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DUI TREATMENT PROGRAMS AND RELIGIOUS FREEDOM: DOES *CUTTER V. WILKINSON* CHANGE THE ANALYSIS?

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I. OVERVIEW

Legal commentators and scholars consistently argue that a compulsory mandate to attend Alcoholics Anonymous (A.A.), either as a condition of probation or as an inmate, violates the First Amendment.¹ They argue that probationers and inmates should have

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1. Michael G. Honeyman, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does it Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437 (1997); Rachel F. Calabro, *Correction through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 602 (1998); Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 851 (1998). Apanovitch argues the following:

As a result of decades of rising crime rates and a revival of the importance of self-responsibility in our society, criminals elicit little sympathy from the populace. The imposition of a religion system on some of the most vulnerable members of our society, however, should not serve as an outlet for our pervasive sense of frustration with crime, criminals, and the overburdened criminal justice system. Although probation and confinement diminish some constitutional rights of individuals, these circumstances do not trump the Establishment Clause, which has an independent vitality that reaches into the darkest dungeons. For inmates and probationers, the wall of separation between church and state is not superseded by prison fences or the terms of probation. If religious indoctrination is countenanced as acceptable in these contexts, the reach of the Establishment Clause is reduced, replaced by the 'considered judgment' of prison authorities and the wide discretion of sentencing judges. This result bodes ill for the principle of separation of church and state.

either statutory or administrative secular alternatives to A.A.² However, some jurisdictions may find that alternatives to A.A. would be costly or geographically prohibited for probationers or inmates.³ We argue that even if A.A. and other related programs could be considered religious in nature, because of its effectiveness and the primary goal of treating alcoholism and problem drinking or addiction, A.A. would be comparable to faith-based programs that deal with violence, teenage pregnancy and other social problems.⁴ Instead of the bright line *Lemon* test,⁵ plaintiffs would have to show how their religious growth, or non-religious growth, is dominated or subdued by attending A.A.⁶ We further argue that recent United States Supreme Court cases allowing for more “play in the joints” permit this highly contextualized approach. Moreover, by taking a contextual approach, the government not only avoids a constitutional challenge, but also adheres to one of the principles of A.A., of not compelling an individual to participate in the A.A. process, while advancing the important social policy of reducing drunk driving.⁷

2. Calabro, *supra* note 1, at 602-06; Apanovitch, *supra* note 1; Honeyamar, *supra* note 1, at 468-71.

3. See Honeyamar, *supra* note 1, at 469. Under the California statute the county should provide secular alternatives; however, if there are none, the statute outlines a process for the “religious” self-help group:

The county shall not require the [self-help organization] to require the participant to read, watch, or listen to material about or provided by a self-help group if the participant informs the self-help organization that he/she disagrees with sectarian principles advocated by the self-help group. The county shall require the self-help organization to allow the participant to complete an alternative activity from the list of approved activities.

Id.

4. Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1161 (1997). According to Salamanca:

Some present practices may violate *Lemon*, which prohibits official actions that have the primary effect of promoting religion. Given the religious nature of A.A., it can be argued persuasively that the ‘primary effect’ of sending people to A.A. is the promotion of religion. Conversely, if one accepts as persuasive the argument that the primary effect of official referral to A.A. is a more sober citizenry, it becomes difficult to argue that outright subsidies to parochial schools—and even churches—would violate the Constitution, insofar as such institutions help mold a stable, healthy citizenry.

Id.

5. See *infra* note 20 and accompanying text.

6. See Salamanca, *supra* note 4, at 1162.

7. *Id.* Salamanca argues that the courts should use the following guidelines to avoid constitutional conflict:

II. INTRODUCTION

The First Amendment to the United States Constitution provides for an individual's right to exercise religious freedom.⁸ This guaranteed individual freedom has been the source of much litigation and will continue to evolve as our society changes. Driving under the influence of alcohol is one of the major concerns of the criminal justice system.⁹ During the 1980s, the number of arrests for driving under the influence of alcohol increased about twenty-two percent for a total of 1,736,200 arrests in 1989.¹⁰ It is estimated that 22,000 highway fatalities in 1989 were related to alcohol.¹¹ In 1989, out of the 1,831,000 individuals on probation, 556,000 of these individuals were on probation for drunk driving offenses.¹² The situation has not improved significantly since the 1980s. According to Mothers Against Drunk Driving, in 2003, after years of strengthened enforcement and tougher laws, there were still 17,013 alcohol-related traffic fatalities.¹³ Plainly, driving under the influence of alcohol remains an intransigent problem. We argue that A.A. can, and ought to be, a part of the solution.

Political and social pressures have created a "get tough" approach to driving under the influence offenses.¹⁴ These increased arrests have caused some courts to use probation to "reform" offenders in an effort to ensure that jail space is reserved for more serious

First, whenever A.A. is required, the government should try to make a more secular program, such as Rational Recovery, an alternative, if possible, assuming such programs demonstrate an ability to deal with alcohol abuse effectively. Second, the government should never require affirmation of the principles of A.A., nor should the government require persons referred to A.A. to do more than attend, listen, and obtain evidence of attendance. Finally, no person should be assigned to A.A. for a long-term or permanent basis.

Id.

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

9. ROBYN L. COHEN, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DRUNK DRIVING, 1989 SURVEY OF INMATES OF LOCAL JAILS 2 (1992).

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. Mothers Against Drunk Driving, State-By-State Traffic Fatalities: 2003, <http://www.madd.org/stats/0,1056,8716,00.html> (last visited Mar. 22, 2005).

14. Patrick T. Kinkade & Matthew C. Leone, *The Effects of "Tough" Drunk Driving Laws on Policing: A Case Study*, 38 CRIME & DELINQ. 239 (1992).

offenders.¹⁵ Probation guidelines permit courts to order attendance at A.A. or community rehabilitative programs.¹⁶ These court-sanctioned organizations, while possibly violative of the First Amendment's Free Exercise and Establishment Clauses, are necessary in order to protect our society from the danger posed by individuals convicted of alcohol-related offenses.

III. RECENT SUPREME COURT CASES AND THE FREE EXERCISE AND ESTABLISHMENT CLAUSES

The test for determining whether a violation of the First Amendment's Free Exercise Clause has occurred was set forth by the United States Supreme Court in *Wisconsin v. Yoder*.¹⁷ The test balances a state's interest in accomplishing an objective against the protection afforded under the Free Exercise Clause.¹⁸ That is, "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, of the Federal Government in the exercise of its delegated powers."¹⁹ As we will demonstrate, A.A. is of proven effectiveness and, thus, clearly related to the state's police powers of promoting safety. At least on this surface analysis, it appears that our proposal respecting the use of

15. Brandon K. Applegate et. al., *Public Support for Drunk-Driving Countermeasures: Social Policy for Saving Lives*, 41 CRIME & DELINQ. 171 (1995).

16. In addition, the criminal justice system took many procedural steps in an attempt to deal with the issue of drunk driving. These steps included electronic monitors (see Robert J. Lilly, *Electronic Monitoring of the Drunk Driver: A Seven Year Study of the Confinement Alternative*, 39 CRIME & DELINQ. 462 (1993)), sobriety checkpoints (see Laurence H. Ross, *Sobriety Checkpoints, American Style*, 22 J. CRIM. JUST. 437 (1994) and Roy S. Ward, *Michigan Department of State Police v. Sitz, The United States Supreme Court Approves Drunk Driving Roadblocks*, 12 U. BRIDGEPORT L. REV. 601 (1992)), ignition locks (see Barbara J. Morse, *Effects of Ignition Interlock Devices on DUI Recidivism: Findings from a Longitudinal Study in Hamilton County, Ohio*, 38 CRIME & DELINQ. 131 (1992)), and bumper stickers on the cars of DUI offenders advertising the fact they had been convicted (see Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986)). Other procedures included mental health and police administrative modifications, including civil commitment of offenders in mental institutions (see Rorie Sherman, *DWI Arrest, Possible Committal*, NAT'L L.J., July 1, 1991, at 3), and possible civil liability for police officers who fail to arrest intoxicated drivers (see Stephen D. Mastrofski, *You Can Lead a Horse to Water . . . A Case Study of a Police Department's Response to Stricter Drunk Driving Laws*, 9 JUST. Q. 465 (1992) and Victor E. Kappeler, *Police Civil Liability for Failure to Arrest Intoxicated Drivers*, 18 J. CRIM. JUST. 117 (1990)).

17. 406 U.S. 205 (1972).

18. *Id.* at 214.

19. *Id.* at 220 (citations omitted).

A.A. as a condition of probation would not run afoul of the Free Exercise Clause. We will return to this later when we analyze the ill-fated Religious Freedom Restoration Act and its successor, the Religious Land Use and Institutionalized Persons Act in later sections of this article.

The First Amendment's Establishment Clause presents a more difficult problem. An early and now largely discredited test formulated by *Lemon v. Kurtzman*²⁰ would, if still followed, prevent the type of analysis herein advanced. The *Lemon* court formulated the test for determining whether a violation of the First Amendment's Establishment Clause has occurred as follows:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."²¹

Furthermore, the United States Supreme Court in an even earlier case held:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religions. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.²²

20. 403 U.S. 602 (1971).

21. *Id.* at 612-13.

22. *Everson v. Bd. of Educ.* 330 U.S. 1, 15-16 (1947).

In 1992, the Court, without explicitly abandoning the *Lemon* test, loosened the test a bit by holding in *Lee v. Weisman* that the Establishment Clause is not violated unless there is psychological coercion pushing a person “to support or participate in religion or its exercise.”²³ Since A.A. as a condition of probation is plainly coercive, it is not surprising that other scholars have argued for allowing A.A. as a treatment program, if and only if, there are secular alternatives.²⁴

If these cases, which have never been formally reversed, remain good law, then our analysis plainly fails. We suggest, however, that *Lemon* has been overruled *sub silentio*, and the *Lee* test has been further relaxed allowing for far more malleability of the First Amendment. Thus, as we argue more fully in later sections of this article, more recent and hospitable case law permits the analysis advanced herein. Specifically, we argue below that the recent Supreme Court case *Cutter v. Wilkinson*²⁵ evinces a far greater sensitivity to state needs in the correctional setting and that even the reintroduction of the “compelling governmental interest” and “least restrictive means” tests, set forth by the Religious Land Use and Institutionalized Persons Act of 2000,²⁶ will not bar A.A. as a tool in the war against drunk driving. First, however, we review some of the reasons why A.A. is so important to this battle.

IV. PROBATION

Probation is a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court, without imprisonment, subject to conditions imposed by the court and subject to supervision of the probation service.²⁷ Probation is considered a privilege rather than a right, a contract between the state and the offender, and a discretionary power of the court.²⁸ Conditions of the probation must be reasonably related to the offense.²⁹ The state of

23. 505 U.S. 577, 587 (1992).

24. *See supra* note 2.

25. 125 S. Ct. 2113 (2005).

26. *See infra* note 147 and accompanying text.

27. Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonable is not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 45 (1991) (quoting NATIONAL COUNCIL ON CRIME & DELINQUENCY, STANDARD PROBATION AND PAROLE ACT §2(a) (rev. 1955)).

28. *Id.* at 55-60.

29. *Id.* at 63.

California has a three-prong test to determine whether a condition of probation is invalid by analyzing whether it:

- (a) has no relationship to the crime of which offender was convicted;
- (b) relates to conduct which is not in itself criminal;
- (c) requires or forbids conduct which is not reasonably related to future criminality.³⁰

Probation allows courts to be creative, within established guidelines, in an attempt to rehabilitate the offender.³¹ Conditions of probation may include opportunities to use services that can attempt to “rehabilitate” the offending driver.³² In fact, the American Bar Association has concluded that probation is a desirable disposition in appropriate cases because:³³

The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for individuals.

(i) Programs should promote offenders’ future compliance with the law.

(ii) Programs should not be unduly restrictive of an offender’s liberty or autonomy. Where fundamental rights are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance.

(iii) Before an offender is sentenced to a program of education, rehabilitation, or therapy, the court should consider whether the offender will participate in and benefit from the program, and

(iv) When an individual is required to pay a fine as a condition of a compliance program, the court should consider the offender’s financial circumstances in determining the total amount of the fine and the

30. *Id.* at 72 (citations omitted).

31. Jaimy M. Levine, *Join the Sierra Club!: Imposition of Ideology as a Condition of Probation*, 142 U PA. L. REV. 1841 (1994) (Levine analyzes cases that imposed conditions of probation that dealt with individuals’ sex lives and other “private” activities. Some of the cases were upheld and others overturned on appeal.).

32. AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-3.17 (1994).

33. *Id.* at 18-3.13.

schedule of payment. When an individual is required to make restitution to a victim as a condition of a compliance program, the court should consider the offender's financial circumstances in determining the schedule of payment.

(d) The agency should ensure that sentencing courts set conditions of a compliance program that fit the circumstances of an individual offender. The basic condition of every sentence to a compliance program is that the offender leads a law-abiding life. Discretionary conditions may deal appropriately with other matters to the extent that restrictions have a reasonable relationship to the individual's current offense and criminal history, such as:

(i) cooperating with the required terms of supervision;

(ii) meeting family responsibilities;

(iii) maintaining steady employment or engaging in a specific employment or occupation;

(iv) pursuing a prescribed educational or vocational training program;

(v) undergoing available medical, rehabilitative, psychological or psychiatric treatment, including periodic testing for illegal use of controlled substances;

(vi) maintaining residence in a prescribed area or in an available facility for individuals sentenced to a compliance program;

(vii) refraining from consorting with specified groups of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities;

(viii) making restitution of the proceeds of the offense or making reparation for loss or injury caused by the offense;

(ix) payment of a fine;

(x) refraining from the use of alcohol or illegal substances or the possession of a dangerous weapon;

(xi) performing specified public or community service.

The agency performing the intermediate function should develop a model set of compliance program conditions and guidance concerning their use.

(e) The legislature should authorize sentencing courts to set terms of a compliance program following release from total or intermittent confinement. The post-release program may, but need not, require supervision of an offender.³⁴

Jail sentences have been said to have no deterrent effect on drunk driving.³⁵ Too often laws are created for their symbolic appeal rather than for their actual effect. It is desirable to adopt policies designed to deter crime (in this case drunk driving), but research shows that these often have only a transient effect toward this intended goal.³⁶ That is,

Court referred substance abuse treatment merits serious consideration as a viable component in any integrated policy on drunken driving. The results support the contention that court-ordered treatment can be effective with DWI offenders who meet clinical criteria for alcohol or drug abuse or dependence as it is with non-court-referred patients.³⁷

Courts throughout the nation have imposed conditions on probation that require defendants to refrain from drinking alcohol if the drinking was related to the offense and the focus is on the defendant's rehabilitation.³⁸ Requiring attendance at A.A. meetings, as a condition of probation, places responsibility on the criminal. Treating the criminal is important because:

[a]ddiction has roots other than those that cause general criminal behavior. An addicted offender, then, differs from a non-addicted offender. Therefore, some

34. *Id.*

35. Laurence H. Ross et al., *Can Mandatory Jail Laws Deter Drunk Driving? The Arizona Case*, 81 J. CRIM. L. & CRIMINOLOGY 156 (1990).

36. Patrick T. Kinkade et al., *Probation and the Drunk Driver: A Cost of Being MADD*, 56 FED. PROBATION, June 1992, at 14.

37. Norman G. Hoffmann et al., *Comparison of Court-Referred DWI Arrestees with Other Outpatients in Substance Abuse Treatment*, 48 J. STUD. ON ALCOHOL 591, 594 (1987).

38. *United States v. Miller*, 549 F.2d 105, 107 (9th Cir. 1977).

purpose may be served by treating the cause of the deviancy rather than simply punishing the criminal behavior. It is this assumption upon which alternative sentencing to Twelve Step programs is founded.³⁹

There exists a need to reevaluate A.A. as a condition of probation, in order to rehabilitate the offender and to free society from the dangers posed by alcohol-related driving incidents. “[W]hile jailing D.U.I. offenders does little to prevent subsequent recommission of the same crime, a sentence involving A.A. . . . can be successful.”⁴⁰ Furthermore,

A.A. is an attractive treatment tool for the criminal justice system for three reasons. First, because it is inexpensive to provide, is run by volunteers, and is independent of the criminal justice system, A.A. relieves the system of many financial expenses and administrative burdens associated with treatment programs. . . .

Second, A.A. is widely accepted by professionals as an effective way to combat the disease of alcoholism. Finally, the program interacts neatly with the goals of the criminal justice system: punishment, incapacitation, rehabilitation, and deterrence.⁴¹

The A.A. organization provides an environment for alcoholics to succeed by providing a support system for alcoholics and an opportunity for an alcoholic to “take responsibility for [his/her] recovery.”⁴²

39. Ethan G. Kalett, *Twelve Steps, You're Out (Of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 HASTINGS L.J. 129, 137-38 (1996).

40. *Id.* at 158.

41. *Id.* at 148-49. “Even if the Establishment Clause requires that some communications between A.A. members in some circumstances be protected by New York’s cleric-congregant privilege, [petitioner’s] communications to fellow A.A. members do not qualify for such protection.” *Cox v. Miller*, 296 F.3d 89, 112 (2d Cir. 2002).

42. Kinkade, *supra* note 36, at 142.

V. EFFECTIVENESS OF ALCOHOLICS ANONYMOUS

Since its inception in 1935, A.A. has been a major force in the treatment of alcoholism, and has been credited with changing society's view of alcoholism from a character flaw to a treatable illness.⁴³ A.A. is probably the most widely sought after intervention for those with alcohol problems in the United States, and perhaps even the world.⁴⁴ In fact, it has been stated that A.A. is sought out more frequently than all other forms of professional alcohol treatment programs combined,⁴⁵ and it is estimated that there are two million worldwide members of A.A.⁴⁶ Of these members, almost 1.2 million are in the United States, and they belong to one or more of the 52,000 plus groups/chapters in the United States.⁴⁷ Using a twelve-step program, A.A. has the main goal of helping people who have problems with alcohol by assisting them through recovery.⁴⁸ It is widely believed to be an effective intervention for alcoholism.⁴⁹

Yet belief is not fact. There is a need to rigorously research the effectiveness of the twelve-step approach used by A.A. However,

43. Christine E. Le et al., *Alcoholics Anonymous and the Counseling Profession: Philosophies in Conflict*, 73 J. COUNSELING DEV. 603, 603 (1995); ERNEST KURTZ, A.A.: THE STORY (Harper & Row, 1988); Diane R. Davis & Golie G. Jansen, *Making Meaning of Alcoholics Anonymous for Social Workers: Myths, Metaphors, and Realities*, 43 SOC. WORK 169, 175 (1988).

44. RESEARCH ON ALCOHOLICS ANONYMOUS: OPPORTUNITIES AND ALTERNATIVES 1-5 (Barbara S. McCrady & William R. Miller eds., 1993).

45. John McKellar et al., *Alcoholics Anonymous Involvement and Positive Alcohol-related Outcomes: Cause, Consequence, or Just a Correlate? A Prospective 2-year Study of 2,319 Alcohol-dependent Men*, 71 J. CONSULTING & CLINICAL PSYCHOL. 302, 302 (2003).

46. Klaus Makela, *International Comparisons of Alcoholics Anonymous*, 17 ALCOHOL HEALTH & RES. WORLD 228, 228 (1993).

47. Alcoholics Anonymous, Membership, http://www.aa.org/en_information_aa.cfm?PageID=2&SubPage=50 (last visited Mar. 22, 2005).

48. Michael Gossop et al., *Is Attendance at Alcoholics Anonymous Meetings after Inpatient Treatment Related to Improved Outcomes? A 6-Month Follow-up Study*, 38 ALCOHOL & ALCOHOLISM 421, 421 (2003).

49. William R. Miller & Barbara S. McCrady, *The Importance of Research on Alcoholics Anonymous*, in RESEARCH ON ALCOHOLICS ANONYMOUS: OPPORTUNITIES AND ALTERNATIVES, *supra* note 44, at 3. There is abundant literature which touts the effectiveness of A.A., but much of this literature is built upon single case studies or individual success stories. See e.g., SUSAN CHEEVER, MY NAME IS BILL: BILL WILSON - HIS LIFE AND THE CREATION OF ALCOHOLICS ANONYMOUS (2004). One of the problems with conducting rigorous empirical research on the effectiveness of A.A. as an intervention is that A.A. does not seek or promote research on the services and treatment it offers. Alcoholics Anonymous, A.A. at a Glance, http://www.alcoholics-anonymous.org/en_information_aa.cfm?PageID=10 (last visited Mar. 22, 2005) ("A.A. does not: [k]eep membership records or case histories . . . engage in or support research.").

there are few well-designed, controlled research studies on its effectiveness.⁵⁰ The limited research to date suggests that A.A. is successful in leading to sobriety, at least for those who attend regularly and finish the program.⁵¹ In fact, A.A. claims a seventy-five percent success rate in terms of sobriety for alcohol drinkers who seriously undertook and completed its twelve-step program.⁵² Among alcoholics, A.A. is frequently mentioned as a recommended treatment intervention.⁵³ C.D. Emrick conducted a meta-analysis of the research evaluating A.A., and found that between forty to fifty percent of

50. See generally Gossop, *supra* note 48; Richard J. Kownacki & William R. Shadish, *Does Alcoholics Anonymous Work? The Results From a Meta-Analysis of Controlled Experiments*, 34 *SUBSTANCE USE & MISUSE* 2897 (1999); Le, *supra* note 43.

51. In a study involving 150 British individuals with alcohol dependence who were in an inpatient unit, it was found that those who frequently attended Alcoholics Anonymous meetings reported drinking alcohol on a less frequent basis than those individuals who did not participate in Alcoholics Anonymous. This was particularly true of those who attended Alcoholics Anonymous on a weekly or more frequent basis after discharge from the inpatient care unit. Those who attended weekly or more after discharge reported greater reductions in alcohol usage. See Gossop, *supra* note 48, at 424. The authors of the study concluded that “[t]he findings suggest that A.A. can provide a useful aftercare resource and that regular contact with A.A. may help to maintain the benefits accrued from alcohol treatment programmes.” *Id.* at 425.

In a study of 172 men and women, it was found that those who regularly attended Alcoholics Anonymous meetings were more successful than those who did not attend or attended less frequently. It was concluded that Alcoholics Anonymous could be a program to help alcoholics achieve sobriety. Phillip Hudson, *THE IMPACT OF ALCOHOLICS ANONYMOUS MEMBERSHIP, SPIRITUAL AWARENESS, AND COMMITMENT EFFORT ON ALCOHOL-PROBLEM ADVERSITY* (2004) (unpublished Ph.D. dissertation, Walden University) (on file with author).

In a study of ninety men and their female partners, it was found that those who frequently attended Alcoholics Anonymous meetings had higher rates of abstinence. See Barbara S. McCrady et al., *Alcoholics Anonymous and Relapse Prevention as Maintenance Strategies after Conjoint Behavioral Alcohol Treatment for Men: 18-month Outcomes*, 72 *J. CONSULTING & CLINICAL PSYCHOL.* 870 (2004).

It was found that Alcoholics Anonymous members generally report greater abstinence than nonmembers. See Gerald M. Cross et al., *Alcoholism Treatment: A Ten-year Follow-up Study*, 14 *ALCOHOLISM: CLINICAL & EXPERIMENTAL RES.* 169, 172 (1990).

It was found that those individuals who attended Alcoholics Anonymous had better alcohol outcomes than those individuals who sought no help. Additionally, it was found that the more Alcoholics Anonymous meetings a person attended, the more likely s/he was to maintain sobriety and s/he was less likely to have drinking problems a year later. Christine Timko et al., *Outcome of Treatment for Alcohol Abuse and Involvement in AA among Previously Untreated Problem Drinkers*, 21 *J. MENTAL HEALTH ADMIN.* 145 (1994).

In a decade long study of 286 undergraduate Harvard graduates and 456 Boston youths, it was found that Alcoholics Anonymous was one of the best predictors of sustained alcohol abstinence. George E. Vaillant, *A 60-year Follow-up of Alcoholic Men*, 98 *ADDICTION* 1043, 1048 (2003).

52. *ALCOHOLICS ANONYMOUS, ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM* (1976).

53. Alisdair Mackenzie & Richard P. Allen, *Alcoholics' Evaluations of Alcoholism Treatment*, 21 *ALCOHOLISM TREATMENT Q.* 1, 8 (2003).

members maintain abstinence long term and over two-thirds of members improved but did not totally abstain.⁵⁴ He concluded that A.A. "has been demonstrated to be associated with abstinence for many alcohol-dependent individuals and thus the professional who comes into contact with alcoholics should become familiar with A.A. and utilize this self-help resource whenever appropriate."⁵⁵ This meta-analysis of 107 published studies concluded that greater involvement in A.A. resulted in reduced alcoholic drinking.⁵⁶ In a long-term study of alcoholics who had undergone formal alcoholic treatment programs, the only predictor of sobriety during the ten years after discharge was frequent attendance of A.A. meetings and functions.⁵⁷ In addition, research has found that those who complete another substance treatment program and then attend A.A. meetings are less likely to resume drinking alcohol as compared to those who did not attend the A.A. meetings after completing another substance abuse treatment program.⁵⁸ Thus, there is an indication that the effectiveness of A.A. is increased when it is tied to participation in other treatment interventions. There is also an indication that the effectiveness of A.A. is not only tied to other treatment programs but also may be independent of the other programs and may even enhance the effects of these other treatment programs.⁵⁹ Moreover, participating in A.A. has been tied to positive outcomes regardless of motivation or psychopathology, suggesting that it is an effective treatment intervention for those suffering from alcohol drinking disorders.⁶⁰

54. Chad D. Emrick, *Alcoholics Anonymous: Affiliation Processes and Effectiveness as Treatment*, 11 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 416, 419 (1987).

55. *Id.* at 421.

56. Chad D. Emrick et al., *Alcoholics Anonymous: What is Currently Known, in RESEARCH ON ALCOHOLICS ANONYMOUS: OPPORTUNITIES AND ALTERNATIVES*, *supra* note 44, at 41-76.

57. Cross, *supra* note 51, at 172.

58. See generally George Christo & Christine Franey, *Drug Users' Spiritual Beliefs, Locus of Control and the Disease Concepts in Relation to NA Attendance and Six-month Outcomes*, 38 ALCOHOL DEPENDENCE 51 (1995); Robert Fiorentine, *After Drug Treatment: Are 12-step Programs Effective in Maintaining Abstinence*, 25 AM. J. ALCOHOL ABUSE 93 (1999); George S. Alford et al., *Alcoholics Anonymous - Narcotics Anonymous Model In-Patient Treatment of Chemically Dependent Adolescents: A 2-year Outcome Study*, 52 J. STUD. ON ALCOHOL 118 (1991).

59. Fiorentine found that weekly attendance of Alcoholics Anonymous was associated with abstinence of alcohol even after controlling for continued treatment in an outpatient treatment program. See Fiorentine, *supra* note 58, at 112. Moreover, those individuals who partook in both treatments did the best. *Id.* at 111.

60. In a study of 2,319 male veterans who sought alcohol treatment at VA hospitals, it was found that participating in Alcoholics Anonymous during year one of the study was associated with lower levels of alcohol-related problems during year two of the study. Conversely, it was found that alcohol problems did not lead necessarily to participating in

While A.A. may be successful, the key to success is completion of the program. Many people who start the twelve-step program by A.A. do not finish it. It has been claimed that almost half of those who start the program drop out after several months.⁶¹ Research strongly suggests that more frequent attendance of A.A. meetings is linked to decreased chances of relapse (i.e., drinking of alcoholic beverages).⁶² In order for the treatment to be effective, it is necessary for the person to continue attending A.A. meetings and treatment events and admit that they are a member of A.A.⁶³ A.A. involves a long-term commitment. Its effects, when discontinued, appear to be short-term. Research suggests that the effects of treatment provided by A.A. begin to wane somewhere between six to eighteen months.⁶⁴ Thus, it is necessary for most alcoholics to continue to attend A.A. meetings for the rest of their lives.⁶⁵ This fact

Alcoholics Anonymous. Specifically, it was found that the level of alcohol-related problems in year one of the study was not related to participation in Alcoholics Anonymous in year two. More importantly, it was found that the level of motivation to change or level psychopathology was not attributed to the changes in the participants in the study. See McKellar, *supra* note 45. The authors concluded that "the findings are consistent with the hypothesis that A.A. involvement causes subsequent decreases in alcohol consumption and related problems." *Id.* at 306.

61. John N. Chappel, *Long-term Recovery from Alcoholism*, 16 PSYCHIATRIC CLINICS N. AM. 177, 179 (1993); Elisha R. Galaif & Steve Sussman, *For Whom Does Alcoholics Anonymous Work?*, 30 INT'L J. ADDICTIONS 161, 164 (1995).

62. Paul E. Caldwell and Henry S. G. Cutter, *Alcoholics Anonymous Affiliation During Early Recovery*, 15 J. OF SUBSTANCE ABUSE TREATMENT 221 (1998); R. Fiorentine & Maureen P. Hillhouse, *Exploring the Addictive Effects of Drug Misuse Treatment and Twelve-Step Involvement: Does Twelve-Step Ideology Matter?*, 35 SUBSTANCE USE & MISUSE 367, 369 (2000); Norman G. Hoffman, Patricia Ann Harrison, & Carol A. Belille, *Alcoholics Anonymous after Treatment: Attendance and Abstinence*, 18 INT'L J. ADDICTIONS 311, 314-15 (1983).

63. In a study of 1,506 alcoholics, it was found that the number of steps completed in the twelve-step Alcoholics Anonymous program, the frequency of attending Alcoholics Anonymous meetings, and identifying one's self as an Alcoholics Anonymous member were highly predictive in drinking outcomes one year after treatment. The more steps completed, the more meetings attended, and the more willingness to admit membership, the greater the number of days the person would remain abstinent during the year after treatment. Richard N. Cloud, Craig H. Ziegler, & Richard D. Blondell, *What is Alcoholics Anonymous Affiliation?*, 39 SUBSTANCE USE & MISUSE 1117, 1128 (2004).

64. George S. Alford, *Alcoholics Anonymous: An Empirical Outcome Study*, 5 ADDICTIVE BEHAV., 359, 365 (1980). For example, Fiorentine found individuals who continued Alcoholics Anonymous after discharge were more likely to maintain sobriety at twenty-four months than those individuals who discontinued Alcoholics Anonymous attendance after discharge. Fiorentine, *supra* note 58, at 107-08.

65. It was found that those alcoholics who frequently attended Alcoholics Anonymous over a period of eight years had much better success rates during the eight years. Christine Timko et al., *Long-term Outcomes of Alcohol Use Disorders: Comparing Untreated Individuals with Those in Alcoholics Anonymous and Formal Treatment*, 61 J. STUD. ON ALCOHOL 529 (2000).

supports the position of A.A. that alcoholism is a disease that can be stopped but never cured.⁶⁶ Likewise, “one day at a time” is the motto of A.A. In fact, there is evidence which suggests that the duration spent with in A.A. is more important than frequency.⁶⁷ Furthermore, it should be pointed out that relapses in other alcohol treatment interventions also fail often and have limited lasting effects.⁶⁸ Thus, the short-term effectiveness and the fact many participants relapse is not unique to A.A.

There is also some evidence to suggest that those individuals who embrace the spiritual part of A.A. are more successful.⁶⁹ In addition, some studies have not found positive outcomes resulting from attendance at A.A. meetings.⁷⁰ While the success of A.A. is subject to debate, A.A. is more frequently found successful as a measure to combat alcoholism. One significant problem with A.A. is that it is based upon voluntary participation and motivation to change. While the research to date generally supports that greater attendance, duration, and acceptance of the principles of A.A. are linked to abstinence, it is unclear how effective A.A. is with people who are forced to attend as part of a criminal sentence. There is very little research on this population of individuals who attend A.A. functions. However, it should be noted that about eighty percent of A.A. participants were directed to A.A. through other programs, especially counseling and other treatment programs.⁷¹ These individuals

66. *Le, supra* note 43.

67. In a study which followed 473 people with alcohol use disorders for eight years, it was found that those who remained with Alcoholics Anonymous did far better than those who did not, regardless of the frequency of attendance in Alcoholics Anonymous at the start of the study. Moreover, those who joined and participated in Alcoholics Anonymous quickly did far better than those who delayed affiliation with Alcoholics Anonymous. Rudolf H. Moos & Bernice S. Moos, *Long-term Influence of Duration and Frequency of Participation in Alcoholics Anonymous on Individuals with Alcohol Use Disorders*, 72 *J. CONSULTING & CLINICAL PSYCHOL.* 81, 84 (2004) [hereinafter *Moos, Long-term Influence*].

68. McCrady, *supra* note 51, at 876.

69. In a study of 172 men and women, it was found that those individuals who reported to have gained higher spirituality from attending Alcoholics Anonymous meetings had fewer negative consequences. *See Gossop, supra* note 48. The finding that spirituality is linked to sobriety fits into the foundation of Alcoholics Anonymous which was originally based upon Christian principles of giving into God, listening to God for direction, and removing sin from one's life, among others. *Le, supra* note 43; KURTZ, *supra* note 43.

70. Brian H. McLatchie & Kenneth G. E. Lomp, *Alcoholics Anonymous Affiliation and Treatment Outcome Among a Clinical Sample of Problem Drinkers*, 14 *AM. J. DRUG & ALCOHOL ABUSE* 309 (1988). Stanton Peele, *Alcoholism, Politics, and Bureaucracy: The Consensus Against Controlled-Drinking Therapy in America*, 17 *ADDICTIVE BEHAV.* 49, 53-54 (1992).

71. *Le, supra* note 43, at 607.

generally benefited from being directed to A.A. Overall the treatment provided by A.A. appears to be effective.

VI. FREE EXERCISE AND ESTABLISHMENT CLAUSES AND ALCOHOLICS ANONYMOUS

A.A., a community rehabilitative program, 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 A.A. is not allied with any sect, denomination, politics, organization or institution Our primary purpose is to stay sober and help other alcoholics to achieve sobriety.

The heart of the A.A.'s suggested program of personal recovery is contained in "Twelve Steps" describing the experience of the earliest members of the Society.⁷² Newcomers are not asked to accept or follow

72 . These twelve steps are:

- (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 ask 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.

these Twelve Steps in their entirety if they feel unwilling or unable to do so. In addition, according to A.A., the “higher power” which the participant is encouraged to acknowledge need not be God.⁷³

Applying this test to a mandatory attendance at A.A. meetings, one court concluded that such condition was not violative of the Establishment Clause by stating that:

[i]t is undisputed that the primary purpose of requiring attendance at self-help meetings such as A.A. is to prevent drunk driving and the tragic injuries and deaths that result from it, while at the same time providing treatment for individuals with substance abuse problems. The “principle and primary effect” of encouraging participation in A.A. is not to advance religious belief but to treat substance abuse.⁷⁴

This result has not been followed in subsequent cases. Indeed, in *Warner v. Orange County*,⁷⁵ the plaintiff, after pleading guilty to an alcohol-related driving offense, was sentenced to three years probation.⁷⁶ The plaintiff sued “alleging that the endorsement and promotion of A.A. by the State through its approval of County alcohol programs violated the Establishment Clause of the First Amendment.”⁷⁷ The court stated:

[t]here can be no doubt . . . that [probationer] was coerced into participating in these religious exercises by virtue of his probation sentence. . . . [Probationer] . . . was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation.⁷⁸

(12) Having had a personal awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

O'Connor v. California, 855 F. Supp. 303, 306, n. 3 (C.D. Cal. 1994).

73. *Id.* at 306.

74. *Id.* at 307.

75. *Warner v. Orange County*, 115 F.3d 1068 (2d Cir. 1996).

76. *Id.* at 1069-70.

77. *O'Connor*, 855 F. Supp. at 305.

78. *Warner*, 115 F.3d at 1075-76.

Given *Lee v. Weisman's* psychological coercion test, it is not surprising that many lower courts and legal scholars have found compulsory referral to A.A., without a realistic secular alternative, as being violative of the Establishment Clause. While there is a non-frivolous argument that A.A. is non-religious, its explicit reference to a higher power combined with the coercive effect of court-ordered probation make these lines of cases unsurprising.

The argument that A.A. is non-religious can be gleaned from the *Warner* court's opinion which stated:

[s]upporters of A.A. refer to it not as a religious organization, but as a spiritual group for recovering alcoholics who have accepted that they are powerless to control their drinking. Although God is mentioned in six of the 12 steps to recovery, the program is not based on a specific religion. Whether a person is Catholic, Jewish, Buddhist, or agnostic should not engender a religious conflict, since the program allows for individual interpretation of "higher power."⁷⁹

Indeed, A.A. and other self-help groups arguably fall outside the domain of formal religion, but they offer strategies to individuals for attaining the ultimate meaning of life.⁸⁰ On the other hand, adherents also argue somewhat inconsistently that the concept of a higher power is necessary from a psychotherapeutic point of view.⁸¹ The point seems to be that A.A. is non-religious, and even if slightly tending towards a vague sense of religiosity, it is unparalleled in its efficacy and therefore necessary to fight the scourge of drunk driving. Because of the powerlessness issue of addiction, and the relinquishing of control over the addiction, an individual is empowered to deal with alcoholism and life in general, through a higher power.⁸²

Involvement in A.A. significantly reduces the possibility of relapse.⁸³ In Massachusetts, the recidivism rate for individuals on

79. Jane L. Uva, *Alcoholics Anonymous: Medical Recovery Through a Higher Power*, 266 JAMA 3065, 3065 (1991).

80. Paul H. Chalfant, *Stepping to Redemption: Twelve Step Groups as Implicit Religion*, 20 FREE INQUIRY CREATIVE SOC. 115 (1992).

81. Stephanie D. Brown, *Alcoholics Anonymous: An Interpretation of its Spiritual Foundation*, 14 BEHAV. HEALTH MGMT. 25, 28 (1994).

82. *Id.* at 26.

83. Mary Sheeren, *The Relationship Between Relapse and Involvement in Alcoholics Anonymous*, 49 J. STUD. ON ALCOHOL 104 (1988).

probation with the conditions of alcohol treatment or education was lower than the recidivism rate for DUI offenders on probation with no conditions of treatment or education.⁸⁴ The primary focus of A.A. is to help other alcoholics achieve sobriety, or at the very least, to make individuals aware of the possibility that they may have serious drinking problems.⁸⁵ One study suggests that the success of A.A. is based upon the recovering person's embracing of religion or a spiritual awakening.⁸⁶

Thus far, our argument is that A.A. is critically important in the fight against drunk driving and that the law, with regard to the Establishment Clause, has been relaxing to the point that compulsory use of these programs can be reconsidered. We turn to that argument.

A. *Free Exercise: Religious Freedom Restoration Act*

In 1993, Congress passed the Religious Freedom Restoration Act⁸⁷ (RFRA). This passage was in response to the United States Supreme Court's ruling in *Employment Division v. Smith*.⁸⁸ In *Smith*, the Court was asked

to decide whether the Free Exercise Clause of the First Amendment permits the State . . . to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.⁸⁹

84. See also Kalett, *supra* note 39, at 139; Mackenzie, *supra* note 53 (some studies suggest alcohol treatment programs decrease recidivism). Other studies argue that A.A. studies are ineffective, possess methodological flaws or provide assistance to recovering individuals through processes other than a reliance on spirituality. See Marc Galanter, *Research on Spirituality and Alcoholics Anonymous*, 23 ALCOHOLISM CLINICAL & EXPERIMENTAL RES. 716 (1999); Moos, *Long-term Influence*, *supra* note 67; J. Scott Tonigan, W.R. Miller & Carol Schermer, *Atheists, Agnostics and Alcoholics Anonymous*, 63 J. STUD. ON ALCOHOL 534, 539 (2002).

85. See Lee Ann Kaskutas et al., *The Role of Religion, Spirituality and Alcoholics Anonymous in Sustained Sobriety*, 21 ALCOHOLISM TREATMENT Q. 1 (2003).

86. Alyssa A. Forcehimes, *De profundis: Spiritual Transformations in Alcoholics Anonymous*, 60 J. CLINICAL PSYCHOL. 503 (2004).

87. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2004) [hereinafter RFRA].

88. *Employment Division v. Smith*, 494 U.S. 872 (1990).

89. *Id.* at 874.

In *Smith*, two employees had been fired from their jobs with a private drug rehabilitation organization as a result of their ingestion of peyote in conjunction with a sacramental ceremony of the Native American Church, of which both were members.⁹⁰ Peyote is a controlled substance proscribed by that state's law.⁹¹ As a result of their discharges for misconduct, the two employees were denied unemployment benefits.⁹²

The *Smith* Court began by citing *Sherbert v. Verner*,⁹³ stating that "the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"⁹⁴ The *Smith* Court continued by stating that

[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."⁹⁵

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law of religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.⁹⁶

The *Smith* Court then detailed the balancing test for exemptible activities resulting from religious purposes indicating that such a test requires a showing that "governmental actions that substantially burden a religious practice must be justified by a compelling

90. *Id.*

91. *Id.*

92. *Id.*

93. *Sherbert v. Verner*, 374 U.S. 398 (1963).

94. *Id.* at 402 (citations omitted).

95. *Smith*, 494 U.S. at 878-79 (citations omitted) (quoting *Minersville School District Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

96. *Id.* at 881 (citations omitted).

governmental interest.”⁹⁷ The *Smith* Court, however, indicated that the *Sherbert* test does not apply to “require exemptions from a generally applicable criminal law.”⁹⁸ The *Smith* court concluded that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”⁹⁹ The *Smith* Court noted that a few states had excepted peyote use from their criminal laws;¹⁰⁰ however, because the state law in question did not include such an exception, because the two employees’ conduct was prohibited under that state’s law, and because such a prohibition was constitutional and consistent with the Free Exercise Clause, the employees’ denial of unemployment benefits was appropriate.¹⁰¹ Thus, “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”¹⁰²

It is plain that the Court’s holding in *Smith* dramatically relaxed the hold of the Establishment Clause. If the law had stayed still at that point, one might have argued that with only a slight expansion on *Smith*’s holding that A.A.’s effectiveness and popularity as a sentencing tool insulated it from serious constitutional attack. However, the law as enunciated by Congress did not hold still for that hypothesis.

As a result of the Court’s holding in *Smith*, RFRA was enacted “to restore the compelling interest test as set forth in *Sherbert* and . . . to guarantee its application in all cases where free exercise of religion is substantially burdened”¹⁰³ The compelling interest test, in light of Congress’ clear intention, would arguably doom compulsory A.A. Clearly, there are expensive and less effective alternatives and it is anybody’s guess as to whether the Court in that climate might have held such alternatives to be necessary.

RFRA was reviewed by the United States Supreme Court in *Boerne v. Flores*.¹⁰⁴ In *Boerne*, Archbishop Flores determined it necessary to expand the church building in order to accommodate the

97. *Id.* at 882-83 (citing *Sherbert*, 374 U.S. at 402-03).

98. *Id.* at 884.

99. *Id.* at 885 (citations omitted).

100. *Smith*, 494 U.S. at 890.

101. *Id.*

102. 42 U.S.C. § 2000bb(a)(4) (2004) (congressional findings include the *Smith* holding).

103. 42 U.S.C. § 2000bb(b)(1) (2004).

104. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

church's growing parish.¹⁰⁵ The church applied for a building permit, but the City of Boerne denied the application as violative of the city's zoning ordinance.¹⁰⁶ The church filed a lawsuit claiming, among other causes of action, that the denial violated RFRA.¹⁰⁷ "The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment."¹⁰⁸ The Fifth Circuit reversed, finding RFRA to be constitutional.¹⁰⁹ The United States Supreme Court granted certiorari.¹¹⁰

The *Boerne* Court began by recognizing that RFRA was enacted pursuant to the Fourteenth Amendment to the United States Constitution.¹¹¹ The *Boerne* Court then detailed the parameters of Congress' power under this Amendment:

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' . . . It is also true, however, that 'as broad as the congressional enforcement power is, it is not unlimited.' . . . Congress' power under section 5, however, extends only to 'enforcing' the provisions of the Fourteenth Amendment. The court has described this power as 'remedial.' . . . [Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.¹¹²

105. *Id.* at 512.

106. *Id.*

107. *Id.*

108. *Id.* See *Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995) ("[T]he Court is of the opinion RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof as established under [Smith].").

109. 521 U.S. at 512. See *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996) (RFRA was constitutionally enacted under Congress' broad section 5 authority and could be enforced without usurping the judiciary's power to interpret the Constitution.).

110. 519 U.S. 926.

111. U.S. CONST. amend. XIV, §§ 1, 5 provides "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

112. *Boerne*, 521 U.S. at 518-19 (citations omitted).

The *Boerne* Court, after providing a thorough analysis of section 5, indicated that the appropriateness of a remedial measure must be viewed against the harm to be addressed.¹¹³ The Court noted that the legislative record lacked evidence supporting the necessity of RFRA¹¹⁴ and that the reach and scope of RFRA was “sweeping.”¹¹⁵ In analyzing the language of RFRA, the Court noted that each party is imposed with the highest burden.¹¹⁶ That is, an objector must demonstrate that “a substantial burden on his free exercise” exists and the “[s]tate must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest.”¹¹⁷ The *Boerne* Court then concluded that:

[i]t is for Congress in the first instance to ‘determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference. Congress’ discretion is not unlimited, however, and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.¹¹⁸

In so concluding, the Supreme Court held that it was beyond Congress’ power under section 5 of the Constitution’s Fourteenth Amendment to enact RFRA.¹¹⁹

B. Application of RFRA to Federal Government and Inmates

While *Boerne* found the enactment of RFRA beyond Congress’ power under section 5, lower courts have found RFRA applicable to

113. *Id.* at 530.

114. *Id.*

115. *Id.* at 532.

116. *Id.* at 533-34.

117. *Boerne*, 521 U.S. at 533-34.

118. *Id.* at 536.

119. *See* 42 U.S.C. § 2000bb (2004) (Congressional findings and declaration of purposes); *but see Boerne*, 521 U.S. 507 (holding that the RFRA was beyond Congress’ power to enact under section 5 of the Constitution’s Fourteenth Amendment).

the federal government.¹²⁰ The Supreme Court has yet to rule on the matter.¹²¹

In *Kikumura v. Hurley*, an inmate in a United States penitentiary sued prison officials alleging violations of his rights under the First and Fifth Amendments and under RFRA.¹²² The *Kikumura* court stated that “[i]t is clear from the analysis in [*Boerne*] that the Court was focusing on Congress’ remedial powers to enforce the Fourteenth Amendment against states and local authorities.”¹²³ The *Kikumura* court reasoned that “[b]ecause Congress’ ability to make laws applicable to the federal government in no way depends on its enforcement power under Section 5 of the Fourteenth Amendment, the [*Boerne*] decision does not determine the constitutionality of RFRA as applied to the federal government.”¹²⁴ Further, the *Kikumura* court reasoned, “Congress’ power to apply RFRA to the federal government comes not from its ability to enforce the Fourteenth Amendment but rather from its Article I powers.”¹²⁵ The *Kikumura* court concluded that a plaintiff, under RFRA, must establish three elements: “(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion.”¹²⁶ Once a plaintiff has established these elements, “the burden shifts to the government to demonstrate that ‘application of the burden’ to the claimant ‘is in furtherance of a compelling government interest’ and ‘is the least restrictive means of furthering that compelling government interest.’”¹²⁷ “Thus, under RFRA, a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the prison regulation to the individual claimant.”¹²⁸

Application of RFRA to inmates is complicated further because:

120. *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

121. *Cutter*, 125 S. Ct. at 2118.

122. *Kikumura*, 242 F.3d at 953.

123. *Id.* at 958.

124. *Id.* See *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (“[W]e join other circuits and hold that RFRA may be applied to the national government.”).

125. *Kikumura*, 242 F.3d at 959. See also *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) (“Supreme Court invalidated RFRA only as applied to state and local courts.”); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (*Boerne* is inapplicable where the RFRA is not being applied to states).

126. *Kikumura*, 242 F.3d at 960 (citations omitted).

127. *Id.* at 961-62 (citing 42 U.S.C. § 2000bb-1(b)).

128. *Id.* at 962.

[p]risoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's free exercise clause. "Balanced against the constitutional protections afforded prison inmates, including the right to free exercise of religion [however,] are the interests of prison officials charged with complex duties arising from administration of the penal system." The free exercise claims of plaintiff are "judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."¹²⁹

One circuit has determined that "substantial burden" includes consideration of:

- (1) whether the "litigant's beliefs [are] sincere and the practices at issue [are] of a religious nature."
- (2) whether "the challenged rule . . . burden[s] a central tenet or important practice of the litigant's religion,"
- and (3) "whether the litigants' beliefs find any support in the religion to which they subscribe or whether the litigants are merely relying on a self-serving view of religious practice."¹³⁰

Thus, while RFRA is unconstitutional as applied to state and local governments, it is, unless the Court rules otherwise, applicable to the federal government. Its application in the prison environment is even more complicated by policies governing the institution's policies. As a result, the question regarding A.A., and other programs like it, is whether the Court's current view of the Establishment Clause is such that A.A. would be able to withstand even the more rigorous "compelling interest" and "least restrictive means" tests. We argue

129. *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (citations omitted). *See also* *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 982 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 501 (2004) (prisoners' constitutional rights may be limited in light of the penal system's needs; "constitutional claims that would otherwise receive strict scrutiny analysis if raised by a member of the general population are evaluated under a lesser standard of scrutiny in the context of a prison setting.") (citing *Turner v. Safley*, 482 U.S. 78, 81 (1987)). *See Turner*, 482 U.S. at 89-90 ("relational-relationship" test for analyzing the constitutionality of regulations that burden prisoners' fundamental rights).

130. *McEachin v. McGuinnis*, 357 F.3d 197, 202-03 (2d Cir. 2004) (citations omitted).

below that it does with respect to states under the new Religious Land Use and Institutionalized Persons Act of 2000,¹³¹ and that argument, if valid, applies equally here as to the federal government.

C. State Initiatives

Several states adopted Religious Freedom Reformation laws.¹³² One state passed a constitutional amendment, adopting RFRA language.¹³³ Two state statutes cite *Boerne* within the statutory language.¹³⁴ A few states cite *Smith* and/or *Wisconsin* and *Yoder* within the language.¹³⁵ All these states have adopted the compelling governmental interest and least restrictive test as the standard for determining whether a government has burdened the exercise of religion.¹³⁶ Standards to determine violations of free exercise of religion include: “restrict,”¹³⁷ “burden,”¹³⁸ and “substantially burden.”¹³⁹ Two states have adopted separate sections applying their religious freedom statutes to correctional facilities, identifying the necessity for the facility to establish a compelling state interest.¹⁴⁰

In applying these state statutes, the courts have given much deference to prison officials in demonstrating a penological interest that outweighs the burden placed upon the inmate. In one case, an inmate claimed that his “Native American Religion” practices included that he smoke tobacco cigarettes in order to permit the smoke to carry

131. 42 U.S.C. § 2000cc-1(a)(1)(2) (2000).

132. ALA. CONST. amend. 622; ARIZ. REV. STAT. § 41-1493.01, et seq. (2004); CONN. GEN. STAT. § 52-571b (2004); FLA. STAT. ANN. § 761.01, et seq. (West 2004); IDAHO CODE ANN. § 73-402, et seq. (Michie 2004); 775 ILL. COMP. STAT. 35/1, et seq. (2004); N.M. STAT. ANN. § 28-22-1, et seq. (West 2004); OKLA. STAT. tit.51, § 251, et seq. (2004); R.I. GEN. LAWS § 42-80.1-1, et seq. (2004); S.C. CODE ANN. § 1-32-10, et seq. (Law. Co-op. 2003); TEX. CIV. PRAC. & REM. ANN. § 110.001, et seq. (Vernon 2004).

133. ALA. CONST. amend. 622.

134. ALA. CONST. amend. 622 § II(6); 775 ILL. COMP. STAT. 35/10(5).

135. ALA. CONST. amend. 622 § II(4); 775 ILL. COMP. STAT. 35/10(4), (6); S.C. CODE ANN. 1-32-30(1).

136. ALA. CONST. amend. 622 § V(b)(1) - (2); ARIZ. REV. STAT. § 41-1493.01C.1-2; CONN. GEN. STAT. § 57-571b(b); FLA. STAT. ANN. § 761.03(1)(a)-(b); IDAHO CODE ANN. § 73-402(3)(a)-(b); 775 ILL. COMP. STAT. 35/10 (b)(1); N.M. STAT. ANN. § 28-22-3B; OKLA. STAT. tit.51, § 253B(1)-(2); R.I. GEN. LAWS § 42-80.1-3(b)(2); S.C. CODE ANN. § 1-32-40(1)-(2); TEX. CIV. PRAC. & REM. ANN. § 110.003(b)(1)-(2).

137. N.M. STAT. ANN. § 28-22-3; R.I. GEN. LAWS § 42-80.1-3(a).

138. ALA. CONST. amend. 622, § IV(a); CONN. GEN. STAT. § 52-571b(a).

139. ARIZ. REV. STAT. § 41-1493.01(B); FLA. STAT. ANN. § 761.03(1); IDAHO CODE ANN. § 73-402(2); 775 ILL. COMP. STAT. 35/10 § 15(i) & (ii); OKLA. STAT. tit.51, § 253A; S.C. CODE ANN. § 1-32-40; TEX. CIV. PRAC. & REM. ANN. § 110.003(a).

140. OKLA. STAT. tit.51, § 254; S.C. CODE ANN. § 24-27-500.

his prayers; that state prison institution had a tobacco-free policy.¹⁴¹ The court, in construing that state's Free Exercise of Religion Act, determined that the state had demonstrated a compelling interest in eliminating tobacco smoke in prison in order to promote "public health, provide an environment free from second-hand smoke, reduce litigation related to second-hand smoke, protect buildings against property damage, and curtail rising medical costs."¹⁴²

Another case held the prison institution had permissibly confiscated an inmate's pamphlet as necessary to promote "order, safety, and discipline."¹⁴³ That court, finding little case law on that state statute, turned "to federal cases for guidance, despite the fact that the federal statute, codified at 42 U.S.C. § 2000bb et seq. (2000), was held unconstitutional because it exceeded the scope of its enforcement power under the Fourteenth Amendment by applying the law to the states."¹⁴⁴

In yet another case, an inmate claimed a violation of his right to practice his religion as a result of the prison institution's policy of random cell assignment.¹⁴⁵ The court found that the institution's policy of randomly assigning cellmates did not inhibit or constrain the inmate's religious conduct.¹⁴⁶ These cases demonstrate that deference is given to prison officials permitting the institution's policy to demonstrate a compelling interest, despite its effect on the inmates.

These cases suggest that state courts will, for the most part, be receptive to compulsory use of A.A. as a probation device. The key question for most state courts will most likely be the position of the United States Supreme Court. State courts, it appears, are not likely to nix an effective treatment option, so long as it is not blatantly unconstitutional as decided by our nation's highest court.

141. *Roles v. Townsend*, 64 P.3d 338 (Idaho Ct. App. 2003), *cert. denied*, 540 U.S. 839 (2003).

142. *Id.* at 339 (citing IDAHO CODE ANN. § 73-402).

143. *Diggs v. Snyder*, 775 N.E.2d 40, 45 (Ill. App. 2002), *appeal denied*, 78 N.E.2d 156 (Ill. 2002) (citing 775 ILL. COMP. STAT. 35/10(a)(6), (b)(1)).

144. *Id.* at 44 (citing *Boerne*, 521 U.S. 507).

145. *Steele v. Guilfoyle*, 76 P.3d 99, 100 (Okla. Civ. App. 2003) (Plaintiff, an inmate who adhered to the Islamic Faith, claimed a violation of his right to practice his religion because he was housed in a cell with a non-Muslim.).

146. *Id.* at 102.

*D. Post RFRA: Religious Land Use and Institutionalized
Persons Act*¹⁴⁷

Three years after *Boerne*, Congress, in yet another attempt to reassert the “compelling interest test” and the “least restrictive means” test, passed the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁴⁸ This act amended RFRA, including re-defining “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹⁴⁹ “The RLUIPA is largely a reprisal of the provisions of the RFRA, but its scope is limited to laws and regulations that govern (1) land use and (2) institutions such as prisons that receive federal funds.”¹⁵⁰ Congress passed RLUIPA, relying on its Spending and Commerce Clause powers.¹⁵¹ The RLUIPA clearly does not apply to the federal government; rather, it protects religious exercise against government burdens imposed by states and localities.¹⁵²

The statutory language [of RLUIPA] is nearly identical [to RFRA] and statements by RLUIPA’s sponsors in the Congressional record indicate that the legislative intent was to reenact RFRA in constitutional form. . . . RLUIPA makes two fundamental changes to RFRA. First, it pares the scope of the legislation from RFRA’s broad applicability down to only land uses and claims by institutionalized persons. . . . Second, it shifted the source of Congress’ power to pass the Act. While RFRA was styled as an expression of congressional authority under Section 5 of the Fourteenth Amendment RLUIPA was enacted pursuant to Congress’ power under the Spending Clause.¹⁵³

147. 42 U.S.C. § 2000cc (2000) [hereinafter RLUIPA].

148. *Id.*

149. 42 U.S.C. § 2000cc-5(7)(A).

150. *Adkins v. Kasper*, 393 F.3d 559 (5th Cir. 2004) (footnote omitted). *See also Murphy*, 372 F.3d 979.

151. *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003). However, the constitutionality of RLUIPA has been questioned. *See Adkins*, 393 F.3d 559 (constitutionality is currently the cause of a circuit split).

152. *Yerushalayim v. United States Dep’t. of Corrections*, 374 F.3d 89, 92 (2d Cir. 2004); *Madison v. Riter*, 355 F. 3d 310, 315 (4th Cir. 2003).

153. *Dehart v. Horn*, 390 F.3d 262, 275 (3rd Cir. 2004) (citation omitted). *See also Madison*, 355 F.3d at 315.

RLUIPA, like RFRA, has also come under constitutional attack. In *Mayweathers v. Newland*,¹⁵⁴ the Ninth Circuit Court of Appeals concluded “that Congress did not exceed its spending clause power in enacting RLUIPA.”¹⁵⁵ The *Mayweathers* court analyzed RLUIPA under several constitutional provisions,¹⁵⁶ including the Establishment Clause of the First Amendment.¹⁵⁷ Applying the *Lemon* test,¹⁵⁸ the court found that

[n]othing in RLUIPA indicates that wholly impermissible purposes, such as the advancement of religion, underlie RLUIPA. . . . RLUIPA intends a secular legislative purpose: to protect the exercise of religion in institutions from unwarranted and substantial infringement . . . RLUIPA neither advances nor inhibits religion. . . . RLUIPA merely accommodates and protects the free exercise of religion, which the Constitution allows.

“The statute itself defines religious exercise, 42 U.S.C. § 2000cc-5(7)(A), and requires only that states avoid substantially burdening these practices without a compelling justification.”¹⁵⁹

Ten months later, the Seventh Circuit Court of Appeals adopted the *Mayweathers* position in *Charles v. Verhagen* that “Congress did not violate the Establishment Clause of the First Amendment by its enactment of RLUIPA.”¹⁶⁰ However, eight days after *Charles*,¹⁶¹ the Sixth Circuit Court of Appeals held RLUIPA unconstitutional in *Cutter v. Wilkinson*.¹⁶² Although the Supreme Court has now reversed the Sixth Circuit, that court’s position is useful for an understanding of why, even given the more rigorous test imposed by RLUIPA, an effective but somewhat religious treatment program such as A.A. may yet survive constitutional scrutiny,

154. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003).

155. *Id.* at 1070.

156. *Id.* at 1066-70 (RLUIPA analyzed under the Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment and principle of separation of powers).

157. *See supra* note 8 (Establishment Clause).

158. *See supra* note 21 and accompanying text.

159. *Mayweathers*, 314 F.3d at 1068-69 (citations omitted).

160. 348 F.3d 601, 610, 611 (7th Cir. 2003) (quoting *Mayweathers*, 314 F.3d at 1069).

161. *See id.*

162. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004). *See infra* note 181 and accompanying text.

notwithstanding the test employed. Our argument is that notwithstanding the test employed, the Court's understanding of the Establishment Clause has shifted to the point that A.A. can withstand attack no matter what the semantic overlay is.

The Sixth Circuit in *Cutter* acknowledged *Charles*¹⁶³ and *Mayweathers*,¹⁶⁴ but determined that "RLUIPA violates the Establishment Clause because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation."¹⁶⁵ The *Cutter* court stated that the First Amendment Establishment Clause requires neutrality.¹⁶⁶ The *Cutter* court analyzed RLUIPA under the *Lemon* test¹⁶⁷ and concluded that "RLUIPA is still unconstitutional because it has the primary effect of advancing religion."¹⁶⁸ The court reasoned that "[p]rior to RLUIPA, restrictions imposed by prison officials upon inmates' fundamental rights were subject to a rational-relationship review. . . ."¹⁶⁹ RLUIPA "[i]n contrast to the highly deferential rational-relationship test . . . requires courts to apply strict scrutiny to all substantial burdens upon the free exercise of religion."¹⁷⁰ That is

[u]nder RLUIPA, prison regulations that substantially burden religious belief, including those that are generally applicable and facially neutral, are judged under a strict scrutiny standard, requiring prison officials, rather than the inmate, to bear the burden of proof that the regulation furthers a compelling penological interest and is the least restrictive means of satisfying this interest. . . . RLUIPA . . . switch[es] from a scheme of deference to one of presumptive unconstitutionality.¹⁷¹

Note the extent to which the argument has shifted. No longer is the First Amendment deployed to stop a state from imposing some form of religion. According to the Sixth Circuit, the state cannot even

163. 348 F.3d 601 (Wis. 2003).

164. *Mayweathers*, 314 F.3d 1062.

165. *Cutter*, 349 F.3d at 262.

166. *Id.*

167. *See supra* note 21 and accompanying text.

168. *Cutter*, 349 F.3d at 264.

169. *Id.* (citations omitted).

170. *Id.* at 265 (citations omitted).

171. *Id.* (citations omitted).

favor a vague general religiosity. Thus, RLUIPA presents a bit of a conundrum. On the one hand, it sets out a stringent test. If a state (or the federal government) wishes to place some burden on religious practice, it must show a compelling interest to do so, and must then do so in the least restrictive manner. But the flip side of this is a robust Establishment Clause that shoves all notion of religion outside of any government program. Thus, it appears that, at least according to the logic of the Sixth Circuit, RLUIPA is found unconstitutional by way of a muscular Establishment Clause that would, if upheld, make treatment programs like A.A. extremely problematic. We argue below that the Court's reversal of this decision by the Sixth Circuit paradoxically opens the door to treatment programs like A.A. notwithstanding the reintroduction of the more rigorous "compelling interest" and "least restrictive means" tests.

One month later, the Fourth Circuit Court of Appeals found that RLUIPA did not violate the Establishment Clause in *Madison v. Riter*.¹⁷² The *Madison* court cited *Charles*,¹⁷³ *Mayweathers*,¹⁷⁴ and *Cutter*,¹⁷⁵ acknowledging the two opposing holdings of those courts regarding the constitutionality of the RLUIPA. Citing the now discredited *Lemon*¹⁷⁶ test, the *Madison* court analyzed the constitutionality of the RLUIPA, acknowledging that the

RLUIPA may impose burdens on prison administrators as they act to accommodate an inmate's right to free exercise. But RLUIPA still affords prison administrators with flexibility to regulate prisoners' religious practices if the commonwealth "demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest."¹⁷⁷

The court concluded, stating that:

Legislative bodies have every right to accommodate free exercise, so long as government does not privilege

172. 355 F.3d 310 (4th Cir. 2003).

173. 348 F.3d 601 (9th Cir. 2003).

174. 314 F.3d 1062 (9th Cir. 2002).

175. 349 F.3d 257 (6th Cir. 2003).

176. See *supra* note 21 and accompanying text.

177. *Madison*, 355 F.3d at 321 (quoting 42 U.S.C. § 2000cc-1(a)).

any faith, belief, or religious viewpoint in particular. Section 3 of RLUIPA fits comfortably within this broad tradition.¹⁷⁸

Finally, about one year after *Madison*, the Eleventh Circuit Court of Appeals held RLUIPA was validly enacted under the Spending Clause in *Benning v. Georgia*,¹⁷⁹ and that it did not violate the Establishment Clause. Again, after applying the *Lemon* test,¹⁸⁰ the *Benning* court disagreed with “the Sixth Circuit, which held that the heightened protection granted to religious exercise by RLUIPA violates the basic requirement of neutrality embodied in the Establishment Clause.”¹⁸¹

E. Cutter v. Wilkinson: Change in the Court’s Analysis of Religion

The United States Supreme Court¹⁸² in *Cutter* reversed the Sixth Circuit, upholding RLUIPA’s constitutionality, while employing an analysis that reinvigorates the space needed for state governments to implement effective penal programs such as A.A.

First, and not insignificantly, as Justice Thomas stated in his concurring opinion, “[t]he court properly declines to assess RLUIPA under the discredited test of *Lemon v. Kurtzman*.”¹⁸³ The Court has been backing away from the *Lemon* test for many years and after *Cutter* all that remains is for the Court to give it a decent burial. This may seem a small thing, but it does show the extent to which the Court is able to back away from unrealistically restrictive Establishment Clause tests in order to give state and local governments breathing space for successful and important penological programs. What the Court and the concurrence must emphasize is the malleability of the clauses that must provide space for programs that are effective and needed but may, like A.A., arguably have some religious nexus.

Second, the *Cutter* case involved a very narrow question: Could a state which accepted federal funding for its prisons, as all states do,¹⁸⁴ prevent federal regulation that essentially mandated

178. *Id.* at 322.

179. *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004).

180. *See supra* note 21 and accompanying text.

181. *Benning*, 391 F.3d at 1311 (quoting *Cutter*, 349 F.3d 257).

182. 349 F.3d 257 (6th Cir. 2003).

183. *Id.* at 2125 n.1 (Thomas, J., concurring).

184. *Id.* at 2119 n.4.

neutrality as among religions? In order to answer that question in the negative, as did the Sixth Circuit, one must have a view of the Establishment Clause that eschews any hint of religion. In other words, in order to reject a position of neutrality among religions, one is forced to take a position that is wholly secular in all respects and is essentially hostile to religion. This stance would also require rejection of all faith-based programs such as those that deal with teenage pregnancy, violence and the like. By rejecting this position, the Supreme Court left space for programs that have a vague religious aura about them.

Third, the Court in *Cutter* emphasized repeatedly the importance of giving “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedure to maintain good order, security and discipline, consistent with consideration of costs and limited resources.”¹⁸⁵ Although deference to prison and probation authorities has been a consistent theme with the Court, it serves here as a warning not to read RLUIPA’s compelling interest and least restrictive means tests too rigorously. The Court has, perhaps, given with one hand and taken away with the other.

Finally, it is clear that *Cutter* will not tolerate “giving greater protection to religious rights than to other constitutionally protected rights.”¹⁸⁶

While the issue is not without doubt, it does appear that the Supreme Court, notwithstanding RFRA and RLUIPA’s attempts to reinvigorate the compelling interest tests and the least restrictive means tests, has fought Congress to a draw. The semantics of compelling interest and least restrictive means have been reinstated and are not entirely toothless. But the climate has changed, and their interpretation is at least an open question. We believe and have argued that A.A. might not have met these tests in the era of *Lemon* or even *Lee v. Weisman*. However, given the present climate, after all of the back and forth between the Court and Congress, space has been made for successful treatment programs, like A.A., to survive constitutional scrutiny. A.A. works and is good policy, and the extent to which it trenches on religious beliefs and practices is minimal.

185. *Id.* at 2123 (citations omitted).

186. *Id.* (citing *Cutter*, 349 F.3d at 264).

VII. CONCLUSION

Society needs assistance in lessening alcohol-related crimes. Permitting probation officers to require attendance at A.A. meetings is necessary to achieving this objective.

The plaintiffs argue that by recommending [community rehabilitative programs] to some offenders, parole officers steer the offenders to a religious program and by doing so provide governmental support to religion. The implications of the argument are unacceptable. If recommending a religious institution constituted an establishment of religion, a public school guidance counselor could not recommend that a student apply to a Catholic college even if the counselor thought that the particular college would be the best choice for the particular student. And, coming closer to home, a parole officer could not recommend to a parolee who had a serious drinking problem that he enroll in Alcoholics Anonymous, even if the officer believed that this was the only alcoholic-treatment program that would keep the parolee from committing further crimes. To suppose such recommendations unlawful would be to adopt a doctrinaire interpretation of the establishment clause remote from its underlying purpose and historical understanding.¹⁸⁷

Violations of the Free Exercise Clause require a balancing of the state's and individual's interests. The state's interest in promoting public safety, peace and order substantially outweighs a drunk driver's threat to society that may be alleviated by mandatory attendance at A.A.¹⁸⁸

A violation of the Establishment Clause "[requires] line-drawing . . . determining at what point a dissenter's rights of religious freedom are infringed by the state."¹⁸⁹ Finally, if Establishment Clause logic were followed:

187. *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 414-16 (2d Cir. 2001).

188. *Yoder*, 406 U.S. at 240 n.1 (White, J., concurring) (citations omitted).

189. *Warner*, 115 F.3d at 1076.

any number of ubiquitous penal programs that are . . . clearly permissible . . . [would be endangered.] To take just two common examples, prisons may have chaplains, who systematically offer religious counseling, services, and other programs to prisoners. They may be selected, paid, and even monitored by state officials. Also, sentences to community service may involve service at soup kitchens, many of which are operated by churches where a meal begins with a prayer and religious tracts are distributed.¹⁹⁰

If the state's purpose is to eradicate alcoholism and its harmful effects on society, the line should be drawn closer to society, requiring A.A. attendance for assistance to the alcohol-related offenders.

190. *Id.* at 1080 (Winter, J., dissenting).

