, it will increase the probability that offenders enter treatment centers with an open mind and a sense of security. This improves the chances of lasting recovery, ultimately realizing the broader societal goals of the drug court movement.

accredited by JCAHO or CARF, nearly all of the centers in this sample (98.9%) were state licensed. ROMAN ET AL., *supra* note 68, at 6. This data suggests that states may need to be more discriminating in licensing treatment centers.