

# HOW IT WORKS: SOBRIETY SENTENCING, THE CONSTITUTION, AND ALCOHOLICS ANONYMOUS

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## INTRODUCTION

Alcoholism, whether viewed as a disease or as aberrant behavior,<sup>1</sup> poses a significant public health risk to drinkers and to those whose lives they affect. In 2000, there were an estimated 6,689,000 men and 2,716,000 women<sup>2</sup> dependant on alcohol.<sup>3</sup> A 1994 paper estimated that 9.6% of men and 3.2% of women will become alcohol dependent at some point in their lives.<sup>4</sup> The general impact on public health and upon alcohol abusers is significant. For instance, alcohol played a role in 30.5% of the 42,116 traffic fatalities recorded in the United States in 2001.<sup>5</sup> Problem drinkers are at increased risk for liver disease,<sup>6</sup> immune system deficiency,<sup>7</sup> and heart disease.<sup>8</sup> Furthermore, many children born to alcoholic parents are exposed to prenatal injury,<sup>9</sup> alcohol related violence and family dysfunction. The cost of alcoholism can also be measured in dollars. In 1998 the estimated national

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1. The view of alcoholism as a disease underlies the twelve-step approach to alcoholism treatment. This view presumes an innate vulnerability to uncontrollable drinking that is avoided only through total abstinence. The behavioral approach views substance abuse as a learned behavior that can be modified by helping the problem drinker to change his approach to drinking and develop skills to avoid negative drinking outcomes. The behavioral approach to treatment does not require abstinence in all cases. See, Paige Crosby Ouimette et al., *Twelve-Step and Cognitive-Behavioral Treatment for Substance Abuse: A Comparison of Treatment Effectiveness*, 65 J. CONSULTING & CLINICAL PSYCHOL. 230 (1997).

2. NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, QUICK FACTS at <http://www.niaaa.nih.gov/databases/abdep2.htm> (last visited Jan. 4, 2005) [hereinafter NIAAA Study].

3. Alcohol dependency is defined as a chronic disorder resulting from a "variety of genetic, psychosocial, and environmental factors." Robert M. Swift, *Drug Therapy for Alcohol Dependence*, 340 NEW ENG. J. MED. 1482, 1482 (1999) referencing R.M. Morse et al., *Definition of Alcoholism*, 268 J.A.M.A. 1012 (1992). In this article, alcoholism and alcohol dependency will be used synonymously.

4. Mary E. McCaul & Janice Furst, *Alcoholism Treatment in the United States*, 18 ALCOHOL HEALTH & RES. WORLD 253, 253 (1994) referencing B.F. Grant, *DSM-III-R and Proposed DSM-IV Alcohol Abuse and Dependence, United States 1988: A Nosological Comparison*, 16 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1068 (1992).

5. NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, TRAFFIC CRASHES, TRAFFIC CRASH FATALITIES, & ALCOHOL-RELATED TRAFFIC CRASH FATALITIES, UNITED STATES, 1977-2002, available at <http://www.niaaa.nih.gov/Resources/DatabaseResources/QuickFacts/TrafficCrashes/crash01.htm> (last visited June 10, 2006). This data is provided from the Fatality Analysis Reporting System (FARS) maintained by the National Traffic Highway Safety Administration.

6. M.C. Dufour et al., *Trends in Cirrhosis Morbidity and Mortality: United States, 1979-1988*, 13 SEMINARS IN LIVER DISEASE 109 (1993).

7. U.S. DEP'T OF HEALTH AND HUMAN SERV., 10TH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH: HIGHLIGHTS FROM CURRENT RESEARCH, 214 (2000), available at <http://pubs.niaaa.nih.gov/publications/10report/intro.pdf> (last visited June 10, 2006).

8. *Id.* at 240.

9. *Id.* at 285.

cost of alcohol related health care, loss of work productivity, automobile accidents, social welfare administration, and law enforcement, totaled \$184,636,000,000.<sup>10</sup>

This paper addresses the American legal system's response to the problem of alcoholism in the context of sentencing for alcohol related crimes. Specifically identified are the legal issues that arise when courts sentence offenders to participate in Alcoholics Anonymous (AA) and related twelve-step recovery programs. This paper also discusses the efficacy of AA. Part II examines the nature and history of Alcoholics Anonymous as well as its effectiveness in treating alcoholism, and also addresses the religiosity of AA and the importance of religious practice in the program. Part III, explores the First Amendment and broader constitutional problems that arise when defendants are sentenced to participate in twelve-step programs and curative measures are proposed. In Part IV, the practical difficulties that plague twelve-step sentencing are summarized and solutions are offered to ameliorate the constitutional and practical problems.

In the process of writing this paper, the author conducted interviews with sentencing judges, probation officers, court officials, practicing attorneys, persons attending AA pursuant to sentencing, and various members of AA, in order to obtain a practical view of the issues. The interview subjects were derived primarily from sources in Northeast Ohio, which is a region of interest for two reasons. First, the program of Alcoholics Anonymous was founded in Akron, Ohio in 1935,<sup>11</sup> and early chapters were established in Cleveland.<sup>12</sup> As of September 2004 there were 984 organized meetings of Alcoholics Anonymous per week in the Cleveland area,<sup>13</sup> providing a diverse and abundant resource for researching the nexus between AA and the legal system. Second, the region has few non twelve-step sobriety options for uninsured and/or low-income clients.<sup>14</sup> The confluence

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10. H. Harwood, *Updating Estimates of the Economic Costs of Alcohol Abuse in the United States: Estimates, Update Methods, and Data* (2000), available at <http://pubs.niaaa.nih.gov/publications/economic-2000/index.htm> (last visited June 10, 2006).

11. ERNEST KURTZ, NOT GOD, A HISTORY OF ALCOHOLICS ANONYMOUS 33, (Hazelden Educational Services 1980) (1979). Kurtz points to four "founding moments" in Alcoholics Anonymous (AA). *Id.* The fourth is the meeting and subsequent interaction between AA co-founders Bill Wilson and Robert Smith, M.D., in Akron, Ohio in May and June of 1935. AA cites June 10, 1935, the day on which Wilson helped Smith to achieve permanent sobriety, as its founding day. *See*, ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS COMES OF AGE vii (2003) (1957) [hereinafter ALCOHOLICS ANONYMOUS COMES OF AGE].

12. *See*, KURTZ, *supra* note 11, at 7-82, for a thorough treatment of AA's early history within the Oxford Group Movement and its subsequent independence. Wilson returned to New York in September 1935 and began working with alcoholics there. *Id.* at 42. Newly sober alcoholics from Cleveland attended Akron Oxford Group meetings beginning in early 1938. *Id.* at 77. In May 1939 the Clevelanders split from the Akron Oxford Group and formed the first Alcoholics Anonymous group in Cleveland. *Id.* at 78-79.

13. Listed meetings are found in the September, 2004 meeting schedule provided by the Central Office of Alcoholics Anonymous in Cleveland.

14. *See*, Part IV, *infra*, for a discussion of non-twelve step alternatives.

of an abundance of AA groups, a comparatively small number of alternative sobriety programs, and a significant alcoholism problem<sup>15</sup> creates an environment in which the constitutional and public health issues surrounding sobriety sentencing are starkly joined.

## I. THE NATURE AND HISTORY OF ALCOHOLICS ANONYMOUS

### A. AA Overview

Alcoholics Anonymous offers its members a programmatic approach to achieving sobriety,<sup>16</sup> and a fellowship of recovering alcoholics who provide social support to each other and to newcomers. The program is apolitical, independent, and offered free of charge to participants.<sup>17</sup> Since its founding in 1935, Alcoholics

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15. Cuyahoga County provided, at public expense, alcoholism treatment for 2,224 persons in 2003 at a cost of \$2,780,000. Information provided by correspondence to the author from Thomas G. Williams, MA.

16. The heart of the program is found in the Twelve Steps. *See generally*, ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., TWELVE STEPS AND TWELVE TRADITIONS 5-8 (1981) [hereinafter TWELVE STEPS AND TWELVE TRADITIONS]. The 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*. (emphasis in original)
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. (emphasis in original)
12. Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.
17. Alcoholics Anonymous represents itself as follows in the preamble read before most AA 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 AA membership; we are self-supporting through our own contributions. AA 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.

Anonymous has achieved enormous growth in membership and influence. In 1990 membership in Canada and the United States was estimated by AA to be 978,982,<sup>18</sup> and 9 % of American adults report having attended an AA meeting at one time in their life.<sup>19</sup> AA's success is also international. In 1998 AA groups were present in 44 countries and AA literature was translated into 8 languages.<sup>20</sup>

AA's twelve-step program is now ubiquitous in alcohol and drug addiction treatment. Approximately one million Americans per year enter treatment for drug or alcohol problems,<sup>21</sup> and 93% of all facilities (both in-patient and out-patient) utilize a twelve-step approach to treatment.<sup>22</sup> As the availability and reputation of twelve-step treatment has grown, courts have increasingly looked to both AA and treatment facilities as alternatives to incarceration for persons convicted of alcohol related offenses. The treatment-in-lieu-of-incarceration trend began in the 1960s and early 1970s with laws and practices designed to treat addiction as the perceived root cause of criminal conduct.<sup>23</sup> The modern result of these laws and practices is a sometimes informal, but highly influential, network of court officials, attorneys, prosecutors and treatment agencies focused on diverting criminal defendants into chemical dependence treatment.<sup>24</sup> In 1995 it was estimated that 46% of persons entering treatment for alcoholism were court-ordered,<sup>25</sup> and AA surveys indicate 16% of its members attended pursuant to a court order.<sup>26</sup>

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Welcome to Alcoholics Anonymous, A.A. Preamble©, available at [http://www.alcoholics-anonymous.org/en\\_services\\_for\\_members.cfm?PageID=98&SubPage=109](http://www.alcoholics-anonymous.org/en_services_for_members.cfm?PageID=98&SubPage=109) (last visited June 9, 2006).

18. Robin Room, *Alcoholics Anonymous as a Social Movement*, in RESEARCH ON ALCOHOLICS ANONYMOUS, 167, 169 (Barbara S. McCrady & William A. Miller eds., 1993). The estimate is from AA's 1990 Triennial Survey, and Room asserts that the actual membership is significantly higher. *Id.*

19. *Id.* Not all attendees are seeking recovery from alcoholism. Some attend out of concern for another, and others may be curious. *Id.*

20. J. Scott Tonigan et al., *Special Populations in Alcoholics Anonymous*, 22 ALCOHOL HEALTH & RES. WORLD 281, 281 (1998).

21. Jon Morgenstern et al., *Affiliation With Alcoholics Anonymous After Treatment: A Study of Its Therapeutic Effects and Mechanisms of Action*, 65 J. CONSULTING & CLINICAL PSYCHOL. 768, 768 (1997).

22. STANTON PEELE, CHARLES BUFE, & ARCHIE BRODSKY, RESISTING TWELVE STEP COERCION: HOW TO FIGHT FORCED PARTICIPATION IN AA, NA OR TWELVE-STEP TREATMENT 22 (See Sharp Press 2000).

23. Constance M. Weisner, *Coercion in Alcohol Treatment*, in BROADENING THE BASE FOR TREATMENT FOR ALCOHOL PROBLEMS, 579, 586 (National Academy Press 1990).

24. *Id.* at 587.

25. PEELE ET AL., *supra* note 22, at 28.

26. *Id.* at 27 n.3. Anecdotal evidence gathered by the author at Cleveland area meetings revealed that at least twenty percent of the attendees of any given group were compelled either by the courts or an employer. The figure varied between meetings, with some meetings unwilling to sign court slips (proof of attendance) and thus not having any coerced attendance, and other meetings having in excess of fifty percent of attendees "on paper" (AA parlance for mandated attendance).

## B. How It Works

This section addresses issues surrounding the efficacy of AA as a treatment for alcoholism. It also discusses how AA works, its demonstrated success and limitations, the impact of coerced attendance on effectiveness, and differences in AA effectiveness among different demographic groups. These issues are important for two reasons. First, judges, probation officers, attorneys, and other court officials need to understand how AA functions in order to craft (or to refrain from crafting) recovery regimens that reflect the needs of individual defendants.<sup>27</sup> Particularly in urban areas, the AA program is highly diverse in terms of the demographic and cultural makeup of meetings,<sup>28</sup> and providing the appropriate match for a newly recovering person may be critical.<sup>29</sup>

Second, court officials should understand AA so they may reconcile the requirements of the Constitution with required participation in twelve-step recovery. To what extent are the more obviously religious aspects requisite to achieving sobriety in AA, and is it possible to craft an approach that cures Establishment Clause issues without severely diminishing the value of AA participation? The position argued below asserts that compliance with the Establishment Clause may be accomplished through curative measures that do not render AA ineffective. However, AA success rates are difficult to measure and difficult to define,<sup>30</sup> and

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27. Charles Bufé proffers statistics from the National Highway Transportation Safety Administration (NHTSA) indicating that fifty percent of those arrested for driving under the influence (DUI) do not meet the definition of alcohol abuse or dependence. PEELE ET AL., *supra* note 22, at 30.

28. Official meeting designations in Northeast Ohio include: Spanish speaking, "gay friendly," men-only, and women-only. Informal differences also exist in terms of age (some groups reflect a younger demographic while others are made up of predominantly older and retired persons), ethnicity (often reflecting the ethnic makeup of the neighborhood), sexual orientation (meetings may be predominantly gay and not be designated as such in the literature), income, and education. It should be noted, however, that many meetings are remarkably mixed with respect to all of these attributes. See, Maureen P. Hillhouse & Robert Fiorentine, *Twelve-Step Program Participation and Effectiveness: Do Gender and Ethnic Differences Exist?*, 31 J. DRUG ISSUES 767, 769 (2001) ("Twelve-step groups reflect the participating community members, and are shaped by the local ecology.").

29. Studies show this to be especially true for gay and lesbian alcoholics and women. See, e.g., James T. Herbert et al., *Counseling Gay Men and Lesbians with Alcohol Problems*, 60 J. REHAB. 52 (1994); Michele G. Cyr & Kelly A. McGarry, *Alcohol Use Disorders in Women: Screening Methods and Approaches to Treatment*, 112 POST GRADUATE MED. 31 (2002) (recommending that women be referred to all female AA groups).

30. AA defines success as cessation from drinking, and the underlying theme of the AA program is that the alcoholic cannot drink safely. See generally, ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS (4th ed. 2001) (1939) [hereinafter ALCOHOLICS ANONYMOUS] (commonly referred to in AA as the "Big Book"). The inability of the problem drinker to moderate his drinking is discussed in detail in the chapter entitled "More About Alcoholism." *Id.* at 30-43. For discussions of AA effectiveness see, Christine Timko et al., *Long-Term Outcomes of Alcohol Use Disorder: Comparing Untreated Individuals With Those in Alcoholics Anonymous and Formal Treatment*, 61 J. STUD. ON ALCOHOL 529 (2000) (finding AA participation to have a moderately positive impact on drinking outcomes); Henry A. Montgomery et al., *Does Alcoholics Anonymous Involvement Predict Treatment Outcome?*, 12 J. SUBSTANCE ABUSE TREATMENT 241, 241-46 (1995) (The authors collect conclusions

courts should not look to AA as the exclusive or even the most effective available treatment regimen.

### 1. *Alcoholics Anonymous and Medicine*

Before proceeding with a discussion of AA's effectiveness, it is important to clarify that AA does not provide professional treatment for alcoholism,<sup>31</sup> and that AA's methods are the product of the experiences of lay-alcoholics in achieving sobriety. AA does embrace the view that alcoholism is a disease,<sup>32</sup> but as with other elements of its program, AA embraces the disease concept of alcoholism as a practical means by which the alcoholic may come to understand his condition. A prominent AA scholar, Ernest Kurtz, explains that the disease paradigm provided an explanation to founding AA members for the otherwise inexplicable and terrifying phenomenon of addictive drinking.<sup>33</sup> Importantly, Kurtz explains that AA does not deal directly with alcoholism, a subject beyond the lay expertise of the organization, but rather deals with the practical impact of the disease upon the alcoholic.<sup>34</sup> A newcomer to AA is provided with a logical explanation for her baffling condition, and then further comforted with the news that her condition may be "treated" by engaging the AA program.

Indeed, AA views the alcoholic malady as one of mind, body, and spirit,<sup>35</sup> and one in which the act of drinking is merely a symptom.<sup>36</sup> Critics rightly point out the

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from studies on effectiveness of AA after treatment and find mixed results that range from modestly positive impact to no impact to negative impact. Per their own study, the authors find that post treatment AA attendance alone is not predictive of better sobriety outcomes, but persons with high AA engagement [measured by the General AA Tools of Recovery Index] did have better drinking outcomes); PEELE ET AL., *supra* note 22, at 44-51 (pointing to controlled studies indicating the ineffectiveness of AA as well as AA's own membership surveys indicating approximately five percent of persons entering the program remain for as long as one year).

31. AA is, by its own traditions, committed to a non-professional approach. See, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 166-71 (explaining the program's commitment to voluntarism while allowing for paid clerical and other support).

32. Central to the AA view of alcoholism is the view that the alcoholic suffers from an "allergy to alcohol." ALCOHOLICS ANONYMOUS, *supra* note 30, at xxvi. The most oft-quoted basis for the disease theory in AA is found in a preface to the book ALCOHOLICS ANONYMOUS, entitled "The Doctor's Opinion." *Id.* at xxv-xxxii.

33. Ernest Kurtz, *Alcoholics Anonymous and the Disease Concept of Alcoholism*, in ALCOHOL PROBLEMS IN THE UNITED STATES (Thomas F. McGovern & William L. White eds. 2002).

34. KURTZ, *supra* note 11, at 202. See also, ALCOHOLICS ANONYMOUS, *supra* note 30, at 30-43. This chapter entitled "More About Alcoholism," focuses more on the alcoholic and his drinking behavior than it does on alcoholism.

35. KURTZ, *supra* note 11, at 202.

36. AA members speak of two distinct aspects of alcoholism. First, the alcoholic seems to suffer from the "allergy" described in "The Doctor's Opinion." ALCOHOLICS ANONYMOUS, *supra* note 30, at xxv-xxxii. The only way to avoid the allergic effects is total abstinence. Second, drinking is but a symptom of the disease and sobriety requires the alcoholic to address the spiritual and mental defects that lead to (and are exacerbated by) drinking. Recovery requires the alcoholic to have

unscientific nature of the AA disease perspective, and rue its seeming influence upon the medical community.<sup>37</sup> For those who have achieved sobriety in AA, the criticism misses the point: the program has provided them a means to overcome what they had formerly perceived as a hopeless condition, and has enabled them to reclaim what had become ruined lives. As one researcher notes, “[a]ll of AA’s official statements about alcoholism are . . . descriptive. It is remarkably indifferent to etiological formulations. On the other hand, it is remarkably rich in methods for not drinking and for achieving spiritual growth.”<sup>38</sup> Thus, while AA was born of a relationship between a treating physician and his alcoholic patient<sup>39</sup> and its founders were never shy about publicizing the medical community’s approval of AA,<sup>40</sup> the specific meaning of alcoholism as a disease lies beyond the ken and concern of Alcoholics Anonymous.<sup>41</sup>

## 2. *How AA Works*

A newcomer to Alcoholics Anonymous in Northeast Ohio may be struck first by the startling diversity of the membership. The 984 meetings listed in the local AA meeting schedule are dispersed throughout every neighborhood and community in the region. The meetings tend to reflect the neighborhood racial and economic demographic, ranging from the moneyed professionals of wealthy outlying suburbs to working class members of the city and inner ring suburbs to predominantly minority and low income inner city residents. However, the individual meetings are also surprisingly mixed. Different religious, ethnic, economic, professional, and age groups appear to mingle easily,<sup>42</sup> and Northeast Ohio meetings tend to confirm the

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“thoroughly followed our path,” meaning the engagement of the Twelve Steps, and members are admonished, “[h]alf measures availed us nothing.” ALCOHOLICS ANONYMOUS, *supra* note 30, at 58-9.

37. See, e.g., STANTON PEELE, *THE DISEASING OF AMERICA*, Chapter 3 (1995) (Peele describes the AA approach to alcoholism as “folk wisdom” and finds it inferior to non-disease approaches as treatment for the majority of problem drinkers.), available at <http://www.peele.net/lib/diseasing3.html> (last visited June 9, 2006).

38. Joseph Nowinski, *Questioning the Answers: Research and the AA Traditions*, in RESEARCH ON ALCOHOLICS ANONYMOUS 28 (Barbara S. McCrady & William R. Miller eds., 1993).

39. Dr. Williams D. Silkworth was Wilson’s physician at Towns Hospital and provided continued counsel and encouragement to Wilson’s nascent efforts to help other alcoholics to achieve sobriety. Kurtz, *supra* note 11, at 14-35.

40. See, e.g., Appendix III, “The Medical View on A.A.,” in ALCOHOLICS ANONYMOUS, *supra* note 30, at 569-70; ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 11, at 204-05 (noting the medical profession’s growing favor of AA during the 1940s).

41. Thus, the complex issue of alcoholism as a disease is an “outside issue” not addressed by AA. Tradition Ten of Alcoholics Anonymous reads: “Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy.” TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 176-79. See also, KURTZ, *supra* note 11, at 199 (noting that AA has avoided the technical difficulties of the disease issue by fealty to the Tenth Tradition).

42. An often heard refrain between members of different backgrounds is “we may come from different places, but what bit you bit me.” The implication is that alcoholism strikes without regard to racial or cultural differences and that the AA program may be engaged by anyone seeking recovery.

findings of researchers that AA's effectiveness is not limited to any one personality type, ethnic group, or cultural background.<sup>43</sup> Despite its origins as an "American Anglo middle class invention"<sup>44</sup> and its early awkwardness in achieving diversity in Cleveland,<sup>45</sup> AA in Northeast Ohio may be described as a melting pot.

Notwithstanding the diverse backgrounds of its membership, however, the groups exhibit a striking similarity in their programmatic approach. Individual members afford themselves great latitude in the interpretation and application of the program, but there are at least three elements that appear important, if not indispensable, to achieving sobriety in AA. These elements are total abstinence from alcohol, some minimal level of engagement in the program, and some willingness to undertake the task of character change and development.

#### a. Abstinence

The commitment to abstinence, based upon the premise that an alcoholic cannot safely take a single drink, is the foundational principle of AA.<sup>46</sup> The "Doctor's Opinion" in the AA's primary text, *Alcoholics Anonymous* (hereafter referred to by its common name, *The Big Book*), describes the reaction of an alcoholic to alcohol as allergic.<sup>47</sup> Contemporary science does not embrace this allergy description,<sup>48</sup> but the view that abstinence is requisite to recovery remains a broadly accepted axiom in the treatment community.<sup>49</sup> The assumption that the alcoholic cannot safely take a drink is inextricably intertwined with the First Step of

43. Maureen P. Hillhouse & Robert Fiorentine, *Twelve-Step Program Participation and Effectiveness: Do Gender and Ethnic Differences Exist?*, 31 J. DRUG ISSUES 767 (2001) (twelve-step recovery appears to be as useful to females and ethnic minorities as for European American males); Tonigan et al., *supra* note 20 (the modestly positive sobriety outcomes noted as a result of AA attendance apply across ethnic groups).

44. Klaus Mäkelä, *Social and Cultural Preconditions of Alcoholics Anonymous (AA) and Factors Associated with the Strength of AA*, 86 BRITISH J. ADDICTION 1405 (1991).

45. See, ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., DR. BOB AND THE GOOD OLDTIMERS, 247-48 (1980) [hereinafter DR. BOB AND THE GOOD OLDTIMERS]. The passage recounts the circumstances surrounding the formation of the first African American AA group in Cleveland in the 1940's. A black woman approached an established AA group for help, but the members would not allow her to attend their meeting. As the writer recounts, "[w]ith all our liberal attitudes, we couldn't accept a colored woman." Several members did, however, help her to establish a group in an African-American neighborhood.

46. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 22 ("We are . . . positive that once . . . [an alcoholic] takes any alcohol whatever into his system, something happens, both in the bodily and mental sense, which makes it virtually impossible for him to stop.")

47. ALCOHOLICS ANONYMOUS, *supra* note 30, at xxv-xxxii.

48. KURTZ, *supra* note 11, at 34 (stating that Silkworth's analysis of "physical allergy" and "mental obsession" have been rejected by modern biochemists).

49. PEELE ET AL., *supra* note 22, at 161-62. The authors question the veracity of this assumption, noting the results of a massive study undertaken by the National Institute on Alcohol Abuse and Alcoholism that indicate alcoholics can successfully reduce their drinking pursuant to treatment. *Id.*

the AA program, “We admitted we were powerless over alcohol—that our lives had become unmanageable.”<sup>50</sup> An unbending orthodoxy in AA is found in the Big Book commentary on powerlessness and loss of control. The “real alcoholic” has no control over his drinking upon taking the first drink,<sup>51</sup> and yet cannot, on his own willpower, avoid taking a drink.<sup>52</sup> Abstinence is, therefore, the sole end in AA, although it is accomplished through a great variety of spiritual and mundane means.<sup>53</sup> A countervailing orthodoxy must be noted, however, which is found in AA’s first tradition: “No AA can compel another to do anything; nobody can be punished or expelled.”<sup>54</sup> That is, even the drinking drunk or the person committed to controlled drinking will not be barred.<sup>55</sup>

Nevertheless, abstinence is the goal and it is accomplished “one day at a time.” This famous motto captures the method that AA members find most effective for permanent abstention. To new members the idea of never taking another drink is intimidating, perhaps unattractive, and reminiscent of earlier failed attempts at sobriety. The goal of one sober day, however, can be accomplished without the effort or commitment of permanent sobriety. As days accumulate the prospect of sober living becomes less onerous and the rewards, including restored mental and physical health, more rewarding. Members in Cleveland meetings often refer to this early period of sobriety as “a pink cloud,” reflecting the joyful sense of restored hope that newly sober persons often experience in AA.<sup>56</sup> Long time members caution, however, that action is required to sustain such newfound sobriety.

#### b. Level of Program Engagement

The degree of involvement required for AA to be useful is important. How much of the program, including the more religious aspects, must a newly sober person embrace in order to sustain sobriety? One study found that certain AA activities including having a sponsor,<sup>57</sup> participating in outreach work with other

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50. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 21.

51. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 21.

52. *Id.* at 24 (“There is a complete failure of the kind of defense that keeps one from putting his hand on a hot stove.”). See also, Nowinski, *supra* note 38, at 28 (explaining that loss of control is the essence of alcoholism in AA).

53. Nowinski, *supra* note 38, at 29 (AA is a “culture, complete with a spiritual philosophy and a body of common wisdom, rites, and rituals, and traditions and ethics. This culture exists for the pragmatic purpose of helping its members avoid taking ‘the first’ drink.”)

54. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 129.

55. The Third Tradition reads “the only requirement for membership is a desire to stop drinking.” This tradition is, however, unenforced and unenforceable.

56. The Big Book captures this feeling in the following statement: “We are like passengers of a great liner the moment after rescue from shipwreck when camaraderie, joyousness and democracy pervade the vessel from steerage to captain’s table.” ALCOHOLICS ANONYMOUS, *supra* note 30, at 17.

57. Sponsorship describes the relationship between a member with established sobriety and a newly sober member. The sponsor generally serves as a sober contact and assists the newer member

new members,<sup>58</sup> leading a meeting,<sup>59</sup> and “increasing one’s degree of participation in the organization compared to a previous time” correlated positively with sobriety outcomes.<sup>60</sup> Another study found that AA attendance alone did not positively correlate with sobriety outcomes, but that active engagement in the program did result in increased sobriety.<sup>61</sup> AA members in Cleveland differ on the degree of initial involvement required. Some urge new members to engage the entirety of the program, including the Twelve Steps, as quickly as possible. Others counsel a much more gradual approach, often asking new members to spend the first year of sobriety attending meetings,<sup>62</sup> perhaps assisting in tasks such as setting up and breaking down of meetings, and “working” the First Step. AA literature urges a complete embrace of the program<sup>63</sup> but also reminds the newcomer that the program is entirely suggestive and its tenets can be accepted (or, presumably, rejected) over time.<sup>64</sup>

Is spiritual practice and a belief in God requisite to recovery in AA? The answer appears mixed. Program literature clearly outlines a spiritually-based means of recovery from alcoholism, and most members attribute their sobriety to spiritual belief and practice. However, numerous members shared with the author that meeting attendance and development of sober friendships provided the basis for their recovery, particularly in the first few years of membership. A core element of the AA program is the peer relationship.<sup>65</sup> One alcoholic can offer another insight, empathy, and advice that is credible and effective because it is clearly grounded in experience. This comports with at least one study that found the development of a sober and supportive network was a significantly positive factor in sobriety

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in acclimating to sobriety and, eventually, undertaking the steps.

58. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 10 (see Step Twelve, referred to as “twelfth step work”).

59. Sharing one’s recovery story with an AA group also correlated positively with sobriety outcomes. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 58 (“Our stories disclose in a general way what we used to be like, what happened, and what we are like now”).

60. See, Chad D. Emrick et al., *Alcoholics Anonymous: What is Currently Known*, in RESEARCH ON ALCOHOLICS ANONYMOUS 54 (Barbara S. McCrady & William R. Miller eds., 1993).

61. Henry A. Montgomery et al., *Does Alcoholics Anonymous Involvement Predict Treatment Outcome?*, 12 J. SUBSTANCE ABUSE TREATMENT 241, 245 (1995).

62. New members are urged to attend meetings on a daily basis during the first ninety days of sobriety, and regularly (no less than four per week) thereafter.

63. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 59 (“Half measures availed us nothing.”).

64. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 26 (discussing Step Two and counseling a fictitious newcomer as follows: “First, AA does not demand that you believe anything. All of its Twelve Steps are but suggestions. Second, to get sober and to stay sober, you don’t have to swallow all of Step Two right now . . . Third, all you really need is a truly open mind.”).

65. See generally, ALCOHOLICS ANONYMOUS, *supra* note 30, at 18, 89-103 (noting the ineffectiveness of help and advice proffered by family, friends, and doctors, the author writes: “But the ex-problem drinker who has found this solution, who is properly armed with facts about himself, can generally win the entire confidence of another alcoholic in a few hours. Until such an understanding is reached, little or nothing can be accomplished.”).

outcomes.<sup>66</sup> AA critics, highly skeptical of the efficacy of a twelve-step approach, attribute what success they find in AA to the utilization of social support networks.<sup>67</sup> It is also in the context of fellowship with recovering alcoholics that the newly sober person begins to replace the sense of shame and degradation with an understanding that her behavior is attributable to a treatable disease and not to innate moral failings.<sup>68</sup> This process leads one writer to describe the AA fellowship as a “healing community.”<sup>69</sup> It seems a credible hypotheses, therefore, that early sobriety in AA can be (and often is) accomplished without conscious reliance upon spiritual belief or practice. This hypotheses comports with the presence of long time atheist members in Cleveland, with studies showing that atheists and agnostics can and do benefit from twelve-step program participation,<sup>70</sup> and with the existence of agnostic AA groups in some communities.<sup>71</sup> It is also relevant that, as discussed *infra*, atheists and agnostics had a formative impact on the development of the AA program, and that the nonsectarian, spiritual latitude built into the twelve steps is the legacy of *founding* members of AA who remained atheist well into their sobriety.<sup>72</sup>

### c. Character Development

It is disingenuous, however, to discuss recovery in AA without addressing the process of character development prescribed by the program. Although members can (and do) accomplish physical sobriety without embracing the entire program, the process of inner change is too central to be dismissed. The change process in AA is based on the view that drinking is but a symptom of underlying dysfunction that must be addressed in order to achieve lasting sobriety.<sup>73</sup> The change process

66. See generally, Jason Bond et al., *The Persistent Influence of Social Networks and Alcoholics Anonymous on Abstinence*, 64 J. STUD. ALCOHOL 579-88 (2003).

67. PEELE ET AL., *supra* note 22, at 2.

68. Bean-Bayog, *Alcoholics Anonymous as a Social Movement*, in RESEARCH ON ALCOHOLICS ANONYMOUS, 104-05 (Barbara S. McCrady & William A. Miller eds., 1993) (“AA defines alcoholism as a ‘disease’ or ‘allergy’ and provides the alcoholic with a form of sick role, ‘recovering alcoholic’ and ‘AA member’, to substitute for ‘drunk’, ‘bum’, and other pejoratives”).

69. *Id.*

70. See generally, J. Scott Tonigan et al., *Atheists, Agnostics and Alcoholics Anonymous*, 63 J. STUD. ALCOHOL 534 (2002). The authors found that atheists are less likely to select AA, but those who attend do benefit in terms of sobriety outcomes. They conclude that “there are multiple pathways for behavior change in AA, not all of which rely on spiritual beliefs and practices.” *Id.* at 539. These include the development of sober social networks.

71. AgnosticAA NYC.org, Meeting List, at <http://www.agnosticanyc.org/meetings.html> (last visited June 10, 2006) (listing twelve-step recovery groups in New York City for non-believers).

72. Laird P. Bridgman & William M. McQueen, *The Success of Alcoholics Anonymous: Locus of Control and God’s General Revelation*, 15 J. PSYCHOLOGY & THEOLOGY 124, 125 (1987).

73. Carlo C. DiClemente, *Alcoholics Anonymous and the Structure of Change*, in RESEARCH ON ALCOHOLICS ANONYMOUS 83 (Barbara S. McCrady & William A. Miller, eds., 1993) (“The twelve steps and twelve traditions of Alcoholics Anonymous understand alcohol consumption as a

in AA may be characterized as three-fold. First, an individual comes to understand his condition, that he is powerless over alcohol and that his life has become unmanageable.<sup>74</sup> Second, pursuant to this recognition, he abstains from alcohol and prepares to undertake AA's prescribed program. The third element of AA recovery is recognition and rehabilitation of what one researcher describes as "maladaptive cognitions."<sup>75</sup> Put another way, the AA program asks members to focus on the character flaws underpinning their drinking behavior. Perhaps the most prominent of these is selfishness and self-centeredness. It is these traits above all others that AA views as the cause and the outcome of a drunken lifestyle.<sup>76</sup>

The AA antidote for selfishness is service, both to fellow alcoholics and to family, colleagues, and the world at large. The twelfth step of the program asks members to be of service to other alcoholics and to "practice these principles in all our affairs."<sup>77</sup> As with the rest of the AA program, the twelfth step aspiration to moral change is grounded in the conviction that such change is requisite to the practical accomplishment of sobriety.<sup>78</sup> Character development in AA also occurs through recognition of character flaws, largely accomplished through the self-examination prescribed in the fourth step of the program,<sup>79</sup> and through the subsequent assumption of individual responsibility found in steps eight, nine, and ten.<sup>80</sup> Members speak of a paradigm for problem solving and conflict resolution that focuses on claiming personal responsibility for one's actions, and disallows avoidance of responsibility through blame. A resounding theme heard in the meetings as well as the literature is "clean up your side of the street," an antidote to the crippling habit of focusing on the misdeeds of others as a root cause of one's own problems.<sup>81</sup>

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symptomatic expression of the disease of alcoholism, a disease of the mind." See also, ALCOHOLICS ANONYMOUS, *supra* note 30, at 63-64 (discussing the need to engage the Fourth Step and asserting that "[o]ur liquor was but a symptom [of underlying character flaws].").

74. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 5 (see, Step One of the AA program).

75. DiClemente, *supra* note 73, at 85.

76. ALCOHOLICS ANONYMOUS, *supra* note 30, at 62 ("Selfishness – self-centeredness! That, we think, is the root of our troubles."); see also KURTZ, *supra* note 11, at 34 (describing recovery in AA as a "conversion from destructively total self-centeredness . . . [to] constructive, creative and fully human interaction with others.") (emphasis in original).

77. See, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16.

78. ALCOHOLICS ANONYMOUS, *supra* note 30, at 89 ("Practical experience shows that nothing will so much insure immunity from drinking as intensive work with other alcoholics."); DR. BOB AND THE GOOD OLDTIMERS, *supra* note 45, at 76-77 (discussing AA co-founder Bob Smith's view that helping others is the best way to stay sober. Smith believed that the Twelve Steps "when simmered down . . . resolve themselves into the words 'love' and 'service.'").

79. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 6.

80. *Id.* at 7-8.

81. ALCOHOLICS ANONYMOUS, *supra* note 30, at 77-78 (discussing the need to make amends to those wronged by the alcoholic, the writer reminds his reader that "we are there to sweep off our side of the street.").

The AA program teaches that the result of physical sobriety coupled with engaging the work outlined in the steps is a spiritual awakening.<sup>82</sup> Many members in Cleveland meetings describe this awakening with the less dramatic, but perhaps no less profound, description of “growing up.” The Big Book describes the AA spiritual experience as a “personality change sufficient to bring about recovery from alcoholism.”<sup>83</sup> However described or interpreted, the spiritual experience is important to members who achieve sobriety in AA. One researcher notes that 91% of regular members sampled in three AA groups reported having had a spiritual awakening since coming to the program.<sup>84</sup>

In summary, the AA program provides recovery from alcoholism through abstinence combined with character change and development. Members differ as to the nature of change required, and the differences reflect both the diversity of personalities within the AA membership<sup>85</sup> and the built-in elasticity of the program itself. In fact, the entire programmatic approach is presented as “suggestive only.”<sup>86</sup> Some members achieve sobriety without even using the Twelve Steps and many more do not ever read the literature. Indeed, AA does not insist that its members profess or adopt any particular philosophy or worldview. Rather, the program allows members to draw conclusions based upon their own drinking histories and what they hear from other members.<sup>87</sup> However, the sense of individual freedom may be somewhat illusory, as AA literature also stresses the collective experience that “half measures availed us nothing.”<sup>88</sup> That is, sobriety as outlined in AA literature requires a (presumably complete) adoption of certain attitudes and

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82. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16 (Step Twelve).

83. ALCOHOLICS ANONYMOUS, *supra* note 30, at 567.

84. Monica J. Horstmann & J. Scott Tonigan, *Faith Development in Alcoholics Anonymous (AA): A Study of Two Groups*, 18 ALCOHOLISM TREATMENT QUARTERLY 75, 80 (2000).

85. Researchers reach divergent conclusions as to whether there is a personality type prone to success in AA. See, Montgomery et al., *supra* note 30 (finding no evidence of an “AA personality”). But see, Alan C. Osborne & Frederick B. Glaser, *Characteristics of Affiliates of Alcoholics Anonymous: A Review of the Literature*, 42 J. ALCOHOL STUDIES 661, 670 (1981) (finding AA members to be dependent on others, authoritarian, and extroverted); A.F. Fontana et al., *AA and Group Therapy for Alcoholics: An Application of the World Hypothesis Scale*, 37 J. STUDIES ON ALCOHOL 675, 679-80 (1976) (stating AA members have low cognitive flexibility); JEFFREY M. BRANDSMA ET AL., OUTPATIENT TREATMENT OF ALCOHOLISM: A REVIEW AND COMPARATIVE STUDY 84 (1980) (finding that AA seems to have definite limitations of social class, ideology, flexibility of adopting new techniques, and the type of personality to which it appeals).

86. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 164; see also, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 129.

87. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 24 (noting that often when skeptical newcomers choose to continue their drinking the inevitable consequences cause them to embrace the AA program. In such an instance “John Barleycorn himself [becomes] our best advocate.”).

88. ALCOHOLICS ANONYMOUS, *supra* note 30, at 59 (urging members to embrace the steps and seek God’s “protection and care with complete abandon.”).

practices that are found in the Twelve Steps,<sup>89</sup> and that are incompatible with uncompromising individualism.<sup>90</sup> Thus, while AA is, by its own design, without authority to enforce norms upon individual groups<sup>91</sup> or members,<sup>92</sup> it does proffer a spiritual philosophy that an identifiable recovery community coheres around.<sup>93</sup>

### C. AA Effectiveness: How Well and for Whom Does it Work?

Here, I address questions relating to AA's overall effectiveness, differing outcomes among identifiable groups, and the impact of compulsion on efficacy. The overall effectiveness of AA is difficult to gauge because AA itself does not undertake rigorous tracking of members and sobriety outcomes. Further, confounding factors make precise measurement of AA success impossible. These factors include: differing study methodologies,<sup>94</sup> the proclivity of courts to order AA attendance for non-alcoholic persons (who have no reason to stay in AA for "recovery" that they do not need),<sup>95</sup> and the tendency of persons to "sample" AA several times before staying in the program and achieving sobriety. The data that is available, however, makes clear that the majority of persons who attend do not quit drinking,<sup>96</sup> and that as few as 5% of persons who attend their first AA meeting

89. This was a view expressed most clearly by a long time member who stressed that "there are a thousand ways to stay sober. Our way requires certain beliefs and acts."

90. See, Room, *supra* note 18, at 179-82 (noting that AA serves in some ways as an antidote to the problems that arise in a highly individualist culture, providing an answer for those whose lives have been demolished as a consequence of their embrace of the ideology of "radical individualism and the patterns of thinking that sustained it.").

91. Tradition Four reads "[e]ach group should be autonomous except in matters affecting other groups or AA as a whole." *Id.* at 146. See also, Room, *supra* note 18, at 171 (stating power within AA resides at the individual group level, and "groups . . . cannot be subject to control either by other groups or by some superior body.").

92. Tradition Three reads "[t]he only requirement for membership is a desire to stop drinking." TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 139.

93. See, Nowinski, *supra* note 38, at 28-29.

94. Controlled studies examine outcomes where persons were assigned randomly to different treatment modalities. Two frequently cited controlled studies show AA to be largely ineffective, particularly when persons are compelled to attend. See, BRANDSMA ET AL., *supra* note 85; see also, Ditman et al., *A Controlled Experiment on the Use of Court Probation for Drunk Arrests*, 124 AM. J. PSYCHIATRY 64 (1967). The obvious confounding factor is compulsion. Participants do not select the treatment modality and are randomly selected and assigned. This factor is less confounding in the present inquiry, however, as this discussion focuses on persons compelled to attend AA by the courts. Uncontrolled studies work without control groups and solicit AA members for participation. These studies include present AA members and thus suffer from the "motivational confound of self-selection." Montgomery et al., *supra* note 30, at 241.

95. The author found numerous persons in Cleveland meetings whose attendance was court-ordered for their first DUI. Driving under the influence may be unwise, but it likely does not offer clear evidence of alcoholism. See, PEELE ET AL., *supra* note 22, at 77 (citing the NHTSA study, *A Guide to Sentencing DUI Offenders* (1996), for data showing at least fifty percent of those convicted for DUI "do not meet the diagnostic criteria for alcohol abuse or alcoholism.").

96. See, studies cited *supra* at note 30.

sustain their participation for as long as one year.<sup>97</sup> Responses gathered from long time AA members in Northeast Ohio were similarly pessimistic. These members estimated that few court-ordered attendees remained to get sober (most felt less than 10%), but noted that many would return later after “the seed had been planted.” This response comports with the view expressed in AA literature that many alcoholics will reject (at least initially) the notion that they need help for their drinking, but the consequences of continued drunkenness will convince them otherwise.<sup>98</sup>

### 1. *Effectiveness and Compulsion*

Many researchers recommend that problem drinkers should not be forced to attend AA due to issues regarding compulsion and efficacy; but they still hold that such drinkers should be encouraged to try it.<sup>99</sup> However, George E. Vaillant, a prolific researcher and writer in the field of alcoholism, posits a contrary theory. Vaillant suggests that compulsory treatment is one of four conditions that contribute to stable lives of alcoholics, the other three being: substituting non-chemical dependency for chemical dependency, establishing new social supports, and maintaining inspirational group membership.<sup>100</sup> Anecdotal feedback from Northeast Ohio AA meetings provides similarly conflicted evidence. Many sober members assert that they owe their sobriety to a court-ordered introduction to AA, and several judges interviewed related stories of letters sent from sober persons expressing their gratitude for being compelled to attend AA. Others achieve a short period of sobriety as a result of attending AA meetings which is enough to provide a meaningful perspective on their drinking even if the individuals ultimately reject AA.<sup>101</sup> Hopeful conjecture and heartening anecdotes, however, must be juxtaposed with the reality that very few court-ordered attendees remain sober members of AA.

### 2. *Demographics, Religiosity, and Life Circumstances*

Who, then, are the hundreds of thousands of sober alcoholics who fill the rooms of AA? For whom does AA work, and for whom does it not? This

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97. PEELE ET AL., *supra* note 22.

98. See, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 23-24 (suggesting that those who doubt their alcoholism be counseled to “try some controlled drinking.”) For those who are alcoholic, the resulting consequences offer the best evidence. See also, Tonigman et al., *supra* note 70.

99. See, e.g., Tonigan et al., *supra* note 70; BRANDSMA ET AL., *supra* note 85, at 84 (stating “AA is just not effective as a coerced treatment with municipal court offenders.”).

100. Katherine A. Bradley, *Management of Alcoholism in the Primary Care Setting*, 156 WESTERN J. MED. 273 (1992) (citing GEORGE E. VAILLANT, THE NATURAL HISTORY OF ALCOHOLISM (1983)).

101. The hard evidence is scant, and critics rightly point to this paucity of evidence as a reason to discontinue twelve-step sentencing. PEELE ET AL., *supra* note 22, at 70 (“Normally, in scientific discourse on the treatment of diseases, the burden of proof falls on those proposing treatment.”).

question may be answered (imprecisely) in terms of demographics and, more importantly, life circumstances.

a. Hitting Bottom

With respect to life circumstances, researchers, court officials, attorneys, AA literature, and AA members are in accord that persons who have “hit bottom” are more likely to achieve sobriety in AA than persons who are early in their drinking. Hitting bottom is analogized to an “existential or meaning crisis” in research literature.<sup>102</sup> To the lay person it may simply mean reaching an emotional, physical, and spiritual nadir, a point in life described by one alcoholic in a Cleveland meeting as “low enough that I couldn’t take what was coming next.” The point where that condition is felt will differ among alcoholics, and an informal distinction has arisen within AA describing “high bottom” and “low bottom” members. AA literature predicts “few people will sincerely try to practice the AA program unless they have hit bottom,”<sup>103</sup> but also makes clear that alcoholics may claim their bottom before the onset of obvious personal catastrophe.<sup>104</sup> The latter point is supported by research that indicates level of alcohol consumption is not predictive of AA affiliation.<sup>105</sup>

The necessity for hitting bottom underpins the single most important attribute for achieving sobriety in AA. Virtually every person interviewed for this article emphasized that sobriety in AA will only be achieved by those who are ready for change. The commonsensical formula is simple: people who can no longer endure the circumstances of their lives will undertake the activities and changes necessary to get sober, a conclusion that is also born out by researchers.<sup>106</sup>

b. Ethnicity, Gender, Sexual Orientation, & Religiosity

Researchers have also sought to identify other characteristics that may have predictive value for success in AA, such as race and ethnicity, gender, sexual orientation, and religiosity. Racial differences appear to play little or no role in predicting sobriety outcomes. African-Americans represent a higher proportion of

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102. Montgomery et al., *supra* note 30, at 244, 245 (noting, too, that this study did not find “existential crisis” to be predictive of AA attendance).

103. See, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 24.

104. *Id.* at 23.

105. J.B. Kingree & Bryce F. Sullivan, *Participation in Alcoholics Anonymous Among African Americans*, in ALCOHOL PROBLEMS IN THE UNITED STATES 179 (Thomas F. McGovern & William L. White eds. 2002).

106. Morgenstern et al., *supra* note 21, at 775 (finding high motivation for change to be a significant predictor of AA affiliation and positive short term sobriety outcomes). *But see*, Hillhouse & Fiorentine, *supra* note 28 (citing studies that indicate elevated rates of abstinence associated with regular twelve-step participation is not the result of higher levels of motivation).

the treatment population<sup>107</sup> but proclivity to affiliate actively with AA after treatment is not dissimilar from that of whites,<sup>108</sup> and researchers indicate no difference in effectiveness between whites and blacks.<sup>109</sup> In Northeast Ohio there exist numerous racially mixed AA meetings as well as predominantly black and Hispanic meetings. Native Americans, too, have adopted AA and shaped the program to comport with Native culture and faith.<sup>110</sup> Research also indicates a high degree of credibility among a broad cross section of ethnic groups regarding AA as a resource for alcoholism treatment.<sup>111</sup>

Gender and sexual orientation differences do not appear determinative as to AA effectiveness. Women comprise 33% of AA membership,<sup>112</sup> and studies show women participate in AA at similar rates as men.<sup>113</sup> Some experts stress, however, that gender differences are important in recovery and women are best referred to all-female AA groups.<sup>114</sup> A probation official in Cleveland cautioned that abused women will not be helped by AA's assertion of the individual's powerlessness, and researchers note that AA may be more effective for women when employed in combination with other treatment options.<sup>115</sup>

The prevalence of alcoholism is far higher in the gay community than the general population, causing one writer to term alcoholism the "number one health issue" for gay men and women.<sup>116</sup> A perception exists in research literature that gay alcoholics find at least some AA members to be homophobic and heterosexist, and

107. Lee Ann Kaskutas et al., *Alcoholics Anonymous Affiliation at Treatment Intake Among White and Black Americans*, 60 J. STUD. ALCOHOL 810 (1999).

108. *Id.* See also, Tonigan et al., *supra* note 20, at 285 ("The studies conducted to date provide no evidence that the drinking status of people who elect to attend AA is affected by their ethnicity.").

109. Kingree & Sullivan, *supra* note 105, at 183 ("AA appears to be appropriate for African-Americans when one considers the nature of AA meetings and alcohol problems in this population").

110. Don Coyhis & William L. White, *Alcohol Problems in Native America: Changing Paradigms and Clinical Practices*, in ALCOHOL PROBLEMS IN THE UNITED STATES 161 (Thomas F. McGovern & William L. White eds. 2002) (explaining the "Indianization of A.A.").

111. Raul Caetano, *Ethnic Minority Groups and Alcoholics Anonymous*, in RESEARCH ON ALCOHOLICS ANONYMOUS 214-15 (Thomas F. McGovern & William L. White eds. 2002).

112. Alcoholics Anonymous 2001 Membership Survey, *available from* A.A. World Services, Grand Central Station; Box 459; New York, New York 10163.

113. Hillhouse et al., *supra* note 28 ("No significant differences in patterns of twelve-step participation was found between males and females?"); see, NIAAA Study, *supra* note 2 for statistics (finding men are twice as likely to suffer from alcoholism).

114. Cyr & McGarry, *supra* note 29. This comports with common AA wisdom that women and men should seek sponsors of the same sex.

115. *Id.* (women have issues including self-esteem, sexual abuse, sexism, and interpersonal relationships that may require specific treatment strategies); Lee Ann Kaskutas, *Women: Pathways to Self-Help Among Women for Sobriety*, 22 AM. J. DRUG ALCOHOL ABUSE 259 (1996) (stating AA is often more effective when used in combination with other programs).

116. Herbert et al., *supra* note 29 (citing statistical evidence that twenty-eight to thirty-two percent of gay men and women are either alcohol abusers or alcoholic, in contrast to ten to twelve percent of the general population).

that lesbians in particular may resist attending general AA meetings as a result.<sup>117</sup> One response has been to recommend all gay or gay friendly meetings,<sup>118</sup> an option only available in larger metropolitan areas. In attending Cleveland area meetings the author heard two openly gay men lead non-gay meetings without evident discomfort from those in attendance or from the speakers.

Religious or spiritual convictions are not requisite to AA affiliation, although atheists and agnostics are statistically less likely to affiliate than persons who are either unsure or who are spiritual or religious.<sup>119</sup> Findings regarding the impact of religiosity on AA effectiveness are scant, but one researcher concludes that AA engagement is not limited to persons with spiritual or religious beliefs.<sup>120</sup> AA effectiveness, however, appears higher for those described as spiritual, although it is unclear whether spirituality is a factor in, or is affected by, successful sobriety.<sup>121</sup> AA literature subscribes to the former view, that persons of any faith or of no faith can successfully engage the program.<sup>122</sup> The author's anecdotal experience reflects the fact that the great majority of sober AA members claim some spiritual practice or faith as an element of their sobriety, but that several long-time members asserted their continued atheism or agnosticism. These members made clear their dependence upon AA for sobriety and their rejection of the more overtly spiritual elements of the program. As noted *supra*, the fellowship and non-spiritual aspects of the program, such as the admission of powerlessness over alcohol, play the predominant role for non-believing members. It is noteworthy that even though relatively few AA members identify themselves as being agnostic or atheist, the number may not be a significant deviation from the general population. That is, .4% of Americans identify themselves as atheist and an additional .5% claim

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117. *Id.* (citing J. M. Brandsma & E.M. Pattison, *Homosexuality and Alcoholism*, in *ENCYCLOPEDIA HANDBOOK OF ALCOHOLISM* 736-41 (E.M. Pattison & E. Kaufman eds., 1982)).

118. There are several meetings in the Cleveland area denoted "gay friendly" in the area meeting book. There are additional meetings, mixed gender as well as men or women only, which are informally recognized as gay friendly. Herbert et al., *supra* note 29 (highlighting the problems that may exist for gay persons in smaller metropolitan or rural areas. The authors recommend that gay clients sample gay and non-gay meetings to find a comfort level).

119. Lee Ann Kaskutas et al., *The Role of Religion, Spirituality and Alcoholics Anonymous*, *ALCOHOLISM TREATMENT QUARTERLY* 2(1) 1, 13 (2003) (reviewing a study of a group culled from the Northern California treatment population which indicated that twenty-five percent of atheists and agnostics, forty percent of unsure, forty-three percent of spiritual, and forty-nine percent of religious continued attending AA meetings at three years).

120. *Id.* at 3.

121. Betty Jarusiewicz, *Spirituality and Addiction: Relationship to Recovery and Relapse*, 18 *ALCOHOLISM TREATMENT Q.* 99, 106-07 (2000).

122. *See*, *TWELVE STEPS AND TWELVE TRADITIONS*, *supra* note 16. *See also*, *ALCOHOLICS ANONYMOUS*, *supra* note 30, at xxxii (concluding: "I earnestly advise every alcoholic to read this book through, and though perhaps he came to scoff, he may remain to pray.").

agnosticism,<sup>123</sup> and it is unclear as to how differently AA configures in terms of members' beliefs.

To the extent that AA is effective, it seems equally so across boundaries of ethnicity, gender, sexual orientation, and even religious beliefs. Groups appear loyal to the foundational AA tradition of singular focus on sobriety,<sup>124</sup> and members of starkly different backgrounds not only mingle easily but interact in a highly personal and mutually supportive manner.<sup>125</sup> One study captures this as follows:

An important aspect of 12-Step programs is the open-door policy which allows entry to anyone wishing to recover from addiction. It may be that, in conjunction with this open-door policy, that the similarities of the addiction experience rather than demographic differences may be one reason why 12-Step seems to be equally utilized and effective for all gender and ethnic populations. Alternately, although 12-Step groups may share a general structure, philosophy, and techniques, they also may be sufficiently flexible to reflect the local ecology and different needs and interests of participating community members. The 12-Step program may be equally utilized and effective because it attends to the needs and interests of the gender and ethnic populations it serves.<sup>126</sup>

The success rate of Alcoholics Anonymous is not high, but neither is it determined by ethnicity, gender, sexual orientation, or even religiosity. The only requisite characteristic appears to be that the individual has "hit bottom," although even that status has limited predictive value. The obvious conclusion is that AA works for some, but not for most, and that courts should take care to direct defendants to either appropriate alternative sobriety programs or to AA meetings that afford the best fit for the individual. A cookie cutter approach to sobriety sentencing will be ineffective and, as discussed in Part III, likely unconstitutional.

#### D. AA and Religion

The purpose here is to address the role of spiritual belief in the AA program and to address the distinction asserted by AA members between religiosity and spirituality. I find that spiritual principles are central to the AA program, but that the program tolerates and encourages the development of individuated faith. The resulting doctrinal elasticity defies attempts to label AA as a religion but, as

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123. THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY, *available at* [http://www.gc.cuny.edu/faculty/research\\_briefs/aris/key\\_findings.htm](http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm) (last visited June 10, 2006).

124. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 139 (providing "[t]he only requirement for A.A. membership is a desire to stop drinking."). Tradition Five states "[e]ach group has but one primary purpose—to carry its message to the alcoholic who still suffers." *Id.* at 150.

125. The Big Book notes that "we are people who normally would not mix." ALCOHOLICS ANONYMOUS, *supra* note 30, at 17.

126. Hillhouse & Fiorentine, *supra* note 28, at 771 (internal citations omitted).

discussed in Section III *infra*, does not avoid the Establishment Clause issue. The discussion below addresses the spiritual component of AA historically and as found in contemporary practice.

Alcoholics Anonymous offers a program of recovery from alcoholism that is unabashedly reliant upon spiritual principles. Permanent physical sobriety is the objective, but many AA members strive to reach that objective through a moral transformation achieved by integrating the twelve steps into their lives. Although the steps of the program are only “suggested” as a means to sobriety,<sup>127</sup> it is a rare AA meeting in which a speaker does not express the conviction that a relationship with a “God of my understanding” is crucial to continued sobriety and a meaningful life. Five of the twelve steps explicitly reference God, Step Two references a “power greater than ourselves,” and the twelfth step describes a “spiritual awakening as a result of these steps.”<sup>128</sup>

### *1. Member Perceptions of Religiosity*

Interviews with AA newcomers as well as members with long-term sobriety confirmed the centrality of spirituality and the concept of a “God of my understanding” to the program. In response to the question “does AA say that a belief in God is necessary to recovery,” virtually all the respondents said that the program says so explicitly or strongly implies it.<sup>129</sup> Members with long-term sobriety who had also served in a leadership capacity<sup>130</sup> all stated that spirituality is “essential” to recovery and that a belief in God is either “essential” or “important.”<sup>131</sup> In interviews as well as comments in meetings, however, members repeatedly stressed the distinction between religiosity and spirituality. For them the distinction is critical. Members need not accept any theological formulations as to the nature of God, and many expressed overt hostility or indifference to the organized faith in which they were raised. Some participants expressed a contrary view, saying that their AA experience had strengthened or rejuvenated their connection with an organized religion, and program literature urges members who

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127. ALCOHOLICS ANONYMOUS, *supra* note 30, at 59; *see also*, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 26 (“Alcoholics Anonymous does not demand that you believe anything. All of its Twelve Steps are but suggestions.”).

128. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 5-9.

129. An exception was a long-term member who is a strongly convicted atheist. The experiences of atheist members will be discussed *infra*.

130. *See*, TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 9 (AA does not have a traditional organizational structure, and governance is democratic and occurs at the individual group level. The governing principles are largely captured in the Twelve Traditions. Tradition Two reads: “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.”).

131. Four such members were interviewed, and all had a minimum of fifteen years of continuous sobriety in AA.

are so inclined to participate in the religious faith of their choice.<sup>132</sup> Whatever their religious views, the salient spiritual concept for most members is two-fold: first, members need only to maintain an open-minded willingness to conceive an individually defined higher power and second, such willingness is essential to recovery.<sup>133</sup> Thus, members refer to Jesus Christ, God, “my higher power,” nature, the AA group, Allah, and innumerable other personal conceptions of the higher power. This spiritual elasticity creates a hospitable environment for diverse members, and it can be traced to the program’s founding.

## 2. *Historic Perspective on AA and Religion*

The AA program was forged in a crucible of religion, spirituality, medicine, and the catastrophe of untreated alcoholism. Co-founder Bill Wilson was in a New York City sanitarium at the low point of a life laid waste by alcoholism.<sup>134</sup> His friend Ebby Thatcher visited Wilson, telling of his own recovery from alcoholism through an admission of the hopelessness of his addiction and subsequent surrender of his life to God.<sup>135</sup> Importantly, Ebby stressed to Wilson that surrender could be proffered to a God of one’s own conception.<sup>136</sup> Wilson wasn’t an atheist, but he was skeptical of organized religion.<sup>137</sup> Ebby Thatcher’s assertion, and Wilson’s ultimate acceptance of its truth, was a life changing epiphany for Wilson<sup>138</sup> and would become foundational to AA’s approach to recovery.

At the beginning, AA’s spiritual foundation was bifurcated. It emerged on the one hand from secular insights into psychic and spiritual change as requisite to alcoholic recovery, and on the other hand from the views of an early twentieth century Christian sect, the Oxford Group, regarding change through certain religious beliefs and practices. The two roots first entwined in the life of Rowland Hazard, a young and wealthy Rhode Island socialite who was also a hopeless alcoholic. In 1931 Hazard traveled to Switzerland to seek the care of Dr. Carl Gustav Jung. After lengthy and seemingly successful treatment under Jung, Hazard

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132. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 87, for a discussion of the value of participating in the devotional exercises of one’s religious faith, and the importance of seeking advice from religious leaders on spiritual practice.

133. See, ALCOHOLICS ANONYMOUS, *supra* note 30, at 567-68.

134. See, KURTZ, *supra* note 11, at 7-36 (recounting Wilson’s final drinking stage and early sobriety). By late 1934, Wilson was a repeat patient at a sanitarium, Charles B. Towns Hospital in New York City, under the care of Dr. William Duncan Silkworth. *Id.* Silkworth was trained in neuropsychiatry and had extensive experience in the treatment of alcoholic patients. *Id.*

135. *Id.* at 19. See also, KURTZ, *supra* note 11, at 33 (Kurtz identifies the Thatcher visit as one of the four founding moments of AA history). See also, ALCOHOLICS ANONYMOUS, *supra* note 30, at 9-12.

136. ALCOHOLICS ANONYMOUS, *supra* note 30, at 12.

137. *Id.* at 10.

138. *Id.* at 12.

relapsed. Following the relapse Jung shared some hard news with his patient: alcoholics of his ilk rarely recovered, and that his only hope lay through a “spiritual or religious experience.”<sup>139</sup> Jung was not advocating religious theology but rather expressing the need for a “moral displacement,” a seismic shift in the “ideas, emotions and attitudes” which govern the alcoholic’s life.<sup>140</sup> Hazard found such an experience in the Oxford Group, a non-denominational, evangelical Christian organization that was prominent in the United States in the early twentieth century.

Hazard shared the news and method of his recovery with another alcoholic, Ebby Thatcher, who shared his story with Wilson. In May of 1935, Wilson shared the story of his recovery with an alcoholic proctologist in Akron, Dr. Robert Smith (known in AA as Dr. Bob), and AA dates its founding from the date in June of 1935 when Dr. Bob took his last drink.<sup>141</sup> Wilson and Smith then went on to work with still more alcoholics and to co-found AA. Hazard, Thatcher, Wilson, and Smith all embraced the teachings of the Oxford Group, and Smith and Wilson incorporated Oxford Group principles into the core of the AA program. These principles included “self examination, acknowledgment of character defects, restitution for harm done, and working with others”<sup>142</sup> as well as surrender to God,<sup>143</sup> all of which are clearly discernable in the steps of AA. In utilizing the religious tenets of the Oxford Group, the founders accomplished Jung’s secular directive that the alcoholic seek recovery through psychic transformation. Early AA was therefore unabashedly Christian in its orientation,<sup>144</sup> and the programmatic fundamentals remain “rooted in Judeo-Christian doctrine.”<sup>145</sup>

The diversity of faith found in modern AA was not, however, unforeseen or unplanned by the founders. Early members, particularly in New York, divided sharply over the proposed contents of the Big Book. Some advocated an explicit embrace of religion, while others sought a text focused on the psychological precepts underlying the program.<sup>146</sup> The resultant compromise is captured in the

139. KURTZ, *supra* note 11, at 8-9.

140. ALCOHOLICS ANONYMOUS, *supra* note 30, at 26.

141. KURTZ, *supra* note 11, at 8-9.

142. ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 11, at 39.

143. This was perhaps *the* central tenet of early AA. See, DR. BOB AND THE GOOD OLDTIMERS, *supra* note 45, at 101 (“[S]urrender was more than important; it was a must.” An early member recalls that “you couldn’t go to a meeting until you did it.”).

144. One early observer, impressed and moved by testimonials of AA members, exclaimed “why this is first century Christianity!” KURTZ, *supra* note 11, at 66. The speaker was Albert Scott, Chairman of the Trustees of Riverside Church in New York City, and the setting was a 1938 meeting in which Wilson, Smith, and friends sought the financial support of John D. Rockefeller, Jr. Despite the positive impressions, Rockefeller limited his support to \$5,000, apparently mindful of Scott’s query of “won’t money ruin this thing?” *Id.*

145. Tonigan et. al, *supra* note 70, at 534.

146. ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 11, at 17.

phrase “God as we understood him.”<sup>147</sup> Wilson described the compromise as “going down the middle, writing in spiritual rather than religious or entirely psychological terms.”<sup>148</sup> The spectrum of belief and non-belief encountered in the rooms of AA today is the legacy of this compromise. In addition to the diversity seen in Northeast Ohio meetings, researchers note international expansion of AA beyond its traditional Christian cultural base.<sup>149</sup> Because of its malleability regarding spiritual belief, AA meetings tend to reflect local religious and cultural values.<sup>150</sup>

### 3. *Contemporary Perspectives*

Commentators note that the AA program lacks some of the salient characteristics of religion. By its terms, AA requires neither a Christian nor even a theistic embrace of a higher power.<sup>151</sup> This absence of theology is rooted in AA’s early and ongoing pragmatism. The AA program concerns itself exclusively with providing a means to stop drinking. Thus AA does not address issues commonly associated with organized religious faith such as the nature of God or the existence of an afterlife. Within AA, faith is generated more by experience (the changes wrought by sobriety in the members’ lives) than by belief.<sup>152</sup> In contrast, biblical faith explicitly requires the believer to embrace “things not seen.”<sup>153</sup> Professor Paul E. Salamanca, writing about AA sentencing and the Establishment Clause, notes that AA, “like psychoanalysis, might function more as a facilitator of established

147. *Id.*

148. *Id.*

149. See, Mäkelä, *supra* note 44, at 1405-13 (“By 1986, the diffusion of AA had definitely moved beyond the cultural confines of the Anglo-Saxon and Protestant world. Long lasting AA activities had typically been established in all wealthy non-Communist countries.”). See also, International AA Meetings at <http://alcoholicsanonymous.9f.com/meetingsworldaa.htm> (last visited June 10, 2006) (including many in non-Christian countries).

150. Klaus Mäkelä, *International Comparisons of Alcoholics Anonymous*, 17 ALCOHOL HEALTH & RES. WORLD 228, 231 (1993) (The author notes, for instance, that eighty-eight percent of Mexican attendees affirmed that “I know God really exists and I have no doubts about it,” whereas only twenty-eight percent of Swedish respondents endorsed the statement. The author notes similar regional differences within American groups: “AA groups in the Midwest and the South typically have a traditional, church-going religious orientation, whereas groups in California and the urban Northeast tend to have a nonreligious approach.”).

151. Mäkelä, *supra* note 44, at 1406.

152. *Id.*; See also, KURTZ, *supra* note 11, at 175-78 (“[M]ost members of Alcoholics Anonymous come to an understanding of their God through His *felt* rather than believed effects in their lives.”) (emphasis in original).

153. *Hebrews* 11:1-3 (King James) (“Now faith is the assurance of things hoped for, the conviction of things not seen. For by it the men of old received divine approval. By faith we understand that the world was created by the word of God, so that what is seen was made out of things which do not appear”). See also, *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (“Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it.”).

religions than as a religion of its own.”<sup>154</sup> Similarly, medical literature has characterized the twelve steps as a “quasireligious expression of the process of change seen in psychotherapy.”<sup>155</sup> Researchers in the field of alcoholism also distinguish between spirituality and religion. One writer notes “spirituality is fundamentally an ideographic aspect of the person. Religion, in contrast, is a social phenomenon.”<sup>156</sup>

For First Amendment purposes, the distinctions between spirituality and religion may be unpersuasive. As Professor Salamanca notes, AA does utilize religious practices in a manner that “implicate[s] the Establishment Clause.”<sup>157</sup> Observers such as Charles Bufe, a long time critic of AA, find that the program is rife with the language and practice of religious faith.<sup>158</sup> One inarguably religious practice that Bufe highlights from his observations of California meetings is the opening and closing of meetings with prayer.<sup>159</sup> Cleveland meetings, too, almost invariably begin with a group recitation of the Serenity Prayer<sup>160</sup> and close with the group saying the Lord’s Prayer.<sup>161</sup> In addition to prayers before and after the meeting, members often express to the group the impossibility of achieving sobriety without God, the fruits of turning one’s will and life over to the care of God, and the importance of a daily regimen of prayer and meditation. AA program literature unapologetically urges those who seek sobriety to establish a relationship with the God of their understanding. Further, AA meetings reflect the surrounding culture in terms of their spiritual orientation,<sup>162</sup> and many meetings in Northeast Ohio explicitly reflect the predominantly Christian faith of the community.

Alcoholics Anonymous offers a spiritual solution to the secular problem of alcoholism. As discussed *infra*, AA should not be characterized as a religion, but many of its practices and beliefs are explicitly grounded in religion. However, the great breadth of beliefs found among the membership, including atheism and agnosticism, as well as the confirmed value of participation even for those not engaging the spiritual elements of the program, militate against precluding AA sentencing altogether on constitutional grounds. As I demonstrate in the remainder

154. Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1160-1161 (1997).

155. Stephen F. O’Neill & Henrietta N. Barnes, *Alcoholics Anonymous*, in *ALCOHOLISM, A GUIDE FOR THE PRIMARY CARE PHYSICIAN* 96 (H.N. Barnes et al., eds., 1987).

156. William R. Miller, *Researching the Spiritual Dimensions of Alcohol and Other Drug Problems*, 93 ADDICTION 979, 980 (1998).

157. Salamanca, *supra* note 154, at 1160-61.

158. PEELE ET AL., *supra* note 22, at 83-106.

159. *Id.* at 85-86.

160. The Serenity Prayer, <http://www.cptryon.org/prayer/special/serenity.html> (last visited June 10, 2006) (“God, grant me the serenity to accept the things I cannot change, the courage to change the things that I can, and the wisdom to know the difference.”).

161. *Matthew* 6:9-13.

162. Mäkelä, *supra* note 44.

of this article, the constitutional issues may be cured, and may be done so in a way that serves to bolster the AA program's effectiveness.

## II. CONSTITUTIONAL ISSUES

Here the discussion will focus on the constitutional issues surrounding AA sentencing. First, I will briefly trace the evolution of the meaning of religion in Supreme Court jurisprudence. In doing so I will explore two tests for the determination of religiosity under the First Amendment, the "place parallel test" found in *Seeger v. United States*,<sup>163</sup> and a deduction-by-analogy test found in *Malnak v. United States*.<sup>164</sup> I will show that under the *Malnak* test AA could be defined as a religion, but that such a finding would be flawed given the secular nature of AA's foundational purpose. However, I will also explain that AA does contain sufficient religious content and practice to invoke Establishment Clause analysis. Second, I will highlight current Supreme Court Establishment Clause tests, examine their constitutional underpinning, and discuss how federal courts have applied the tests in AA sentencing cases. Third, I will examine several curative approaches, and will conclude with my own suggestion as to how sentencing courts may direct defendants to AA without injury to the Establishment Clause or broader constitutional principles.

### A. Evolving Views and Contemporary Tests

The Supreme Court view of what constitutes religion under the First Amendment has evolved and broadened in parallel with the nation's increasing religious diversity.<sup>165</sup> Nineteenth century opinions reflected a strictly theistic view, defining religious convictions in terms of man's relationship with God and to the "obligations they impose of reverence for his being and character, and of obedience to his will."<sup>166</sup> Chief Justice Hughes echoed this view in 1933, writing that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."<sup>167</sup>

In the 1940's federal courts addressed the question of religion in determining an allowable basis for conscientious objection to military service. Their task was to

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

164. *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979).

165. In 1776, seventy-five percent of the colonial population identified "with denominations that had arisen from the Reformed, Puritan wing of European Protestantism: Congregationalism, Presbyterianism, Baptists, and German and Dutch Reformed." DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774-1789, at 45 (2000). *See also, Seeger*, 380 U.S. at 174 (writing for the Court, Justice Black noted the existence of over 250 religious sects in America, including many holding non-Christian beliefs).

166. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

167. *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

separate insufficient secular philosophical and political objections from those grounded in “religious training and belief.”<sup>168</sup> In *Berman v. United States* the Ninth Circuit maintained the relationship between God and man as requisite and central to religion.<sup>169</sup> The Second Circuit, however, took a broader view in Judge Augustus Hand’s opinion in *United States v. Kauten*.<sup>170</sup> Judge Hand departed from the traditional God-man relationship and recognized religiosity as “a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.”<sup>171</sup> Judge Hand found sufficient basis for religious exemption when the claimant’s response emanated from “an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.”<sup>172</sup> The *Kauten* holding shifted decidedly from the view of religion as embracing an external relationship with God toward an inquiry into the individual’s inner life and personal moral center.<sup>173</sup>

The Supreme Court similarly broadened its view of religion in *Seeger v. United States*,<sup>174</sup> where again the issue was defining allowable grounds for conscientious objection to military service under the Universal Military Training and Service Act.<sup>175</sup> The defendants held either broadly theistic, non-sectarian beliefs<sup>176</sup> or a doctrinally agnostic but spiritually based commitment to “goodness” that the Court found sufficiently religious to fall within the draft exemption.<sup>177</sup> In so holding, Justice Clark wrote that the term “religious training” includes “all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is

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168. Selective Training and Service Act of 1940, 54 Stat. 894 (1940) (current version at 50 U.S.C.A. App. § 305(g) (2005)).

169. *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946). Judge Stephens wrote “philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as used in the statute.” *Id.* at 381. He cited the necessary presence of “a process of vital and reciprocal interplay between the human and the supernatural.” *Id.* at 382. He also quoted approvingly the Encyclopedia of Social Sciences definition of religion as the “complex of man’s interrelations with the superhuman powers.” *Id.*

170. *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

171. *Id.* at 708.

172. *Id.*

173. See, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1061 (1978) (describing the *Kauten* holding as a “dramatic shift in emphasis” from “the external attributes of a denomination—its dogma, doctrines, and creeds—[to] the psychological function of the belief in the life of the individual”).

174. *Seeger*, 380 U.S. at 163.

175. The Act, *supra* note 168, had been amended in 1948 to define “religious training and belief” as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.” *Seeger*, 380 U.S. at 172.

176. *Seeger*, 380 U.S. at 174.

177. *Id.* at 186-87.

subordinate or upon which all else is ultimately dependent.”<sup>178</sup> The Court adopted a test requiring “a sincere and meaningful belief which occupies in the life of its possessor a place parallel<sup>179</sup> to that filled by the God of those admittedly qualifying for the exemption.”<sup>180</sup> In concurrence, Justice Douglas made clear that the protective ambit of the First Amendment extends beyond traditional faith focused on a “Supreme Being” to include, for instance, a system of thought such as Buddhism that does not contemplate a God within the Judeo-Christian theological framework.<sup>181</sup> Justice Douglas’ view echoed the Court’s dicta in *Torcaso v. Watkins*, a case invalidating Maryland’s requirement that state officers profess a belief in God.<sup>182</sup> In a footnote, the unanimous *Torcaso* opinion counted “Buddhism, Taoism, Ethical Culture, Secular Humanism and others” among non-theistic American religions enjoying First Amendment protection.<sup>183</sup>

Subsequent to *Seeger*, several federal appellate decisions proffered tests designed to identify and define religion for constitutional purposes.<sup>184</sup> The most helpful of these is *Malnak v. United States*, where Judge Adams provided a concurrence containing a three-part test designed to identify indicia by which courts might discern religiosity.<sup>185</sup> The case centered on whether the Science of Creative Intelligence Transcendental Meditation (SCI/TM) was a religion, and whether offering SCI/TM courses in New Jersey public schools violated the Establishment Clause. The most important prong of Judge Adams’ test is the first, which inquired of “the nature of the ideas in question.”<sup>186</sup> Judge Adams asked whether the entity or belief sought to answer “fundamental questions” about the “ultimate concerns”

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178. *Id.* at 176.

179. *See*, *Welsh v. United States*, 398 U.S. 333, 340 (1970) (explaining “a place parallel” as follows: “If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious convictions.”).

180. *Seeger*, 380 U.S. at 176.

181. *Id.* at 191. Douglas and the majority were, in fact, interpreting the draft statute. In doing so, however, they sought to avoid invalidating the statute for offending the First Amendment. Their interpretation of the statutory language, therefore, tracked the contours of the Religion Clauses.

182. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

183. *Id.* at 495 n.11.

184. *See*, *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969) (Scientology is a religion for purposes of the Free Exercise Clause); *See also*, *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979) (Transcendental Meditation is religious under the Establishment Clause); *See also*, *Africa v. Pennsylvania*, 662 F.2d 1025 (3rd Cir. 1981) (the MOVE organization is not religious under the test established in *Malnak*); *See also*, *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (adopting William James’ definition as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”).

185. *Malnak v. Yogi*, 592 F.2d 197, 208-11(3rd Cir. 1979).

186. *Id.* at 208.

of human existence.<sup>187</sup> Such concerns would include “the meaning of life and death, man’s role in the Universe, [and] the proper moral code of right and wrong.”<sup>188</sup> The second indicium addresses the “comprehensiveness” of the alleged religion.<sup>189</sup> Judge Adams posited that a religion must generally provide answers to a multiplicity of moral questions and issues rather than centering on a single issue.<sup>190</sup> Third, the *Malnak* opinion looks for “formal, external, or surface signs that may be analogized to accepted religions,” including worship formalities, organizational and theological leadership, and holidays.<sup>191</sup> Despite SCI/TM protestations to the contrary, Judge Adams examined the Creative Intelligence textbook and found the teachings religious as they addressed a ubiquitous “life force” which clearly qualified as an “ultimate concern.”<sup>192</sup>

#### B. Testing AA as a Religion: Recommended Outcome and Conclusion

Applying the language of the *Seeger* test, AA does not appear to occupy a “place parallel” to traditional religious faith.<sup>193</sup> As discussed, the program’s near limitless elasticity in terms of the meaning of God, the broad range of belief and non-belief within the fellowship, and the lack of a central authority capable of expressing (or enforcing) a theological orthodoxy all militate against finding AA to be a religion under the “place parallel” test. This is true despite the fact that the *Seeger* defendants proffered spiritual precepts as similarly open ended as those of AA. The *Malnak* opinion solves the contradiction by explaining that the *Seeger* opinion did not find the views at issue to constitute religions, but rather found them to be “based in religious belief.”<sup>194</sup> Thus a court applying *Seeger* could find an AA member’s step work to be protected from government regulation under the Free Exercise Clause without finding AA to be a religion.

Application of the *Malnak* factors produces a closer call. Judge Adams limited his examination to the SCI/TM textbook, and an examination of the AA Big Book may yield a similar finding of an “ultimate concern.” For instance, the main text of the Big Book concludes as follows:

Our book is meant to be suggestive only. We realize we know only a little. God will constantly disclose more to you and to us. Ask him in your morning meditation what you can do each day for the man who is still sick. The answers will come, if your own house is in order. But obviously you

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187. *Id.*

188. *Id.* (citing PAUL TILLICH, DYNAMICS OF FAITH 1-2 (1958)).

189. *Id.* at 209.

190. *Id.*

191. *Malnak v. Yogi*, 592 F.2d 197, 209 (3rd Cir. 1979).

192. *Id.* at 213.

193. *See, Welsh v. United States*, 398 U.S. 333 (1970).

194. *Malnak*, 592 F.2d at 212.

cannot transmit something you haven't got. See to it that your relationship with Him is right, and great events will come to pass for you and for countless others. This is the Great Fact for us.

Abandon yourself to God as you understand God. Admit your faults to him and to your fellows. Clear away the wreckage of your past. Give freely of what you find and join us. We shall be with you in the fellowship of the spirit, and you will surely meet some of us as you trudge the Road of Happy Destiny.

May God bless you and keep you—until then.<sup>195</sup>

Limiting one's examination to the Big Book, the reader may easily conflate "the Great Fact for us" with a matter of "ultimate concern."<sup>196</sup> Under the second *Mahnak* prong, Judge Adams found SCI/TM "sufficiently comprehensive to avoid the suggestions of an isolated theory unconnected with any particular world view or basic belief system."<sup>197</sup> AA, by contrast, seems to lack the requisite coherence, given its singular focus on sobriety. The Big Book, however, prescribes a broad moral transformation as a means of achieving sobriety, and members are urged to adopt a way of living embracing such values as honesty,<sup>198</sup> unselfishness,<sup>199</sup> and a willingness to discern and do God's will.<sup>200</sup> Similarly, the Twelfth Step urges members to "practice these principles in all our affairs."<sup>201</sup>

Regarding Judge Adams' third element, AA appears to lack the requisite forms and structure that signal the existence of a religion. By its traditions AA is not "organized"<sup>202</sup> and lacks any center of authority beyond the individual meeting.<sup>203</sup> The Supreme Court has admonished, however, that "the law reaches past

195. ALCOHOLICS ANONYMOUS, *supra* note 30, at 164.

196. *Mahnak*, 592 F.2d at 213 (observing that Creative Intelligence is "at the basis of all growth and progress" and is "the basis of everything" and noting that such a foundational view of "life and the world itself" embraced an "ultimate concern.").

197. *Id.*

198. ALCOHOLICS ANONYMOUS, *supra* note 30, at 58. The text explains that even persons with "grave emotional and mental disorders" may recover if they have the "capacity to be honest." *Id.* Honesty is a value underpinning much of the program, especially steps four, five, eight, nine and ten. *See generally, id.* at 58-86. Honesty is also one of the "four absolutes," which are not found in the literature but are often repeated in AA meetings. The other three are unselfishness, love, and purity.

199. *See*, ALCOHOLICS ANONYMOUS, *supra* note 30, at 62; *see also*, KURTZ, *supra* note 11, at 34.

200. ALCOHOLICS ANONYMOUS, *supra* note 30, at 59. The Eleventh Step states that members "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." *Id.* (emphasis in original). The Big Book explains this step at pages 85-88. For example, the text recommends that "[b]efore we begin [planning for the day] we ask God to direct our thinking, especially asking that it be divorced from self pity, dishonest or self seeking motives." *Id.* at 86.

201. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16.

202. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16 (specifically the 9th Tradition).

203. *See*, Nowinski, *supra* note 38.

formalism,”<sup>204</sup> and AA is replete with informal structure. Substantively, the twelve steps provide a structured if malleable and suggestive approach to achieving sobriety. Meetings are regular with respect to time, place,<sup>205</sup> and format, and are listed in directories. Judge Adams found the existence of trained SCI/TM teachers and an “organization devoted to the propagation of the faith” as relevant to satisfying the third prong.<sup>206</sup> AA sponsorship may be analogized to the existence of informal teachers,<sup>207</sup> albeit untrained and wholly independent, and Step Twelve of the AA program urges members to “carry this message to the alcoholic who still suffers.” Such exhortive language is counterbalanced, however, by the limitation of audience (alcoholics) and the tradition of refraining from promotion of AA.<sup>208</sup> Nevertheless, one can argue that application of each *Malnak* prong to AA yields a finding of religion.

The potential use of the *Malnak* factors highlights a problem with identifying newer religions by analogy to established religions. Theologian Harvey Cox cast the problem in terms of potential under-inclusiveness, noting that early Christianity would not have been accepted as a religion if analyzed by analogy to contemporary accepted Roman faith.<sup>209</sup> Application of *Malnak* may also result in over-inclusiveness. Marxism and secular humanism are bodies of secular thought that, if practiced in a fashion reflecting the *Malnak* indicia, would likely be embraced as religion for constitutional purposes.<sup>210</sup>

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204. *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

205. Numerous meetings in the Cleveland area have been in existence since the early 1940s.

206. *Malnak*, 592 F.2d at 214.

207. TWELVE STEPS AND TWELVE TRADITIONS, *supra* note 16, at 8.

208. The eleventh Tradition reads in part “our public relations policy is based on attraction rather than promotion.” *Id.*

209. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1181 (1988) (quoting Professor Cox as follows: “[A] man-in-the-street approach would surely have ruled out early Christianity, which seemed both subversive and atheistic to the religious Romans of the day. The truth is that one man’s ‘bizarre cult’ is another’s true path to salvation.”). Professor Tribe dismisses the *Malnak* analysis, and urges instead the approach adopted by the Second Circuit in *United States v. Sun Myung Moon*, 718 F.2d 1210 (1983). *Id.* at 1181-82. The court in *Sun Myung Moon* defined religion as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.” *Sun Myung Moon*, 718 F.2d at 1227. The court also defined “divine” as “any object that is godlike, whether it is or is not a specific deity.” *Id.* The *Sun Myung Moon* holding, however, would seem to suffer from the same lack of closed meaning that plagues the *Seeger* holding.

210. *See*, *Torcaso v. Watkins*, 367 U.S. 488, 488 n11 (1961) (including Secular Humanism as among the “religions in this country which do not teach what would generally be considered a belief in the existence of God.”); *see also*, *Malnak v. Yogi*, 592 F.2d 197, 212 (noting that “*Torcaso* does not stand for the proposition that ‘humanism’ is a religion, although an organized group of ‘Secular Humanists’ may be.”) Similarly, the D.C. Circuit Court of Appeals limited the meaning of the *Torcaso* footnote to “the idea that a particular non-theistic group calling itself the ‘Fellowship of Humanity’ qualified as a religious organization under California law.” *Kalka v. Hawk*, 342 U.S. App. D.C. 90, 99 (2000). *Malnak* did note that “government propagation of Marxism” could, under “certain circumstances” result in an Establishment Clause violation. *Malnak*, 592 F.2d at n52. *See also*, Kent

An examination of the predominant organizational purpose may provide a clearer insight and more rational result. Marxism, at least as envisioned by Marxist-Leninists, is dedicated to the accomplishment of a just and equitable society through establishment of a particular form of government. That Marxist philosophy also attends to inarguably spiritual issues such as the inner life of working persons and the attainment of a more developed state of human relations should be insufficient to confer religious status. Similarly, the primary purpose of Alcoholics Anonymous, as evidenced by its literature and its practice, is sobriety for the alcoholic.<sup>211</sup> That AA recommends a spiritual course of recovery should not result in religious status.<sup>212</sup>

The import of the conclusion is limited to this: AA is not itself a religion, and, therefore, courts may require AA participation as an element of probation and/or sentencing, but many AA practices and methods are inarguably religious<sup>213</sup> and courts must undertake curative measures so as not to compel persons to engage in religion against their will.<sup>214</sup> A core mission of the Establishment Clause is to enjoin

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Greenawalt, *Symposium: The Religion Clauses Article: Religion as a Concept of Constitutional Law*, 72 CAL. L. REV. 753 (1984) (advocating the deduction of religion by analogy approach of *Malnak*. *Id.* at 753. Professor Greenawalt concedes Marxism to be a close call, but excludes it as a political philosophy whose inclusion would lead to the inevitable inclusion of other less “arguably” political philosophies. *Id.* at 813.

211. Alcoholics Anonymous Preamble, available at [http://www.alcoholics-anonymous.org/en\\_services\\_for\\_members.cfm?PageID=98&SubPage=109](http://www.alcoholics-anonymous.org/en_services_for_members.cfm?PageID=98&SubPage=109) (last visited June 10, 2006) (stating “[o]ur primary purpose is to stay sober and help other alcoholics to achieve sobriety”).

212. Professor Greenawalt makes a similar point when he notes that “[o]ther features of paradigm instances, such as belief in God, may by themselves always be religious, but they do not always make the broader practices and organizations associated with them religious. A simple requirement that members believe in God would not alone make an organization religious, nor would commencement with a prayer make a legislative meeting religious.” Greenawalt, *supra* note 210, at 768. The converse is also true. A church may provide a soup kitchen to feed the poor, an inarguably secular effort, without ceasing to be a religious organization.

213. *Griffin v. Coughlin*, 673 N.E.2d 98, 101 (1996) (noting that AA meetings were “heavily laced with at least general religious content,”) and that AA literature “demonstrably express[es] an aspiration that each member of the movement will ultimately commit to a belief in the existence of a Supreme Being of independent higher reality than humankind.” *Id.* at 102. *See also*, *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (“A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the twelve steps consistently refer to ‘God, as we understood Him.’ Even if we expanded the steps to include polytheistic ideals, or animistic philosophies, they are still fundamentally based on a religious concept of a Higher Power.”).

214. *See*, *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002). In *Cox* the court addressed a claim by a state prisoner that his murder conviction was unconstitutional because it depended upon testimony from AA members revealing admissions made in the context of Cox completing the Fifth Step of the AA program. Cox asserted that those admissions were improperly admitted because they were made in the context of his AA step work and thus enjoyed the protection of New York’s cleric-congregant privilege. In dicta, the opinion made clear that prior Second Circuit holdings found elements of AA sufficiently religious to implicate the Establishment Clause, but that these holdings did not find AA

government from interference with the religious choices of the American people. Coercing engagement in a religious practice, regardless of whether such a practice is undertaken in a school, a church, or an AA meeting, is unconstitutional. When courts require criminal defendants to attend AA meetings and engage the AA program, therefore, questions arise as to whether that requirement is constitutional and, if not, what may be done to cure the constitutional flaw.

### C. Establishment Clause Jurisprudence and the Underlying Principles of Neutrality and Autonomy

#### 1. Three Tests

The Supreme Court has adopted three tests to determine violation of the Establishment Clause. The first test, articulated most famously in *Lee v. Weisman* in 1992, asks whether the state has compelled an individual to participate in a religious activity.<sup>215</sup> The inquiry is particularly searching when the state has authored or participated in shaping the content of the religious message at issue.<sup>216</sup> The second test inquires into the purpose of the disputed state action and its effect. This test was first expressed in three parts in *Lemon v. Kurtzman*,<sup>217</sup> and modified to the two-prong inquiry found in *Agostini v. Felton* in 1997.<sup>218</sup> The test thus asks whether the state action was undertaken with the intent of impacting religion,<sup>219</sup> and whether the primary effect of the state action is to advance or inhibit religion.<sup>220</sup> To determine a violation of the effect prong of the *Lemon-Agostini* test the Court looks to three

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to be a religion. *Id.* at n12. *But see*, Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1080 (2d Cir. 1997) (Winter, J., dissenting) (arguing that if attendance at AA meetings violates the Establishment Clause, the violation does not depend upon the presence of coercion but rather arises from "governmental sponsorship of religion over nonreligion." Under Judge Winter's reasoning, the presence of alternatives would also be irrelevant to the endorsement inquiry).

215. *Agostini v. Felton*, 505 U.S. 577, 587 (1997) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

216. *Id.* at 586 (citing as "dominant" the fact that state officials "direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools").

217. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that the Lemon test asked: (1) whether the statute had a secular purpose; (2) whether the statute's primary effect would be the advancement or inhibition of religion; and (3) whether the action at issue would result in "excessive entanglement" between government and religion). The first two prongs of the Lemon test are drawn from *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). The third prong comes from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

218. *Agostini*, 521 U.S. at 232-33. The *Agostini* holding folded the entanglement prong of *Lemon*, supra note 218, to the second prong, the primary effect inquiry. *Id.*

219. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (an Alabama statute requiring a brief period for meditation and voluntary prayer at the beginning of each school day was unconstitutional because its purpose was entirely religious).

220. *Agostini*, 521 U.S. at 222-23.

factors: the presence of religious indoctrination attributable to the government; the definition of “government aid recipients” by reference to religion; and the creation of excessive entanglement between government and religion.<sup>221</sup>

The third test, first offered by Justice O’Connor’s 1984 concurrence in *Lynch v. Donnelly*, is a variation of the effect prong of the *Lemon* test, precluding government endorsement or disapproval of religion in a way that impacts “in any way . . . a person’s standing in the political community.”<sup>222</sup> The Court has referred to the endorsement test as a “refinement” of the *Lemon* inquiry into the purpose or primary effect of the contested state action.<sup>223</sup>

## 2. Foundational Principles

These tests themselves may be viewed as means to vindicate two foundational constitutional principles: government neutrality in religion and individual autonomy in shaping religious and political views.

### a. Neutrality

First, government must maintain neutrality with respect to religious matters. Although in its earliest constitutional inception this principle was confined to equal treatment as between different Christian sects,<sup>224</sup> the Court has made clear since its 1946 decision in *Everson v. Board of Education* that the First Amendment requires “the state to be a neutral in its relations with groups of religious believers and non-believers.”<sup>225</sup> The neutrality principle is central in at least two broad sets of circumstances. First, the government may not seek to influence religious choices—it must avoid taking sides or advocating the truth or falsity of any theological view or advocating religion over irreligion.<sup>226</sup> This may be described as the traditional

221. *Id.* at 234.

222. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984).

223. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989).

224. *Wallace*, 472 U.S. at 55 n.36 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877, at 594 (1851) as follows: “The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government” (emphasis in the original)).

225. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

226. *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 728 (1872) (stating “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (stating “[m]an’s relation to his God was made no concern of the state” and that man “was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.”); *Everson*, 330 U.S. at 18; *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (overruled in part on other grounds by *Agostini v. Felton*, 521 U.S. 203) (stating “[g]overnment must maintain a course of neutrality among religions, and between religion and nonreligion”).

view of neutrality, where government sustained a position of “equipoise”<sup>227</sup> between religious positions, and a finding of such neutrality generally equated to a finding of constitutionality.<sup>228</sup>

Second, where government confers a benefit enjoyed by religious and nonreligious institutions alike, it must do so in a neutral fashion so as not to have as its primary effect the advancement of religion (the second prong of the *Lemon-Agostini* inquiry).<sup>229</sup> In these cases, most often focused on government aid to sectarian schools, neutrality is important but not dispositive.<sup>230</sup> Neutrality must be maintained so that the government distributes resources evenhandedly to further a permissible government objective without regard to the religious character of the recipient.<sup>231</sup> However, a factor of equal importance to neutrality is the availability of choice: government may aid religious institutions in a neutral fashion where the aid results from “genuine and independent choices of private individuals.”<sup>232</sup> To what degree, if any, the government may allow its resources to be used toward the end of the religious mission of aid recipients is not entirely clear. In *Bowen v. Kendrick* the Court repeated its earlier assertion prohibiting “government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”<sup>233</sup> This view appears to hold, at least where the government aid is provided directly to the religious institution.<sup>234</sup> Where, however, the government aid is the result of private choice, the Court appears less likely to ascribe resulting religious indoctrination to the government.<sup>235</sup>

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227. *Mitchell v. Helms*, 530 U.S. 793, 878 (2000) (J. Souter, dissenting) (“Neutrality has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion.”)

228. *Id.* at 883.

229. *Id.* at 808.

230. *Id.* at 838-40 (O’Connor, J., concurring).

231. *Id.* at 838.

232. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002); *Id.* at 669 (O’Connor, J., concurring); *Mitchell*, 530 U.S. at 810 (identifying the presence of choice as a means to discern neutrality). *See infra* note 235.

233. *Bowen v. Kendrick*, 487 U.S. 589, 542 (1989) (citing *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1988)).

234. *Destefano v. Emergency Housing Group Inc.*, 247 F.3d 397, 418 (2d Cir. 2001). The Second Circuit panel noted that a plurality of Justices in *Mitchell*, 530 U.S. at 809, appeared to adopt the position that where government aid is distributed neutrally (to the “religious, irreligious, and areligious” alike) its utilization for the purposes of religious indoctrination would be ascribed to the recipient and not the government. This assertion was vigorously rejected by two concurring Justices and three dissenters, giving the Second Circuit grounds to look to *Bowen* as continuing authority. *Id.* at 419.

235. *Mitchell*, 530 U.S. at 842-43 (O’Connor, J., concurring). Here, Justice O’Connor discusses the difference between instances of “true private choice” where government aid flows directly from private choices (e.g. an individual family selecting a sectarian school) and aid distributed on a “per-capita” basis. In the former case, Justice O’Connor argues that any religious indoctrination arises purely from the private choice and may not be ascribed to the government. Thus the government has

### b. Individual Autonomy

The protection of individual autonomy in shaping religious and political views also undergirds much Establishment Clause and broader constitutional jurisprudence. Americans are accorded the right to select, shape, embrace, or discard worldviews, theologies, and politics without governmental interference. Per the Supreme Court's near-iconic language in *West Virginia State Board of Education v. Barnette*:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>236</sup>

Thus, a state may not require that students recite the Pledge of Allegiance where such recitation offends the child's religion.<sup>237</sup> A state may also not require a person to "profess a belief or disbelief in any religion,"<sup>238</sup> nor may it enforce a law requiring the display of the state motto on a license plate against one who finds the motto repugnant to his religious and political beliefs.<sup>239</sup>

In short, the Constitution forbids the imposition by the state of intellectual, spiritual, or political orthodoxy. Such an imposition is anathema to the American view of freedom, and the American aversion to legally enforced orthodoxy is deeply embedded in the First Amendment.<sup>240</sup> As the Court explained in *Barnette*, there is a "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>241</sup>

## D. Applying the Tests: The AA Case Law

### 1. *The Coercion Test*

Judicial decisions since *Lee v. Weisman* have predominantly invalidated AA sentencing on Establishment Clause grounds where defendants are not provided

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not impermissibly engaged in indoctrination, nor is there the impression of government endorsement of religion. *Id.* (citing *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481, 488 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)). Where the aid is provided on a per-capita basis there lacks a separation between government and "endorsement of the religious message." *Id.* at 843.

236. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

237. *Id.*

238. *Everson*, 330 U.S. at 16; *Torcaso*, 367 U.S. at 495.

239. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

240. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) ("The government can, of course, no more coerce political orthodoxy than religious orthodoxy").

241. *Barnette*, 319 U.S. at 642.

nonreligious treatment alternatives.<sup>242</sup> The touchstone of the analysis is coercion to participate in a religious program. In *Warner v. Orange County Department of Probation*, the Second Circuit Court of Appeals found twelve-step sentencing to violate the Establishment Clause where the sentencing court failed to provide the defendant with secular alternatives.<sup>243</sup> The Seventh Circuit, addressing a case where a prison inmate was required to participate in Narcotics Anonymous,<sup>244</sup> propounded a three part inquiry: (1) has the state acted; (2) does the action amount to coercion; and (3) is the object of the coercion religious or secular.<sup>245</sup> Courts adduce coercion where a defendant is required to choose between incarceration or loss of privilege and participation in AA, reasoning that the negative consequences attached to refusal of AA eliminate the presence of real choice.<sup>246</sup> Where the state does provide real choice, there is virtual unanimity among courts that AA may be among the treatment options offered, as the danger of coercion is then cured.<sup>247</sup>

Courts addressing AA sentencing have perhaps painted too broadly with the *Lee* holding. As the Court in *Lee* pointed out, Establishment Clause jurisprudence is highly contextual and different facts give rise to different outcomes.<sup>248</sup> The *Lee* Court found highly relevant the fact that the plaintiff represented a young student,<sup>249</sup>

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242. See, *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 407 (2d Cir. 2001) (collecting cases).

243. *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997).

244. *Kerr v. Farrey*, 95 F.3d 472, 474 (noting that Narcotics Anonymous utilizes the identical twelve-step approach pioneered by AA).

245. *Id.* at 479.

246. *Warner*, 115 F.3d at 1075; *Griffin v. Coughlin*, 673 N.E.2d 98, 111 (N.Y. 1996) (rejecting as “grudgingly”) narrow the view that a prisoner had exercised choice when he rejected twelve-step and suffered consequent deprivation of family visiting privileges and finding such a view violative of the “anticoercive core of the Establishment Clause.”)

247. *Warner*, 115 F.3d at 1075 (“Had *Warner* been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different”); *Griffin v. Coughlin*, 673 N.E.2d at 109 (same); *Destefano*, 247 F.3d at 412 (requiring that clients of a state supported treatment program attend AA meetings “as a matter of his or her own genuine personal choice”); *Kerr*, 95 F.3d at 480 (citing with approval other cases declaring lack of choice to be determinative); *O'Connor v. California*, 855 F.Supp. at 308 (O'Connor applied a *Lemon* analysis and found the presence of nonreligious treatment options to be “significant” in finding no Establishment Clause violation where a convicted drunk driver was allowed to choose between AA, Rational Recovery (a non-spiritual treatment approach) or a program of his own devise). *But see Warner*, 115 F.3d at 1080 (Winter, C.J., dissenting) (arguing that “[i]f attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion.”). Under Judge Winter's reasoning, provision of alternatives is no cure where such government sponsorship is found. Judge Winter applied the *Lemon* test and found no Establishment Clause violation. *Id.* at 1080-81.

248. *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (distinguishing the case at bar from *Marsb*, the majority wrote “[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one.”)

249. *Id.* at 597. The plaintiff in *Lee* was the parent of a Rhode Island middle school student who brought suit to prevent the deliverance of religious invocations at graduation ceremonies.

a factor that distinguishes *Marsh v. Chambers*<sup>250</sup> where the Court upheld the practice of opening sessions of the Nebraska state legislature with an invocation led by a state-paid chaplain. The Court's opinion in *Lee* reconciled *Marsh* by noting the difference between adult legislators, free to come and go and unlikely to feel coerced into participating in the prayer, and young students attending their graduation exercises.<sup>251</sup> This solicitude for the vulnerabilities of young people plays heavily in many Establishment Clause cases.<sup>252</sup> Many AA meetings in Northeast Ohio, however, more closely resemble legislative chambers than a middle school graduation ceremony. Particularly at large open meetings, the adult attendees<sup>253</sup> walk in and out of the room freely and without consequence. The Second Circuit examined this difference, however, and found it unpersuasive. In *Warner*, the court noted the difference between the adolescents in *Lee* and adult defendants but dismissed the difference by pointing to the fact that court-compelled attendance at AA involves a higher degree of compulsion than the psychological coercion at play in *Lee*.<sup>254</sup> The court took cognizance, however, of the freedom of movement at AA meetings noted above.

Another fact, present in *Lee* but not in the AA sentencing cases, is the direct involvement by the state in the shaping of the religious message. The *Lee* holding found "dominant"<sup>255</sup> the fact that school officials directly oversaw the event and provided direction to the rabbi with respect to the content of the prayer. Indeed, school officials invited the rabbi and provided guidance as to the permissible contents,<sup>256</sup> thereby creating a perception among students of official sanction and compulsory participation.<sup>257</sup> The Court found the resulting relationship between government and the religious expression at issue to be "pervasive."<sup>258</sup> The obvious

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250. *Marsh v. Chambers*, 463 U.S. 783 (1983).

251. *Lee*, 505 U.S. at 596-97.

252. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (noting that the "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" and collecting cases); *Sch. Dist. v. Schempp*, 374 U.S. 203, 252-53 (1963) (Brennan, J., concurring) (highlighting different "constitutional results" under the Establishment Clause between actions affecting college students and those affecting primary and secondary students); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (re-stating the observation made in *Lee* that high school students' vulnerability to social pressure is highly relevant to the coercion analysis).

253. The focus of this article is on adult attendees. In many jurisdictions juveniles are compelled to attend AA meetings, and this practice would appear to be inarguably violative of the *Lee* and *Santa Fe* holdings.

254. *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1076 (2d Cir. 1997).

255. *Lee v. Weisman*, 505 U.S. 577, 586-88 (1992).

256. *Id.* at 588 ("Principal Lee provided Rabbi Gutterman with a copy of the 'Guidelines for Civic Occasions,' and advised him that his prayers should be nonsectarian").

257. *Id.* at 590 (citing *Engel v. Vitale*, 370 U.S. 421, 425 (1962) for the proposition that "our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students").

258. *Id.* at 587.

distinction is that prayers recited at AA meetings are not connected in any meaningful way to the sentencing court. As discussed *infra*, this distinction can and must be further strengthened with curative language provided by a sentencing court.

## 2. *The Lemon Test*

A 1994 Ninth Circuit holding applied the *Lemon* test to AA sentencing and found no violation. The *O'Connor v. California* decision applied the three-prong analysis and concluded that neither the purpose<sup>259</sup> nor the primary effect<sup>260</sup> was unconstitutional, and that no excessive entanglement between government and religion resulted.<sup>261</sup> The court did note the importance to its holding of available treatment alternatives,<sup>262</sup> but also conceded that the only court-authorized alternative, Rational Recovery, held only two meetings per week in the area as opposed to “hundreds” of AA meetings.<sup>263</sup> Although the *O'Connor* court cited *Bowen v. Kendrick* in passing,<sup>264</sup> it did not probe the issue of indoctrination raised by *Bowen* and its progeny.<sup>265</sup> The issue may be inapposite, as the government does not supply financial support to AA either directly or indirectly.<sup>266</sup> 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 provides direct or indirect financial support to a religious organization that is furthering a permissible public objective.<sup>267</sup> Absent a Supreme Court holding to the contrary, therefore, the presumption may be that whatever religious indoctrination occurs as a result of attendance at a program such as AA, where no state financial support is involved, is attributable to AA and not the government. Where,

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259. *O'Connor v. California*, 855 F.Supp. 303, 307 (D. Cal. 1994) (“It is undisputed that the primary purpose of requiring attendance at [AA] 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”).

260. *Id.* (“The purpose and primary effect of encouraging participation in AA is not to advance religious belief but to treat substance abuse”) (internal quotations deleted).

261. *See, id.* at 308 (noting that the state involvement was also insufficient to determine impermissible “endorsement.”).

262. *Id.*

263. *See, id.* at 305.

264. *See, id.* at 307.

265. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

266. Such is not the case with court-mandated treatment that embraces a twelve-step approach. *See, Destefano v. Emergency Housing Group Inc.*, 247 F.3d 397 (2d Cir. 2001) (analyzing treatment centers). The *DeStefano* holding, in line with *Bowen v. Kendrick*, 487 U.S. 589 (1989), analyzed the presence of indoctrination and found impermissible inculcation (and thus a violation of the second *Lemon-Agostini* prong) where treatment center staff actively participated in sharing the AA program, e.g. through the reading of AA literature at regularly scheduled treatment center functions. *Id.* at 416.

267. *Supra*, notes 234, 235 and accompanying text.

however, persons are compelled to attend AA by the government, such a distinction may smack more of legal formalism than substantively sound jurisprudence.

### 3. *The Endorsement Test*

Courts have not made primary use of the endorsement test in analyzing AA sentencing. Justice O'Connor herself has indicated that the test is appropriately applied to instances of "government sponsored speech or displays."<sup>268</sup> Where, however, courts require defendants to attend AA, and particularly where defendants are instructed to engage the program in a fashion as specific as working the steps and obtaining sponsorship,<sup>269</sup> it is hard to discern the absence of government endorsement of AA and its' most religious aspects.

#### E. Proposed Solutions: Vindicating Neutrality and Autonomy

Professor Salamanca advocates an Establishment Clause jurisprudence that enjoins government from imposing religious orthodoxy or impacting individuals' personal religious conceptions,<sup>270</sup> but that permits a healthful "dialogue" between church and state reflecting "the close fit between human nature and religion."<sup>271</sup> He finds such an approach in Justice O'Connor's endorsement test,<sup>272</sup> as well as Justice Kennedy's application of the coercion test.<sup>273</sup> Thus, Professor Salamanca recommends that required AA attendance may be reconciled with Establishment Clause principles where the court provides non-spiritual alternative programs (if available), refrains from requiring affirmation of the principles of AA, and does not require long term attendance.<sup>274</sup>

The State of California Administrative Code offers a solution to the Establishment Clause issue that acknowledges AA as sectarian and requires court officials to provide secular alternatives when defendants are required to attend self-

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268. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 53 (2004) (O'Connor, J., concurring). Justice O'Connor also joined the *Lee* opinion, which did not utilize the endorsement analysis. *Lee v. Weisman*, 505 U.S. 577, 577 (1992). Justice Blackmun's concurrence did, however, invoke endorsement. *Id.* at 604 (Blackmun, J., concurring).

269. One probation officer in Northeast Ohio indicated to the author that she requires AA meeting attendance, sponsorship, and evidence of "progress" in the steps, particularly including the second and third steps. *See, supra* note 15 and accompanying text. Numerous attendees shared similar stories with the author. In *Warner* the plaintiff was required by his parole officer to attend step meetings, and get a sponsor to "give him guidance and encourage his adherence to the program." *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1070 (2d Cir. 1997).

270. Salamanca, *supra* note 154, at 1168 n.7.

271. *Id.* at 1098.

272. *Id.* at 1168 n.9.

273. *Id.* at 1168 n.10.

274. *Id.* at 1162.

help programs as part of sentencing.<sup>275</sup> Where no such alternatives are available, a court may not require AA attendance.<sup>276</sup> Finally, Justice Scalia offered perhaps the simplest Establishment Clause solution in his *Lee* dissent, where he opined that school officials might continue to sponsor graduation ceremonies with religious elements if they provide curative disclaimers, avoid endorsement of the religious content of the benediction, and assure objectors of their right to abstain from participation.<sup>277</sup> Under Justice Scalia's reasoning, a court may require AA attendance without Establishment Clause violation when it provides curative instructions making clear that the defendant need not participate in any prayer or other religious exercise to which he objects.<sup>278</sup>

This article proposes that courts should, at a minimum, undertake the curative measures offered by Professor Salamanca. Non-twelve-step programs should be made available whenever possible, defendants should be appraised that they need not adopt any of AA's principles, and no one should be required to attend AA meetings for a period longer than that required to understand the fundamentals of the program (likely no more than several months). Professor Salamanca's proposed requirements are informed by his perceived Establishment Clause threshold: the point at which the individual's "process of religious growth is dominated—subdued—by an external authority."<sup>279</sup> While this view is a sound starting point, AA sentencing practices should additionally be evaluated in light of the principles of government neutrality and individual autonomy discussed above.

Principles of neutrality and individual autonomy are largely but not completely subsumed by a model that protects the sanctity of individual religious conceptions and the process from which they develop. First, neutrality requires that government refrain from favoring religion over irreligion.<sup>280</sup> Curative measures must, therefore, not only affirm the defendant's right to reject any and all of AA's spiritual precepts, but must also clearly and forcefully enjoin officers of the court from requiring or even encouraging an embrace of these precepts.

Protection of individual autonomy, as envisioned by the *Barnette* opinion and others discussed above, requires even more careful scrutiny of twelve-step

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275. Cal. Code Regs. Tit. 9, 9860 (c) (1) (2005) (enacted pursuant to *O'Connor v. California*, 855 F. Supp. 303 (D. Cal. 1994)). See, Michael G. Honeyman, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM.L. REV. 437, 468 n140.

276. Cal. Code Regs. Tit. 9, 9860 (c)(2). The statute lists six additional conditions that counties may impose as part of sentencing in addition to required participation in self-help groups. These include community service and educational activities. *Id.* at §§ 9860 (b) (2)-(7).

277. *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

278. This reasoning rests upon the conclusion that AA has religious elements but is not a religion. See, *supra* note 214 and accompanying text.

279. Salamanca, *supra* note 154, at 1162.

280. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985). See, *Lee*, 505 U.S. 577.

sentencing. AA is bottomed on a coherent body of principles whose acceptance government may not compel without compromising the “sphere of intellect and spirit” that the Constitution holds inviolate.<sup>281</sup> This careful protection of autonomy and personhood is not limited to the Establishment Clause, but rather finds expression in a breadth of constitutional case law ranging from free speech and expression<sup>282</sup> to privacy rights.<sup>283</sup> Court officials violate defendants’ constitutionally protected autonomy when they urge or coerce the adoption of core AA principles and practices such as admitting powerlessness over alcohol, describing oneself as suffering from the “disease” of alcoholism, and undertaking a moral makeover based upon AA teachings.

The cure for such potential constitutional violation requires that courts not only disavow intent to enforce acceptance of AA religious beliefs and practices, but also that courts make clear that defendants are free to accept or reject the entirety of the AA program. Again, providing non-secular alternatives and limiting the required time spent in AA meetings should also be adopted as required practices. Further, court officials should be cognizant of the differences in AA meetings so that they may direct offenders to meetings that are appropriate not only in terms of religious sensibilities but the individual needs of the offender. When courts take an informed and serious approach to twelve-step sentencing, constitutional infirmities may be cured and public health outcomes may be improved.

### III. CONCLUSION

The provision of a constitutional cure only partially addresses the issue of twelve-step sentencing. An equally important issue surrounds the efficacy of AA. It is clear that AA has provided hundreds of thousands, perhaps millions, of people with recovery from a debilitating, heartbreaking, and often fatal condition. Health has been restored, families healed, careers resuscitated, and once ruined lives made whole and meaningful. For those who are charged with addressing alcoholism as a public health and legal issue, however, the “miracle” of AA recovery must be

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281. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

282. *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (Brennan, J., plurality opinion) (finding that a school board may violate “transcendent imperatives of the First Amendment” where it removes controversial books from school libraries); *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (protecting the right to refrain from expressing a state ideological idea carried on a license plate).

283. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

viewed in the sober light of statistical reality. As discussed in Section II above, AA is ineffective as an exclusive means for most persons to recover from alcoholism.

Two lines of approach are called for. First, court officials should be cognizant of alternatives to AA, and make these alternatives available to defendants in need of organized alcohol treatment. Such alternatives include, for instance, brief intervention, a strategy that has been demonstrated to be equally or more effective than twelve step treatment, and likely as inexpensive in its implementation.<sup>284</sup> There are also secular self-help alternatives available in most metropolitan areas, including SMART Recovery,<sup>285</sup> Secular Organizations for Sobriety,<sup>286</sup> and Women for Sobriety.<sup>287</sup> Behavioral modification approaches have also shown effective results, and may in some ways parallel the twelve-step change process absent religious overtones.<sup>288</sup> Additionally, new pharmaceutical products such as acamprosate (Campral) have shown promise in treatment, particularly when coupled with “psychosocial and behavioral therapies.”<sup>289</sup> Finally, it must be noted that most alcoholics who cease drinking do so on their own, without any organized treatment.<sup>290</sup>

Court officials interviewed for this article unanimously indicated a lack of non twelve-step alternatives available in Northeast Ohio, and this observation comports with national statistics regarding the overwhelming dominance of twelve-step programs in the treatment field.<sup>291</sup> The position taken here is that courts may make AA referrals when no alternative programs exist, so long as curative measures are undertaken. However, as indicated above, there *are* alternatives that either exist or that may be developed with a minimal expenditure of resources. Given AA’s

284. Alcohol Alert, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM NO. 43, *Brief Intervention for Alcohol Problems* (April 1999), available at <http://pubs.niaaa.nih.gov/publications/aa43.htm> (last visited June 10, 2006).

285. Information available at <http://www.smartrecovery.org/> (last visited June 10, 2006). SMART Recovery offers weekly meetings (two are available in Northeast Ohio) as well as on-line meetings.

286. Information available at <http://www.cfiwest.org/sos/index.htm> (last visited June 10, 2006). SOS offers three meetings within twelve miles of downtown Cleveland.

287. Information available at <http://www.womenforsobriety.org> (last visited June 10, 2006). This organization does not currently have meetings in Northeast Ohio, but meetings can be established by interested persons.

288. Paige Crosby Ouimette et al., *Twelve-Step and Cognitive-Behavioral Treatment for Substance Abuse: A Comparison of Treatment Effectiveness*, 65 J. CONSULTING & CLINICAL PSYCHOL. 230 (1997).

289. Gerald P. Overman et al., *Acamprosate for the Adjunctive Treatment of Alcohol Dependence*, 37 THE ANNALS OF PHARMACOTHERAPY 1090-99 (2003).

290. Christine Timko et al., *Long-Term Outcomes of Alcohol Use Disorder: Comparing Untreated Individuals With Those in Alcoholics Anonymous and Formal Treatment*, 61 J. STUDIES ON ALCOHOL 529 (2000) (“Natural recovery (i.e. the resolution of alcohol problems without formal treatment and, according to some researchers’ definitions, without participation in self-help) appears to be the most common path to recovery”); see also, PEELE ET AL., *supra* note 22, at 73-74 (citing a Canadian study that found most “problem drinkers” recovered “without help or treatment”).

291. See, *supra* note 22 and accompanying text.

limited effectiveness for most persons who are compelled to attend, these alternatives should be discovered and/or made available as quickly as possible.

The second line of approach is that where referral to AA is appropriate, probation officers should be aware of the differences between AA meetings and guide attendees accordingly. Many AA meetings have distinctive cultural characteristics and varying levels of religiosity. As discussed in Section II above, these differences may be determinative as to AA's effectiveness for some individuals.<sup>292</sup> Also, AA groups and courts have found that outcomes improve when court-ordered attendees are educated in a court sponsored process about AA prior to attending. Under the aegis of the court, potential attendees may learn about core AA precepts, and may also be informed as to their right to accept or reject any and all teachings or beliefs that they may encounter in an AA meeting. AA members, as well as representatives of alternate programs, may attend and offer insights into their programs. Such an approach has been usefully engaged in numerous communities across the United States.<sup>293</sup>

When properly understood and utilized, AA and related twelve-step programs offer hope and recovery for many persons who are before the court as a result of their alcoholism. Fortunately, the requirements of the Constitution may work to bolster the efficacy of AA. Where persons choose AA and approach the program with an open mind unfettered by coercion, the likelihood of sobriety increases as the threat to constitutional rights recedes.

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292. See, *supra* discussion at 13-16.

293. Numerous articles on this topic may be found in, *BOX 4-5-9*, an AA publication available from the AA U.S./Canada General Service Office, at [http://www.district02aa.org/box\\_459.htm](http://www.district02aa.org/box_459.htm) (last visited June 10, 2006). See, e.g., April/May 1991, *Missouri Workshop Accents A.A.s' Understanding of Court-Mandated Programs*; Aug./Sept. 1992 *Colorado Court Class Helps to Slow the Revolving Prison Door*; Aug./Sept. 1993 *Areas Help Each Other to Ease the Way of Court Referrals to A.A.*; Feb./March 1994 *Phoenix A.A.s Give Court Referrals a Helping Hand*.