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## Secular Dissent: Protecting Non-Believers from Coercive Religious Parole Programs

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# COMMENTS

## SECULAR DISSENT: PROTECTING NON-BELIEVERS FROM COERCIVE RELIGIOUS PAROLE PROGRAMS

Phillip Grudzina\*

*It is common practice for states to contract with third party organizations to run their parole rehabilitation programs. A majority of these organizations emphasize religious themes as a means of recovery from alcohol and substance abuse problems. However, for parolees who reject a belief in God, there are rarely any secular alternatives available. Those whom object are often given the choice between forced participation in religious activities or revocation of their parole. For years, courts have held that such practices violate parolees' First Amendment rights. Nonetheless, most states have failed to implement policies to prevent such violations from reoccurring. Due to the country's increasingly secular population, it is becoming more important that states do so. Existing laws, such as the Religious Land Use and Institutionalized Persons Act, should be used to guide new reforms to protect parolees whom object to religious rehabilitation programs.*

### TABLE OF CONTENTS

INTRODUCTION.....	566
I. THE CONSTITUTIONALITY OF RELIGIOUSLY AFFILIATED PAROLE PROGRAMS: SCHOLARSHIP AND CASE LAW .....	570
II. EXISTING LAWS, RULES, AND REGULATIONS GOVERNING PAROLE PROGRAMS & PAROLEE RIGHTS .....	574
A. State Governments .....	574

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B. Federal Government .....	578
III. CONSTRUCTING NEW RIGHTS AND PROTECTIONS .....	581
A. Costs and Benefits: Religious Contractors are Successful and Necessary, as well as Constitutional .....	581
B. Statutory Solutions: Lessons from RLUIPA and RFRA .....	586
C. Non-Statutory Solutions: Affirmative Rights and Protections ..	591
CONCLUSION .....	592

#### INTRODUCTION

In early 2007, Barry Hazle completed a one-year prison sentence for methamphetamine possession and was released on parole.<sup>1</sup> As a condition of parole, he was required to complete a residential drug rehabilitation program approved by the California Department of Corrections and Rehabilitation (CDCR).<sup>2</sup> The only program available in his region used a version of the so-called “12-Step Program” pioneered by Alcoholics Anonymous (AA).<sup>3</sup> This rehabilitation model required participants to make various religious affirmations, including a belief in God or higher power.<sup>4</sup> As an atheist, Hazle objected to participating in such a program and requested that he be placed in one with a more secular outlook. But since the CDCR had not approved other rehabilitation programs in his area, his parole officer gave him no choice but to participate in the religious one or return to prison.<sup>5</sup> Upon learning of Hazle’s reservations, program staff told him: “Anything can be your higher power. Fake it till you make it.”<sup>6</sup> When Hazle refused to comply, he was thrown out of the program, declared in violation of parole, and returned to prison, where he remained for an additional 100 days.<sup>7</sup> After filing suit for First Amendment rights violations and six years of ensuing litigation, Hazle’s claim was finally vindicated.<sup>8</sup>

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<sup>1</sup> Hazle v. Crofoot, 727 F.3d 983, 987 (9th Cir. 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Kimberly Winston, *Barry A. Hazle Jr., Atheist, Should Be Compensated By State For Religious Rehab, Says Court*, HUFFINGTON POST, Aug. 27, 2013, [http://www.huffingtonpost.com/2013/08/26/barry-a-hazle-atheist-religious-rehab-california\\_n\\_3818833.html](http://www.huffingtonpost.com/2013/08/26/barry-a-hazle-atheist-religious-rehab-california_n_3818833.html).

<sup>5</sup> *Id.*

<sup>6</sup> Bob Egelko, *Atheist Inmate Settles for \$1.95 Million Over 12-Step Drug Rehab*, SFGATE, Oct. 15, 2014, <http://www.sfgate.com/news/article/Atheist-inmate-settles-for-1-95-million-over-5822767.php> (internal quotation marks omitted).

<sup>7</sup> See Scott Mobley, *Judge: Atheist’s rights violated*, REDDING RECORD SEARCHLIGHT, Apr. 8, 2010, <http://www.redding.com/news/judge-atheists-rights-violated>. Program staff described Hazle as resisting “in a congenial way.” *Id.*

<sup>8</sup> See Ed Mazza, *Barry A. Hazle Jr., Atheist, Wins Nearly \$2 Million In Settlement Over*

After the Ninth Circuit overturned a jury verdict for failure to award damages, Hazle settled with the CDOC and the company that managed the religious rehabilitation program for nearly two million dollars.<sup>9</sup>

Incidents of this sort are increasingly common for two reasons.<sup>10</sup> First, because atheists, agnostics, and other individuals with heterodox beliefs (hereinafter “heterodox prisoners” or “heterodox parolees”) have come to occupy a larger share of America’s religious landscape, it is expected that First Amendment issues like those that Hazle faced will continue to increase.<sup>11</sup> Although heterodox individuals are generally underrepresented in prison populations,<sup>12</sup> higher societal representation will naturally lead to a higher raw number of interactions with the criminal justice system and, specifically, the parole system. Second, and more importantly, the majority of modern parole programs are not organized or implemented by state departments of corrections (DOC) or the Federal Bureau of Prisons (BOP)<sup>13</sup> but rather by third-party institutions, a large number of which incorporate religious teachings and require participating parolees to submit to a higher power.<sup>14</sup> This is because legislatures have sought to offset the financial

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*Faith-Based Rehab Program*, HUFFINGTON POST, Oct. 15, 2014, [http://www.huffingtonpost.com/2014/10/15/barry-a-hazle-jr-atheist-settlement\\_n\\_5987630.html](http://www.huffingtonpost.com/2014/10/15/barry-a-hazle-jr-atheist-settlement_n_5987630.html).

<sup>9</sup> Denny Walsh, *Shasta atheist wins \$2 million settlement over drug program*, SACRAMENTO BEE, Oct. 14, 2014, <http://www.sacbee.com/news/local/crime/article2768782.html>. The jury found for Hazle on the merits but only awarded nominal damages. *Id.* CDOC and the rehabilitation company each paid roughly half of the total settlement figure. *Id.*

<sup>10</sup> See *infra* notes 31, 39–42 and accompanying discussion for similar incidents.

<sup>11</sup> See *U.S. Public Becoming Less Religious*, PEW RESEARCH CENTER (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/#social-and-political-values> (finding that the religiously unaffiliated or “nones” are becoming increasingly secular); see also *“Nones” on the Rise*, PEW RESEARCH CENTER (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (finding that the percentage of Americans identifying as either atheist or agnostic increased from 3.7% to 5.7% from 2007 to 2012 while the overall share of religiously unaffiliated grew from 15.3% to 19.6% in the same period).

<sup>12</sup> Mona Chalabi, *Are Prisoners Less Likely To Be Atheists?*, FIVETHIRTYEIGHT, Mar. 12, 2015, <http://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/> (finding that atheists and agnostics make up only 0.7% of the federal prison population while accounting for about 5.7% of the overall population).

<sup>13</sup> See generally Emily M. Gallas, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U. L. REV. 1063 (2004).

<sup>14</sup> The most prevalent religious rehabilitation model is known as the 12-Step Program. First propagated in the 1930s by American evangelical Bill Wilson, it calls for participants to make twelve successive commitments in order to achieve sobriety. Of the twelve, seven involve God, religion, or prayer. Significantly, God is referred to in the singular and distinguished from the “powerless” alcoholic. Alcoholics Anonymous is the largest substance-abuse rehabilitation organization in the United States. See generally ALCOHOLICS ANONYMOUS WORLD SERVICES, *ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY*

burden associated with containing more prisoners by outsourcing the administration of parole to such contracting third-party institutions.<sup>15</sup> Often, given the lack of alternative institutions, access to parole is essentially contingent on the profession or practice of religious faith. This situation has led to a non-trivial number of individuals—who, like Mr. Hazle, reject some or all religious teachings—to have been found in violation of their parole for attempting to protect their First Amendment rights (hereinafter “heterodox prisoners” or “heterodox parolees”).

Instances of the problem Hazle experienced (hereinafter the “heterodox parolee problem”), however, have not occurred everywhere. Instead, they have occurred more frequently in those states and jurisdictions without any statutory, administrative, or regulatory protections allowing parolees to express philosophical dissent without adverse consequences as compared to those states that have implemented such protections.<sup>16</sup> This Comment argues that these protections are becoming increasingly necessary not only to protect heterodox parolees, but also to protect public budgets, which are strained when parolees initiate costly litigation to vindicate their civil rights. Though a handful of commentators suggest simply banning religious non-profits from administering parole programs to solve the heterodox parolee program,<sup>17</sup> this Comment rejects such an approach as it would achieve the first goal (protecting heterodox parolees) at the expense of the second (protecting public budgets). Rather, this Comment argues that an appropriate solution to the heterodox parolee problem must balance the rights of parolees, on the one hand, with the monetary and administrative interests of government apparatuses on the other.

Part I of this Comment provides background on several issues underlying the heterodox parolee problem. First, it surveys the vigorous scholarly debate on the constitutionality of outsourcing parole programs to religiously and ideologically affiliated non-profits. This part demonstrates a firm scholarly and judicial consensus finding that the practice is unconstitutional where participation in such programs is compulsory. Second, Part I examines the relevant cases, paying particular attention to common features in judicial reasoning and decision-making. This part finds

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THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM (4th ed. 2002). See also CHARLES BUFE, ALCOHOLICS ANONYMOUS: CULT OR CURE? (2d ed. 1998). Narcotics Anonymous, the largest drug-abuse recovery program in the United States, also uses the 12-Step Program.

<sup>15</sup> See generally Gallas, *supra* note 13.

<sup>16</sup> See *infra* Part II for discussion of specific protections.

<sup>17</sup> See, e.g., Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L. J. 459 (2009).

that judges have vindicated parolees' constitutional claims with remarkable consistency, despite the fact that judges have uniformly declined to address the constitutionality of using religious non-profits to administer parole programs generally.

Part II examines the existing laws, rules, and regulations that govern parole programs. By and large, this Comment finds that legislators, bureaucrats, and other official decision makers fail to address the lack of parole protections for heterodox parolees. The handful of protections that do exist constitute a step in the right direction. But most are ambiguous or circuitous, and therefore insufficient for a society that is becoming less Christian and more likely to assert beliefs that conflict with the dominant philosophy of non-profit parole programs.

Part III focuses on the construction of new legal protections for heterodox parolees within the context of the country's existing rehabilitation infrastructure. After analyzing the costs and benefits to the government agencies responsible for corrections and parole, this Comment argues that the best solution to the heterodox parolee problem would not involve—as other commentators have suggested—an outright ban on religious parole programs. Instead, the solution would involve implementing rules and regulations barring penalties for sincere objections to religious parole programs. This Comment argues that existing laws (the Religious Land Use and Institutionalized Persons Act<sup>18</sup> and the Religious Freedom Restoration Act<sup>19</sup>), regulations (Charitable Choice<sup>20</sup>), and administrative rules (CDOC Memorandum Directive No. 08-06<sup>21</sup>) provide strong guidance to this end. Existing laws protect prisoners' sincerely held religious beliefs and provide a framework enabling them to vindicate their rights in court. Given the continuity of focus and wealth of case law, implementing a modified version of the rights established by laws, regulations, and administrative rules provides the best guide for legislative action.

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<sup>18</sup> See Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-1 to -5 (2000).

<sup>19</sup> See Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1993).

<sup>20</sup> See Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants and/or Projects for Assistance in Transition from Homelessness Grants, 42 C.F.R. § 54 (2016).

<sup>21</sup> See CAL. DEP'T OF CORR. & REHAB., MEMORANDUM DIRECTIVE NO. 08-06: PAROLEE PARTICIPATION IN FAITH-BASED DRUG TREATMENT PROGRAMS (2008).

## I. THE CONSTITUTIONALITY OF RELIGIOUSLY AFFILIATED PAROLE PROGRAMS: SCHOLARSHIP AND CASE LAW

Although this Comment emphasizes practical concerns over theoretical ones, the scholarly debate over the constitutionality of using religious non-profits to administer parole programs, and how that debate accords with case law, provides a useful context for thinking about solutions. To the extent that commentators have addressed the topic, there is a clear consensus that religious rehabilitation programs violate the First Amendment's Establishment Clause only when they are effectively compulsory because no alternatives are available.<sup>22</sup> A zealous minority, however, has argued that the use of religious non-profits to administer parole programs is unconstitutional even if alternatives are available.<sup>23</sup>

To the chagrin of commentators arguing for the strict unconstitutionality of religious parole programs, no judge has decided the question. However, when the narrower issue of an individual's constitutional rights has arisen, courts have consistently vindicated the plaintiff's position.<sup>24</sup> As discussed above, Mr. Hazle filed suit under 42 U.S.C § 1983 claiming that his First Amendment rights had been violated when he was returned to jail for 100 additional days for failing to adequately participate in an in-patient drug rehabilitation program administered by a religious non-profit as required for parole.<sup>25</sup> However, Hazle only appealed on the issue of damages because he had already won summary judgment on the substance of his claim.<sup>26</sup> The district court judge awarded summary judgment on the substance of Hazle's claim because there was already a strong consensus that the First Amendment barred state actors from compelling prisoners and parolees to attend religious programs.<sup>27</sup> This part discusses how this consensus has evolved.

Supreme Court cases on the Establishment Clause are generally

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<sup>22</sup> See, e.g., Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L. J. 785 (1997); Rachel F. Calabro, *Correction through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565 (2004); Christopher M. Meissner, *Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment*, 54 CLEV. ST. L. REV. 671 (2006); Michael G. Honeyman, Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437 (1997); Gallas, *supra* note 13.

<sup>23</sup> See, e.g., Henderson-Utis, *supra* note 17.

<sup>24</sup> See *infra* notes 29–40 and accompanying discussion.

<sup>25</sup> See *Hazle v. Crofoot*, 727 F.3d 983, 987–90 (9th Cir. 2013).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

organized into two categories.<sup>28</sup> The first involves the government attempting to “coerce anyone to support or participate in religion or its exercise.”<sup>29</sup> Such cases arise when “the state is imposing religion on an unwilling subject.”<sup>30</sup> The Supreme Court has unequivocally held this type of behavior unconstitutional.<sup>31</sup> The second category of cases includes those involving government actors and institutions behaving in a way that benefits religions.<sup>32</sup> At least until recently, the *Lemon* test has been the preferred means of adjudicating these cases.<sup>33</sup> The *Lemon* test evolved from a challenge to the constitutionality of state laws providing aid to private parochial schools. It requires, that to be constitutional, a law must (1) “have a secular legislative purpose,” (2) “neither advance[] nor inhibit[] religion,” and (3) “not foster ‘an excessive government entanglement with religion.’”<sup>34</sup> Although some scholars have suggested that the Supreme Court may be moving away from this test, it is still followed.<sup>35</sup>

Although the Supreme Court has not addressed the issue directly, state and lower federal courts unanimously classify cases involving religious themed rehabilitation in the “coercion” category.<sup>36</sup> The Seventh Circuit—the first appellate court to adjudicate the issue—created the now dominant test for evaluating prisoner and parolee First Amendment claims in *Kerr v. Farrey*.<sup>37</sup> In *Kerr*, an inmate sued a minimum-security prison in Wisconsin that required those convicted of drug-related crimes to attend a rehabilitation program or face removal to a higher security prison.<sup>38</sup> Narcotics Anonymous (N.A.) was the program’s sole facilitator and thus

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<sup>28</sup> See Gallas, *supra* note 13 at 1078–79.

<sup>29</sup> *Kerr v. Farrey*, 95 F.3d 472, 477 (7th Cir. 1996) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (finding official school prayer unconstitutional); *Sch. Dist. of Abington Twp v. Schempp*, 374 U.S. 203 (1962) (finding school Bible reading unconstitutional); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (finding unconstitutional a law that required public officials to affirm belief in the existence of God).

<sup>32</sup> *Kerr*, 95 F.3d at 477–78; see, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977) (finding state law providing aid to private parochial schools unconstitutional); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (finding state law providing aid to private parochial schools unconstitutional with respect to reimbursing public transportation costs of private parochial school students).

<sup>33</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971).

<sup>34</sup> *Id.* at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

<sup>35</sup> See *Honeymar*, *supra* note 22.

<sup>36</sup> See *infra*, notes 47–48.

<sup>37</sup> See *Kerr*, 95 F.3d 472.

<sup>38</sup> *Id.* at 474.

the only option for the inmates required to participate.<sup>39</sup> One such inmate, James Kerr, objected to the consistent references to and invocations of God in N.A.'s rehabilitation program and sued when his access to parole was adversely affected.<sup>40</sup> The district court analyzed Kerr's First Amendment claim, not as a claim that the state was coercing him to participate in a religious exercise, but rather as essentially claiming that the state was acting in a way that benefits religions. Thus, the district court applied the *Lemon* test and, under that test, it ultimately granted summary judgment in favor of the state.<sup>41</sup>

The Seventh Circuit, however, rejected the district court's reliance on *Lemon* and reversed its grant of summary judgment, as the Seventh Circuit treated Kerr's first claim as one alleging that the state was coercing him to follow religion and not just acting in a way to benefit religion.<sup>42</sup> Relying on Supreme Court language from *Lee v. Weisman*,<sup>43</sup> the court held that state coercion claims beg three questions: "[F]irst, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?"<sup>44</sup> The court answered the first question affirmatively, even though N.A. ran the program, because the prison required inmate participation.<sup>45</sup> In response to the second question, the court found that the state had acted coercively by penalizing non-participation with removal to higher security prisons even though Kerr himself was not removed.<sup>46</sup> Finally, the court held that the coercion was religious because the program was "based on the monotheistic idea of a single God or Supreme Being," despite N.A.'s insistence that their God concept could be interpreted secularly.<sup>47</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 475. Kerr was removed to a higher security prison for noncompliance with the rehabilitation program. *Id.*

<sup>41</sup> *Id.* at 476–79.

<sup>42</sup> *Id.* at 479–80.

<sup>43</sup> 505 U.S. 577, 587 (1992) (The "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'").

<sup>44</sup> *Kerr*, 95 F.3d at 479.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 479–80. The N.A. principles repeatedly reference "God, as we understood Him." *Id.* (quoting the twelve steps of the N.A. program). Although the district court interpreted the second clause as compatible with secular concepts such as "willpower within the individual," the Seventh Circuit focused on the phrase's inclusion of the word "Him." *Id.* at 480. It emphasized, "[e]ven if we expanded the steps to include polytheistic ideals, or animistic philosophies, they are still fundamentally based on a religious concept of a Higher Power." *Id.*

All federal appeals, district,<sup>48</sup> and state supreme courts<sup>49</sup> addressing prisoners' and parolees' First Amendment rights have used the standard the Seventh Circuit articulated in *Kerr* to reach the same conclusion on the constitutional question.<sup>50</sup> However, since all heterodox lawsuits name public officials as defendants, the core constitutional issue is, in practice, always linked to and contingent upon a determination of whether the official has qualified immunity. On this question courts have meaningfully evolved since *Kerr*.

The doctrine of qualified immunity provides government officials found to have violated certain rights with immunity from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>51</sup> "Clearly established," the operative phrase, serves as the primary locus for debate. If the right the official violated was "clearly established" at the time of the violation, then the official is not entitled to qualified immunity.<sup>52</sup> If, however, the right the official violated was not "clearly established" at the time of the violation, then the official is entitled to

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<sup>48</sup> See, e.g., *Turner v. Hickman*, 342 F. Supp. 2d 887 (E.D. Cal. 2004) (finding unconstitutional violation where atheist parolee was required to attend NA program); *Alexander v. Schenk*, 118 F. Supp. 2d 298 (N.D.N.Y. 2000) (finding compulsory participation in an AA-based substance abuse program unconstitutional); *Warburton v. Underwood*, 2 F. Supp. 2d 306 (W.D.N.Y. 1998) (finding compulsory participation unconstitutional with respect to a N.A. program); *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784 (E.D. Va. 2002) (finding the conditioning of "good credits" on attending religious programming unconstitutional); *Ross v. Keelings*, 2 F. Supp. 2d 810 (E.D. Va. 1998) (finding unconstitutional a compulsory program emphasizing rehabilitation through spirituality); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029 (E.D. Wis. 2001) (denying summary judgment on atheist parolee's claim that he was unconstitutionally coerced to attend a AA-based rehabilitation program).

<sup>49</sup> See, e.g., *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996) (finding requirement to attend AA meetings to participate in family reunion program unconstitutional); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478 (Tenn. 1997) (finding that inmate stated a claim where he was denied parole for failure to participate in AA meetings).

<sup>50</sup> See, e.g., *Jackson v. Nixon*, 747 F.3d 537 (8th Cir. 2014) (finding that a Missouri nonbeliever's First Amendment rights had been violated when he was denied early parole after withdrawing from a religious rehabilitation program necessary to receive it); *Hazle v. Crofood*, 727 F.3d 983 (9th Cir. 2013) (finding a California atheist's First Amendment rights had been violated when he was returned to prison for refusing to participate in religious exercises during parole program); *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007) (finding that a parole officer had violated a Buddhist parolee's rights by compelling his participation in a religious program despite his objections and request for a secular alternative); *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068 (2d Cir. 1997), *aff'd on reh'g*, 173 F.3d 120 (2d Cir. 1999) (finding required AA meetings unconstitutional).

<sup>51</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>52</sup> *Id.*

qualified immunity.<sup>53</sup> The Supreme Court has clarified that this question must be answered from the perspective of a reasonable public official in the defendant's position.<sup>54</sup>

Because precedent was sparse at the time *Kerr* was decided, the Seventh Circuit ultimately found the rights were not "clearly established," and thus, the officials were immune.<sup>55</sup> Although the broader coercion question was abundantly clear, it had not been answered in a relevant context so case law could not be considered "clearly established."<sup>56</sup> By 2007, however, other courts were becoming less forgiving.<sup>57</sup> In *Inouye v. Kemna*, the Ninth Circuit reversed a district court's grant of qualified immunity to a Hawaiian parole officer emphasizing that case law was almost entirely consistent and that the limited exceptions in existence were either distinguishable or had been abrogated by higher courts.<sup>58</sup> All appellate cases since *Inouye* have denied qualified immunity on the First Amendment question.<sup>59</sup>

## II. EXISTING LAWS, RULES, AND REGULATIONS GOVERNING PAROLE PROGRAMS & PAROLEE RIGHTS

This part focuses on existing legal instruments that affect the constitutional rights of heterodox parolees. Subpart A discusses protections that have been implemented at the state level, most notably by DOCs and administrative agencies in California and Illinois. Subpart B examines actions taken at the federal level, such as the Charitable Choice regulations and executive orders controlling the distribution of money under the Faith-Based Initiatives Program. This Comment ultimately argues that many of the legal instruments discussed in this part provide strong models for additional public actions that can resolve the heterodox parolee problem more comprehensively.

### A. STATE GOVERNMENTS

Despite being thoroughly rebuked by courts, states have been wary to

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<sup>53</sup> *Id.*

<sup>54</sup> See *Anderson v. Creighton*, 483 U.S. 635 (1987); see also *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (finding that case law may be "clearly established" even without an absolute legal consensus).

<sup>55</sup> See *Kerr v. Farrey*, 95 F.3d 472, 480–81 (7th Cir. 1996).

<sup>56</sup> See *id.*

<sup>57</sup> See *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007).

<sup>58</sup> See *id.* at 715–16.

<sup>59</sup> See, e.g., *Jackson v. Nixon*, 747 F.3d 537 (8th Cir. 2014); *Hazle v. Crofood*, 727 F.3d 983 (9th Cir. 2013).

limit their reliance on religious rehabilitation organizations. So far, California is the only state that reacted to First Amendment parolee lawsuits by formally adopting written policies to prevent future civil rights abuses.<sup>60</sup> In fact, it did so twice.<sup>61</sup>

The first time California reacted to a First Amendment parolee lawsuit was in response to the 1994 case, *O'Connor v. California*.<sup>62</sup> The heterodox plaintiff in that case had been convicted of driving while intoxicated and was required to participate in an outpatient alcoholism treatment program.<sup>63</sup> Although CDOC had approved a secular alcoholism program in his area, it was not included on the list of options the corrections officials gave him when he reported for referrals.<sup>64</sup> This had the effect of limiting him to AA or other religious programs.<sup>65</sup> After signing up for one, the heterodox plaintiff took exception to its religious content and filed suit on First Amendment grounds in the U.S. District Court for California's Central District.<sup>66</sup> The district court ultimately held the plaintiff's First Amendment rights were not violated because there was a secular alternative to the religious program in the area.<sup>67</sup>

Even though the district court denied the plaintiff's claim, the state of California took action to protect other heterodox parolees. The state amended California Administrative Code § 9860, which is a regulation issued by the California Department of Alcohol and Drug Programs that deals with the menu of programming options for parolees sentenced to alcohol treatment. The version of the regulation in effect at the time the plaintiff in *O'Connor* filed suit simply stated that corrections officers within each county "shall ensure that a variety of options are available which *take into account the unique needs of each participant*."<sup>68</sup> This language did not immediately call attention to parolees' religious beliefs or lack thereof. However, as a result of the *O'Connor* case, California amended the regulation to more clearly address parolees' religious beliefs or lack thereof.

The amended provision, which came into effect in 1995, addresses this issue in two ways. First, it classifies AA and other 12-Step programs as

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<sup>60</sup> See *infra* notes 62–67 and accompanying discussion.

<sup>61</sup> See *infra* notes 72–75 and accompanying discussion.

<sup>62</sup> 855 F. Supp. 303 (C.D. Cal. 1994).

<sup>63</sup> See *id.* at 304.

<sup>64</sup> See *id.* at 305.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 304–05.

<sup>67</sup> See *id.* at 307–08.

<sup>68</sup> See Honeyman, *supra* note 22, at 468 (emphasis added) (quoting the 1992 version of the provision).

sectarian organizations and then requires counties using such organization to also list available “non-sectarian organizations.”<sup>69</sup> Second, and more importantly, it compels counties to approve a non-sectarian organization if: (1) it has only certified sectarian organizations, or (2) the only available non-sectarian organizations are not accessible to the parolee.<sup>70</sup> The second prong of the amended regulation is particularly remarkable in that it goes farther than any other piece of law by requiring that the non-sectarian parolee programs be “accessible” to the parolee, unlike the previous version of the regulation, which only required that alternative options be made “available.” “Accessibility” is a stricter concept than availability, and thus effectively provides more protection for heterodox parolees.<sup>71</sup>

The second time California took legislative action as a result of a heterodox parolee lawsuit ultimately resulted from a gap in the protection provided by the amended § 9860. The amended regulation operated in relatively small space: it only dealt with outpatient self-help alcohol treatment programs.<sup>72</sup> As a consequence, the regulation did not eliminate the possibility of constitutional rights being infringed upon in other areas of the parole system, such as narcotics and inpatient programs. Barry Hazle, ordered to attend a drug treatment program, fell into this gap about a decade later. This eventually led to California passing its second initiative to address the rights of heterodox parolees.

In November 2008, more than a year after Hazle filed suit, CDOC issued new instructions that barred parole officers from penalizing parolees who refuse to participate in religious or faith-based programs because of their beliefs.<sup>73</sup> With the Ninth Circuit’s 2007 holding in *Inouye* in mind, CDOC spoke unequivocally: “Effective immediately, Parole Agents assigned to the [Division of Adult Parole Operations], shall not require a parolee attend AA, NA, or any other religious based program if the parolee refused to participate in such a program for religious reasons.”<sup>74</sup> Most importantly, the directive stipulated that if a parolee refused to participate on religious grounds, “the parolee shall be referred to an alternative nonreligious program.”<sup>75</sup> Although the directive failed to protect Hazle, it seems to have prevented similar lawsuits since.

To this extent, the directive seems to have been successful, but it has

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<sup>69</sup> *Id.* at 468 & 468 nn.142–44 (quoting the 1995 version of the provision).

<sup>70</sup> *See id.* at 468 & 468 n.145.

<sup>71</sup> *See id.* at 466, 471.

<sup>72</sup> *See id.* at 471–72.

<sup>73</sup> *See* CAL. DEP’T OF CORR. & REHAB., *supra* note 21.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

potential conflicts with CDOC rules governing parolee program placement. Specifically, the CDOC operations manual calls for parolees to be placed in rehabilitation programs based in the same county in which they were incarcerated.<sup>76</sup> There are several exceptions allowing parolees to be placed in other counties, but a lack of secular programs is not among them.<sup>77</sup> Although it may be that the official policy under the operations manual is practically to provide for an exception in the case of secular programs as well,<sup>78</sup> the best practice would be to formally incorporate the directive into the operations manual.

This confusion aside, CDOC has the most robust protections for heterodox parolees in the country. Its strength is especially clear when contrasted with the protections (or lack thereof) in other states. Illinois is the only other state with protections on the books in the rehabilitation context.<sup>79</sup> The Illinois Department of Human Services (IDHS) is responsible for licensing rehabilitative facilities in the state.<sup>80</sup> IDHS's licensing requirements stipulate that all types of facilities must provide patients with a list of their rights.<sup>81</sup> The list must include statements conveying that: "access to services will not be denied on the basis of race, religion, ethnicity, disability, sexual orientation or HIV status," and "the right to refuse treatment or any specific treatment procedure and a right to be informed of the consequences resulting from such refusal."<sup>82</sup> Although heterodox parolees could argue that a failure to place them in a non-religious program constitutes a denial to services on the basis of religion, the argument is tenuous in light of how challenges under this licensing requirement are brought in reality. The vast majority of religious objections handled by state and federal courts are made by individuals that adhere to specific religious creeds, not individuals that reject such belief systems.<sup>83</sup> Furthermore, state corrections officers, like judges, are generally more suspicious of the motives of heterodox individuals who, like adherents of obscure religions, have a hard time establishing the sincerity of their convictions.<sup>84</sup> This probably means that Illinois parolees would have to

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<sup>76</sup> See CAL. DEP'T OF CORR. & REHAB., OPERATIONS MANUAL §§ 81010.1–.2 (2005).

<sup>77</sup> See *id.* § 81010.2.

<sup>78</sup> The relevant policy statement suggests that "[a]n inmate may be paroled to another county if it would be in the best interest of the public *and of the parolee.*" *Id.* (emphasis added).

<sup>79</sup> Patient Rights, ILL. ADMIN. CODE tit. 77, § 2060.323 (2003).

<sup>80</sup> *Id.* § 2060.323(a)

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *supra* notes 48–51.

<sup>84</sup> See *infra* notes 162–163 and accompanying discussion of relevant cases.

resort to filing a lawsuit to vindicate their constitutional rights, like parolees in other states.

## B. FEDERAL GOVERNMENT

The federal government's involvement with parole and rehabilitation systems is principally shaped by its Charitable Choice regulations.<sup>85</sup> Charitable Choice was created by the Welfare Reform Act of 1996.<sup>86</sup> In 2000, the U.S. Department of Health and Human Services expanded it to cover substance abuse treatment providers.<sup>87</sup> Charitable Choice makes religious organizations eligible for federal funding without having to "secularize" as long as they comply with a number of provisions designed to ensure they do not violate the Establishment and Free Exercise Clauses of the First Amendment.<sup>88</sup> Broadly speaking, religious organizations comply with these provisions when they do not "discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief."<sup>89</sup> But as the provision has never been adjudicated, it is unclear what discrimination means in this context. Similarly, Charitable Choice bans organizations from using federal money to engage in "*sectarian* worship, instruction, or proselytization."<sup>90</sup> As the operative term—"sectarian"—is undefined, it is unclear whether this would prevent, for example, a non-denominational Christian prayer as well as a denominational one.<sup>91</sup>

Notwithstanding this lingering confusion, Charitable Choice's most notable feature is unambiguous. Similar to the aforementioned Illinois regulations,<sup>92</sup> Charitable Choice gives program participants the right to object to any treatment.<sup>93</sup> But it goes further. First, it makes clear that this

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<sup>85</sup> See 42 C.F.R. § 54 (2016).

<sup>86</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (2016).

<sup>87</sup> See 42 C.F.R. § 54.1 (2000).

<sup>88</sup> 42 U.S.C. § 290kk-1(b), (c)(1) (2000) ("The purpose of this section is to allow religious organizations to be program participants on the same basis as any other nonprofit private provider without impairing the religious character of such organizations, and without diminishing the religious freedom of program beneficiaries."). Previously, organizations would have to eliminate all traces of religion from their services and charters, and refrain from taking religion into account in hiring decisions to be eligible to receive federal funding. See Meissner, *supra* note 22, at 692.

<sup>89</sup> 42 U.S.C. § 290kk-1(f)(4) (2000).

<sup>90</sup> *Id.* § 290kk-2 (emphasis added).

<sup>91</sup> See Meissner, *supra* note 22, at 692-93.

<sup>92</sup> See *supra* note 28 and related discussion.

<sup>93</sup> See 42 C.F.R. § 54.8(a) (2003).

objection may simply derive from the program's "religious character."<sup>94</sup> Second, when the objection is registered, the program administrators must refer the participant to the controlling governmental body.<sup>95</sup> The controlling government body is then obligated to give the participant access to an acceptable "alternative provider" whose services are of at least equal rehabilitative value.<sup>96</sup>

Although this protection seems to substantially resolve the heterodox parolee problem, its effectiveness is undermined in two ways. First, Charitable Choice regulations only apply to organizations that accept federal money on its terms.<sup>97</sup> As a vast number of private rehabilitation programs do not accept federal money,<sup>98</sup> many are simply not obligated to respect their patients' ideological objections or refer the participants to government officials for alternative treatment. Second, nothing prevents religious programs from working directly with DOCs and drug courts. In fact, 12-Step programs often take this approach with the strategic end of preserving their "sectarian" approach to rehabilitation.<sup>99</sup> Given their low overhead costs, state resources and referrals are more than enough for such programs to prosper. The existence of Charitable Choice's protection gap has abetted and continues to abet the abuse of heterodox parolees' constitutional rights.<sup>100</sup>

In addition to Charitable Choice, another area where the federal government has gotten involved in the heterodox parolee problem is in regard to Federal Bureau of Prisons (BOP) regulations. Although the federal protections against religious rehabilitation programs are easily avoided, the BOP has a record of quickly rolling back other problematic regulations that have been challenged.<sup>101</sup> Shortly after entering the White House, President George W. Bush issued an executive order designed to increase aid to religious charities.<sup>102</sup> Among other things, this expanded the use and capabilities of religious non-profits working in federal prisons.<sup>103</sup> In Iowa, for example, an evangelical Christian non-profit called Inner Change

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<sup>94</sup> 42 U.S.C. § 290kk-1(f)(1).

<sup>95</sup> *See id.*

<sup>96</sup> *Id.* § 290kk-1(f)(1)(A)-(B).

<sup>97</sup> *See* 42 C.F.R. § 54.1.

<sup>98</sup> *See* Gallas, *supra* note 13.

<sup>99</sup> *See* Meissner, *supra* note 22, at 675 n.31 (providing examples of "stealth evangelism").

<sup>100</sup> *See id.* (arguing that Charitable Choice regulations must be made applicable to all treatment centers that accept offenders from any court across the country).

<sup>101</sup> *See infra* note 107 and accompanying discussion.

<sup>102</sup> *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

<sup>103</sup> *See id.*

began offering rehabilitation programs that required prisoners to submit applications.<sup>104</sup> Admittance was contingent on prisoners' agreement to use and study the Bible<sup>105</sup> and those that enrolled received perks like free t-shirts and books, less supervision by prison staff, streaming radio, and increased phone access.<sup>106</sup> Shortly after its implementation, a secularist group sued on behalf of affected Iowa prisoners alleging that the DOC was unconstitutionally discriminating against non-Christians by retaining Inner Change, which was rewarding participants and attempting to indoctrinate those that did not.<sup>107</sup> Within weeks of the district court's ruling that found the program in violation of the First Amendment under the *Lemon* test, the BOP eliminated Inner Change programming in Iowa.<sup>108</sup>

The BOP's rapid response to the district court decision, which took place while the decision was docketed for appeal,<sup>109</sup> was not a signal of broader policy change within the BOP. The BOP continued using religious non-profits like Inner Change in other facilities without providing alternative or equivalent programming for heterodox prisoners and parolees, or otherwise implementing rules to protect their rights.<sup>110</sup> Given abundant scholarly criticism of Bush's faith-based initiatives<sup>111</sup> and unequivocal rejection of funded programs in court,<sup>112</sup> this inaction suggests an insufficient level of respect for taxpayer resources and constitutional rights. Fortunately, however, the problem can be rectified without negating the financial benefits of using religious non-profits to administer rehabilitation

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<sup>104</sup> See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 871 (S.D. Iowa 2006). Inner Change was also active in prisons in Texas, Minnesota, Kansas, Tennessee, Arkansas, and Missouri. The Iowa DOC had hoped to set up their own rehabilitation program "without the overtly religious instruction included in Inner Change," but found that doing so was cost prohibitive and solicited the organization for programming administration. *Id.* at 881.

<sup>105</sup> See Nathaniel Odle, *Privilege Through Prayer: Examining Bible-Based Prison Rehabilitation Programs Under the Establishment Clause*, 12 TEX. J. C.L. & C.R. 277, 278 (2007).

<sup>106</sup> See *Ams. United*, 432 F. Supp. 2d at 901.

<sup>107</sup> *Id.* at 865.

<sup>108</sup> *Morning Edition: Bible-Based Prison Treatment Program Shelved*, NATIONAL PUBLIC RADIO (June 7, 2006), <http://www.npr.org/templates/story/story.php?storyId=5456293>.

<sup>109</sup> The Eighth Circuit affirmed the district court's constitutional holdings, but reversed its order for Inner Change to repay the fees it had accepted. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007).

<sup>110</sup> See, e.g., Scott M. Michelman, *Faith-Based Initiatives*, 39 HARV. J. ON LEGIS. 475 (2002).

<sup>111</sup> See *id.* at 476–78.

<sup>112</sup> See *supra* notes 31–34 and accompanying text.

programming.

### III. CONSTRUCTING NEW RIGHTS AND PROTECTIONS

This part discusses ways of protecting the constitutional rights of heterodox prisoners and parolees in court-ordered rehabilitation programs. It prefers solutions that seek to prevent violations from arising in the first place over solutions that merely improve the ability of injured parties to vindicate their rights in court.

Subpart A argues that the most comprehensive way of protecting constitutional rights requires the continued use of religious service providers as part of each DOC's "menu" of rehabilitative programming. The next two subparts discuss specific solutions to the heterodox parolee problem that can be implemented while still using religious rehabilitative programs. Subpart B focuses on statutory solutions, and argues that there is precedent for congressional action involving the religious rights of prisoners and parolees and that existing legislation provides a proven model for new law tailored to heterodox individuals. Finally, Subpart C focuses on non-statutory solutions as it discusses the role of DOCs and other public administrative entities involved in the administration of prison and parole. This Comment argues that their close proximity to and direct authority over prisoners and parolees gives them the best opportunity to prevent abuse proactively.

#### A. COSTS AND BENEFITS: RELIGIOUS CONTRACTORS ARE SUCCESSFUL AND NECESSARY, AS WELL AS CONSTITUTIONAL

The success of rehabilitation programs is typically measured by examining their effects on recidivism rates: if program participants have a lower recidivism rate than the general inmate population, then the program is generally considered successful.<sup>113</sup> However, although these low recidivism rates may indicate the programs are successful, they do not indicate that the programs are cost effective. In order for these programs to be cost effective, the savings from not having to re-incarcerate or discipline inmates must outweigh the overhead costs of administering the program, which are often considerable. This subpart examines religious and secular rehabilitation programs with these considerations in mind. Taking into account the additional factor of program availability, this Comment argues that the costs and logistics of phasing out religious contractors altogether

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<sup>113</sup> See Kimberly L. Patch, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 165, 190–91 (2013).

create an insurmountable barrier for cash-strapped state DOCs.

It would be difficult to overstate the deleterious consequences recidivism has on the administration of prisons and parole. On average, approximately 28% of inmates released from prison in 2005 were rearrested for a new crime within six months.<sup>114</sup> This figure climbed to 43% within one year of release, 67% within three years, before finally peaking at 76% within five years.<sup>115</sup> Moreover, when the sample of released inmates is limited to those originally convicted for drug-related offenses, the recidivism rate increases even more dramatically.<sup>116</sup>

From the perspective of prosecutors and sentencing judges, recidivism is perhaps the most important factor used in determining the costs and benefits of different sentencing options.<sup>117</sup> In 2010, for example, the Missouri Sentencing Advisory Commission<sup>118</sup> developed a framework, Automated Recommended Sentencing, to encourage judges to consider the costs of sentencing options in light of their predicted recidivism rates.<sup>119</sup> Based on the nature of a convict's crime and criminal history, the sentencing judge is presented with several sentencing options with their respective costs to the state budget.<sup>120</sup> Critically, the costs of a given sentence are listed alongside the historical recidivism rates associated with it.<sup>121</sup> For example, a sentence of five years probation with enhanced supervision has an expected total cost of \$8,960.<sup>122</sup> If, on the other hand, the judge opts for normal supervision over the same timeframe, the total

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<sup>114</sup> *Prisoner Recidivism Analysis Tool: 2005*, BUREAU OF JUST. STAT. (Feb. 4, 2016), [http://www.bjs.gov/recidivism\\_2005\\_arrest/#](http://www.bjs.gov/recidivism_2005_arrest/#) (select the "Analysis" tab and then the "Cumulative Percentages" button). These statistics are derived from data the Department of Justice aggregated from thirty state DOCs.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; see also MATTHEW R. DUROSE ET AL., BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 at 8 (2014) (finding that those originally convicted of drug offenses are the second most likely category of criminals to be rearrested within any of the tracked timeframes, after those convicted of property offenses).

<sup>117</sup> See Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT'G REP. 169, 169–70 (2012).

<sup>118</sup> The Missouri Sentencing Advisory Commission is a public research entity that works alongside Missouri's DOC and Board of Probation and Parole. See *About Us*, MO. SENT'G ADVISORY COMMISSION, <http://www.mosac.mo.gov/page.jsp?id=45464> (last visited Sept. 24, 2016).

<sup>119</sup> See Michael A. Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 FED. SENT'G REP. 161, 161 (2012).

<sup>120</sup> See *id.* at 162.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

expected cost is reduced to \$6,770.<sup>123</sup> In this case, however, the respective recidivism rates of the sentencing options—both exactly 29.7%—would encourage the judge to opt for the cheaper, yet equally effective option.<sup>124</sup> Missouri's Automated Recommended Sentencing system was the first of its kind and is by no means common.<sup>125</sup> The impetus behind it and its generally favorable reception amongst legal experts suggest that recidivism statistics may start to play a larger role in individual sentencing decisions.<sup>126</sup>

Ultimately, however, Missouri's Automated Recommended Sentencing framework is crude and potentially misleading because of its failure to factor long-term costs avoided by rehabilitative sentencing options. As of now, no state DOC, legislature, or administrative agency has sought to scientifically incorporate rehabilitation data into sentencing decisions.<sup>127</sup> Given the dramatic beneficial effects rehabilitation programs have on reducing recidivism rates, this is unfortunate.

Alcohol and substance abuse programs are administered to parolees either on an outpatient or inpatient basis. A large majority of both program types use a version of the 12-Step model.<sup>128</sup> From states' perspectives, referring parolees to such religious-oriented programs is desirable because they are typically cheap, their prices driven down by heavy reliance on volunteer labor and member donations.<sup>129</sup> Many programs, especially of the outpatient variety, are altogether free.<sup>130</sup> But when statewide DOC costs are analyzed, research clearly indicates that both varieties come with significant average costs in raw dollars and cents.<sup>131</sup> In California, for example, a 2000–2001 study of substance treatment centers revealed that the average costs of out- and inpatient treatment for one parolee were \$1,505 and \$6,745 respectively.<sup>132</sup> This data is in line with an analogous study conducted in the state ten years earlier.<sup>133</sup>

Rehabilitative programs' price tags, although significant, are largely justified by the two beneficial effects they have on systemic costs. First,

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<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 162–63.

<sup>125</sup> *See* Branham, *supra* note 117, at 169.

<sup>126</sup> *See id.* at 169–71.

<sup>127</sup> *See* Wolff, *supra* note 119, at 163.

<sup>128</sup> STANTON PEELE ET AL., RESISTING 12-STEP COERCION: HOW TO FIGHT FORCED PARTICIPATION IN AA, NA, OR 12-STEP TREATMENT, 22 (2000).

<sup>129</sup> *See* Gallas *supra* note 22, at 1096–99.

<sup>130</sup> *See id.* at 6.

<sup>131</sup> Susan L. Ettner et al., *Benefit–Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment “Pay for Itself”?*, 41 HEALTH SERVICES RES. 192 (2006).

<sup>132</sup> *See id.* at 202.

<sup>133</sup> *See id.* at 194–95 (discussing and analyzing the previous study).

outpatient and inpatient treatment programs tend to pay for themselves in absolute dollars by reducing the amount of money individuals and institutions have to pay for future medical care associated with substance abuse.<sup>134</sup> When upfront program costs are compared to the predicted medical costs associated with untreated drug addicts and alcoholics, the estimated costs-benefits ratios are quite favorable: for every dollar spent on rehabilitation programs, the state can expect to save (by not having to spend) between six and eleven dollars.<sup>135</sup> Second, both outpatient and inpatient programs tend to lower recidivism rates relative to the general inmate population by a significant margin. In Delaware, for example, parolees who completed an inpatient rehabilitation program were 11% less likely than the state's general inmate population to engage in additional criminal activity.<sup>136</sup> When parolees completing the inpatient program were allowed to participate in an additional outpatient treatment program before release, they had a 31% lower recidivism rate than the general inmate population.<sup>137</sup> This data has been borne out by subsequent studies examining other prison populations in Delaware<sup>138</sup> and other states.<sup>139</sup>

Although these statistics speak volumes about the relative success of parolee treatments programs generally, they do not tell us much about sectarian programs directly. An unambiguous statistical consensus regarding another factor in the rehabilitation process, however, amply fulfills this role: ideological commitment. When parolees' beliefs and convictions comport with the ethos of the rehabilitation programs they attend, the likelihood that they will be incarcerated again declines.<sup>140</sup> This

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<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 201–02.

<sup>136</sup> Steven S. Martin et al., *Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare*, 79 PRISON J. 294, 305–07 (1999).

<sup>137</sup> See *id.* at 307.

<sup>138</sup> See, e.g., James A. Inciardi et al., *Five-Year Outcomes of Therapeutic Community Treatment of Drug-Involved Offenders After Release from Prison*, 50 CRIME & DELINQ. 88, 97–101 (2004).

<sup>139</sup> See, e.g., Michael L. Prendergast et al., *Amity Prison-Based Therapeutic Community: 5-Year Outcomes*, 84 PRISON J. 36, 48–50 (2004) (finding roughly the same difference in recidivism probability between the groups within five years of their release); Harry K. Wexler et al., *Three-Year Reincarceration Outcomes for Amity In-Prison Therapeutic Community and Aftercare in California*, 79 PRISON J. 321 (1999) (finding that inmates who completed a drug rehabilitation were roughly 40% less likely than non-participants and program dropouts to be reincarcerated within three years of their release).

<sup>140</sup> See SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., DEP'T OF HEALTH & HUMAN SERVS., TREATMENT IMPROVEMENT PROTOCOL SERIES 35: ENHANCING MOTIVATION FOR CHANGE IN SUBSTANCE ABUSE TREATMENT xv (1999) (“[L]ongitudinal research

simple, almost intuitive concept has been repeatedly borne out by research.<sup>141</sup> Specifically, when parolees participating in religious rehabilitation programs like AA *already* value religion upon entering the program, the likelihood that they will complete the program and avoid future criminal activity increases.<sup>142</sup> This should not be taken as evidence for the proposition that the religious features of AA and other similar programs drive lower recidivism rates. Although, on the one hand, it highlights the fact that recidivism declines when the philosophical ethos of rehabilitation programs matches the preexisting beliefs and values of their patients;<sup>143</sup> on the other hand, it suggests that recidivism may increase (or, at least, decrease by a smaller rate) when there is discontinuity between program ethos and patient beliefs and values.<sup>144</sup>

Considering this effect associated with the religious nature of rehabilitative programs, there is reason to believe that the average effectiveness of parolee rehabilitation would decline if religious programs were declared categorically unconstitutional as there is a high representation of Christians and other theists in jails and prisons. Without any personal or emotional connection to secular programs, religious parolees would be less engaged with the rehabilitation process and thus more likely to violate their parole or eventually commit another substance-related offense. This insight, when placed alongside the efficacy of religious rehabilitation programs generally, provides a strong public policy justification for allowing DOCs to continue to use such programs, in addition to the fact that the practice is constitutionally defensible.<sup>145</sup>

Nevertheless, the best strategy, according to rehabilitation experts, is for each DOC to develop a “menu” of rehabilitation programs “that are responsive to client’s needs, preferences, and cultural background.”<sup>146</sup> But little evidence suggests that there are sufficient secular program providers in each state to satisfy the demand for parole rehabilitation. There are only a

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suggest[s] that an individual’s level of motivation is a very strong predictor of whether the individual’s substance use will change or remain the same.”).

<sup>141</sup> See, e.g., Jane Witbrodt et al., *Do 12-Step MATO Over 9 years Predict Abstinence?*, 43 J. SUBSTANCE ABUSE TREATMENT 30, 34–38 (2012).

<sup>142</sup> See, e.g., James D. Griffith et al., *A Cost-Effectiveness Analysis of In-Prison Therapeutic Community Treatment and Risk Classification*, 79 PRISON J. 352, 360–62 (1999).

<sup>143</sup> See Witbrodt et al., *supra* note 141, at 36–38.

<sup>144</sup> See *id.*

<sup>145</sup> See *supra* Part I.

<sup>146</sup> Keith Humphreys et al., *Self-Help Organizations for Alcohol and Drug Problems: Toward Evidence-Based Practice and Policy*, 26 J. SUBSTANCE ABUSE TREATMENT 151, 151 (2004).

handful of national secular program providers: SMART Recovery, Rational Recovery, Women For Sobriety, and Secular Organizations for Sobriety (SOS). Collectively, these organizations provide some degree of coverage for each state in the U.S.<sup>147</sup> This coverage, however, lacks depth. The total number of in-person programs is in the hundreds, not thousands.<sup>148</sup> On the other hand, there are tens-of-thousands of religious programs, providing virtually universal on-demand access to rehabilitation services to prisoners and parolees. Moreover, the secular organizations primarily provide outpatient group therapy run by volunteers, not the more intensive inpatient treatment run by specialists.

A flat constitutional bar on religious programs would eliminate the use of religious contractors for both inpatient and outpatient programs, so even if secular groups could sustain the demand for outpatient programs, they could not for inpatient programs. DOCs could, of course, attempt to subsidize the requisite groups to meet their demands. But this would involve expending indeterminable amounts of their already limited resources. Moreover, in light of the well-established importance of ensuring philosophical continuity between programs and their patients, there is little incentive to risk upsetting the rehabilitation infrastructure when the constitutional impetus for doing so is so thin. There is little evidence suggesting that this same philosophical continuity could not be preserved for heterodox parolees by emphasizing shared beliefs and values unrelated to religion. But available data make clear that religion is one of the largest and most important options on the “menu” of rehabilitation programming.<sup>149</sup>

#### B. STATUTORY SOLUTIONS: LESSONS FROM RLUIPA AND RFRA

Since the prospects are slim for widespread state-by-state action to mitigate the threat to heterodox prisoners and parolees, some form of federal action is desirable. Congress intervened twice on behalf of the First Amendment rights of prisoners and parolees. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA).<sup>150</sup> The RFRA barred state and federal governments from imposing a “substantial burden” on one’s “sincerely held religious beliefs” unless they pass a strict scrutiny test.<sup>151</sup> This requires the government to demonstrate that the restriction is the “least

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<sup>147</sup> See Gallas, *supra* note 22, at 1098.

<sup>148</sup> See *id.*

<sup>149</sup> See Humphreys et al., *supra* note 146.

<sup>150</sup> Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb to bb-4 (1994).

<sup>151</sup> *Id.*

restrictive means” of “achieving a compelling government interest.”<sup>152</sup> In 1997, the Supreme Court ruled the RFRA unconstitutional as it applied to the states.<sup>153</sup>

Although the federal government remained bound by RFRA, the ruling left states uncovered until 2000 when Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>154</sup> RLUIPA, which was passed to rectify the RFRA’s constitutional problems, bars state and federal prisons from engaging in the same burdensome behavior and subjects them to strict scrutiny when they do so.<sup>155</sup> Since the Supreme Court upheld the RLUIPA’s constitutionality in 2005,<sup>156</sup> it has become the preeminent tool for religious minorities to protect their religious traditions within prisons and jails, and has been praised by both religious and civil liberties advocates.<sup>157</sup> This subpart argues that there are compelling justifications for congressional action in the area of parolee rights and that RLUIPA provides an attractive model for such action.

As discussed, prisoners and parolees who were penalized for objecting to compulsory participation in religious rehabilitation programs have brought constitutional claims in roughly a dozen states.<sup>158</sup> Despite the near uniform success in court of these prisoner and parolee lawsuits, California is the only state to have independently altered its correctional policies to prevent future First Amendment violations.<sup>159</sup> It is true that the problem of penalizing these heterodox parolees is not particularly old—the first lawsuit was brought in the mid-1990s. But the fact that most of the significant cases—and most of the cases generally—occurred ten or more years ago, suggests that states had a reasonable opportunity to respond, failed to do so, and may continue to be unresponsive. This vacuum of state action provides Congress with ample cause to act. Indeed, there is precedent for intervening in this arena: its decision to enact RFRA and later RLUIPA was motivated by nearly identical concerns.<sup>160</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *See* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>154</sup> *See* 42 U.S.C. § 2000cc (2000).

<sup>155</sup> *Id.*

<sup>156</sup> *See* *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

<sup>157</sup> *See* Derek L. Gaubatz, *RLUIPA At Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J. L. & PUB. POL’Y 501, 506–11 (2004).

<sup>158</sup> *See supra* notes 32–33, 48–50.

<sup>159</sup> *See supra* Part II.A.

<sup>160</sup> *See* Gaubatz, *supra* note 157, at 511 (describing how one of Congress’s primary motives for passing RLUIPA was its concern “that most states were unlikely to implement their own laws promoting the free exercise rights of prisoners”).

Each piece of RLUIPA's substantial burden test is applicable, indeed conducive, to the heterodox parolee context. Although RLUIPA does not define "substantial burden," it incorporated the term's well-established judicial meaning set forth by the Supreme Court.<sup>161</sup> According to the Court, an individual is substantially burdened when she is forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other."<sup>162</sup> More recently, the Court simplified its position and thereby broadened the concept, emphasizing that a "tendency to coerce individuals into acting contrary to their religious beliefs" constitutes a substantial burden.<sup>163</sup> Shrewdly summarizing the relevant body of case law, attorney Derek Gaubatz noted that substantial burdens often manifest in one of two forms: they either "(1) put[] pressure on individuals to modify their religious behavior or (2) prevent[] them from engaging in religious conduct, in a way that is greater than a mere inconvenience."<sup>164</sup> Significantly, RLUIPA's broad definition of "religious exercise" helps distinguish what is "significant," on the one hand, from what is "mere[ly] inconvenien[t]," on the other.<sup>165</sup> The RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>166</sup> This casts a broad net and, to a large extent, eliminates the theological hair-splitting judges have a history of engaging in.<sup>167</sup> Thus, the concept of "substantial burden" provides an attractive model for legislation protecting the constitutional rights of heterodox parolees.

Since the term is defined by abundant and well-established case law, the primary task would simply involve recasting it, so as to protect individuals who do not profess any religious beliefs. Because most of its existing formulations could almost accomplish this task already, this should not pose a complex interpretive problem. But to minimize confusion, Congress must, at minimum, provide clear instructions that foreclose the possibility of absurd interpretations.<sup>168</sup> Factual similarities between all

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<sup>161</sup> See *id.* at 515.

<sup>162</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

<sup>163</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

<sup>164</sup> See Gaubatz, *supra* note 157, at 517.

<sup>165</sup> Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A) (2000).

<sup>166</sup> *Id.*

<sup>167</sup> See Gaubatz, *supra* note 157, at 518–19 (discussing how the RFRA's lack of an analogous definition allowed judges to stymie its intent by requiring that beliefs be central to an inmate's religion to warrant protection).

<sup>168</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 431–32 (1989).

heterodox parolee cases to date<sup>169</sup> strongly suggest that a slightly modified version of the first prong of Gaubatz’s “substantial burden” definition can serve as the foundation for new law. Accordingly, such parolees are “substantially burdened” when they are pressured to engage in a religious exercise that they would otherwise avoid because of their general absence or rejection of religious belief.<sup>170</sup>

The remaining elements of RLUIPA’s religious exercise protection can be imported into the heterodox parolee context with more ease. First, the requirement that religious beliefs be “sincerely held” to merit protection is almost always perfunctory.<sup>171</sup> It originated to prevent members of religions that “are obviously shams” from cynically bringing First Amendment claims.<sup>172</sup> As of now, no judge has questioned the sincerity of heterodox parolees attempting to vindicate their constitutional rights.<sup>173</sup> And despite the relative absurdity of many specific claims made under RLUIPA, they rarely do with respect to religious claimants.<sup>174</sup>

Second, strict scrutiny can be implemented, without modification, in the heterodox parolee context. Under RLUIPA, once plaintiffs demonstrate a substantial burden on their sincerely held religious beliefs, the government bears the burden of passing strict scrutiny.<sup>175</sup> This consists of demonstrating that the burden it has imposed “further[s] a compelling

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<sup>169</sup> Specifically, all relevant cases involve the parolee being pressured to engage in certain religious activities—which modifies their behavior insofar as they previously did not engage in religious exercise—not being prevented from engaging activities their lack of religious belief demands of them. *See supra* Part I.

<sup>170</sup> In the past, the Supreme Court has contrasted religion with “a way of life based on purely secular considerations” and choices that are merely “philosophical or personal” in nature. *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972). Although somewhat pejorative, either of these terms could serve as the operative phrase to appropriately cover non-believers and heterodox thinkers.

<sup>171</sup> *See Gaubatz, supra* note 157, at 521.

<sup>172</sup> *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974).

<sup>173</sup> *See supra* Part I.

<sup>174</sup> *See, e.g., Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009) (accepting inmate’s claim that his Tulukeesh religion was substantially burdened by prison’s refusal to serve him non-soybean-based vegan diet); *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (accepting inmate’s claims that his Ordo Templi Orientis religion was substantially burdened by prison’s refusal to serve him a kosher diet); *Shabazz v. Johnson*, No. 3:12CV282, 2015 WL 4068590 (E.D. Va. July 2, 2015) (accepting inmate’s claims that his Nation of Islam religion was substantially burdened by prison’s refusal to serve him one meal every 24 hours consisting only of “fresh, cooked spinach, cauliflower, rhubarb, eggplant, red cabbage, broccoli, white cabbage, okra, carrot, navy (pea) beans, asparagus, brussel sprout[s], turnip root, browned rice, white corn in its milk stage, [or] whole wheat bread that has been slowly baked twice and then allowed to set for 2–3 days before eaten”).

<sup>175</sup> *See Gaubatz, supra* note 157, at 4.

government interest,” by the “least restrictive means” possible.<sup>176</sup> Both of these concepts are “terms of art” with clearly delineated parameters.<sup>177</sup> Under RLUIPA, courts have recognized relatively few government interests as compelling.<sup>178</sup> Security and orderly administration of prison rules are most widely accepted, but cost and labor sustainability has been successfully proffered on several occasions.<sup>179</sup> One could easily envision a state DOC claiming that providing parolees access to secular rehabilitation programs would be cost prohibitive, especially given the more limited availability of secular inpatient facilities. Standing alone, this argument might carry substantial weight in certain states that have very low demand for secular programming and DOC budgets. But given the operation of the “least restrictive means” element, it is unlikely to be successful. If the circumstances suggest that the government could protect its proffered compelling interest by *any* other means, then it will fail the test.<sup>180</sup> This imposes a high evidentiary burden on the government in the context of a relatively simple demand for non-religious rehabilitation alternatives. At best, a government entity might be able to establish least restrictive means where it already provides some secular alternatives with limited programming options. In this situation, a parolee ordered to complete outpatient treatment might find it logistically onerous to, for example, maintain a job while traveling to meeting locations (leading to an accessibility problem).<sup>181</sup> But it is difficult, if not impossible, to construct a situation where the application of strict scrutiny in the heterodox parolees context would enable government institutions to sidestep its First Amendment responsibilities altogether (and thereby get away with not making any secular programs available).

Finally, RLUIPA requires plaintiffs to “exhaust[] any available administrative remedies” before bringing a claim thereunder.<sup>182</sup> This provision is critical to minimize litigation under the proposed RLUIPA. But

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<sup>176</sup> Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2015).

<sup>177</sup> See Gaubatz, *supra* note 157, at 539–40 (discussing key case law).

<sup>178</sup> See *id.*

<sup>179</sup> See, e.g., *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007); *Muhammad v. Sapp*, 388 F. App’x 892 (11th Cir. 2010); *Williams v. Wilkinson*, No. 96-3715, 1997 WL 809971 (6th Cir. Dec. 18, 1997); *Via v. Wilhelm*, No. 7:11CV00050, 2011 WL 5419709 (W.D. Va. Nov. 9, 2011).

<sup>180</sup> See Gaubatz, *supra* note 157, at 541.

<sup>181</sup> See *Honeyman*, *supra* note 22, at 465–67 (discussing situations where limited programming availability amounts to “de facto” compulsion of religious activity).

<sup>182</sup> Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 1997e(a) (2000).

requiring that parolees exhaust administrative alternatives would make little sense if relevant administrative channels do not already exist. This insight, combined with a recognition that state DOCs must be involved with the process, underscores the importance of supplementing new legislation with new rules and regulations.

### C. NON-STATUTORY SOLUTIONS: AFFIRMATIVE RIGHTS AND PROTECTIONS

Implementing a modified version of RLUIPA's substantial burden and strict scrutiny tests to cover heterodox parolees is an attractive solution. However, because this course of action depends on private litigation for enforcement, it cannot be relied on exclusively to protect rights while also lowering costs. This subpart argues that appropriately crafted administrative rules and regulations offer the cheapest way of protecting the constitutional rights of parolees, and that these provisions can be modeled off of ones that are already in effect at the state and federal levels of government.

If new regulation is to be implemented at the federal level, the most appropriate problem for it to address is the issue of availability, not accessibility. Both concepts are bound up in the constitutional question of whether a given use of a religious program violates the Establishment Clause.<sup>183</sup> Availability relates primarily to de jure religious compulsion, which might include sentencing parolees to specific religious programs or to rehabilitation generally where the government has failed to approve any secular programs.<sup>184</sup> Accessibility, on the other hand, pertains to de facto religious compulsion.<sup>185</sup> This refers to incidents where there are no secular alternatives available in the parolee's state or county.<sup>186</sup> A large portion of state DOCs' responsibilities must be carried out at the county level, with local geography, crime, and infrastructure in mind. It would be demanding too much of the federal government to encourage it to regulate at this level of detail. The federal government can, however, reduce or altogether eliminate the largest availability gaps with a two-prong approach.

First, the federal government should expand the grasp of its Charitable Choice regulations so that they are not as easily skirted by religious contractors and state DOCs. The primary objective of this task would be to expand its formal referral process, which protects dissenters by ensuring that alternative programs are available, not to compel more religious

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<sup>183</sup> See Honeyman, *supra* note 22, at 469.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

contractors to secularize their charters and services.<sup>187</sup> Second, since there are likely to be at least some states that experience budgetary and logistical difficulties in carrying out the first step, the federal government should facilitate compliance and then incentivize further reform. Facilitating compliance should consist of reasonable subsidies to states for the express purpose of rounding out their menu of available parole programs for minimum compliance with the First Amendment. Incentivizing further reform, on the other hand, should offer additional, more flexible funding to state DOCs in exchange for specific commitments to improve their parole infrastructure and thus the level of accessibility their parolees enjoy locally.

#### CONCLUSION

Although the debate about the constitutionality of using religious rehabilitation programs to service parolees has consumed the most time and ink, it is, at least in many ways, one of the least interesting pieces of the heterodox dilemma. Dozens of heterodox parolees have brought more or less the same claims over the past twenty-five years.<sup>188</sup> The vast majority spent years litigating before finally being informed that their constitutional rights had, in fact, been infringed. Although we know that a few, such as Barry Hazle, won highly lucrative settlements and seem to have been decisively vindicated,<sup>189</sup> it is almost certainly the case that most were less fortunate. All of these people probably would have preferred to avoid the punishment they experienced merely for refusing to participate in religious activities. This alone underscores the legal community's responsibility to design and implement new legal instruments that proactively prevent constitutional abuses, not ones that merely facilitate the expensive, arduous process of reactively vindicating rights in court. Furthermore, when one considers the availability of low-risk models to emulate and expand on as discussed in this Comment, the impetus to design such reforms should be impossible to ignore.

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<sup>187</sup> See *supra* Part II.B.

<sup>188</sup> See *supra* notes 31, 37–42 and accompanying discussion.

<sup>189</sup> See Mazza, *supra* note 8.