

COMMENTS

ENDORISING RELIGION: DRUG COURTS AND THE 12-STEP RECOVERY SUPPORT PROGRAM

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TABLE OF CONTENTS

Introduction.....	1064
I. What is a Drug Court?.....	1067
II. What 12-Step Participation Entails.....	1072
A. Spiritual Beginnings of Alcoholics Anonymous.....	1073
B. Current 12-Step Practices.....	1074
C. Judicial Consideration of the Religious Nature of 12-Step Programs.....	1075
III. Religious Exposure and the Establishment Clause.....	1078
A. Introduction to Establishment Clause Jurisprudence	1078
B. Coerced Participation in Religious Practice	1080
1. Fundamentals of the Coercion Test	1080
2. 12-Step Programs and coercion	1082
3. Applying the Coercion Test to the drug court setting	1084
a. The consequences for drug court failure are not as coercive as the consequences for probationers or prisoners	1084
b. Lesser protection for adults	1088
c. Waiver of objection	1089
C. Court “Endorsement” of Religious Programs	1091

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1. Emergence of the Endorsement Test	1091
2. Endorsing 12-Step programs in prison	1094
3. Applying the Endorsement Test to the drug court setting	1094
IV. 12-Step Dominance and the Importance of Alternatives	1096
Conclusion	1099

INTRODUCTION

Incarceration as a means of rehabilitation is one of the most important American contributions to criminal punishment theory. In America's early years, authorities imprisoned only political prisoners, while common criminals were tortured, killed, or pardoned.¹ Members of the Quaker faith promoted incarceration as punishment based on the idea that everyone had the potential to be redeemed;² therefore, imprisonment saved the lives of criminals and allowed them the time and repose to reform themselves.³ While rehabilitation has never completely disappeared as a criminal justice goal, by the mid-1970s, many people questioned the effectiveness of rehabilitation programs.⁴ In the 1990s, incarceration as retribution and incapacitation achieved dominance, as expressed by strict mandatory sentences and the "Get Tough on Crime" rhetoric.⁵

America's "War on Drugs" exemplifies problems associated with a policy of incarceration without rehabilitation. Fueled by the crack-cocaine epidemic of the 1980s, this "War" brought strict mandatory minimum sentences for drug offenses and flooded the jails and prisons with drug offenders.⁶ This response, however, did little to

1. See THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* 65-86 (U. Wis. Press 1987) (providing historical background to the growth of the penitentiary in American criminology).

2. *Id.* at 65; see also OXFORD ENGLISH DICTIONARY 478 (2d ed. 1989) (revealing that the etymological origin of the word "penitentiary" means, in its original design, the reformation of convicts through personal repentance).

3. See DUMM, *supra* note 1, at 77 (explaining the Quaker belief that through personal reflection, everyone could find "God's Inner Light" and be saved).

4. See Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, 6 SENTENCING AND CORRECTIONS: ISSUES FOR THE 21ST CENTURY, May 2000, at 1, 2 (giving historical context for the rise and fall of rehabilitation as a popular punishment goal).

5. *Id.* at 2; see also Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and their Children*, 11 STAN. L. & POL'Y REV. 133 (1999) (examining the dramatic increase in the incarceration rates of women and girls since the 1970s).

6. DRUG COURT STANDARDS COMMITTEE, NAT'L ASS'N OF DRUG COURT PROF'LS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 5 (1997) [hereinafter DRUG COURT STANDARDS COMMITTEE]; see also Ethan G. Kalett, Note, *Twelve Steps, You're Out (of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 HASTINGS L.J. 129, 134 (1996) (characterizing the harsh sentences and political attitudes toward drug offenders as a manifestation of national frustration over addiction

“curtail the illicit use of drugs and alcohol,”⁷ but instead resulted in prisons crowded with drug offenders.⁸ Many see this as a policy failure, and have sought alternative approaches for dealing with drug offenders in the criminal justice system.

Currently, many incarcerated drug offenders receive treatment for substance abuse in the correctional setting.⁹ However, the more promising recent developments for rehabilitation now occur outside prisons in programs and courts that send certain criminal offenders to treatment in the community, rather than prison.¹⁰ Among the most exciting of these developments are the drug treatment courts, often referred to simply as drug courts.

Although neither drug courts nor criminal and addiction rehabilitation generally advocate a spiritual or religious reformation of the drug abuser, one of the most common addiction treatment support programs used in the drug courts does have religious components.¹¹ Narcotics Anonymous and its precursor, Alcoholics Anonymous, are often a part of the treatment protocol assigned to drug court participants.¹² Many commentators have noted the religious aspects of the 12-Step model on which these programs are based, such as the necessity of belief in a “Higher Power.”¹³ While the

problems).

7. DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 5.

8. See BUREAU OF JUSTICE STATISTICS, DRUG AND CRIME FACTS (2002) (reporting that the number of drug arrests among adults almost tripled during the 1980s—from 471,200 in 1980 to 1,247,800 in 1989), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/DCF.pdf> (on file with the American University Law Review); Douglas Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 997-98 (2002) (comparing a fifty-five percent recidivism rate for all criminal offenders with an eighty-five percent recidivism rate for drug offenders).

9. See BUREAU OF JUSTICE STATISTICS, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997-10 (1999) (reporting that one in four prisoners in the United States participated in some kind of drug abuse program while incarcerated). *But see* Marlowe, *supra* note 8, at 998-1001 (concluding, based on several studies, that in-prison substance abuse treatment programs have little effect on long-term drug use or criminal recidivism).

10. See WILLIAM WHITE, SLAYING THE DRAGON: THE HISTORY OF ADDICTION TREATMENT AND RECOVERY IN AMERICA 305 (1998) (providing alternatives to incarceration such as pre-arrest diversion to detoxification, post-arrest diversion to detoxification or counseling, and treatment as a condition of pre-trial release); *see, e.g.*, THE NATIONAL GAINS CENTER FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYSTEM, NEW OPTIONS FOR OFFENDERS WITH MENTAL HEALTH AND SUBSTANCE USE DISORDERS (2001) (outlining a program that promotes diversion from jail to treatment for persons with co-occurring mental illness and substance abuse).

11. See Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 790-91 (1998) (exploring the religious aspects of Alcoholics Anonymous, such as prayer and emphasis on theistic principles).

12. See JAMES L. NOLAN, JR., DRUG COURTS IN THEORY AND PRACTICE vii (2002) (giving an overview of elements of standard treatment protocols in drug courts).

13. *See, e.g.*, Apanovitch, *supra* note 11, at 797 (finding that the religious components of 12-Step programs should prompt Establishment Clause scrutiny);

program model is widely recognized and widely regarded as successful, a large movement of individuals exists that dislikes the 12-Step model for a number of reasons, including the religious content.¹⁴

Several commentators have persuasively argued that state mandated participation in 12-Step programs violates the Establishment Clause of the U.S. Constitution when included as a condition of probation or when a prisoner is required to attend in order to receive favorable treatment.¹⁵ While the drug court context fundamentally alters the analysis required by Establishment Clause jurisprudence, this Comment ultimately argues that these distinctions do not change the results of the inquiry. Specifically, mandated 12-Step participation as a component of a drug court treatment program violates an individual's First Amendment right to be free from government endorsed religion.

To facilitate the analysis, Part II presents background information on drug courts. Part III follows with an overview of 12-Step programs and explains why some courts have concluded that they are religious. Part IV delves into the Establishment Clause analysis, explaining the tests the Supreme Court developed to analyze challenged government action, how they have been applied in prison and probation contexts, and how they should be applied to drug court action. Part V explores the popularity of 12-Step programs and some alternatives. Additionally, this part presents a policy analysis, reasoning that it is inappropriate to try to rehabilitate addicts through programs that alienate them. Finally, this Comment concludes by recommending that drug courts give participants the choice of a secular support group rather than just mandating 12-Step

Rachel F. Calabro, Note, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 595, 613 (1998) (concluding that, based on its history, continuing traditions and incorporation of prayer, Alcoholics Anonymous is properly considered a religion).

14. See WHITE, *supra* note 10, at 156-57 (listing some frequent criticisms of the 12-Step approach, including the complaints that the model only treats symptoms and not the underlying cause of addiction; that the programs tend to disempower participants; that the program ignores environmental factors like socio-economic status; and that the religious language and concepts keep many addicts from wanting to become affiliated with a 12-Step program).

15. See, e.g., Apanovitch, *supra* note 11, at 851 (concluding that the principle of separation of church and state dictates a finding that government promotion of 12-Step programs is unconstitutional); Calabro, *supra* note 13, at 613 (arguing that compulsory 12-Step participation in prison is unconstitutionally coercive); Michael G. Honeymar, Jr., *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does it Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 471 (1997) (contending that compulsory attendance to Alcoholics Anonymous as a condition of probation for a drunk driving offense is a violation of the Establishment Clause).

programs, and suggesting that professional organizations concerned with drug courts promote this change.

I. WHAT IS A DRUG COURT?

Drug courts are specialty courts that apply legal pressure to prod drug offenders and other substance-involved defendants to complete substance abuse treatment instead of receiving a traditional punishment. This is done in the hope that remedying someone's addiction will remove that participant's incentive to commit future crimes.¹⁶

What has turned into an international movement¹⁷ began in 1989 with an experimental judicial program in Dade County, Florida.¹⁸ The innovations of the first drug court emphasized "drug treatment, responsibility, and accountability,"¹⁹ and created a setting in which the judge, prosecutor, and defense attorney worked together as a team to promote successful treatment of the offender.²⁰ The program developed as a practical response to the extreme pressure the courts and correctional system experienced as a result of the explosion of drug cases that accompanied the War on Drugs.²¹ While the reason behind the innovation was to serve court efficiency, and

16. See generally DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 7 (explaining that the mission of drug courts is to stop criminal activity by stopping drug abuse).

17. See *infra* note 25 and accompanying text (discussing the global expansion of the drug court system).

18. See John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION 19, 19 (W. Clinton Terry, III ed., 1999) (discussing the creation of Miami's drug court, which undertook the bold step of fully integrating treatment into the court setting, contrary to contemporary drug policy).

19. *Id.* at 22.

20. *Id.* The public defender involved in the program was initially hesitant to promote the drug court model because of concerns that the length of the program was longer than the sentences many defendants would receive otherwise. *Id.* at 22-23. Further, the public defender had concerns that the due process rights of clients might not be protected when judges and prosecutors teamed up with defense attorneys, who would otherwise function solely for their client. *Id.*; see also Richard Boldt, *The Adversary System and Attorney Role in the Drug Treatment Court Movement*, in DRUG COURTS IN THEORY AND IN PRACTICE 121, 122 (James L. Nolan, Jr. ed., 2002) (arguing that the drug court's departure from the traditional adversarial model is cause for concern because the defense attorney is no longer dedicated to the client's legal needs).

21. See Goldkamp, *supra* note 18, at 21-22 (highlighting the crisis, and the desperation of criminal justice leaders to make an impact on the situation). Other courts have been quick to adopt, and adapt, the Miami model. See The Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 456 (1999) (illustrating how the drug court model spread primarily through a grassroots movement of judicial innovation, rather than through top-down, legislative action).

not to improve addicts' lives, the court chose to address the problem through rehabilitation of drug-addicted offenders.²²

This mixture of criminal and addiction rehabilitation concepts has proved to be successful and enormously popular. Today there are 1,160 drug courts in operation, with 517 more in the planning stages.²³ There is at least one local drug court in all fifty states, plus the District of Columbia, Puerto Rico, and Guam, and one federal district;²⁴ additionally, the drug court model is being replicated abroad.²⁵ By incorporating advances in addiction research into their program design, drug courts ensure that the means used for promoting recovery will be tested and proven.²⁶ The programs are still developing, but many studies point to lower recidivism and increased well-being for drug court graduates, while also benefiting participants that did not graduate.²⁷

22. See John Terrence A. Rosenthal, *Therapeutic Jurisprudence and Drug Treatment Courts: Integrating Law and Science*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 157, 157 (James L. Nolan, Jr. ed., 2002) (explaining that the rehabilitative theory of punishment does not necessarily underlie drug court programs; rather the programs are aimed at easing caseloads by reducing recidivism, which is accomplished through rehabilitation). A number of scholars have, however, noted a connection between the creation of drug courts and the therapeutic jurisprudence theory. See, e.g., Hora, *supra* note 21, at 442 (noting that the legal theory of therapeutic jurisprudence, which examines the impact of the legal system on individuals, can provide a guiding legal theory for the drug courts); Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 *TOURO L. REV.* 479, 480 (2002) (describing drug courts and other "problem-solving courts" as applications of the theory of therapeutic jurisprudence); Jeffrey S. Tauber, *Therapeutic Jurisprudence Holds Potential for Drug Offenders*, *ALCOHOLISM & DRUG ABUSE WKLY.*, Dec. 3, 2001, at 5 (recognizing the opportunity to merge the academic discipline of therapeutic jurisprudence with the pragmatic foundation of drug courts). When analyzed from this framework, the focus shifts from the impact on the particular court system to the rehabilitative impact on the defendant involved, as well as how the community at large is affected. See generally Hora, *supra* note 21 (suggesting that therapeutic jurisprudence and drug courts can enrich each other as disciplines).

23. JUSTICE PROGRAMS OFFICE, AM. UNIV., SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (May 2004), available at <http://spa.american.edu/justice/publications/drgchart2k.pdf>.

24. *Id.*

25. James L. Nolan, Jr., *Separated by an Uncommon Law: Drug Courts in Great Britain and America*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 89 (James L. Nolan, Jr. ed., 2002) (stating that the American drug court model has been replicated in Australia, Canada, England, Ireland and Scotland).

26. See Goldkamp, *supra* note 18, at 27-32 (describing some of the innovations influenced by addiction research, such as the flexibility to allow some failed drug tests, based on the understanding in the treatment community that a single misstep does not indicate a total failure); see also Rosenthal, *supra* note 22, at 161 (explaining that all drug courts shape their programs based on advances in the understanding of addiction in order to maximize the chances of achieving sustained sobriety for the offender).

27. See Gebelein, *supra* note 4, at 5 (stating that reduced criminal recidivism is observed even in offenders who participated in but did not graduate from drug court); NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DRUG COURT RESEARCH SHOWS, at <http://www.nadcp.org/whatis/> (last visited Apr. 6, 2004) (on

Drug courts depart dramatically from typical courts by focusing on stopping the substance abuse presumed to be the root cause of the defendant's criminal activity, rather than on the charged criminal activity.²⁸ This method abandons the traditional adversarial approach of prosecution and defense, and replaces it with the two sides working together as a team, along with the judge and treatment provider.²⁹ Drug courts vary widely in their particular approach, but generally they require a defendant to plead guilty to the criminal charges, or the court defers charges pending treatment.³⁰ In exchange for successfully completing treatment, drug courts generally dismiss the original charge, or set aside the sentence.³¹

A drug court participant must appear before the court fairly often, and undergo frequent drug testing to ensure treatment compliance.³² The in-court interactions with the judge tend to be informal, and ongoing successes or setbacks in recovery receive, respectively, immediate rewards or sanctions.³³ Each participant is assigned to a

file with the American University Law Review) (claiming that drug court clients substantially reduce their drug use and criminal behavior, and that criminal behavior remains low after graduation). *But see* U.S. GEN. ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 14 (1997) (suggesting that current studies have not yet definitively answered the question of whether drug courts work).

28. *See* DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 5-7 (describing the revolving door of arrest, prosecution, conviction, imprisonment, and release through which the traditional criminal justice system sends drug offenders); Boldt, *supra* note 20, at 119 (explaining the intertwined premises supporting drug court programs: that the disease of substance abuse often leads directly to criminal acts, that drug-addicted offenders do not receive adequate treatment in the traditional correctional setting, and that substance use and criminal behavior will continue after the period of incarceration is complete).

29. DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 6; *see also* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 40 (2001) (explaining that for many routine drug court appearances, the lawyers do not even attend, and if they do, they may not even be recognizable as defense attorneys or prosecutors).

30. *See* NOLAN, JR., *supra* note 29, at 41 (providing an explanation of the mechanisms to enter drug court pretrial/preplea, pretrial/postplea, postconviction, or some combination of these events); *see also* Juanita Bing-Newton, *What Does the Future Hold for Drug Courts?: Eleventh Annual Symposium on Contemporary Urban Challenges*, 29 FORDHAM URB. L.J. 1858, 1881 (2002) (expressing concern over the Fourth Amendment implications of treating a defendant as guilty without a trial or plea).

31. DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 7.

32. *See* Gebelein, *supra* note 4, at 3 (noting that courts require defendants to appear in court as often as several times a week, and that drug tests are frequent and random).

33. *See* NOLAN, JR., *supra* note 29, at 40 (listing as incentives offered judicial praise, applause, or prizes such as t-shirts, key-chains, mugs, donuts, or candy, along with graduation ceremonies that include cake, speeches, visits from local dignitaries and media coverage). In addition to general expressions of judicial disapproval, sanctions include community service, short jail stays, required increase in 12-Step participation or time in the jury box during other drug court sessions. *Id.*; *see*

specific treatment regimen that may include inpatient or outpatient treatment, individual and group counseling, and development of various coping strategies.³⁴ One of the common features of treatment protocols is assignment to a 12-Step program.³⁵ Likewise, a common sanction for a failed drug test or other treatment setback is a mandate to attend supplementary 12-Step sessions.³⁶

Most drug court entry procedures begin with a two-step screening process soon after arrest to determine who will be offered the opportunity to enter the drug court.³⁷ The first step is a judicial screening to determine if the arrestee meets the eligibility requirements set by each individual court.³⁸ Eligibility criteria include factors such as criminal history,³⁹ extent of substance abuse dependency,⁴⁰ and current criminal charge.⁴¹ The second part of the

generally Rosenthal, *supra* note 22, at 161 (explaining that the traditional criminal justice system often serves as an unwitting enabler because the slow and deliberative procedures delay consequences for actions, and traditional defense counsel can reinforce an addict's denial of a drug problem).

34. See NOLAN, JR., *supra* note 29, at 41 (providing details of the range of treatment options available to different courts, such as private treatment facilities, county health departments, outpatient treatment, and residential facilities).

35. See *id.* at vii (noting that treatment protocols generally include the support of regular 12-Step participation, group counseling sessions, craving-relieving acupuncture, and regular reports to the drug court judge).

36. See *id.* (confirming that penalties for drug use during rehabilitation include Narcotics Anonymous meetings, community service, and jail time).

37. See W. Clinton Terry, III, *Judicial Change and Dedicated Treatment Courts: Case Studies in Innovation*, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION 1, 5 (W. Clinton Terry, III ed., 1999) (explaining that the intervention is designed to be swift in order to capitalize on the ordeal of the arrest and to engage the individuals while their motivation to reform is high).

38. See ROGER H. PETERS & ELIZABETH PEYTON, AM. UNIV., GUIDELINES FOR DRUG COURTS ON SCREENING AND ASSESSMENT 3 (1998) (summarizing a typical drug court screening process, in which the judge and prosecutor make the final decision on eligibility), available at <http://www.ncjrs.org/pdffiles1/bja/171143.pdf>.

39. See CAROLINE S. COOPER, 2000 DRUG COURT SURVEY REPORT, EXECUTIVE SUMMARY 21 (2001) (explaining that because federal funding is only available to programs that exclude persons convicted of violent offenses, a non-violent criminal history is required to enter most drug courts), available at <http://spa.american.edu/justice/publications/execsum.pdf>. Federal funding became available to drug courts with the passage of the Omnibus Crime Control and Safe Streets Act of 1994, which authorized the Attorney General to make grants to states, localities, and tribal authorities to establish drug courts for non-violent drug offenders. 42 U.S.C. § 3769 (1994).

40. See COOPER, *supra* note 39, at 22 (reporting that all programs target drug users with moderate illegal substance use, and that 90 percent of programs target individuals with severe substance abuse problems). Most programs also accept individuals with alcohol addictions, although usually only when the alcohol problem is also associated with a drug addiction. *Id.*

41. See *id.* at 21 (stating that all drug court programs indicated that they accept participants charged with drug possession, while a smaller percentage allow individuals into the program charged with small drug sales, property offenses, DUI/DWI, financial or prescription forgeries, and prostitution). Certain factors such as gang membership, out of county residence, current probation or parole

screening process involves a clinical screening to determine if the arrestee actually has an addiction or substance abuse problem that is likely to benefit from available treatment.⁴² The clinical screening also determines whether there are other clinical features, such as a psychiatric disorder that could compromise the potential participant's success in overcoming the addiction.⁴³

If the screening reveals arrestees that are eligible, and they choose to enter the drug court, then each must continue to meet the court requirements for a specified amount of time before exiting successfully.⁴⁴ Most drug courts require participants to remain "clean and sober" for twelve consecutive months in addition to other obligations, such as earning a high school diploma or GED and obtaining a job before they can "graduate."⁴⁵

Courts punish minor infractions or an occasional failed drug test with intermediate sanctions, such as a brief detention in jail, or greater treatment requirements.⁴⁶ However, if the infractions are more constant, the drug court team may conclude that the individual will not succeed in the program at all.⁴⁷ If the team reaches this conclusion, the individual will fail out of drug court, and the case will be remanded back to the traditional criminal court for trial or sentencing.⁴⁸

It is important to note that drug courts are local creations, designed by the judges sitting in individual jurisdictions.⁴⁹ As such,

status, mental illness, or lack of transportation can disqualify a potential participant in various drug courts. *Id.* at 22.

42. PETERS & PEYTON, *supra* note 38, at 3.

43. COOPER, *supra* note 39, at 8. According to a 1997 survey, over one-half of the existing drug courts maintained services for persons with co-occurring psychiatric and substance use disorders, but judges did not believe they were adequately equipped with an understanding of how a mental illness could affect an individual's experience in drug court. DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, ISSUES MEMORANDUM: DRUG COURT CLIENTS WHO ARE DUALY DIAGNOSED (June 1997), available at <http://spa.american.edu/justice/publications/dualdiag.htm>.

44. See generally Terry, III, *supra* note 37, at 7-8 (describing the central role of the judge as a problem-solver in developing the specific requirements designed to address the addictions and criminal behaviors of each participant).

45. James J. Hennessy, *Introduction: Drug Courts in Operation*, in DRUG COURTS IN OPERATION: CURRENT RESEARCH 1, 6 (James J. Hennessy & Nathaniel J. Pallone eds., 2001).

46. *Id.*

47. See Elaine M. Wolf, *Systemic Constraints on the Implementation of a Northeastern Drug Court*, in DRUG COURTS IN THEORY AND IN PRACTICE 27, 40-44 (James L. Nolan, Jr. ed., 2002) (chronicling the treatment non-compliance of a drug court participant, including daily use of drugs, that led the team to consider failing him even after nineteen months in the program).

48. Hennessy, *supra* note 45, at 7.

49. See NOLAN, JR., *supra* note 29, at 42 (quoting drug court judge Henry Weber describing the spread of drug courts as "a grassroots kind of movement"). He

there are numerous variations intended to meet local needs.⁵⁰ Therefore, any constitutional analysis of a specific drug court program that is based on individual program features may not be applicable to all drug courts. However, major themes and similarities pervade the drug court context and allow for general discussion.⁵¹

II. WHAT 12-STEP PARTICIPATION ENTAILS

Generally, 12-Step programs play small, but important, roles in the treatment plans designed for drug court participants.⁵² The 12-Step program does not function as the primary treatment component, but rather supplements other treatment elements.⁵³ The 12-Step model, which was originally developed by Alcoholics Anonymous,⁵⁴ has been replicated in numerous programs that address a variety of addictions,

continues, "It's not something where bureaucrats in Washington tell you what to do. Each community has developed its own program for its own particular needs and they all deal with it on a local level." *Id.*; see also Terry, III, *supra* note 37, at 6 (characterizing local variations in drug programs as critical to the success of drug courts because of the weight of local tradition in the American criminal justice system).

50. See generally COOPER, *supra* note 39 (noting the distinguishing features of each court, such as eligibility criteria, treatment components, and sanctions).

51. Despite the local variations, there are some common factors. See DRUG COURT STANDARDS COMMITTEE, *supra* note 6, at 9-37 (listing key components of drug courts as follows: (1) integrated treatment with justice system case processing; (2) non-adversarial approach; (3) eligible participants identified early; (4) access to a continuum of treatment and rehabilitation services; (5) abstinence monitored by frequent drug testing; (6) coordinated strategy governing responses to compliance; (7) ongoing judicial interaction with participants; (8) evaluation measuring program goals; (9) continuing interdisciplinary education promoting effectiveness of program; and (10) partnerships forged with the community to enhance the effectiveness of the program).

52. See, e.g., DUCKWATER SHOSHONE TRIBAL DRUG COURT, TREATMENT PROGRAM REQUIREMENTS, available at <http://spa.american.edu/justice/publications/duckwaterjuvrequirements.pdf> (last visited Jan. 5, 2004) (listing drug court's specific requirements for the initial phase to include twice-weekly meetings with a social worker, twice-monthly individual counseling sessions, four-times-weekly drug testing, twice-weekly 12-Step attendance, twice-monthly appearances at drug court, attendance to two "sober activities" planned by the social worker, general education advancements, and education and counseling specific to addiction issues such as fetal alcohol syndrome and HIV); see also COOPER, *supra* note 39, at 8 (explaining that the range of services provided by most drug courts has expanded to include services ancillary to formal addiction treatment, such as support for family problems, employment, and self-esteem).

53. See WHITE, *supra* note 10, at 175-76 (explaining that formal treatment is focused on initiating sobriety, while mutual aid programs like Alcoholics Anonymous work to help individuals sustain that sobriety). Addiction treatment involves diagnosis and interventions by doctors or therapists that target the cravings and compulsions of addictive behavior. Alcoholics Anonymous, on the other hand, claims no expertise in addiction science, but looks only to help alcoholics get through each day without drinking. *Id.*

54. See *id.* at 127-32 (establishing that, while mutual aid groups existed long before the founding of Alcoholics Anonymous in 1935, it was Alcoholics Anonymous founder Bill Wilson who compiled the influential 12-Step program).

such as drug use, gambling, and overeating.⁵⁵ These offshoots tend to remain loyal to the basic structure of Alcoholics Anonymous, despite the different vices they address.⁵⁶ While the Alcoholics Anonymous organization is adamant that the 12-Step model that is the foundation for each of these programs is not religious,⁵⁷ many courts and commentators find differently, based on the history of the organization and the current meeting practices.⁵⁸

A. *Spiritual Beginnings of Alcoholics Anonymous*

The founders of Alcoholics Anonymous were “enthusiastic members” of the Oxford Group Movement, a non-denominational, evangelical Christian movement.⁵⁹ This movement taught participants to publicly confess their sins, surrender to guidance from God, and carry their religious message to others.⁶⁰ Alcoholics Anonymous tells its own history in what is termed “The Big Book,”⁶¹ including the colorful story of founder Bill Wilson’s alcoholism and the epiphany that led to his recovery.⁶²

55. See KLAUS MÄKELÄ ET AL., *ALCOHOLICS ANONYMOUS AS A MUTUAL-HELP MOVEMENT: A STUDY IN EIGHT SOCIETIES* 217 (1996) (providing background information on the offshoots of Alcoholics Anonymous, including Narcotics Anonymous, which is particularly important to the drug court context). The Narcotics Anonymous program, formed in 1953, was originally a branch of Alcoholics Anonymous for members with both alcohol and drug problems, but it soon gained organizational independence. *Id.*

56. *Id.* See generally CHARLES BUFE, *ALCOHOLICS ANONYMOUS: CULT OR CURE?* 64-66 (2d ed. 1998) (stating that the philosophy of the 12-Step program requires addicts to admit their addictions and their personal powerlessness to overcome them). Through the 12-Steps and life-long fellowship with other program members, participants are supposed to gain strength to achieve abstinence. *Id.*

57. See *infra* notes 63-65 and accompanying text (asserting that Alcoholics Anonymous does not purport to align itself with religious doctrine).

58. See *infra* notes 75, 82-87 and accompanying text (noting that, although Alcoholics Anonymous insists it is not religious, many courts have determined that its references to God violate the Establishment Clause).

59. BUFE, *supra* note 56, at 14-15.

60. *Id.* at 18.

61. BILL W., *ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM* (3d ed. 1976) [hereinafter *BIG BOOK*].

62. See *id.* at 9-13 (giving Wilson’s account of the inspiration for the 12-Step movement). He claims that the movement began when he was visited by an old friend and former drinking companion who explained his restraint from drinking by proclaiming, “I’ve got religion.” *Id.* at 9. Amazed at the recovery of his friend, Wilson experienced an epiphany regarding the possibility of recovery through spirituality. *Id.* at 11. The triumphant crescendo to Wilson’s story reads as follows:

There I humbly offered myself to God, as I then understood Him, to do with me as He would. I placed myself unreservedly under His care and direction. I admitted for the first time that of myself I was nothing; that without Him I was lost. I ruthlessly faced my sins and became willing to have my new-found Friend take them away, root and branch. I have not had a drink since.

Id. at 13.

Alcoholics Anonymous does not espouse any particular religious doctrine. On the contrary, the Big Book goes to pains to explain that any sect will do.⁶³ It further explains that the references to “God” in Alcoholics Anonymous programs are not meant to be limited to any set doctrinal formulation of the Deity.⁶⁴ Instead, the book instructs readers to apply their “own conception of God.”⁶⁵

Despite this non-denominational bent, however, it is clear that monotheistic spirituality is at the heart of Alcoholics Anonymous.⁶⁶ Notably, there is a chapter in the Big Book addressed to agnostics and atheists that rebukes non-believers.⁶⁷ It explains that agnostics and atheists cannot overcome their addiction without a belief in a higher power.⁶⁸ According to this principle, such individuals only benefit from the program if they cease to be atheistic or agnostic.⁶⁹ Though Alcoholics Anonymous does not consider addiction a moral failing,⁷⁰ it is clear that spirituality is required for recovery.⁷¹

B. Current 12-Step Practices

The 12-Steps described in the Big Book continue to be central to Alcoholics Anonymous and its progeny.⁷² As part of their recovery-

63. *See id.* at 45-46 (explaining the 12-Step belief, which holds that there is not just one way that faith can be acquired, but that all humans can form their own personal relationship with the Higher Power as long as they are honest and willing to make the attempt).

64. *Id.* at 47.

65. *Id.*

66. *See Kerr v. Farey*, 95 F.3d 472 (7th Cir. 1996) (asserting that “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”); BUFE, *supra* note 56, at 64 (explaining that the 12-Steps were drawn directly from Oxford Group teachings, compiled by Bill Wilson who believed he was working under divine guidance). The author states that there is no mistaking the “overtly religious nature of the steps.” *Id.*

67. BIG BOOK, *supra* note 61, at 44.

68. *See id.* at 50 (stating that many of the original members of Alcoholics Anonymous had been atheistic and had denied that they were alcoholics, but that they eventually understood that they needed a spiritual basis for addiction recovery).

69. *See id.* at 44-45 (equating acceptance of religion with admitting an addiction, and thus necessary for starting on the road to recovery).

70. *See id.* at 33 (presenting a medical theory for addiction that prevents an individual from ever fully recovering); WHITE, *supra* note 10, at 151 (stating that 12-Step members use terms such as “allergy, illness, sickness and disease” to describe their addictions). *But see id.* at 330 (explaining that in the larger political community, addiction often is characterized as a moral failing, rather than a medical disease).

71. *See* BIG BOOK, *supra* note 61, at 44 (asserting the belief that a “mere code of morals or a better philosophy of life” would be insufficient to overcome addiction; rather, an acceptance of spirituality is required).

72. *See* BUFE, *supra* note 56, at 65 (describing the zealous endorsement of the 12-Steps by members of Alcoholics Anonymous, Narcotics Anonymous, and other 12-Step groups); *see also* BIG BOOK, *supra* note 61, at 59-60 (laying out the 12-Steps as follows:

support process, members work their way through each step with the encouragement of their peers.⁷³ Religious concepts pervade the traditions of many 12-Step programs, including prayers to open and close meetings.⁷⁴

C. Judicial Consideration of the Religious Nature of 12-Step Programs

In determining whether the 12-Step program model can be characterized as religious, courts rely on factors such as the spiritual themes and practices, as well as the primary purpose of the organization.⁷⁵ While this Comment agrees with the many

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

(emphasis in original).

73. See Ethan G. Kalett, *Twelve Steps, You're Out (of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 HASTINGS L.J. 129, 143 (1996) (describing a typical meeting in which a speaker shares her or his story of addiction, followed by open discussion of common experiences the participants share as persons recovering from addiction); BUFE, *supra* note 56, at 66 (explaining that the steps provide a structure and clear directions for the recovering addicts to follow).

74. See Calabro, *supra* note 13, at 598 (reporting that 12-Step meetings often begin with a group recitation of the Serenity Prayer and end with the participants joining hands and reciting the Lord's Prayer). Both prayers are distinct to western Christianity. *Id.*; see also BUFE, *supra* note 56, at 65-66 (claiming that many who adhere to the 12-Step practices experience religious conversions in part because of the emotional vulnerabilities caused by their attempts to stop abusing substances).

75. See Honeymar, Jr., *supra* note 15, at 444-45 (explaining that, though in many instances the determination of what is "religious" is a complex academic investigation, in the case of the 12-Step program, the quintessential religious ideas of prayer and theism that are part of the 12-Step philosophy make the determination much simpler).

commentators that conclude that 12-Step programs are religious,⁷⁶ courts have had differing opinions.⁷⁷

In *Stafford v. Harrison*,⁷⁸ for example, to support a finding that Alcoholics Anonymous is not religious, the court relied on the fact that the “Higher Power is expressly left to the definition of the individual.”⁷⁹ Likewise, in *Youle v. Edgar*,⁸⁰ the court reasoned that, as the primary function of the organization was to cope with addiction and not to proselytize, it was not religious.⁸¹

76. See, e.g., *id.* at 445 (characterizing the determination of religiousness of Alcoholics Anonymous as an easy one because of program components such as prayer and theism); Apanovitch, *supra* note 11, at 796-97 (explaining that by examining the 12-Step program, rather than deferring to the group’s own statement disclaiming any religious affiliation, one can find themes characteristic to most theistic religions); Calabro, *supra* note 13, at 596 (citing three reasons to consider 12-Step programs fundamentally religious: the history rooted in the religious Oxford Group Movement, the references to “God” in the central texts of 12-Step programs, and the incorporation of prayer into 12-Step events); Christopher K. Smith, Note, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299, 304 (1992) (suggesting that Alcoholics Anonymous’ claim to be “spiritual” but not “religious” is just a semantic distinction, not one that should withstand legal scrutiny). While Alcoholics Anonymous chapters are fairly autonomous and may vary in religious content, they consistently require compulsory admission of powerlessness and submission to a higher being. *Id.* at 304 n.44. But see Byron K. Henry, Note, *In “a Higher Power” We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 471 (1997) (arguing that current constitutional definitions of religion are inadequate to determine whether 12-Step programs are included).

77. See *infra* notes 78-87 and accompanying text (finding that, while some courts decline to find 12-Step programs religious because of the flexibility inherent in the concept of a “higher Power,” others are unable to reconcile that finding with the programs’ religious content).

78. 766 F. Supp. 1014 (D. Kan. 1991).

79. *Id.* at 1017. The prisoner claimed that mandated participation in Alcoholics Anonymous as part of a prison treatment program violated the First Amendment because it “improperly obligated him to abandon his own principles and adhere to the principles of Alcoholics Anonymous.” *Id.* at 1016; see also *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *6 (S.D. Iowa Apr. 29, 1993) (relying on the fact that the “God” or “Higher Power” of the program is as the prisoner understands, rather than a static image, and that he could substitute other words for “God,” to find the program not religious).

80. 526 N.E.2d 894 (Ill. App. Ct. 1988).

81. See *id.* at 899 (stating, without elaboration, that the primary function of the program was to confront alcoholism). In this case, a driver whose privileges had been revoked because of a drunk driving conviction sued the state for requiring him to attend an alcoholism support group as a precondition to getting his license back. *Id.* at 895-98. What is particularly striking about this case is that the court adopted several 12-Step premises, namely that an alcohol abuser must admit to being an alcoholic and receive life-long support. *Id.* at 897. While the petitioner demonstrated over two years of sobriety without attending any support program, the hearing officer found that he would always be at risk for a relapse and that merely discontinuing the use of alcohol did not meet the definition of sobriety according to Alcoholics Anonymous and others in the alcoholism field. *Id.* The court defined sobriety not as abstinence, but as a “way of thinking” or a “manner of living.” *Id.*

The majority of courts find that 12-Step programs are constitutionally “religious.”⁸² *In re Garcia*⁸³ is representative of the conclusions of these courts.⁸⁴ Rather than relying on the organization’s assertion that the program is not religious, the court examined the history of Alcoholics Anonymous and its contemporary doctrine and practices.⁸⁵ The court found that the required 12-Steps were “premised on the idea of a monotheistic God”⁸⁶ and that 12-Step meetings are “permeated with religion.”⁸⁷

While the *Youle* court was correct that the primary 12-Step mission is not religious, this should be only one factor in the Establishment Clause analysis.⁸⁸ Both the *Youle* and *Stafford* courts neglected to do a thorough analysis of the program at issue, coming to an abrupt conclusion based on Alcoholics Anonymous’ misleading self-characterization of the 12-Step program.⁸⁹ The *Garcia* court’s more thorough examination revealed doctrine and practices that include prayer and frequent reference to a monotheistic deity.⁹⁰ That court appropriately judged these factors to be determinative on the issue of whether the programs were actually religious.⁹¹

82. See Honeyman, Jr., *supra* note 15, at 445 (stating that most courts find Alcoholics Anonymous “religious” because it relies on theism and prayer); Ira Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 985 (2003) (noting that courts consider 12-Step programs religious, while discussing the recent shift away from strict Separationism); see, e.g., *DeStefano v. Emergency Hous. Group*, 247 F.3d 397, 407 (2d Cir. 2001) (holding that an Alcoholics Anonymous program was a religion for Establishment Clause purposes); *Rausser v. Horn*, No. CIV.A.98-1538, 1999 WL 33257806, at *7 (W.D. Pa. Nov. 2, 1999), *rev’d on other grounds*, 241 F.3d 330 (3d Cir. 2001) (adopting *Kerr’s* conclusion that 12-Step programs are religious); *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996) (finding Narcotics Anonymous to be religious because of the repeated references to God in the texts).

83. 24 P.3d 1091 (Wash. Ct. App. 2001).

84. See, e.g., *Griffin v. Coughlin*, 673 N.E.2d 98, 102-03 (N.Y. 1996) (concluding that, based on 12-Step doctrine and practices, Alcoholics Anonymous is religious); *Warner v. Orange County Dep’t of Prob.*, 115 F.3d 1068, 1076-77 (2d Cir. 1997) (holding that the county could not condition probation on attendance at a 12-Step program because of its religious content).

85. See *Garcia*, 24 P.3d at 1096 (discussing the religious background of Alcoholics Anonymous as well as the current practices that require a belief in a “Higher Power” and recitation of religious prayers).

86. *Id.*

87. *Id.* Alcoholics Anonymous participants in *Garcia* also recited the Lord’s Prayer and received coins inscribed with the Serenity Prayer. *Id.*

88. See Honeyman, Jr., *supra* note 15, at 445 (emphasizing the presence of theism and prayer in the assessment of religious programs).

89. See *supra* notes 78-81 and accompanying text (discussing *Youle* and *Stafford* as examples of courts that look to the stated mission of programs rather than looking at the actual practices of programs).

90. See *supra* notes 83-87 and accompanying text (citing courts that, in determining whether a program is “religious,” look to the actual practices of the program, rather than its stated mission).

91. See *Smith*, *supra* note 76, at 304 (noting that courts should investigate the

III. RELIGIOUS EXPOSURE AND THE ESTABLISHMENT CLAUSE

A. *Introduction to Establishment Clause Jurisprudence*

The Establishment Clause captures the principle of separation of church and state commanding that “Congress shall make no law respecting an establishment of religion. . . .”⁹² Historically, the clause was not understood to forbid governmental expressions of support for religion, but rather to ensure that there was no compulsive state taxation in support of established churches.⁹³ In modern times, however, the Supreme Court has moved towards restricting government expressions that communicate support for religious ideas.⁹⁴ When challenging mandated 12-Step participation, a conclusion that 12-Step programs are religious does not alone compel a further conclusion that the Establishment Clause has been violated. Rather, courts make that determination by applying one of several tests that have emerged in Establishment Clause jurisprudence.⁹⁵ The two tests currently used most often in determining an unconstitutional establishment of religion are the “Coercion Test” and the “Endorsement Test.”⁹⁶

actual activities of a group, rather than rely on the group’s stated purpose).

92. U.S. CONST. amend. I. The Supreme Court in *Everson v. Board of Education* clearly stated that the Establishment Clause is “made applicable to the states” through the Fourteenth Amendment. 330 U.S. 1, 5 (1947); *see also* *School Dist. v. Schempp*, 374 U.S. 203, 230-55 (1963) (Brennan, J., concurring) (discussing historical and logical support for the incorporation of the Establishment Clause into the Fourteenth Amendment).

93. *See* Ira C. Lupu, *Government Message and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 776-77 (2001) (noting that, in the primarily Protestant Christian early America, theistic government pronouncements were common, but they did not draw the same reaction as did coercive taxation used to support the Church).

94. *See generally id.* (tracing both the change in Establishment Clause jurisprudence away from a strict monetary separation of church and state and towards a restriction on government speech that could be viewed as promotion of religion and the change in American religious history from a primarily Protestant nation to a religiously pluralistic society).

95. *See generally* Apanovitch, *supra* note 11, at 797-804 (tracing the process of Establishment Clause determination under several tests, including the “Coercion Test” and the “Endorsement Test”).

96. *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 504-08 (2002) (characterizing the Coercion Test and the Endorsement Test as the two prime candidates to officially oust the Court’s three-prong test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The *Lemon* test, which was initially articulated in a case about state financial assistance to religious schools, requires that a statute have a secular legislative purpose, that its primary effect is neutral as to religion, and that it does not foster “an excessive government entanglement with religion.” 403 U.S. at 612-13. While the *Lemon* test reigned supreme for decades, in recent years it has been discredited, if not overruled. *See, e.g.*, *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing the *Lemon* test to “some ghoul in a late-night horror movie that

In deciding cases dealing with mandated 12-Step participation in prison or probation contexts, courts have generally relied on the Coercion Test.⁹⁷ Using this test, the courts find Establishment Clause violations if a prisoner or probationer is coerced to participate in the program.⁹⁸ However, because of the idiosyncrasies of the drug court setting, such as the choice to enter the alternative docket,⁹⁹ it is difficult to conclude that a participant has been coerced into religious observance.¹⁰⁰ The Endorsement Test is more appropriate for the drug court context because it looks at the overall results of government promotion of the program instead of relying on the program's details.¹⁰¹ Rather than focusing on whether the state compelled a particular individual to participate in a religious exercise, this test questions the public statement made by such government interaction with religion.¹⁰² If the government action appears to endorse the religious message, then it violates the Establishment Clause.¹⁰³

repeatedly sits up in its grave and shuffles abroad"); *Mitchell v. Helms*, 530 U.S. 793, 794 (2000) (recalling that, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court recast the entanglement inquiry to represent just one criterion in the effect inquiry). The *Mitchell* Court went on to decide the case on the basis of neutrality and secular content, virtually ignoring the *Lemon* test altogether. *Id.* Although the Court has never formally overruled the *Lemon* test, scholars assume it is essentially defunct. *See, e.g.*, Choper, *supra* note 96, at 499 (declaring that the Court has abandoned the *Lemon* test in favor of the endorsement test). The two most prominent tests, Coercion and Endorsement, are theoretically distinct, but the current state of flux of Establishment Clause jurisprudence has led to decisions that seem to combine the two. *See, e.g.*, *Kerr v. Farey*, 95 F.3d 472, 480 (7th Cir. 1996) (using the Coercion Test for the ultimate finding, but including language that condemns a prison for favoring religion over non-religion, an Endorsement Test matter).

97. *See infra* notes 127-42 and accompanying text (finding that, where prison or probation officials use coercion to encourage 12-Step program attendance, courts will declare the practice unconstitutional and in violation of the Establishment Clause).

98. *See infra* notes 127-42 and accompanying text (discussing the court treatment of 12-Step programs in correctional contexts).

99. *See Terry, III, supra* note 37, at 4-5 (describing some differences between traditional courts and drug courts, focusing particularly on drug court procedures that accelerate the intervention).

100. *See infra* notes 143-94 and accompanying text (arguing that the Coercion Test is inappropriate in the drug court context).

101. *See infra* notes 192-220 and accompanying text (exploring the strengths of the Endorsement Test, as applied to drug courts).

102. *See Apanovitch, supra* note 11, at 789 (suggesting that the Coercion Test improperly ignores the principle of separation of church and state, which is a focus of the Endorsement Test).

103. *See infra* notes 192-220 and accompanying text (providing background for the adoption of the Endorsement Test and discussing several of its recent applications).

*B. Coerced Participation in Religious Practice**1. Fundamentals of the Coercion Test*

The first test, the Coercion Test, finds a violation of the Establishment Clause if a state actor forces an individual to participate in or observe religious practices.¹⁰⁴ The central debate of the test involves a determination of what constitutes coercion.¹⁰⁵ In *Lee v. Weisman*¹⁰⁶ the Supreme Court majority held that including prayer in a public middle school graduation forced students to participate in a religious activity.¹⁰⁷ Despite the objections of fourteen-year-old Deborah Weisman and her father, the school principal invited a rabbi to offer prayers at the opening of the graduation ceremony for Weisman's class.¹⁰⁸ The Court's majority noted the social importance of a school graduation ceremony, and suggested that the choice to abstain from prayer was not a fair choice for a graduating student.¹⁰⁹ According to the decision, this kind of social pressure to support or participate in a religious act amounts to an act of government coercion.¹¹⁰ "It is beyond dispute," the Court concluded, that "at a minimum, the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise."¹¹¹ Further, the Court found the school graduation prayers to be state-compelled religious conformity.¹¹²

The Court, however, acknowledged that the young age of the students exposed to the school-sponsored prayer influenced the decision, because of the students' vulnerability to peer pressure.¹¹³

104. See, e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding that a voluntary class in religion was constitutional, but if teachers coerced students to take the class, then the Establishment Clause would be violated). But see *Allegheny County v. Am. Civil Liberties Union*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring) (cautioning that "[t]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis").

105. See Calabro, *supra* note 13, at 580 (exploring two versions of the Coercion Test that have emerged from the Supreme Court, a broad psychological Coercion Test and a more demanding legal Coercion Test).

106. 505 U.S. 577 (1992).

107. *Id.* at 587, 596.

108. *Id.* at 584. The students were expected to stand as a group during the prayers, or at least keep respectfully silent. *Id.* at 593.

109. See *id.* at 594 (finding that the public prayers would exert terrific peer pressure on the student to conform, especially in a school setting where the risk of compulsion is especially high).

110. See *id.* at 586 (noting that, even though the school district did not require attendance at the ceremony as a condition of graduation, the participation was "in a fair and real sense obligatory").

111. *Id.* at 587.

112. *Id.* at 599.

113. See *id.* at 593 (considering psychology research that found teenagers to be

The Court did not indicate that the conclusion would necessarily differ if the case involved adults rather than teenagers.¹¹⁴ However, it made clear that youth—and the presumption of susceptibility to psychological coercion that accompanies it—were factors in determining whether the government acted coercively.¹¹⁵

Writing the dissent in this case, Justice Scalia took a more straightforward approach to coercion, asserting that the majority's "psychological coercion" test was unworkable and "boundlessly manipulable."¹¹⁶ He noted that students at the graduation ceremony had the choice to sit during the prayers rather than stand and participate.¹¹⁷ He explained that the "coercion that was the hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."¹¹⁸ Students who chose to abstain from the religious observance of prayer faced no actual penalties.¹¹⁹ By this definition, then, the school did not coerce the students to take part in a religious exercise.¹²⁰

A more recent case indicates that the dissenting view in *Lee* currently represents the more prominent approach to the Coercion Test. Specifically, the Court in *Zelman v. Simmons-Harris*¹²¹ reviewed a school voucher program in which low-income parents could choose to send their children to neighboring school districts, private religious schools, private non-religious schools, or get tutoring for children who remained enrolled in the local public school.¹²² Where the voucher money was spent was highly dependent on where the parents chose to enroll their children.¹²³ The majority relied heavily on the notion of private choice, and ruled that the school voucher

especially susceptible to pressure to conform to social conventions).

114. *See id.* (explaining that the application of the decision to adults was not addressed by the Court).

115. *Id.*; *see also* Choper, *supra* note 96, at 504 (suggesting that the majority definition of coercion, which includes indirect and subtle pressures, is broader than the common understanding of the term).

116. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

117. *See id.* at 637 (explaining that there was nothing physically compelling the students to stand or participate, and no indication that student dissents were dissuaded in any way).

118. *Id.* at 640.

119. *Id.* at 637. Justice Scalia further notes that a student's mere respectful silence during a prayer need not be considered assent nor participation. *Id.*

120. *See id.* at 642 (agreeing with the notion that the government cannot force individuals to participate in religion, but finding that exposure to a school prayer did not amount to coercion); *see also id.* at 609 (Souter, J., concurring) (considering the disputed school practice to raise an issue of endorsement, rather than coercion).

121. 536 U.S. 639 (2002).

122. *Id.* at 645-46.

123. *Id.* at 646.

program was constitutional because parents maintained the choice to determine whether to send their children to religious schools.¹²⁴ A dissenting opinion, written by Justice Souter, however, suggests that the parents' decisions were based on limited educational options, rather than religious preference and genuine choice.¹²⁵ The majority dismissed this hypothesis, and concluded that coercion did not exist if the state did not force parents to send their children to a religious school or only offered religious schools as a choice.¹²⁶ Thus, a straightforward definition of coercion seems to currently reign on the Court.

2. 12-Step programs and coercion

A number of lower courts have addressed the issue of mandated participation in Alcoholics Anonymous or Narcotics Anonymous. Generally, challenges to the constitutionality of the mandated programs rest on Establishment Clause grounds,¹²⁷ and nearly all of the cases apply the Coercion Test.¹²⁸ The Seventh Circuit opinion in *Kerr v. Farrey*¹²⁹ provides the clearest statement of the Coercion Test as applied to mandated participation in a 12-Step program.¹³⁰ Prison authorities required Kerr to attend Narcotics Anonymous meetings during his period of incarceration.¹³¹ If Kerr refused, the authorities

124. *Id.* at 662-63.

125. *See id.* at 698 (Souter, J., dissenting) (arguing that it was obvious that limited educational options influenced parents rather than religious preference because nearly two out of three families using vouchers to send their children to religious schools did not agree with the religion taught there).

126. *See id.* at 640 (emphasizing that the choice offered to parents remedies any coercion that could otherwise be present).

127. *See infra* notes 128-142 and accompanying text (discussing cases challenging mandated participation in 12-Step programs). The one exception in the framing of the challenges is *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Kan. 1991), in which the plaintiff challenged mandatory participation in the prison 12-Step program on Free Exercise Clause grounds rather than Establishment Clause grounds. His specific contention was that the program required him to abandon his personal religious beliefs and to replace them with the principles of the 12-Step program. *Id.* at 1016. Because the court ruled that the program was not religious, it did not consider the intricacies of the Free Exercise argument. *Id.* at 1017.

128. *See, e.g.,* *Rauser v. Horn*, No. CIV.A. 98-1538, 1999 WL 33257806, at **4-7 (W.D. Pa. Nov. 2, 1999) *rev'd on other grounds*, 241 F.3d 330 (3d Cir. 2001) (considering the coercion involved with conditioning parole on 12-Step attendance); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997) (finding coercion in a parole condition, but remanding to determine if the mandated program was religious); *United States v. Behler*, 187 F.3d 772, 780 (8th Cir. 1999) (ruling that coercion could not be considered until a specific treatment plan was developed for the individual on probation).

129. 95 F.3d 472 (7th Cir. 1996).

130. *See Apanovitch, supra* note 11, at 828 (describing the court's influential analysis of the alleged coercive conditions).

131. *Kerr*, 95 F.3d at 474.

would classify him as a higher security risk, a label that would have had negative consequences on parole eligibility.¹³² In applying the Coercion Test, the *Kerr* court concluded that requiring attendance at 12-Step meetings constituted coercion.¹³³ Although the prisoner technically had a choice of whether to attend, the consequence of a negative decision would be a longer period of incarceration, and thus it was not a meaningful choice.¹³⁴

In addition to declaring the prison practice unconstitutional, the Seventh Circuit suggested a remedy. The opinion did not forbid religious-based rehabilitation programs at the prison.¹³⁵ Instead, it ruled that the prison needed only offer a non-religious program as an alternative.¹³⁶ This alternative would provide Kerr and other prisoners with a meaningful choice, thus defeating state coercion.¹³⁷

Following the *Kerr* decision, the District Court for Eastern Wisconsin addressed the related question of whether criminal justice authorities could avoid the coercion issue by having an alternative, non-religious program made available at the petitioner's request.¹³⁸ The court found that a parolee was coerced to enter a religiously-oriented residential treatment facility as an alternative to returning to prison for parole violations.¹³⁹ His parole officer contended that his

132. *Id.* Mr. Kerr brought suit claiming that he was required to participate in a substance abuse program with overt religious content while in prison. *Id.* If he did not participate, he would suffer adverse effects for parole eligibility. *Id.* The only program offered was Narcotics Anonymous, to which the prisoner objected, because he did not want to drag "God's name into 'this messy business of addictions' and he expressed his disagreement with the view of God that was proposed at the meeting." *Id.*

133. *Id.* at 479. The court concluded that the threat of adverse consequences for refusing to attend amounted to coercive pressure to participate in a religious activity. *Id.*

134. *Id.*

135. *See id.* at 470 (finding that the Establishment Clause was violated if the prison only offered Narcotics Anonymous, or other religious based programs, without also providing a secular alternative).

136. *Id.* (finding that case law supported the same conclusion that the Establishment Clause does not allow the state to discriminate against atheistic or agnostic inmates if they refuse to attend and participate in religious-based substance abuse programs).

137. *Id.*; accord *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002); see also *Rausser v. Horn*, No. CIV.A. 98-1538, 1999 WL 33257806, at *7 (W.D. Pa. Nov. 2, 1999), *rev'd on other grounds*, 241 F.3d 330 (3d Cir. 2001) (following the *Kerr* court and deciding that participation in a religious-based rehabilitation program cannot be a parole condition); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 484 (focusing on choices offered to a prisoner in its consideration of whether the prisoner was coerced into attending a specific treatment program); *United States v. Behler*, 187 F.3d 772, 780 (holding that Behler did not have a First Amendment claim based on his condition for supervised release mandating that he undergo treatment as directed by his probation officer because no treatment protocol had yet been established).

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

139. *Id.* at 1037. After the plaintiff was caught committing a parole violation, his

attendance was not coerced, because she would have provided him with secular alternatives if he had so requested.¹⁴⁰ Regardless, the court found that the choice presented to the petitioner, namely prison or a rehabilitation program with religious components, was “inherently coercive.”¹⁴¹ According to the court, the state is required to provide a meaningful choice of whether to enter a religious program, rather than rely on an individual to request such a choice.¹⁴²

3. *Applying the Coercion Test to the drug court setting*

a. *The consequences for drug court failure are not as coercive as the consequences for probationers or prisoners*

There is no case law on mandated 12-Step participation as part of a drug court treatment protocol; however, the practice would likely survive Establishment Clause scrutiny under the Coercion Test as it has developed. Under the broader psychological Coercion Test of *Lee*, the public order of a judge might be considered coercive.¹⁴³ However, the Supreme Court in *Zelman*¹⁴⁴ and lower courts addressing 12-Step mandates have opted for the stricter version of the Coercion Test in which the consequences of refusing to comply and the individual choices offered must be examined.¹⁴⁵ At first glance, the

parole officer advised him that he could avoid returning to prison by entering a specific residential substance abuse treatment program. *Id.* at 1029. The parole officer did not suggest any alternative programs. *Id.*

140. *Id.* at 1035.

141. *Id.* at 1036. *But see In re Garcia*, 24 P.3d 1091, 1098 (Wash. Ct. App. 2001) (arriving at a different conclusion based on similar facts). In a prison program discussed in *Garcia*, an inmate was enrolled in either Narcotics Anonymous or Alcoholics Anonymous sessions upon entering a chemical dependency treatment program. *Id.* at 1091. The program did allow, however, for each individual to make alternate arrangements. *Id.* at 1096. Though it appears that a prisoner would have to act affirmatively to preserve his or her constitutional rights, the court found that the existence of a non-religious program as an alternative meant that a prisoner was not coerced, so there was no First Amendment violation. *Id.* at 1096-97.

142. *See Bausch*, 139 F. Supp. 2d at 1035 (providing the eloquent summary statement that “it is the government’s obligation always to comply with the Constitution, rather than to do so only upon request”); *see also Apanovitch*, *supra* note 11, at 850 (suggesting that few would be brave enough to assert their rights while under criminal justice supervision, and thus, most individuals would assume they have no choice other than compliance).

143. *Compare Philip Bean, Drug Courts, the Judge, and the Rehabilitative Ideal*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 235, 238-39 (James L. Nolan, Jr. ed., 2002) (describing the legal and personal influence most drug court judges have over the participants), *with Lee v. Weisman*, 505 U.S. 577, 581 (1992) (concluding that the subtle pressure to conform that resulted from a public prayer was constitutionally coercive).

144. 536 U.S. 639 (2002).

145. *See supra* notes 121-142 and accompanying text (looking at both school voucher systems and mandatory prison substance abuse programs, the courts have

situation of a drug court judge assigning a 12-Step program to a defendant does not seem to differ from a traditional judge mandating 12-Step participation as a condition of probation. Yet, the choice a defendant has of whether to enter the drug court, as well as the kinds of consequences that exist for failure, make the drug court context quite different.¹⁴⁶ As such, challenges based on the Coercion Test are likely to fail.¹⁴⁷

Unlike traditional court settings, defendants make the choice of whether to enter the drug court docket.¹⁴⁸ While the consequence awaiting a probationer or prisoner who refuses to attend a mandatory 12-Step program is immediate or lengthened imprisonment,¹⁴⁹ an arrestee refusing the opportunity to enter drug court will receive nothing worse than the traditional court process.¹⁵⁰ The choice offered to the defendant is between the traditional court procedure and an alternative venue.

While undergoing criminal court proceedings may be unpleasant, it can hardly be characterized as a coercive consequence on par with definite incarceration. The traditional adversarial trial includes well-tested procedural protections, as well as the chance that the judge or jury will return a not-guilty verdict.¹⁵¹ Drug courts, on the other hand,

found it important that individuals are given options and that, beyond not having to participate in religious-based programs, a refusal does not have negative consequences).

146. See Terry, III, *supra* note 37, at 1-9 (comparing features of traditional courts with drug courts, such as the procedure by which one enters each court docket; the respective roles of attorneys, judges, and defendants; and the results of failing to heed the stated requirements).

147. Compare Bausch v. Sumiec, 139 F. Supp. 2d 1029 (E.D. Wis. 2001) (finding coercion based on the adverse consequence of imprisonment for refusing the probation mandate), with NOLAN, JR., *supra* note 29, at 41 (explaining that the consequences of drug court program failure is not immediate imprisonment but a trial in the traditional court system).

148. See Sara Steen, *West Coast Drug Courts: Getting Offenders Morally Involved in the Criminal Justice Process*, in DRUG COURTS IN THEORY AND IN PRACTICE 51, 61 (James L. Nolan, Jr. ed., 2002) (explaining that the option offered to arrestees of whether to enter the drug court not only fulfills the practical purpose of assigning defendants to dockets, but also serves the therapeutic goal of empowering substance abusers to make the decision to actively pursue rehabilitation).

149. See, e.g., Bausch, 139 F. Supp. 2d at 1029 (reporting that the petitioner would have gone to prison if he had refused to enter the religious program); Kerr v. Farrey, 95 F.3d 472, 474 (7th Cir. 1996) (stating that the prisoner had a worse chance of gaining parole as a result of refusing to attend the 12-Step meetings in prison).

150. See William D. McColl, *Theory and Practice in the Baltimore City Drug Treatment Court*, in DRUG COURTS IN THEORY AND IN PRACTICE 3, 8 (James L. Nolan, Jr. ed., 2002) (describing the free choice an arrestee has between entering the drug court program or continuing on the traditional criminal justice path).

151. See generally STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 997-1307 (6th ed. 2000) (discussing the due process rights afforded to each criminal defendant in the traditional court system).

have the controversial feature of defense counsel participation in the drug court “team.”¹⁵² Additionally, all participants in drug courts are treated as if they were guilty.¹⁵³ While the major benefit of the drug court seems to be the chance to get a sentence other than incarceration, this option actually exists in both dockets. Drug courts do not change the existing sentencing structures.¹⁵⁴ Rather, judges in traditional courts can also avoid mandatory minimum sentences by imposing deferred sentences or probation, and they can also mandate addiction treatment.¹⁵⁵ Additionally, for drug court participants, there is a distinct possibility that the mandated treatment will take longer than any jail sentence they could receive for their alleged crimes.¹⁵⁶ While entry into many drug courts inevitably leads to mandated 12-Step participation, there does not seem to be any coercion to enter the alternative docket, because there is a meaningful choice between two dockets.¹⁵⁷

There is another point in the drug court process, however, that opens the door to analysis under the Coercion Test. When the judge provides the individual with the components of the treatment program she or he must follow to remain in good standing with the drug court, the individual is faced with a potentially coercive

152. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1246 (1998) (examining the conflicting goals of the traditional adversarial system and the therapeutic-oriented drug court system along with the risks defendants encounter when defense attorneys abandon their adversarial role and enter into a rehabilitative team); Morris B. Hoffman, *The Denver Drug Court and its Unintended Consequences*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 67, 80 (James L. Nolan, Jr. ed., 2002) (exclaiming that “the bedrock protections inherent in the adversary nature of our criminal justice system and the independence of the judiciary are put seriously at risk” by the collaborative team structure of drug courts).

153. See generally Bing-Newton, *supra* note 30, at 1881 (lamenting the assumption of guilt that most people accused of drug crimes experience).

154. See Hoffman, *supra* note 152, at 79-80 (explaining that without separate legislation, drug courts are still bound by the same sentencing rules that guide traditional courts).

155. *Id.* This is not to suggest that drug courts are not innovative or that they fail to do more to promote rehabilitation than traditional courts. Terry, III, *supra* note 37, at 7. Rather, this point is made to emphasize the fact that the consequence of choosing traditional court is not comparable to the consequence of definite incarceration in the probation or prison contexts. See *supra* notes 121-42 and accompanying text.

156. See Goldkamp, *supra* note 18, at 22-23 (explaining that the minimum twelve months of intensive treatment and significant judicial involvement is often seen as more demanding than the few months in jail or on probation that an individual would otherwise receive for their crime).

157. See, e.g., McColl, *supra* note 150, at 8 (explaining the detailed process judges go through to allow participants to make an informed choice between traditional court and drug court).

decision.¹⁵⁸ Though the atmosphere in most drug courts seems far less coercive than in a traditional court,¹⁵⁹ it is important to remember that judges still have the power of the criminal justice system behind them.¹⁶⁰

Even at this point, however, the determination of coercion for Establishment Clause purposes is less clear cut than in the probation and prison cases. While the consequences of refusing a mandate to go to 12-Step meetings in the probation and prison cases was actual incarceration, the ultimate sanction in drug court is failing out and returning to the traditional court system.¹⁶¹ Immediate incarceration is only a threat for a drug court participant as an intermediate sanction through which a judge may impose a brief jail stay to scare the defendant into treatment compliance.¹⁶² Though brief, it is an actual deprivation of liberty and may be considered coercion when viewed with a bright-line test that considers any consequence of incarceration to constitute coercion.¹⁶³ This creates an odd situation, however, in which an intermediate sanction is considered to be more coercive than the ultimate drug court sanction—getting kicked out.¹⁶⁴ The better test for determining an Establishment Clause violation in the drug court context is Endorsement, because it focuses on the overall implications of government interaction with religion, rather than the details of specific choices and consequences.¹⁶⁵

158. See Steen, *supra* note 148, at 52 (explaining that treatment decisions are made at various points during the drug court, which may have input from the defendant, but are actually imposed by the judge).

159. See Bean, *supra* note 143, at 236-37 (describing drug court status hearings in which the judge inquires casually about a defendant's progress in the treatment programs and appears to be on the defendant's side); see also Steen, *supra* note 148, at 60 (describing the incorporation of the defendant into the decision-making process, in part to characterize the decision to abstain as a personal choice, rather than one prompted by the court). *But see id.* at 59 (relating a prosecutor's statement that most real decisions are made outside of the courtroom, and away from the defendant, so that the "team" can present a united front).

160. See NOLAN, JR., *supra* note 29, at 50-52 (arguing that it is a mistake to consider drug courts to be "soft on crime" because the therapeutic approach is not necessarily easier on defendants, even though it is more likely to achieve positive results).

161. See Hennessy, *supra* note 45, at 7 (listing as intermediate sanctions community service, extra treatment requirements, additional time observing the drug court, and being sent back to the regular court system as the ultimate sanction).

162. See Steen, *supra* note 148, at 62 (describing the judge's decision to impose a short jail stay as a "tough love" approach to convince the participant to focus on their rehabilitation goals).

163. See *supra* notes 127-42 and accompanying text (describing cases that focused on the consequences of failure to comply in the probation and prison contexts).

164. See Wolf, *supra* note 47, at 42 (showing the drug court team's hesitation to give up on a participant and fail him out of the drug court).

165. See *infra* notes 226-29 and accompanying text (describing how religious endorsement is a violation of the Establishment Clause).

b. Lesser protection for adults

As described above, age has been an influential factor in the Supreme Court's treatment of coercion.¹⁶⁶ In *Lee*, the Court admitted that the school setting and the students' youthful susceptibility to coercion had some impact on its decision.¹⁶⁷ The Court even suggested that the result might be different if adults rather than adolescents were being pressured to participate in religious exercises.¹⁶⁸

An opinion by the federal district court in southern Iowa on a program in the prison setting similarly explored the vulnerability of the defendant, and implied there was a higher standard for adults than minors.¹⁶⁹ In *Jones v. Smid*, the prisoner objected to a treatment program that was based on Alcoholics Anonymous principles.¹⁷⁰ The court denied that the program was "religious" by constitutional standards, and thus denied him relief.¹⁷¹ The fact that he was an adult, however, clearly influenced the result. The court stated that as an adult, he should understand that his participation in a religious activity would not necessarily signify "his own participation in, or approval of, a religious practice."¹⁷² The premise, evidenced by this decision, is that prisons can pressure adults to participate in activities that may be morally offensive to them, like prayer and religious recitation.¹⁷³

Fortunately, other cases examining mandated 12-Step participation did not follow suit.¹⁷⁴ These court opinions focused on the choices made available to prisoners and probationers, rather than the likelihood that a particular individual would feel compelled to

166. *See supra* notes 113-115 and accompanying text.

167. *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992).

168. *See id.* (noting psychological research supporting the "common assumption" that children are susceptible to strong peer pressure to conform). To illustrate how adults are less susceptible to this type of pressure, the Court distinguished the school setting from a prayer at the opening session of a state legislature, where adults are free to enter and exit freely. *Id.* at 596-97.

169. *Jones v. Smid*, No. 4-89-CV-20857, 1993 WL 719562, at *4 (S.D. Iowa Apr. 29, 1993).

170. *See id.* at **1-2 (detailing the prisoner's experience, in which he attended 12-Step meetings as a condition of probation, but objected to a recitation of a promise that included a recognition of God).

171. *See id.* at **4-5 (concluding that because Jones had the chance to substitute different words for "God," the program was not religious).

172. *Id.* at *5.

173. *Id.* (noting that the program and promise were not unconstitutional despite the fact that they were offensive to Jones).

174. *See, e.g., Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996) (failing to consider the age of the prisoner in the context of coercion); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1033-34 (E.D. Wis. 2001) (focusing on the nature of the choice articulated to the probationer, rather than any personal factors, to determine coercion).

conform.¹⁷⁵ Similarly, it is unlikely that age or susceptibility to compulsion would be factors considered by drug courts, because of the legal trend away from the psychological definition of coercion promoted in *Lee*.¹⁷⁶

c. Waiver of objection

Arguably, persons electing to enter drug court programs waive their rights to be free from pressure to engage in religious activities.¹⁷⁷ In electing to join the alternate docket, they have clearly indicated an interest in avoiding the traditional consequences of criminal trial.¹⁷⁸ This choice, however, can hardly be equated with a conscious decision to adopt religious views or even embark on a lifestyle change.¹⁷⁹ Further, it is not reasonable to expect the arrested individual to predict that the state would choose a religious-oriented support group as part of the treatment mandated.¹⁸⁰

This position is supported by the analysis in a Second Circuit case, *Warner v. Orange County Dep't of Prob.*,¹⁸¹ which dealt with Alcoholics Anonymous attendance as a probation condition. The defendant attended a few meetings before sentencing and did not object at sentencing when the judge included a mandate to continue attending Alcoholics Anonymous meetings.¹⁸² When the defendant later complained, the government argued that forcing him to go to Alcoholics Anonymous did not violate the Establishment Clause, and the dissent contended that he had waived any Establishment Clause

175. *Id.*; see also Calabro, *supra* note 13, at 579-81 (contrasting the psychological Coercion Test put forth in *Lee*, 505 U.S. 577 (1992), which considered some characteristics of the victims, with the more direct legal Coercion Test promoted by the Court that dealt only with the objective factors of choices offered).

176. See *supra* notes 121-27 and accompanying text (discussing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), where the Supreme Court upheld a school-voucher program based on parent choice with an argument analogous to Scalia's dissent in *Lee*, which rejected the psychological Coercion Test); see also *infra* notes 252-55 and accompanying text (exploring policy reasons for avoiding the imposition of a set of offensive beliefs onto someone as a part of rehabilitation).

177. See, e.g., *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1078 (2d Cir. 1997) (Winter, J., dissenting) (arguing that a defendant who accepted a sentence of mandatory 12-Step participation without complaining or appealing waived his rights to later object to the religiousness of the program).

178. See Steen, *supra* note 148, at 51-52 (expounding on the importance of the choice to enter drug courts, rather than choosing the traditional path of criminal justice).

179. See *id.* at 63 (describing the initial choice to enter the drug court for many people as "calculative involvement," in which they make their decision based on a desire to have their charges dismissed instead of a desire for treatment).

180. See generally *id.* (suggesting that most offenders have little understanding of the drug court requirements when first exposed to the program).

181. 115 F.3d 1068 (2d Cir. 1997).

182. *Id.* at 1073.

objection.¹⁸³ However, the majority found that a few meetings were not enough for him to realize the full religious content of the program.¹⁸⁴ The court continued with a finding that the defendant's attendance before sentencing could not be relied on as an unambiguous statement of assent to waive his rights, because his knowledge and understanding of the program were incomplete.¹⁸⁵

Most drug court participants will likewise be uninformed when they opt into the alternate docket. Different drug courts have various strategies for informing prospective participants about what their treatment regimen will entail. For example, in the Baltimore City Drug Treatment Court the program starts with the public defender and the prosecutor agreeing on a plan for the defendant, which is later memorialized in a contract outlining the program and possible sanctions for violations.¹⁸⁶ The defendant will enter the drug court after signing the contract, where the judge will give the defendant one last chance to reconsider.¹⁸⁷ Under these circumstances, the defendant will understand what treatment protocol is required. Ambiguity still exists, however, about whether the defendant recognizes the religious nature of any mandated 12-Step participation.¹⁸⁸

The process in other drug courts, however, can be even less ambiguous. In two west coast drug courts, for example, prospective participants actually go through a two-week introductory period that includes tasks such as 12-Step attendance.¹⁸⁹ The individual officially opts into the drug court only after completing the two weeks.¹⁹⁰ In this situation, it is difficult to suggest that the defendant did not know what the treatment protocol required. Following the guidance of the *Warner* court, however, it is arguable that even in this situation, the defendant could not knowingly and voluntarily waive his or her rights. In *Warner*, the court found that the evidence did not show

183. *Id.*

184. *Id.* The court mentions that the religiosity of the program intensified after the defendant had attended for some time, because when he was found to be unengaged and lacking zeal, his probation officer required him to attend more meetings, despite his complaints about the religious content. *Id.* at 1073-74.

185. *Id.* at 1074. By his own admission, Warner only attended meetings before sentencing to convince the judge he was already getting his problem under control. *Id.* at 1074, 1078.

186. McColl, *supra* note 150, at 8.

187. *Id.*

188. *Id.* (describing the drug court components that will be explained to a potential participant, such as treatment requirements and sanctions, but not indicating that the specific programs will be described at any great length).

189. Steen, *supra* note 148, at 61.

190. *Id.*

that Warner's attendance at a few Alcoholics Anonymous sessions prior to sentence gave him sufficient awareness of the nature or extent of the religious exercises to justify either imputing consent or charging him with forfeiture.¹⁹¹ While the spiritual nature of the program was apparent to Warner immediately, it was not until well after beginning his sentence that Warner recognized the depth of the program's religious contents.¹⁹² Similarly, a two-week introduction to the drug court program and 12-Step meetings would give a criminal defendant a sense of the program, but it would not be enough to convey the full extent of the religious requirement.¹⁹³ More than just a brief attendance is necessary to impute a knowing and voluntary waiver, and thus the waiver doctrine does not repair the flaws of the Coercion Test when applied in the drug court context.¹⁹⁴

C. Court "Endorsement" of Religious Programs

1. Emergence of the Endorsement Test

The Endorsement Test is applied less frequently to questions of mandated 12-Step participation than the Coercion Test,¹⁹⁵ but it is the better test with which to evaluate religious program components in drug courts because it does not require an examination of the penalty for failing out of drug court and the coercive power of that consequence.¹⁹⁶ Rather the Endorsement Test condemns any government action that promotes or endorses one religion over another, or religion over non-religion.¹⁹⁷

191. 115 F.3d at 1073-74.

192. *Id.* at 1073.

193. *See* Steen, *supra* note 148, at 63-65 (describing the typical progression of involvement with drug court programs as starting with an impersonal calculation based on avoiding incarceration or clearing their records and moving to moral involvement and engagement with treatment components).

194. *See supra* notes 180-84 and accompanying text (discussing *Warner*, 115 F.3d at 1073-74, where the court decided that attending Alcoholics Anonymous for a few meetings is not long enough for a defendant to understand the full religious content of the program and therefore could not knowingly waive the right to object to the program).

195. *See infra* notes 220-24 and accompanying text (noting only one case where the court applied the Endorsement Test to a question of mandated 12-Step participation in the prison context).

196. *See* Apanovitch, *supra* note 11, at 837 (positing that the Coercion Test is popular in the criminal context because it is an easier site-specific analysis for the penal system, but suggesting that the Endorsement Test is more appropriate because it emphasizes the constitutional issue of separation of church and state).

197. *See generally* Choper, *supra* note 96, at 508 (examining the Endorsement Test and suggesting that it has gained favor among the Supreme Court justices, five of whom have embraced it in various opinions).

Justice O'Connor first articulated the test in her *Lynch v. Donnelly* concurrence.¹⁹⁸ Justice O'Connor expressed concern with the message of exclusion sent by the government when it supported a particular religion.¹⁹⁹ The *Lynch* case involved a government-sponsored winter holiday display that included a Christian nativity scene in a local park.²⁰⁰ Justice O'Connor examined both what the city intended to communicate with the display, and the likely effect on the viewers, concluding that the Establishment Clause would be violated if either the government intended to endorse religion, or if the government expression had the effect of conveying a message of endorsement.²⁰¹ Using this test, Justice O'Connor concluded that the holiday setting—which included primarily traditionally secular holiday symbols²⁰²—suggested not endorsement of a religious message, but a mere acknowledgement of the public holiday.²⁰³ Thus, she agreed with the Court that the display was best understood as a traditional celebration of a public holiday rather than a religious endorsement.²⁰⁴

Subsequently, the Court's majority adopted the Endorsement Test in *Allegheny County v. ACLU*,²⁰⁵ when the Court noted that in the preceding years it had increased its scrutiny of the question of "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."²⁰⁶ This case also involved public displays of winter holiday symbols; however, there were two different displays involved, which the Court chose to evaluate separately.²⁰⁷ The first display was an elaborate Christian nativity

198. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). In this articulation, Justice O'Connor proposed an endorsement inquiry as a clarification of the *Lemon* Test. *Id.* at 688-89; see *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Since then, however, it has evolved into an independent test. See *Allegheny County v. Am. Civil Liberties Union*, 492 U.S. 573, 594-95 (1989) (using the Endorsement Test without any reliance on *Lemon*).

199. See *Lynch*, 465 U.S. at 687-88 (describing two situations that make a person's religion relevant to their political standing: government alignment with a specific religion, even if informal; and outright endorsement or disapproval).

200. *Id.* at 671.

201. *Id.* at 690.

202. See *id.* at 671 (listing other elements of the display, including a Santa Clause house, reindeer pulling a sleigh, candy-striped poles, and a banner reading "Seasons Greetings").

203. *Id.* at 692.

204. *Id.* at 691. See also *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2323 (2004) (O'Connor, J., concurring) (clarifying her belief that instances of "ceremonial deism" such as the national motto—In God We Trust—, religious references in patriotic songs, and the words "Under God" in the Pledge of Allegiance, do not amount to government endorsement of religion).

205. 492 U.S. 573 (1989).

206. *Id.* at 592.

207. *Id.* at 581-82.

scene located by the “Grand Staircase” of the county courthouse.²⁰⁸ The second display was a Chanukah menorah, along with a Christmas tree and a sign saluting liberty, in the City-County municipal building.²⁰⁹ Applying Justice O’Connor’s Endorsement Test, the Court found that the first display’s grandeur and location in a central government building amounted to endorsement.²¹⁰ They did not find, however, that the second display violated the Establishment Clause, because the combination of religious and secular symbols communicated recognition of the winter-holiday season, rather than a preference for any religion, or for religion over non-religion.²¹¹

In reaching these fact-specific conclusions, the Court examined the concept of government endorsement.²¹² Seeking to elucidate the principle, the Court stated that the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief” or from creating a situation in which a person’s religious beliefs are relevant to their standing in the political community.²¹³ Because the first display communicated support for Christianity, it violated the Establishment Clause, while the second display did not send a similar message of government preference because of its particular characteristics.²¹⁴

The most recent Supreme Court expression of the Endorsement Test is in *Santa Fe Indep. Sch. Dist. v. Doe*.²¹⁵ In this case, the Court determined whether a student-led prayer delivered over the public address system before public high school football games amounted to endorsement.²¹⁶ The Court easily concluded that the speech in

208. *Id.* at 578.

209. *Id.* at 587.

210. *Id.* at 599-600.

211. *Id.* at 616.

212. *Id.* at 592-93 (listing prior cases where the Court either invalidated statutes and programs because they constituted government endorsement of religion, or where it explored the definition of the term); *see, e.g.*, *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Engel v. Vitale*, 370 U.S. 421 (1963); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring) (exploring the definition of “endorsement”).

213. *Allegheny*, 492 U.S. at 594.

214. *Id.* at 621.

215. 530 U.S. 290 (2000). This case also provides a good example of the way the Coercion and Endorsement Tests can overlap because the case relies on *Lee* as its primary precedent, but the majority of the Court’s inquiry focuses on whether the expression in question communicated government endorsement of religion. *Lupu, supra* note 93, at 808-10.

216. *See Santa Fe*, 530 U.S. at 294 (explaining that this tradition in a heavily Baptist county was challenged by two families, one Catholic and the other Mormon).

question was not the private expression of the student chaplain, but had the appearance of school approval.²¹⁷ The Court noted that the policy through which the student prayer-leader was selected encouraged religious messages.²¹⁸ Because most students at the school would undoubtedly believe that the school supported the pre-game prayer, the Court found that the practice violated the Establishment Clause.²¹⁹

2. *Endorsing 12-Step programs in prison*

One lower court has used the Endorsement Test to scrutinize the religious nature of mandatory 12-Step programs in the prison context, and found improper government endorsement.²²⁰ In *Griffin v. Coughlin*, the Court of Appeals of New York emphasized that a secular objective would not rescue a program that delivered a religious message from Establishment Clause scrutiny.²²¹ Defining the test, the court explained, “[a]n endorsement violating the Establishment Clause can be determined by examining whether the message that the government’s practice communicates may be fairly understood as favoring or promoting religion.”²²² Based on this criterion, the court found that the prison practice of conditioning expanded family visiting privileges on participation in Alcoholics Anonymous upset the neutrality principle underlying the Establishment Clause.²²³ In choosing to promote the 12-Step program, prison managers essentially choose to favor a religious message.²²⁴

3. *Applying the Endorsement Test to the drug court setting*

Where drug courts mandate, or even encourage participation in a religious activity, without simultaneously providing a secular alternative, this constitutes endorsement. As the Supreme Court held in *Allegheny*, the Establishment Clause prohibits the government from

217. See *id.* at 302 (noting that there was a specific school policy authorizing the student-led prayer, and that the prayer was delivered on government property at government-sponsored events).

218. *Id.* at 306.

219. *Id.* at 308.

220. *Griffin v. Coughlin*, 673 N.E.2d 98, 105 (N.Y. 1996).

221. See *id.* at 107-09 (explaining that the fact that the 12-Step program was primarily for rehabilitation did not affect the investigation of its religious components).

222. *Id.* at 108.

223. *Id.* at 106-07.

224. See *id.* at 108 (explaining that a “mandatory, exclusive program” with religious components “favors inmates who adhere to those beliefs, and symbolically condones the religious proselytizing those expressions literally reflect”).

taking a position on religious issues.²²⁵ When a judge recommends participation in a religious activity as a way for an individual to overcome an addiction, the judge is essentially telling the individual that the values promoted in the activity are those by which he must live in order to extricate himself from criminal justice scrutiny.²²⁶ Within 12-Step programs, participants are instructed to adopt a particular belief system, and court endorsement of the program creates the unmistakable appearance of endorsement of that belief system.²²⁷ This kind of government expression sends a message to nonbelievers that “they are outsiders, not full members of the political community,”²²⁸ and thus violates the Establishment Clause.

The Endorsement Test does not prohibit the state from offering a 12-Step program as one rehabilitative option.²²⁹ The test does, however, prohibit the government from offering only a religious-based program in the drug court context.²³⁰ As in *Allegheny*, where the presence of several symbols negated the potential message of government endorsement of religion, a presentation of a different program option undermines any suggestion that the government prefers religion over non-religion.²³¹ Therefore, if a drug court provides non-religious alternatives to the 12-Step program, and does not promote one over the other, it will withstand scrutiny under the Endorsement Test.²³²

225. See *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (noting that the Establishment Clause also prevents the government from making religious practice relevant to an individual’s political standing).

226. See Steen, *supra* note 148, at 62 (emphasizing the role of the judge in both fashioning the treatment protocol and enforcing it). A judge’s role in drug court is not only to ensure that a client completes a program, but it is also to praise the client for successful behavior in the program and to help the client understand the dangers of lapsing from it. *Id.*

227. See Stanton Peele, *Foreword* to REBECCA FRANSWAY, 12-STEP HORROR STORIES: TRUE TALES OF MISERY, BETRAYAL, AND ABUSE 5-10 (2000) (describing the pressure new 12-Step group members feel to adopt the values of the group, and referring to these programs as group “coercion and brainwashing”), available at <http://www.peele.net/lib/twelve.html>.

228. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

229. See Apanovitch, *supra* note 11, at 815-16 (noting that it may be constitutional for states to offer religious programs in prisons as long as there are secular alternatives available and the overall system is neutral). Apanovitch argues, however, that the principle of government distance from religion would be better served if only secular programs were offered. *Id.* at 839-41.

230. *Id.* at 815-16.

231. See *County of Allegheny v. ACLU*, 492 U.S. 573, 616-20 (1989) (finding that the grouping of a Chanukah menorah with secular symbols on city property did not convey government endorsement of religion).

232. *Id.*; see Smith, *supra* note 76, at 327-28 (describing a choice of programs as a “constitutional cure” to an Establishment Clause violation); see also Calabro, *supra* note 13, at 611 (arguing that while the state has a high interest in rehabilitating substance abusers, its interest in doing so exclusively via Alcoholics Anonymous

IV. 12-STEP DOMINANCE AND THE IMPORTANCE OF ALTERNATIVES

Despite the constitutional problems with 12-Step programs, they remain incredibly popular as part of many addiction recovery plans.²³³ One of the primary reasons for this reliance is the cost. The programs are either virtually or totally free both to participants and the courts,²³⁴ with any costs accrued borne by small donations from members.²³⁵ Furthermore, the programs have a wide range, and exist in nearly every corner of the United States.²³⁶

In addition to their low cost and convenience, 12-Step programs are widely regarded as successful.²³⁷ Although there is little formal research on the approach,²³⁸ it is clear that the programs have helped thousands of people.²³⁹ While studies indicate that results are mixed,²⁴⁰ many people benefiting from the programs are true

participation, without alternatives, is unacceptable).

233. See MILTON A. MAXWELL, PH.D., *THE AA EXPERIENCE: A CLOSE-UP VIEW FOR PROFESSIONALS 1* (Thomas H. Quinn & Michael Hennessey eds., 1984) (describing the powerful influence of the 12-Step method in the addiction recovery field, and suggesting that it is crucial for treatment professionals to understand the features of the 12-Step “phenomenon”).

234. See Ethan G. Kalett, *Twelve Steps, You're Out (of Prison): An Evaluation of “Anonymous Programs” as Alternative Sentences*, 48 HASTINGS L.J. 129, 148-49 (1996) (exploring the reasons behind the growing connection between 12-Step programs and the criminal justice system). Because these programs are run by volunteers, they relieve the criminal justice system of many financial and administrative expenses. *Id.* at 148. Additionally, professionals widely accept 12-Step programs as an effective way to fight addiction. *Id.* at 149.

235. See *id.* at 140 n.64 (explaining that “corporate poverty” was a deliberate decision by the young Alcoholics Anonymous organization so that they would not be distracted from their primary mission of helping persons addicted to alcohol).

236. See, e.g., Alcoholics Anonymous, *A.A. Fact File*, at http://www.alcoholics-anonymous.org/default/en_about_aa_sub.cfm?subpageid=12&pageid=24 (last visited Aug. 28, 2004) (on file with the American University Law Review) (estimating that they have over 100,000 groups worldwide); Narcotics Anonymous, *Information About NA*, at <http://www.na.org/basic.htm> (last visited Mar. 30, 2004) (on file with the American University Law Review) (reporting that, as of 2002, there were approximately 20,000 known groups, holding over 31,000 weekly meetings).

237. See Alisdair MacKenzie & Richard P. Allen, *Alcoholics' Evaluation of Alcoholism Treatment*, 21-2 ALCOHOLISM TREATMENT Q. 1 (2003) (reporting that in a study of the recommendations and criticisms of treatment clients, clients recommended Alcoholics Anonymous as one of two preferred treatment components).

238. See WHITE, *supra* note 10, at 156 (explaining that the singleness of purpose and tradition of anonymity complicate, if not outright preclude, the types of research that behavioral health scientists would like to do on the 12-Step model). However, Alcoholics Anonymous itself has published that of its dedicated members, fifty percent became and remained sober, while twenty-five percent became sober after some relapses. *Id.*

239. See Alcoholics Anonymous, *Do You Think You're Different*, at http://www.alcoholics-anonymous.org/default/en_about_aa.cfm?pageid=12 (last visited Mar. 30, 2004) (on file with the American University Law Review) (rebutting the lack of objective data with numerous anecdotal stories of individual success).

240. See, e.g., Don McIntire, *How Well Does A.A. Work? An Analysis of Published A.A. Surveys (1968-1996) and Related Analyses/Comments* 18-1 ALCOHOLISM TREATMENT Q. 1 (2000) (concluding that the effectiveness of 12-Step programs remains unproven);

believers attributing their own recoveries to the 12-Step method and assuming it is also the best approach for other substance abusers.²⁴¹

There are effective alternatives to 12-Step programs, however, even for reluctant clients. A number of programs have been developed specifically in response to perceived weaknesses and client objections to Anonymous programs.²⁴² These alternative self-help support groups include Secular Organizations for Sobriety (S.O.S.),²⁴³ Women For Sobriety,²⁴⁴ SMART Recovery,²⁴⁵ and Rational Recovery.²⁴⁶ While there is little reliable data on the effectiveness of any of these

Chad Emrick, *Overview: Alcoholics Anonymous, in* RECENT DEVELOPMENTS IN ALCOHOLISM, VOLUME 7, TREATMENT RESEARCH 3, 4 (M. Galanter ed., 1989) (reporting that while Alcoholics Anonymous membership often results in high rates of abstinence, professionals are not able to reliably predict who will affiliate with the organization and who will be helped by it).

241. See BUFE, *supra* note 56, at 65 (suggesting that most people who have used 12-Step programs to support their abstinence, including recovered addicts-turned-counselors, believe recovery is not possible without going through the 12-Steps).

242. See WHITE, *supra* note 10, at 156-57 (exploring some of the criticisms of the 12-Step method that have inspired others to create alternatives). For instance, many feel that the religious concepts of Alcoholics Anonymous alienate and drive off non-believers, that Alcoholics Anonymous replaces one dependency/addiction with another, and that reliance on the "Higher Power" prevents individuals from developing their internal strengths and competencies. *Id.*

243. See Laura Flynn McCarthy, *Beyond AA: Alternatives for Alcoholics Who Resist the Program's Religious Approach*, HEALTH MAG., July/Aug. 1991, at 40, 43 (describing S.O.S. as one of the original alternatives to 12-Step programs, with meetings in many locations across the United States); see also BUFE, *supra* note 56, at 177 (explaining that people displeased with 12-Step groups often attend S.O.S. meetings to vent about the condescension and hostility they experienced in 12-Step groups, but facilitators are skilled at steering discussions back to methods of staying sober).

244. See Mary Jeffrey Stevens, *Alternatives to AA: Other Models for Dealing with Addictions*, at <http://www.uic.edu/orgs/convening/AA.htm> (last visited Mar. 30, 2004) (on file with the American University Law Review) (endorsing the Women For Sobriety approach, with its Thirteen Statements of Acceptance that "help members become more self-reliant in everyday life and achieve a lasting and successful recovery"); BUFE, *supra* note 56, at 185 (describing this group as one that focuses on empowerment of women addicts, based on the premise that women have different emotional reasons for using substances, and require a different kind of recovery support).

245. See SMART Recovery, at <http://www.smartrecovery.org> (last visited Mar. 30, 2004) (on file with the American University Law Review) (defining their purpose to provide support for those who want to abstain, or are considering abstinence from addictions, by changing individual behavior to achieve satisfaction and quality of life); see also BUFE, *supra* note 56, at 178-79 (explaining that the SMART program is based on cognitive behavioral self-help methods that allow participants to build motivation, cope with urges, learn to manage desires and actions, and build a balanced, happy life).

246. See Stevens, *supra* note 244 (providing an overview of the Rational Recovery approach as one that emphasizes individual power and encourages group participation to be limited to the short-term); BUFE, *supra* note 56, at 172 (reporting that Rational Recovery is based on experiences of people who recovered without help of any program and that it teaches individuals to recognize and overcome their "addictive voice" that spurs them into addictive behaviors).

approaches, anecdotal information and the rapid spread of some of these programs suggest their potential.²⁴⁷

The most significant hurdle for drug courts hoping to offer an alternative to the 12-Step program is availability. While 12-Step programs are nearly everywhere,²⁴⁸ the alternatives suggested above still have limited range.²⁴⁹ Each organization does, however, offer support in starting new groups, and some offer internet meetings or discussion groups.²⁵⁰

Finding a way to offer one of these secular alternatives in drug courts will eliminate any Establishment Clause issue.²⁵¹ More importantly, however, from a policy perspective is the expectation that having alternative approaches is likely to yield better rehabilitation results.²⁵² 12-Step programs work for many people, but not for everyone.²⁵³ Unfortunately, addiction research has not revealed what type of program will work best for each person, but there is evidence that those who are personally invested in their recovery achieve better results.²⁵⁴ Thus, programs that alienate

247. See *id.* at 168 (noting that, while in 1980 Women for Sobriety was the only secular alternative to the 12-Step approach, there are a number of choices now, all of which report numerous victories in the fight against substance abuse). These alternative organizations function, like the 12-Step programs, as self-help support groups and are offered free of charge or at little cost. *Id.*

248. See *supra* note 236 and accompanying text (discussing the prevalence of 12-Step programs and reviewing the number of groups and meetings of popular organizations).

249. See, e.g., *SMART Recovery*, *supra* note 245 (listing only 300 face-to-face meeting groups worldwide); *S.O.S.*, at <http://www.cfiwest.org/sos/asp/result.asp?listtype=ListAll> (last visited Mar. 30, 2004) (on file with the American University Law Review) (listing only 122 meetings across the country).

250. See, e.g., *SMART Recovery*, *supra* note 245 (listing at least one internet chat or live voice online meeting each day of the week); *Rational Recovery*, at <http://www.rational.org/faq.html> (last visited Apr. 19, 2004) (on file with the American University Law Review) (offering online discussion groups with the caveat that they are not intended to serve as a permanent support resource, as the Rational Recovery program is intended to empower individuals to function without life-long reliance on support groups).

251. See, e.g., *O'Connor v. California*, 855 F. Supp. 303 (C.D. Cal. 1994) (holding that the state did not violate the Establishment Clause by promoting a program with religious overtones when there were some, however few, secular alternatives).

252. See Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1226-28 (2002) (reporting on the perceived strengths and weaknesses of several treatment modalities, including therapeutic communities, pharmacological treatment, and inpatient treatment).

253. See Peele, *supra* note 227 (introducing stories of individuals that had unsuccessful experiences with 12-Step programs because they were pressured to accept pro-forma explanations of their troubles and were convinced that any hesitation on their parts to admit their addictions or embrace the 12-Steps was destructive denial).

254. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES 35: ENHANCING MOTIVATION FOR CHANGE IN SUBSTANCE ABUSE

participants, or pressure an unwanted belief system on them are unlikely to assist individuals in overcoming their addiction.²⁵⁵

CONCLUSION

Drug Court evaluations suggest that the innovative combination of criminal and addiction rehabilitation concepts is making a difference in the criminal justice system, and that drug courts are meeting their goal of reducing recidivism.²⁵⁶ The problems associated with mandated 12-step participation need not interfere with these positive results. Fortunately, solving the problems associated with encouraging participation in religiously-oriented 12-Step programs is easy: to defeat both the Coercion Test and the Endorsement Test, drug courts need only offer a secular alternative when assigning a 12-Step program as a treatment component.²⁵⁷ By offering a drug court participant the choice between religious and secular support groups, the state maintains its neutrality²⁵⁸ and provides the participants a better chance of treatment success.²⁵⁹

Although this solution is not complicated, courts have been slow to recognize the issue, due in part to the prominence of 12-Step recovery programs, as well as misunderstandings about their religious

TREATMENT 5 (1999) (reporting on longitudinal research that indicates that an individual's level of motivation is a "very strong predictor" of whether she or he will succeed in changing addictive behaviors).

255. See BUFE, *supra* note 56, at 65 (noting, however, that many formerly nonreligious members of Alcoholics Anonymous undergo a type of religious conversion during the program because while healthy, well-adjusted people normally do not change their views, it is not unusual for those in emotional crises to radically alter their beliefs).

256. See STEVEN BELENKO, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 1 (Nat'l Center on Addiction and Substance Abuse at Columbia U. ed., 2001) (reporting, based on the considerable amount of research there is on each drug court, that drug use and criminal activity are reduced while defendants are in the program), *available at* <http://www.drugpolicy.org/docUploads/2001drugcourts.pdf>. Further, the fewer studies that do exist on long-term impacts tend to show a reduction in recidivism among persons who participated. *Id.* Other benefits attributed to drug courts are cost savings and the collaboration they bring to how the criminal justice system addresses drug offenders. NATIONAL DRUG COURT INSTITUTE, DEVELOPMENT AND IMPLEMENTATION OF DRUG COURT SYSTEMS 7 (1999).

257. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 655-56 (2002) (revealing that non-religious alternatives render the Coercion Test defeated); *O'Connor v. California*, 855 F. Supp. 303, 308 (C.D. Cal. 1994) (concluding that the ability of the probationer to pick among secular and religious programs meant the government had not endorsed a religious one).

258. *Id.*

259. See Steen, *supra* note 148, at 64-65 (emphasizing the large role that moral involvement with treatment can play in a substance abuser's recovery). Study results show that successful clients in their treatment programs seem to be morally involved in drug court. *Id.* at 64.

nature.²⁶⁰ Because drug courts are a court-produced phenomenon, the best solution will be one that similarly comes from the courts themselves.²⁶¹ However, because few have recognized the legal and policy questions related to mandating 12-Step participation, it would be helpful for professional organizations involved in the drug court field to address the issue in their training materials and conferences.²⁶² While each drug court operates alone, they are not isolated from the experience and advice of others, nor are they operating without sources for technical support.²⁶³ While offering alternatives may be easy in large urban areas where non-12-Step programs already exist, in smaller settings the transition could be more challenging.²⁶⁴ Yet, together with the local treatment provider, judges can craft individual solutions to ensure that each treatment protocol will offer appropriate choices for the participant. The best chance participants have for recovery is a creative judge following the latest research, and working closely with treatment providers.

For most drug courts, this change will have little impact. Participating in a 12-Step program is an important, but not irreplaceable, component of the treatment provided to a participant.²⁶⁵ Not only does offering a secular alternative answer the Establishment Clause concerns, but it makes sense to provide drug

260. See BUFE, *supra* note 56, at 65 (noting that while in Alcoholics Anonymous, religion is presented as the primary solution to addiction, this fact is seldom mentioned in either the media or professional journals). When this fact is highlighted in the media, it is often accompanied by the claim that Alcoholics Anonymous' program is not religious, but rather merely spiritual. *Id.*

261. See *supra* notes 17-22 and accompanying text (describing the judicial creation of the drug court model). While a legislative directive to provide alternatives to 12-Step programs could be effective, it would require a legislature to single out the 12-Step model in order to ensure that any restrictions imposed would have the intended effect. It is likely that this would not be a politically palatable move, because of the wide-spread support that 12-Step programs receive, as well as public misconceptions of addiction and recovery.

262. See *National Association of Drug Court Professionals*, at <http://www.nadcp.org/about/> (last visited Mar. 31, 2004) (on file with the American University Law Review) (describing their mission as support and technical assistance for drug courts, and listing training conferences and other resources); *Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project*, at <http://spa.american.edu/justice/drugcourts.asp> (last visited July 30, 2004) (on file with the American University Law Review) (listing facilitation of discussion on issues of concern, individual consultations, and responses to information requests among the services offered).

263. See, e.g., *National Drug Court Institute*, at <http://www.ndci.org/aboutndci.htm> (last visited Mar. 30, 2004) (on file with the American University Law Review) (providing numerous training and technical assistance opportunities for new and established drug courts).

264. See, e.g., *SMART Recovery*, *supra* note 245 (listing current programs primarily in large urban areas); *Rational Recovery*, *supra* note 250.

265. See *supra* notes 241-47 and accompanying text (describing alternatives to 12-Step programs).

2004]

ENDORSING RELIGION

1101

court participants with the chance to become involved in a support group with which they are comfortable. This will increase their chances of successful treatment, which in turn will increase the likelihood that they will not go back through the revolving door of drug use, crime, and punishment.²⁶⁶

266. See NOLAN, JR., *supra* note 29, at 39 (describing the drug court movement as a “revolution” in criminal justice because of the innovative collaboration between the fields of addiction treatment and criminal justice).