ADDENDUM

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When published, this article contained the full name of a victim of a sexual crime. At the request of both the victim and the article's author, the Seattle University Law Review has elected to republish the electronic version of this article with the victim's name redacted.

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Seattle University Law Review

NOTE

Between a Man and His God: Violating the First Amendment Through Compelled Behavior Modification

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I. INTRODUCTION

Clifford T. Boone was given a choice. Although he was unaware of it at the time, Boone was offered a choice by the Missouri Department of Corrections: renounce his religious beliefs or be confined to prison indefinitely. Of course, the choice was not put so candidly by the State.

Boone was a convicted sex offender.[1] Although he was accused of sex crimes many times,[2] he was convicted only twice: once in 1989 on a guilty plea for attempted rape, and again in 1993 for rape.[3] His criminal activities extended back to his teenage years and included a wide variety of offenses—mostly related to drugs and prostitution—committed over a period of twenty-five years.[4]

In Missouri, convicted sex offenders are required to participate in the Missouri Sex Offender Program (MOSOP).[5] MOSOP is a twelve-month program that consists of two phases: a three-month psychoeduca-

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1. Boone v. Missouri, 147 S.W.3d 801, 803 (Mo. App. E.D. 2004).

2. Appellant's Statement, Brief and Argument at 22–23, *Boone*, 147 S.W.3d 801 (No. ED 82669).

3. *Boone*, 147 S.W.3d at 803; Brief of Respondent State of Missouri at 8, *Boone*, 147 S.W.3d 801.

4. Appellant's Statement, *supra* note 2, at 9; Brief of Respondent, *supra* note 3, at 8.

5. The Missouri Sex Offender Program, or MOSOP, is a cognitive behavior modification program designed by the director of the Department of Corrections and required for all persons imprisoned for sexual assault offenses. The program was created in 1980 to fulfill the mandate of MO. REV. STAT. § 589.040 (2005). Clifton v. Ashcroft, No. 92-2030, 1993 U.S. App. LEXIS 15498, at *1 (8th Cir. June 29, 1993).

tional phase followed by nine months of cognitive behavioral therapy.[6] MOSOP uses group therapy in an effort to teach sex offenders not to reoffend.[7]

While in prison, Boone "found God."[8] As he became more involved with religion, he "came to believe that he could only live the way of the Bible with the Spirit of God in his body, mind, and behavior."[9] Although he began participation in MOSOP, Boone refused to complete the program, after concluding that it ran counter to his belief that true change could only come through God.[10]

As a result of Boone's failure to complete MOSOP, he was subjected to an end-of-confinement evaluation.[11] Information gathered from this evaluation can then be used against the prisoner for a determination of Sexually Violent Predator (SVP) status.[12] Boone's evaluation, which referred to his belief in God as "internal distortions," was among the evidence used by the State to brand Boone an SVP, and which led to an indefinite extension of Boone's eight-year sentence.[13]

The State of Missouri violated Clifford Boone's right to freedom of religion under the First Amendment[14] by forcing him to choose between indefinite incarceration and participation in a program incompatible with his religious beliefs. Because MOSOP advances the tenets of Secular Humanism, a non-theistic religion, Boone's compelled participation in MOSOP was an unconstitutional burden on the free exercise of his religious beliefs.

Boone asserted his First Amendment claims before the Missouri Court of Appeals.[15] The court's decision, however, was more a referendum on Boone's character than a careful application of the Constitution's religion clauses. Because of the court's shortcuts, dismissive handling of the issues, and misapplication of admittedly inconsistent precedent, a man who has served his entire sentence remains indefinitely incarcerated.

Part II of this Note discusses the facts leading up to *Boone v. State*[16] and the First Amendment arguments raised by Boone. Part III offers a brief historical perspective on religion in the American legal system, em-

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6. *Boone*, 147 S.W.3d at 804.
7. *Id.*
8. Brief of Respondent, *supra* note 3, at 8.
9. Appellant's Statement, *supra* note 2, at 9.
10. *Id.* at 11.
11. *Boone*, 147 S.W.3d at 806.
12. *Id.*
13. *See id.* at 805–06; Appellant's Statement, *supra* note 2, at 37.
14. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.
15. *Boone*, 147 S.W.3d at 804.
16. 147 S.W.3d 801.

phasizing specific developments relevant to Boone's case. Part IV analyzes the court's fatally flawed analysis, and Part V addresses the ramifications of the holding and offers some suggestions.

II. *BOONE V. STATE*

A. Boone's Criminal History and Religious Conversion

Clifford Boone was born and raised in St. Louis, Missouri.[17] From an early age, Boone became involved in a life of crime. At age eighteen, he began to commit a series of street crimes, such as selling drugs, exchanging drugs for sex, and selling the services of prostitutes.[18] From 1964 to 1980, Boone was arrested or charged with a series of crimes, including non-support, armed robbery, fleeing probation, trespassing, destruction of property, assault, receiving stolen property, assaulting a police officer, loitering, and battery.[19] Boone was first charged with a sex crime in 1983, but was acquitted after a trial.[20] He was charged with another sex crime the following year, but the judge dismissed the case, finding the "complainant's testimony to be incredible."[21] From 1986 to 1988 he was arrested, charged, or convicted four more times for battery, theft, possession of cocaine, manslaughter, and burglary.[22]

In 1987, Boone picked up eighteen-year-old [--], who had missed the bus she was waiting for, by promising her a ride home.[23] Instead of giving [--] a ride home, Boone drove toward the riverfront, grabbed [--], and told her he was going to have sex with her.[24] [--] escaped from the car and called the police.[25] Boone pleaded guilty to sexual abuse for the attempted rape of [--] and was sentenced to prison in 1988.[26]

After the attempted rape of [--] but before he entered his guilty plea, Boone was arrested on four additional allegations of rape, none of which ultimately led to charges against Boone.[27] After completing his sentence for the attempted rape, Boone was charged with multiple rapes

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17. Appellant's Statement, *supra* note 2, at 9.
18. *Id.*
19. *Id.* at 22.
20. *Id.*
21. *Id.*
22. *Id.* at 23.
23. *Id.* at 15.
24. *Id.*
25. *Id.* at 16.
26. *Id.* at 23.
27. *Id.*

and multiple sodomies in 1992.[28] Boone was convicted of only one of the offenses, and in 1992[29] he returned to prison to serve an eight-year sentence for the rape of Kathy Brown.[30]

During Boone's first prison stint, he began attending church services and experienced a conversion.[31] Having nowhere else to go and no one else to turn to, Boone became a born-again Christian.[32] During his prison term for the 1992 offense, Boone started to pray in earnest.[33] He completed fifteen bible correspondence courses, participated in prison biblical organizations, and assisted the prison chaplain while attending sermons and bible studies.[34] Boone also earned his GED, completed a Department of Corrections course in anger management, and became a course facilitator.[35]

Reverend Gary McCord, a minister in Belleview, Missouri, had known Boone for ten years and had been assisting him with his correspondence studies.[36] McCord acknowledged that Boone persevered through courses that many other inmates failed to complete because of the substantial work involved.[37] Knowing that many inmates are disingenuous about their religious beliefs, merely using their alleged conversion in an attempt to manipulate their captors, Reverend McCord approaches such "born-again" prisoners with skepticism, but he had no doubts about the sincerity of Boone's devotion and beliefs.[38]

B. Boone's Trouble with Missouri's Sexual Offender Program

The Missouri Sexual Offender Program (MOSOP) is a group therapy program designed to teach prisoners not to reoffend.[39] It consists of two phases: Phase I, a three month psychoeducational phase; and Phase II, nine months of group-structured cognitive behavioral therapy.[40] While serving his eight-year sentence for the rape of Kathy Brown, Boone completed Phase I of the program, but was dismissed from Phase II for

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28. *Id.*

29. Boone was arrested and held in 1992, but not convicted until September 24, 1993. *See* Boone v. Missouri, 147 S.W.3d 801, 803 (Mo. App. E.D. 2004).

30. *Id.*; Brief of Respondent, *supra* note 3, at 8.

31. *See* Appellant's Statement, *supra* note 2, at 9.

32. *Id.*

33. *Id.*

34. *Id.* at 9–10.

35. *Id.* at 9.

36. *Id.* at 10.

37. *Id.*

38. *Id.*

39. Boone v. Missouri, 147 S.W.3d 801, 804 (Mo. App. E.D. 2004).

40. *Id.*

creating a disturbance.[41] Although Boone was given the opportunity to re-enroll in Phase II, he declined to do so because of dissatisfaction with MOSOP.[42]

Boone arranged for alternative sexual offender treatment to commence upon his anticipated release from prison in February 2000.[43] David Holden,[44] the director of counseling services at the Biblical Counseling and Education center in St. Louis, had accepted Boone into his program, which combines cognitive behavioral therapy with Christian counseling.[45] Holden was experienced in counseling sexual offenders, and after evaluating Boone, was convinced of Boone's sincerity.[46] Boone, however, was never released from prison, and is yet unable to participate in Holden's program.

Having served his entire sentence, Boone was scheduled for release on February 18, 2000.[47] Two weeks before his release date, the State of Missouri filed a motion seeking to confine Boone indefinitely as a sexually violent predator.[48] A probable cause hearing was held February 17, 2000, at which evidence was presented regarding not only Boone's 1988 sexual abuse conviction and his 1993 rape conviction, but the other charges for sexual assault that had not resulted in convictions.[49] The court found probable cause to hold Boone, and a jury trial was set.[50] The jury determined that Boone was a sexually violent predator based on the evidence provided, and Boone was committed pursuant to Missouri's SVP statute.[51]

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41. *Id.*; Brief of Respondent, *supra* note 3, at 8.

42. *Boone*, 147 S.W.3d at 804; Appellant's Statement, *supra* note 2, at 8.

43. Appellant's Statement, *supra* note 2, at 11–12.

44. David Holden has a Master of Arts in Counseling and a Master of Divinity from Covenant Theological Seminary. He is a Licensed Christian Counselor and is pursuing a Doctor of Ministry at Westminster Theological Seminary in Philadelphia, Pennsylvania. Center for Biblical Counseling and Education, *at* http://www.cbce.org/about_staff.asp (last visited May 4, 2006).

45. *Id.*; *see* Appellant's Statement, *supra* note 2, at 11–12.

46. Center for Biblical Counseling and Education, *at* http://www.cbce.org/about_staff.asp (last visited May 4, 2006); *see* Appellant's Statement, *supra* note 2, at 11–12.

47. *Boone*, 147 S.W.3d at 804.

48. *Id.* Missouri's SVP statutes allow the State to commit to people convicted of certain sex crimes to state mental facilities after they have served their sentences. After a probable cause hearing, a jury trial is set to determine whether the person qualifies as a sexually violent predator. Upon a unanimous verdict, the prisoner is committed under the supervision of the Department of Mental Health. Each person committed receives an annual examination and a report is provided to the court. These statutes have been upheld on due process, double jeopardy, and ex post facto grounds. *See generally* Robert Bilbrey, *Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem*, 55 J. MO. B. 321 (1999).

49. *Boone*, 147 S.W.3d at 804.

50. *See id.*

51. *Id.* at 805; MO. REV. STAT. § 632.480-513 (2004); Appellant's Statement, *supra* note 2, at 28.

Boone appealed his conviction, arguing that MOSOP is unconstitutional under the First Amendment.[52] According to Boone, MOSOP "establishes a [S]ecular [H]umanist religion based on psychiatry or psychology that is hostile to theistic religious beliefs" in violation of the Establishment Clause.[53] Boone also argued that the State violated the Free Exercise Clause when it used Boone's refusal to participate in MOSOP on religious grounds as a basis for finding SVP status and subjecting him to indefinite commitment.[54]

III. A BRIEF SURVEY OF RELIGION ON THE LEGAL LANDSCAPE[55]

A. Religion Under the First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[56] This single statement creates two prohibitions regarding government and religion:[57] the Establishment Clause, which prohibits state endorsement of religion, and the Free Exercise Clause, which excludes all governmental regulation of religious beliefs.[58] The Establishment and Free Exercise Clauses have been applied to the states by incorporation through the Fourteenth Amendment.[59] Over the years, the tests used to decide when these clauses have been violated have been inconsistently developed and applied.[60]

1. Establishment Clause Analysis Options: More is Less

One of the most commonly used Establishment Clause tests, and the one used by the *Boone* court, is the test developed in *Lemon v.*

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52. *Boone*, 147 S.W.3d at 805.

53. Appellant's Statement, *supra* note 2, at 31.

54. *Id.*

55. This Note does not attempt to provide a comprehensive exposition of religion and law in America. The purpose of the section is merely to draw attention to some of the major developments that provide a foundation for Boone's establishment and free exercise claims.

56. U.S. CONST. amend. I.

57. Byron K. Henry, Note & Comment, *In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 447 (1997).

58. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b).

59. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

60. *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J. dissenting) (explaining that the tension between the Establishment and Free Exercise Clauses is due in part to overly expansive judicial interpretation); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J. concurring) (bemoaning the "strange Establishment Clause geometry of crooked lines and wavering shapes" that the intermittent use of the *Lemon* test has produced). *Id.*

Kurtzman.[61] The *Lemon* court pointed out that the First Amendment does not merely forbid the government from establishing a religion, but also from passing any law "respecting an establishment of religion."[62] Thus, laws that violate the Establishment Clause are not easily identified.[63] Using criteria developed over years of Establishment Clause jurisprudence, the Court crafted a three-part test for establishment questions: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[64]

Lemon v. Kurtzman involved Rhode Island and Pennsylvania statutes that provided state funding to non-public schools intended to cover costs involved in teaching secular subjects.[65] Applying the newly created test, the Court found that the first prong—that the statute have a secular legislative purpose—was satisfied because both statutes had the legislative purpose of enhancing the quality of secular education.[66] The Court then determined that it need not even address the second prong—primary effect—because both statutes involved excessive entanglement between government and religion in violation of the third prong.[67] The Rhode Island and Pennsylvania legislatures recognized the potential that state funds could be used to support religious education functions.[68] To address this risk, the states set up pervasive restrictions to guarantee that state funds applied only to the secular functions.[69] The very restrictions that were put in place to avoid First Amendment violations created the "entanglement" that rendered the statutes unconstitutional.[70]

While the *Lemon* test has never been overruled, the Supreme Court has freely abandoned it on occasion, refusing to be "confined to any single test or criterion in this sensitive area."[71] Such vacillation over when the Court will use the *Lemon* test has left the lower courts without a clear

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61. 403 U.S. 602 (1971).

62. *Id.* at 612.

63. *Id.*

64. *Id.* at 612–13 (internal citations omitted).

65. *Id.* at 606–07.

66. *Id.* at 613.

67. *Id.* at 613–14.

68. *Id.* at 613.

69. *Id.* For example, the Rhode Island program required a "comprehensive, discriminating, and continuing state surveillance" of the religious schools receiving funds to ensure subsidized teachers did not teach religion. *Id.* at 619.

70. *Id.* at 614. Of the Pennsylvania statute, the Court noted that "the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." *Id.* at 621–22.

71. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

standard, reluctant to abandon it, yet inconsistently applying it.[72] This inconsistency has resulted in courts' application of outcome-determinative tests.[73]

The Court redefined the standard for Establishment Clause analysis when it decided *Lee v. Weisman*.[74] At issue in *Lee* was whether a prayer spoken at a school's commencement ceremony violated the First Amendment.[75] Without applying *Lemon*, the Court found that although participation in the ceremony was voluntary, the practice amounted to indirect coercion by the State to participate in the prayer.[76] While coercion is not a necessary element in proving an Establishment Clause violation, government pressure to participate in a religious activity is sufficient to find a violation.[77] In his dissent, Justice Scalia applauded the court for not using *Lemon*,[78] but argued for an "actual coercion" test, as opposed to "indirect coercion," that would find Establishment Clause violations only when a person has been coerced "*by force of law and threat of penalty*."[79] The majority's holding indicated that while the concern of coercion was more pronounced in the school environment, it was not necessarily limited to that context.[80]

The *Lee* decision distinguished, rather than overruled, the Court's earlier decision in *Marsh v. Chambers*.[81] In *Marsh*, the Court held that opening each session of the Nebraska Legislature with a prayer did not violate the Establishment Clause.[82] While the Court based its decision primarily on the rationale of tradition and historical practice,[83] it recog-

72. *See* Henry, *supra* note 57, at 451–52.

73. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

74. 505 U.S. 577 (1992).

75. *Id.* at 580.

76. *Id.* at 594.

77. *Id.* at 604–05 (Blackmun, J., concurring).

78. *Id.* at 644 (Scalia, J., dissenting). Previously, Justice Scalia had decried the Lemon test as:

> [A] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . . The secret of the Lemon test's survival . . . is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.

Lamb's Chapel, 508 U.S. at 399 (Scalia, J., concurring).

79. *Lee*, 505 U.S. at 640–41 (Scalia, J., dissenting). Justice Kennedy, joined by Justice Scalia, among others, also advocated for a coercion test in *County of Allegheny v. ACLU*, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in part and dissenting in part). The important distinction is that Kennedy's coercion test requires a finding of coercion before the Establishment Clause is violated in contrast to the *Lee* Court's "sufficient, but not necessary" reasoning. *Compare id.* at 661 n.1 *with Lee*, 505 U.S. at 604 (Blackmun, J. concurring).

80. *Lee*, 505 U.S. at 592.

81. 463 U.S. 783 (1983).

82. *Id.* at 791.

83. *Id.* at 786. Interestingly, *Marsh* is also an example of an Establishment Clause case in which the Court did not apply the *Lemon* test.

nized that the person claiming injury in that case was an adult and "presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure."[84] The juxtaposition of the two cases draws a fine line demarking the boundary between what does and does not violate the Establishment Clause: an adult who is free to leave is not coerced, while a child who is similarly free to leave is nonetheless subject to indirect coercion.

The "endorsement test" first suggested by Justice O'Connor in *Lynch v. Donnelly* is another test used by the Supreme Court.[85] Justice O'Connor sought to clarify the Court's Establishment Clause doctrine by dividing establishment violations into two principal types: excessive entanglement between the state and religious institutions, and government endorsement or disapproval or religion.[86] Under the endorsement test, the purpose prong of *Lemon* inquires whether the government intends to convey a message of endorsement or disapproval of religion and the effects prong "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[87] A plurality of the Court formally adopted the endorsement test in *County of Allegheny v. ACLU*[88] and despite bitter opposition from some,[89] the Court has continued to make use of it.[90]

The abundance of Establishment Clause tests has resulted in courts' ability to choose the test that is most likely to bring about the result it desires. If a court desires to find a challenged program constitutional, especially in a close case, there is likely to be a test that will conclude the program is constitutional. The opposite is likewise true. Thus, a court deciding an Establishment Clause issue holds a tremendous amount of power—in deciding which Establishment Clause test will be used, the outcome of the issue is also decided.

2. The Right to Free Exercise of Religion

The purpose of the Free Exercise Clause is to protect the "right to believe and profess whatever religious doctrine one desires."[91] The exercise of one's religion, however, often includes the performance of physi-

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84. *Id.* at 792 (citations omitted).

85. 465 U.S. 688, 687–94 (1984) (O'Connor, J., concurring).

86. *Id.* at 687–88.

87. *Id.* at 690.

88. 492 U.S. 573 (1989).

89. *See id.* at 668 (Kennedy, J., dissenting) (referring to the endorsement test as "a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence."). *Id.*

90. *See, e.g.*, Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

91. Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

cal acts,[92] and a person's conduct remains subject to government regulation.[93] In *Employment Division Department of Human Resources v. Smith*,[94] for example, two members of the Native American Church were fired from their jobs because they ingested peyote for sacramental purposes in violation of Oregon's controlled substance statute.[95] They were subsequently denied unemployment benefits because they had been discharged for work-related "misconduct."[96] The Court held that the First Amendment does not require an exemption allowing for the sacramental use of peyote.[97]

An individual cannot use the Free Exercise Clause to avoid compliance with a "valid and neutral law of general applicability."[98] However, even a law that is not neutral and not of general applicability may be constitutional if "justified by a compelling governmental interest" and "narrowly tailored to advance that interest."[99] While the freedom to believe is absolute,[100] the Court has never held that prohibited conduct must be free from government regulation when accompanied by religious convictions.[101]

B. Finding a Workable Definition of Religion—Theistic vs. Non-Theistic

Central to the determination under either religion clause is finding a satisfactory definition of religion for the purposes of the First Amendment.[102] The two religion clauses serve a dual role, at once preventing the government from improperly promoting religion, and at the same time preventing government from interfering with religion.[103] Some argue that there should be two definitions of religion: a narrow one to be used in Establishment Clause cases and a broader one for use in Free Exercise Clause cases.[104] However, because the term "religion" appears only once in the First Amendment, others contend that each guarantee uses the term in exactly the same manner in each instance.[105] Thus, a religion or belief

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92. *Id.*

93. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

94. 494 U.S. 872 (1980).

95. *Id.* at 874; ORE. REV. STAT. § 475.992(4) (1987); OR. ADMIN. R. 855-80-021(3)(s) (1988).

96. *Smith*, 494 U.S. at 874.

97. *Id.* at 890.

98. *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263 (1982)).

99. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).

100. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

101. *Smith*, 494 U.S. at 882.

102. Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?* 70 NOTRE DAME L. REV. 581, 589 (1995).

103. *Id.* at 585.

104. Henry, *supra* note 57, at 447.

105. *Id.*; Esbeck, *supra* note 102, at 589.

system found to be entitled to First Amendment protection under the Free Exercise Clause must be similarly protected under the Establishment Clause.[106]

Courts' interpretation of what belief systems fall within the realm of "religion" has broadened over time. Originally, religious liberty in America was based on Christianity, specifically Protestantism.[107] The pagan beliefs of the Native Americans and African Americans "were not deemed worthy of protection."[108] In 1890, religion was defined by the Supreme Court as requiring "a belief in, and worship of, God as practiced in conventional, well-established Christian religions."[109] As our nation has become more religiously diverse, religion in the eyes of the law is no longer restricted to Christianity, or even to belief in a god.[110]

This expansion of First Amendment protections is further illustrated by two cases involving military conscription, commonly referred to as the "draft cases." The first, *United States v. Seeger*,[111] involved interpretation of the Universal Military Training and Service Act,[112] which allowed draftees to avoid combat training and service if by reason of their religious training and belief they were opposed to war.[113] "Religious training and belief" was defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[114] Not included under the act were views that were merely political, sociological, or philosophical.[115]

Seeger sought exemption under the statute, even though he was openly skeptical about the existence of God.[116] The Supreme Court,

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106. Everson v. Bd. of Ed., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting). Additionally, a dual definition of religion would have the effect of creating a classification of ideas that would receive the benefits of free exercise protection while remaining free from establishment restrictions. Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring). No policy reason supports granting certain belief systems this favored status. *Id. But cf.* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985) ("a less expansive notion of religion [is] required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect.") *Id.* (alteration in original) (*quoting* L. Tribe, *American Constitutional Law* 827–28 (1978)).

107. Grant H. Morris & Ansar Haroun, M.D., *"God Told Me to Kill": Religion or Delusion?* 38 SAN DIEGO L. REV. 973, 979 (2001).

108. *Id.* at 978–79.

109. *Id.* at 982.

110. *Id. See also* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (1969) ("The fact that [Scientology] postulates no deity in the conventional sense does not preclude its status as a religion.") *Id.*

111. 380 U.S. 163 (1965).

112. 50 U.S.C. § 456 (j) (2003).

113. *Seeger*, 380 U.S. at 164–65.

114. *Id.* at 165 (citing 50 U.S.C. § 456 (j) (1985 ed.)).

115. *Id.*

116. *Id.* at 166.

however, allowed the exemption, holding that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[117] Subsequently, the Court in *Welsh v. United States*[118] confirmed and extended that concept, granting conscientious objector status to Welsh even though he "denied that his objection to war was premised on religious belief."[119] Thus, in determining the scope of the Free Exercise Clause, the Court recognized the role of deeply held moral convictions, whether or not those convictions were tied to the traditional Christian God.

The expansion of First Amendment protection to non-theistic beliefs left the lower courts with the daunting task of determining where to draw the line between religion and philosophy. This problem received a thorough treatment in *Malnak v. Yogi.*[120] In *Malnak*, the Third Circuit was faced with deciding whether the teaching of Transcendental Meditation in New Jersey public schools violated the Establishment Clause.[121] Although the per curiam opinion lacked an in-depth analysis, Judge Adams wrote separately, concurring in the result, to address the "novel and important" question presented.[122]

Relying on the more expansive reading of religion developed in the context of free exercise over the previous two decades, Judge Adams identified three indicia that are basic to traditional religions and related to the values encompassed by the First Amendment.[123] First, and most important, is whether the belief system addresses questions of "ultimate concern."[124] Ultimate concerns, such as "the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong" are "likely to be the most 'intensely personal' and important to the believer," and therefore should be "carefully guarded from governmental interference."[125] The second of the three indicia is comprehensiveness.[126]

117. *Id.* at 176.

118. 398 U.S. 333 (1970).

119. *Id.* at 341 (citing Welsh v. United States, 404 F.2d 1078, 1082 (9th Cir. 1968)).

120. 592 F.2d 197 (3d Cir. 1979).

121. *Id.* at 197–98. The course, called Science of Creative Intelligence Transcendental Meditation (SCI/TM) required each student to attend a ceremony called a "puja" at which "the teacher sang a chant and made offerings to a deified 'Guru Dev.'" *Id.* at 198.

122. *Id.* at 200 (Adams, J., concurring). Judge Adams noted that not only was this the first time that the Supreme Court's expanded reading of religion was applied to invalidate a program under the Establishment Clause, but also the first appellate decision to find that a set of ideas constituted a religion "over the objection and protestations of secularity by those espousing those ideas." *Id.*

123. *Id.* at 207–08.

124. *Id.* at 208.

125. *Id.*

126. *Id.* at 209.

Ideas or theories that address one ultimate concern do not rise to the level of religion, while a comprehensive belief system laying claim to an ultimate truth may.[127] The third element identified by Judge Adams is "formal, external, or surface signs that may be analogized to accepted religions."[128] Signs such as formal services, clergy, organization, and observance of holidays meet the third element.[129] Judge Adams notes that while these can be helpful in supporting a conclusion of religious status, because many religions exist without these signs, their absence is not dispositive.[130]

Judge Adams' framework provides a particularly useful tool for analyzing belief systems such as Secular Humanism because it is based on previous Supreme Court precedent and does not limit the concept of religion to a traditional God, yet requires a sufficient resemblance to traditional religions such that it avoids including philosophical ideas.

C. Taking the "Secular" Out of Secular Humanism

Against the background of a newer, more expansive judicial understanding of religion, Secular Humanism does qualify as a religion for the purposes of the First Amendment.[131] Secular Humanism has been described as a world view that espouses the idea, among others, that ideologies and traditions must be "weighed and tested by each individual and not simply accepted on faith."[132] It also promotes "critical reason, factual evidence, and scientific methods of inquiry, rather than faith and mysticism, in seeking solutions to human problems and answers to important human questions."[133] The tenets of Secular Humanism are out-

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127. For example, although it answers an ultimate question, the "Big Bang" theory is not, by itself, a religious idea. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEXAS TECH L. REV. 1, 30–31 (1978) ("Therefore, Secular Humanism is a religion whose doctrine worships Man as the source of all knowledge and truth, whereas theism worships God as the source of all knowledge and truth."); Eric C. Freed, Note, *Secular Humanism, The Establishment Clause, and Public Education*, 61 N.Y.U.L. REV. 1149, 1169–70 (1986) (finding Secular Humanism should be considered a religion under some analyses, but is clearly non-religious under others); B. Douglas Hayes, Note, *Secular Humanism in Public School Textbooks: Thou Shalt Have no Other God (Except Thyself)*, 63 NOTRE DAME L. REV. 358, 368 (1988) (finding Secular Humanism to be a religion under Judge Adams' three indicia); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1209 n.71 (1982) ("The system of beliefs set forth in Humanist Manifesto II . . . is easily characterized as religious.") *Id.* [hereinafter *Secondary Effects*].

132. Council for Secular Humanism, *at* http://www.secularhumanism.org/index.php?section=main&page=what (last visited May 9, 2006).

133. *Id.*

lined in the Humanist Manifesto I, II, and III.[134] Humanist Manifesto II offers, among its list of principles, that "we can discover no divine purpose or providence for the human species. While there is much that we do not know, humans are responsible for what we are or will become. No deity will save us; we must save ourselves."[135] On morals, it states: "We affirm that moral values derive their source from human experience. Ethics is autonomous and situational needing no theological or ideological sanction."[136]

Although it may seem contradictory to classify a belief system labeled "secular" as a religion, John Whitehead and John Conlan offer this explanation: "'Secularism' is nontheistic and 'humanism' is secular because it excludes the basic tenets of theism. Therefore, Secular Humanism is nontheistic. However, while Secular Humanism is nontheistic, it is *religious* becaue [sic] it directs itself toward religious beiefs [sic] and practices, that are in active opposition to traditional theism."[137]

Conservative Christians generally raise the assertion that Secular Humanism is a religion in the context of public education.[138] In *Grove v. Mead School District No. 354*,[139] for example, the plaintiffs objected to using the book *The Learning Tree* in public schools, which they claimed advanced the religion of Secular Humanism while inhibiting their own religion, fundamentalist Christianity.[140] Most courts, including the *Grove* court, have avoided deciding whether Secular Humanism is a religion by finding that even if it is, the challenged practice does not advance that religion.[141]

The Supreme Court has never decided the issue of whether Secular Humanism is a religion for First Amendment purposes.[142] Justice Black,

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134. American Humanist Association: About the AHA, *at* http://www.secularhumanism.org/index.php?section=main&page=what (last visited May 9, 2006).

135. Humanist Manifesto II, *at* http://www.americanhumanist.org/about/manifesto2.php (last visited May 9, 2006).

136. *Id.*

137. Whitehead & Conlan, *supra* note 131, at 30.

138. *See, e.g.*, Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994); Frost v. Hawkins County Bd. of Ed., 851 F.2d 822, 823–24 (6th Cir. 1988); Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985).

139. 753 F.2d 1528 (9th Cir. 1985).

140. *Id.* at 1535.

141. Freed, *supra* note 131 at 1156; *See, e.g.*, *Grove*, 753 F.2d at 1534 ("Secular Humanism may be a religion. The Learning Tree, however, was included in a group of religiously neutral books in a review of English literature, as a comment on an American subculture. Its use does not constitute establishment of religion or anti-religion.") (citations omitted). *Id.*

142. The Court of Appeals for the Ninth Circuit, however, struck down a claim that evolutionism, and more broadly Secular Humanism, were not religions for First Amendment purposes. While noting that the Supreme Court had never held either to be a religion, the decision discussed only the merits of the evolutionism claim, merely mentioning Secular Humanism in passing. *See Peloza*, 37 F.3d 517.

however, wrote in *Torcaso v. Watkins*: "Among religions in this county which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[143] Though this statement lends support to the idea that the Supreme Court would treat Secular Humanism as a religion, Judge Adams on the Third Circuit takes the approach that "*Torcaso* does not stand for the proposition that 'humanism' is a religion, although an organized group of "Secular Humanists" may be."[144]

Lower courts have also given credence to the idea that Secular Humanism is a religion. In 2000, the U.S. Court of Appeals for the District of Columbia assumed for the purposes of its decision that Secular Humanism was a religion, although it did not go so far as to decide that Secular Humanism actually was a religion.[145] Moreover, in 1987, Judge Hand of the U.S. District Court for the Southern District of Alabama concluded in a lengthy, deliberate opinion regarding school textbooks that Secular Humanism was in fact a religion.[146]

Central to Judge Hand's opinion was what he saw as a requirement that students take a leap of faith in accepting the premise advanced by home economics textbooks that morals and values come from within rather than from a higher power.[147]

> The books do not state that this is *a theory* of the way humans make choices, they teach the student that things *are* this way. This claim . . . is not a legitimate scientific claim, but a faith-statement: an assumption based on a particular vision of human nature unrelated to science.[148]

Additionally, Judge Hand noted that the students were required to "accept that the validity of a moral choice is only to be decided by the student" and the faith assumption required to do that was "a religious dogma."[149] Although Judge Hand's opinion was overturned on appeal by

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143. 367 U.S. 488, 495, n.11 (1961).

144. Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring) (noting that even the expanded definition of religion "does not extend so far as to include those who hold beliefs however passionately regarding the utility of Keynesian economics, Social Democracy, or, for that matter, Sociobiology."). *Id.*

145. Kalka v. Hawk, 215 F.3d 90, 98 (D.C. Cir. 2000).

146. Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939 (D. Ala.1987), *rev'd on other grounds,* 827 F.2d 684, 692 (11th Cir. 1987).

147. *Id.* at 986.

148. *Id.*

149. *Id.*

the Eleventh Circuit, the court avoided the question of whether Secular Humanism was a religion.[150]

Although many courts still do not recognize non-theistic beliefs as religions under the Constitution, the door has been opened by the draft cases and those cases discussed above. Until the Supreme Court decides the issue, whether a particular lower court will accept Secular Humanism as a religion is left to that court to decide. The contention that it is a religion, however, has found enough support that courts should not dismiss the issue summarily. That is, however, exactly what the *Boone* court did.

V. ANALYSIS OF THE *BOONE* COURT'S DECISION

The Missouri Court of Appeals' decision consists of a combination of faulty and nonexistent analysis. Whatever one's opinion may be of the correctness of the outcome, the road taken to reach that destination was a shortcut that bypassed thoughtful constitutional analysis. This section describes the court's reasoning, followed by an analysis of how that reasoning was fatally flawed.

A. The Court's Decision and Inadequate Reasoning

In subjecting Boone to civil commitment, the court affirmed the finding of the probate division of the Circuit Court of St. Louis County that Boone was a sexually violent predator, and stated that the Missouri statutes did not violate Boone's rights under the First Amendment.[151]

The court started by evaluating the Establishment Clause claim.[152] It identified the *Lemon* test[153] as the means to determine whether a statute violates the Establishment Clause of the First Amendment.[154] In applying the three-prong test, the court referenced the statute[155] that provides for the development of the MOSOP program and which requires the director of the Department of Corrections to develop a treatment program for prisoners serving time for sexual assaults.[156] The statute further states that the ultimate goal of the program "shall be the prevention of future

150. *Smith,* 827 F.2d at 689 (". . . even assuming that secular humanism is a religion for purposes of the establishment clause, Appellees have failed to prove a violation of the establishment clause through the use in the Alabama public schools of the textbooks at issue in this case."). *Id.*

151. Boone v. Missouri, 147 S.W.3d 801, 805 (Mo. App. E.D. 2004).

152. *Id.*

153. The *Lemon* test requires first that the "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations omitted).

154. *Boone,* 147 S.W.3d at 805.

155. MO. REV. STAT. § 589.040.1 (2004).

156. *Boone,* 147 S.W.3d at 805.

sexual assaults by the participants."[157] According to the court, the first prong of the test—that the statute must have a secular legislative purpose—was clearly met, by the secular purpose of preventing future sexual assaults.[158]

The second prong, that the statute's principal or primary effect must be one that neither advances nor inhibits religion, received little discussion by the court. The court first considered Boone's argument that the effect of MOSOP was to advance the religion of Secular Humanism in violation of the Establishment Clause.[159] The court disagreed with Boone, stating once again, that the "goal of the program is to prevent recidivism in sex offenders."[160] Briefly addressing the third prong, the court found, without discussion, that MOSOP does not excessively entangle the government with religion.[161]

The court then turned to the question of whether compelled participation in MOSOP violated Boone's rights under the Free Exercise Clause of the First Amendment.[162] The court relied on the rule announced in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[163] that "a compelling governmental interest is not necessary to justify a law that is neutral and of general applicability, even if the law has the incidental effect of burdening a particular religious practice."[164] A law that is not neutral or of general applicability "must be narrowly tailored" to advance the state's interest.[165] The court stated that it need not decide the issues of neutrality and general applicability because there was a compelling governmental interest and the law was narrowly tailored.[166] The court found that the "compelling government interest" was to protect the public from future crime.[167]

The court's only support for the proposition that the law was narrowly tailored was the observation that MOSOP is a voluntary program.[168] The court pointed out that failure to complete the program "does

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. 508 U.S. 520, 531 (1993).
164. *Boone*, 147 S.W.3d at 806.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 806. This in spite of statutory language that states: "*All persons* imprisoned by the department of corrections for sexual assault offenses *shall be required to successfully complete* the programs developed pursuant to subsection 1 [MOSOP] of this section." MO. REV. STAT. § 589.040.2 (2004) (emphasis added).

not result in any additional punishment beyond what has already been imposed . . . ; [r]ather, its only effect is to extend the possible early release date."[169] Based on MOSOP's voluntary nature, as well as testimony that Boone posed a high risk of reoffending sexually in the future, the court found that MOSOP was not an unconstitutional infringement on Boone's free exercise right under the First Amendment.[170]

B. Critique of the Court's Analysis

1. The Court Failed the *Lemon* Test

The court's application of the *Lemon* test to Boone's establishment claim was flawed on every level. In deciding that the first prong was met, the court noted the secular purpose of the statute authorizing creation of MOSOP.[171] This reasoning, however, assumes that the director of the Department of Corrections actually developed a program that complied with the statute's requirements. No evidence discussed by the court shows that MOSOP actually meets the secular requirements of the authorizing statute.

The second prong of the test requires a primary effect that neither advances nor prohibits religion. Although the court did not ignore this prong of the test, it failed to apply it. Boone's argument was supported by a report prepared by MOSOP therapists that said that his "internalized distortions prevented him from benefiting from the concepts presented [through MOSOP] and he consistently exhibited resistance to change or things that he did not agree with."[172] In his brief, Boone argued that the therapists had designated his "religious belief that his will must be surrendered to the will of God, not to the will of man" as an "internalized distortion."[173] Mischaracterization of a person's religious convictions should have alerted the court that the program had, or at least may have had, the impermissible effect of inhibiting religion.

Boone argued further that the concepts presented by MOSOP—and that he resisted due to his deeply held religious beliefs—were those championed by the religion of Secular Humanism.[174] Specifically, MOSOP requires participants to accept the idea that through psychology

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169. *Boone*, 147 S.W.3d at 806.

170. *Id.*

171. *Id.* at 805. The court quoted the statutory language of MO. REV. STAT. § 589.040.1: "the ultimate goal shall be the prevention of future sexual assaults." *Id.*

172. *Boone*, 147 S.W.3d at 805.

173. Appellant's Statement, *supra* note 2, at 37. The State responded to this argument with a list of Boone's faults, yet did not specifically deny that the "internalized distortions" included his surrender to the will of God. Brief of Respondent, *supra* note 3, at 12–13.

174. Appellant's Statement, *supra* note 2, at 37.

a person has the power to effect true change from within.[175] This concept is rooted in the tenets of Secular Humanism.[176] First, Secular Humanism denies the relevance of a Deity.[177] Humanists also believe in the supremacy of human reason—the ability of a man to use his own mental faculties to attain truth.[178] Secular Humanism provides that science guides human progress and serves as an alternative to moral absolutes.[179] Finally, the belief in the self-sufficiency and centrality of Man releases Man from any obligations to a Deity.[180] Therefore, there is no need for salvation or theological redemption or transcendent absolutes.[181] For Boone to demonstrate acceptance of MOSOP's concepts, he would have been required to think and act in conformity with these principles. However, Boone's refusal to abandon his religious beliefs in favor of the beliefs advanced by MOSOP was "interpreted by the therapist as 'resistance to . . . things he did not agree with.'"[182]

The court's response to Boone's argument was simply: "We disagree. The stated goal of the program is to prevent recidivism in sex offenders. Boone is unquestionably a repeat sex offender."[183] Although the second prong of the *Lemon* test requires the court to consider the statute's effect, the court failed to do so, instead merely referring to its stated purpose once again. Ultimately, the court made no findings as to the statute's effects, primary or otherwise, and ignored any possible inhibitory effect on Boone's religion or its advancement of Secular Humanism. Equally disturbing, by referencing Boone's status as a repeat sex offender, the court implies that his crimes rendered his religious convictions unworthy of protection. Convicted felons, however, do not surrender their right to freedom of religion under the First Amendment.[184]

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175. Jerry Hoeflein, Associate Psychologist for the Missouri Department of Corrections, who testified for the State at the probable cause hearing, described the cognitive behavior therapy by stating that "if you can change how a person usually thinks about things, you can change the [resulting] behavior." Appellant's Statement, *supra* note 2, at 14. (brackets in original).

176. Though the Humanist Manifesto I, II, and III outline many principles, Whitehead and Conlan have distilled them down to six common elements, or tenets, that apply universally to adherents of the religion of Secular Humanism. Whitehead & Conlan, *supra*, note 131, at 37. Four of those tenets apply to MOSOP's psychological requirement that participants look to within, rather than to God, for change.

177. *Id.*

178. *Id.* at 38.

179. *Id.* at 42.

180. *Id.* at 44–45.

181. *Id.* at 44.

182. Appellant's Statement, *supra* note 2, at 37.

183. *Boone*, 147 S.W.3d at 805.

184. In fact, prisoners are given special protection under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000cc-1 (2000). The RLUIPA prohibits the government from imposing "substantial burdens on the religious exercise of institutionalized persons unless the burdens are the least restrictive means of furthering a compelling government interest."

The third prong of the *Lemon* test requires that the statute must not encourage government to be excessively entangled in religion.[185] The *Boone* court, however, merely stated, without any discussion or explanation, that the prong was satisfied.[186] Due to the court's failure to address the effect prong, the assertion that there is no excessive entanglement is entirely unsupported. In essence, the court decided that Boone's rights under the Establishment Clause were not violated based solely on the first prong of the test: that the statute has a secular legislative purpose. This is wholly insufficient as all three criteria must be met for the program to be upheld.[187]

2. The Court Failed to Address the Heart of the Establishment Claim

The court failed to give due consideration to Boone's claim by omitting any analysis of whether Secular Humanism is a religion for the purposes of the First Amendment and if so, whether MOSOP advances that religion. Certainly, if Secular Humanism was determined by the court to not constitute a religion, the Establishment Clause would not be offended by a program that required adherence to its principles. Similarly, even if the court found that Secular Humanism was a religion, no Establishment Clause violation exists if MOSOP does not advance its tenets. A determination of whether the principal or primary effect of MOSOP advances or inhibits religion cannot be decided without a determination of at least one of these two issues.

The court's failure to address the religious nature of Secular Humanism and whether MOSOP advances its tenets is inexplicable. The court's disregard of these issues is most logically explained by the court's feeling that the Secular Humanism argument was without merit. This position is undercut, however, by the court's own treatment of the case when it first had the opportunity to hear it. When the case first came before the Court of Appeals in April of 2004, the court decided that the Missouri Supreme Court should have jurisdiction because the appeal involved a "real and substantial claim challenging the constitutionality of a

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Anne Y. Chiu, Note & Comment, *When Prisoners are Weary and their Religious Exercises Burdened, RLUIPA Provides Some Rest for their Souls*, 79 WASH. L. REV. 999, 1000 (2004). Although RLUIPA does not factor into Boone's case because he did not file suit under the Act, the court did purport to use the "compelling government interest" and "narrowly tailored" tests required by the Act.

185. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

186. Boone v. Missouri, 147 S.W.3d 801, 805 (Mo. App. E.D. 2004).

187. "As the *Lemon* test is disjunctive, a statute or policy that fails to satisfy any one of this test's three prongs must be struck as violative of the Establishment Clause." Doe by Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999).

Missouri statute."[188] In order for jurisdiction to vest in the state Supreme Court, the claim must be "real and substantial," not merely colorable.[189] Having originally found the claim to be "real and substantial," it does not follow that on remand the court would use shortcuts in its analysis because it felt the argument was without merit.

Moreover, summary dismissal of the argument that Secular Humanism is a non-theistic religion as a non-issue has been precluded by the momentum of its acceptance in the courts and by commentators.[190] Although the Court of Appeals of Missouri is not bound by any court decision that holds that Secular Humanism is a religion, there is certainly enough precedent[191] to merit serious analysis by the court.

3. Choosing the Test According to the Desired Result

Perhaps the most fundamental flaw in the court's consideration of Boone's establishment claim was its initial decision to use the *Lemon* test. The Supreme Court has abandoned it on numerous occasions,[192] so the Missouri Court of Appeals was not restricted to the *Lemon* test.[193] Although the *Lemon* test takes into consideration the principal or primary effect of a statute, it fails to account for secondary effects, or the element of coercion.[194] The role of secondary effects becomes important in the case of a statute whose primary effect is secular, but whose ends are reached through means that clearly advance or inhibit religion.[195] While the primary effect of MOSOP may be to reduce recidivism, its psychological processes may produce diffuse religious effects.[196] The endorsement test would also not suffice in this situation. Because of the general

188. Boone v. Missouri, No. ED82669, 2004 Mo. App. LEXIS 501, at *5 (Mo. App. Apr. 6, 2004).

189. *Id.* at *6. A substantial claim involves "some fair doubt and reasonable room for controversy," while one that is merely colorable "is so obviously unsubstantial and insufficient in either fact or law as to be clearly without merit." *Id.* at *7.

190. *See discussion supra*, section III.C.

191. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961); Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939 (D. Ala. 1987).

192. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

193. In fairness, Boone's brief to the court relied on *Lemon*, arguing that the program "excessively entangle[d] the State in a contest between secular humanism and Christianity." Appellant's Statement, *supra* note 2, at 38. While the State couched its response in terms of the endorsement test, Brief of Respondent, *supra* note 3, at 10, the court's analysis makes no mention of endorsement. *See* Boone v. State, 147 S.W.3d 801, 805 (Mo. App. E.D. 2004).

194. *See* Henry, *supra* note 57, at 473.

195. *See generally Secondary Effects*, *supra* note 131 at 1211–22.

196. *See id.* at 1216 (explaining "diffuse religious effects" in relation to the form of Secular Humanism promoted by Humanistic Education: "because Humanistic Education programs attempt fundamentally to alter the moral orientation of children, they thus are also at least arguably religious") *Id.*

public's ignorance of in-prison rehabilitation programs, the danger of sending a message of state endorsement of a religion is minimal.

The court should have used an approach, like that in *Lee v. Weisman*,[197] in order to better account for the conditions of the prison setting. Although prisoners are adults, and therefore not as susceptible to coercion as schoolchildren, the unique circumstances of incarceration—where walking away is not an option—increase the risk of state coercion. The court should have first determined whether Secular Humanism was a religion, and if so, whether MOSOP advances its tenets, in effect creating a religious exercise. Then, using the *Lee* test, it should have determined whether Boone was coerced to participate in that exercise. Certainly the specter of an SVP hearing and possible indefinite commitment would rise to the level of indirect coercion, if not direct coercion.[198]

4. A Twelve-Step Analogy

Statutes that compel prisoners to participate in twelve-step programs in which they must submit to a "higher power" regardless of their religious beliefs best illustrate the point that the choice of Establishment Clause test determines the outcome. These statutes have been scrutinized under both *Lemon* and *Lee* to strikingly different results.[199]

Courts using the *Lemon* test generally find compelled participation in twelve-step programs to be constitutional.[200] For example, in *Jones v. Smid*[201] the court considered the constitutionality of an alcohol treatment program modeled after the twelve-step concepts used by Alcoholics Anonymous.[202] Jones, who was convicted of drunk driving and sentenced to five years in prison,[203] was given a suspended sentence and probation provided that he reside at a correctional facility while completing a twelve-step program.[204] Relying on the finding in *Stafford v. Harrison*[205] that the twelve-step program is spiritual in nature but is not itself a religion,[206] the *Jones* court applied *Lemon* and determined that the program passed all three prongs.[207] Here, as in *Boone*, the secondary effects of submitting to a "higher power"[208] were not taken into consideration along

197. 505 U.S. 577 (1992).

198. *See* notes 74–80, *supra* and accompanying text.

199. Henry, *supra* note 57, at 454.

200. *Id.* at 462.

201. No. 4-89-CV-20857, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993).

202. *Id.* at *2.

203. *Id.* at *1.

204. *Id.*

205. 766 F. Supp. 1014 (D. Kan. 1991).

206. *Id.* at 1016–17.

207. *Jones*, 1993 WL 719562 at *5.

208. Or to the tenets of Secular Humanism, in Boone's case.

with the secular primary effect of substance abuse treatment. Further, the element of coercion was not given any consideration.[209]

On the other hand, when courts use the *Lee* analysis, which focuses on whether the participant is being coerced by the state to participate in a religious exercise, courts are more likely to find that the programs violate the Constitution.[210] For example, in *Warner v. Orange County Department of Probation*,[211] Warner was convicted of his third DUI and sentenced to three years probation on the condition that he attend Alcoholics Anonymous (AA) meetings at the direction of his probation officer.[212] Warner sued, claiming that compelled attendance at AA violated his rights under the Establishment Clause.[213] The court examined the content of the program, noting that a central theme of the program was emphasis on a higher power, and group prayer, including the Lord's Prayer, which is specific to Christianity, was commonly used.[214] Referencing *Lee*, the court stated that the government "may not coerce anyone to support or participate in religion or its exercise."[215] Without any reference to *Lemon*, the court held that the Establishment Clause was violated because "sending probationers to rehabilitation programs which engage in the functional equivalent of religious exercise is an action which tends to establish a state religious faith."[216]

Following this reasoning, MOSOP, while not a religion in itself, advances the tenets of the religion of Secular Humanism[217] and is therefore the functional equivalent of religious exercise. The State's requirement that Boone participate in MOSOP is therefore equivalent to an establishment of a state religion.[218]

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209. The *Jones* court acknowledged the *Lee* element of coercion, noting that *Lee* involved children and Jones was an adult. While not addressing the idea that compelled attendance was itself coercion, the court seemed to think that the fact that Jones did not have to use the word "God" while submitting to a higher power offered him enough choice that coercion was not an issue. *See Jones*, 1993 WL 719562 at *5.

210. *See* Henry, *supra* note 57.

211. 870 F. Supp. 69 (S.D.N.Y. 1994).

212. *Id.* at 70.

213. *Id.*

214. *Id.* at 71.

215. *Id.* at 72.

216. *Id.* at 73. *See also* Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding required attendance in Narcotics Anonymous a violation of the Establishment Clause).

217. For example, that change comes from within rather than from God. *See* notes 174–81, *supra*, and accompanying text.

218. This holds true even under the more stringent "direct coercion" standard suggested by Justice Scalia in his dissent in *Lee*. Under this standard, the Establishment Clause is violated when a person is coerced "*by force of law and threat of penalty*." Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). *See also* Ralph W. Johnson III, *Lee v. Weisman: Easy Cases can Make Bad Law Too—The "Direct Coercion" Test is the Appropriate Establishment Clause Standard*, 2 GEO. MASON IND. L. REV. 123 (1993). In Boone's case, failure to complete MOSOP resulted

5. The Court's Free Exercise Evaluation Failed

Turning to the free exercise analysis, the court again gave an incomplete and flawed analysis. First, the court was correct in stating that the government can burden one's exercise of religion when the law is either neutral and generally applicable or justified by a compelling government interest and narrowly tailored to advance that interest.[219] The court also correctly stated that there is a compelling government interest in protecting the public from crime.[220] However, the determination of whether the program is narrowly tailored is less clear. The court pointed to the voluntary nature of participation in MOSOP as evidence that MOSOP is narrowly tailored.[221] This is not the case. The statute authorizing MOSOP *requires* participation by *all persons* imprisoned for sexual assault offenses.[222] The court further asserted that failure to complete the program "does not result in any additional punishment beyond what has already been imposed. Rather, its only effect is to extend the possible early release date."[223] Again, this is not the case. Failure to complete the program would make Boone ineligible for parole.[224] Boone felt, however, that to achieve true change in his life, he had to relinquish his will to the will of his creator.[225] He was willing to serve his entire sentence to avoid compromising in what he believed was the truth.[226]

Denial of parole was not the only consequence of failure to complete MOSOP. Prisoners who fail to successfully complete MOSOP, for any reason, are evaluated at the end of their sentence.[227] Information from that evaluation can then potentially be used in proceedings under the SVP statutes.[228] If a prisoner is adjudged an SVP, he is subject to indefinite confinement.[229] While the court pointed out that SVP status is not determined solely by the report,[230] the fact that the report is used in

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in indefinite incarceration, which would qualify as coercion even under Scalia's preferred test. Boone v. Missouri, 147 S.W.3d 801, 805–06 (Mo. App. E.D. 2004).

219. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

220. *Boone*, 147 S.W.3d at 806.

221. *Id.*

222. MO. REV. STAT. § 589.040.2 (emphasis added).

223. *Boone*, 147 S.W.3d at 806 (citations omitted).

224. *See* Appellant's Statement, *supra* note 2, at 40.

225. *Id.* "My personal opinion is that I have a sin problem which the MOSOP program does not address and seems not even to acknowledge. I believe the word of God has the only answers whereby I may overcome my total state of depravity." *Id.* at 8.

226. *Id.* at 40.

227. *Boone*, 147 S.W.3d at 806.

228. *Id.*

229. *See* MO. REV. STAT. §§ 632.495 (2004).

230. *Boone*, 147 S.W.3d at 806.

the determination creates the very real possibility that it will be a key piece of evidence used to indefinitely confine the prisoner.[231]

Lack of choice is another factor that militates against a finding that MOSOP is narrowly tailored.[232] Prisoners are offered no alternative to participation in MOSOP. Boone tried to arrange a post-release program that would be consistent with his religion.[233] The prison, however, offers no Christian alternative to MOSOP.[234] Moreover, the state presented no evidence demonstrating that the program actually reduced sexual recidivism or that MOSOP was the only means to serve that interest.[235]

Most importantly, the free exercise discussion by the court misses the distinction between state regulation of action in the name of religion and state regulation of the religious *belief itself*. The Court of Appeals made reference to this concept when it stated that "[f]reedom to believe is absolute. Freedom to act, however, remains subject to regulation for the protection of society."[236] However, the court began its discussion about compelling state interest and narrow tailoring without any recognition of exactly what was being burdened—Boone's constitutional right to believe in his God, in his way, without interference from the State.[237]

Boone's free exercise was impermissibly burdened, not because he wanted to engage in an act that was otherwise against the law, but because successful completion of MOSOP would have required him to actually accept as true concepts that are incompatible with his deeply held

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231. Jerry Hoeflein, who prepared Boone's end of confinement report, wrote that "Mr. Boone followed his termination from the MOSOP Phase II with a refusal to participate in a second attempt. Therefore, he remains an untreated recidivist sex offender who is still at high risk to reoffend." Appellant's Statement, Brief and Argument at 12–13, *Boone* (No. ED 82669). Boone's religious convictions prevented him from participating, and that refusal led to his being labeled "at high risk to reoffend." Because one of the constitutional requirements for upholding civil commitment statutes is a finding of "dangerousness either to one's self or to others," Boone's refusal to participate on religious grounds very likely provided the jury with the evidence it needed to adjudge him to be an SVP. *See* Kansas v. Crane, 534 U.S. 407, 409 (2002) (describing the narrow circumstances under which involuntary civil commitment is upheld—there must be (1) "proper procedures and evidentiary standards," (2) a finding of "dangerousness either to one's self or to others," and (3) proof of dangerousness "coupled . . . with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"). *Id.*

232. Interestingly, in one of the twelve-step cases involving the Establishment Clause, the statute was found to be constitutional because the inmates were offered a choice between the religiously-based twelve-step program and a secular alternative. *See* O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994).

233. Appellant's Statement, *supra* note 2, at 11.

234. *See* Missouri Department of Corrections, http://www.doc.missouri.gov/division/rehab/mosop.htm (describing MOSOP as the treatment program developed to satisfy the mandate of Mo. Rev. Stat. § 589.040 — not one of multiple options) (last visited May 9, 2006).

235. *Id.* at 45–46.

236. *Boone*, 147 S.W.3d at 806 (citations omitted) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

237. *See id.*

religious beliefs.[238] The landmark free exercise cases, in establishing the extent to which the government may constitutionally burden religion and under what conditions, expressly assert that state action cannot compel a particular belief.[239] The successful completion of MOSOP requires the participants to attempt change through psychoeducational classes followed by group therapy,[240] as opposed to external forces such as the will of God.[241] To the extent that this belief is incompatible with a participant's own religious beliefs, the program is an unconstitutional violation of the Free Exercise Clause.

V. IMPACT OF *BOONE* AND SUGGESTIONS

Boone is unlikely to have a broad, sweeping impact on the interpretation of the religion clauses. However, it profoundly impacts Boone and any other similarly situated inmates who attempt or would have attempted the same challenge.[242] It also sets back the movement toward the acceptance of non-theistic belief systems as religions worthy of protection under the First Amendment. To the extent that it allows the government to burden an individual's religious beliefs, it cannot stand up to constitutional scrutiny. In essence, *Boone* is an example of what happens when a court operates without clear guidelines regarding a definition of religion, and with conflicting precedents regarding the analysis of an Establishment Clause claim.

The Supreme Court should construct a workable definition of religion for the purposes of the First Amendment. As lawsuits continue to be

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238. Jerry Hoeflein, Associate Psychologist for the Missouri Department of Corrections, who testified for the State at the probable cause hearing, described the cognitive behavior therapy by stating that "if you can change how a person usually thinks about things, you can change the [resulting] behavior." Appellant's Statement, *supra* note 2, at 14. Additionally, in a description of the program by Todd Moody, Director of MOSOP, it was stated that completion of the program requires "satisfactory internalization of concepts." E-mail from Todd Moody to the author (Nov. 1, 2004, 08:24 a.m. PST) (on file with author).

239. *See, e.g.*, Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'") (emphasis in original); Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting from a letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802)) ("[R]eligion is a matter which lies solely between man and his god; . . . the legislative powers of the government reach actions only, and not opinions.").

240. *Boone*, 147 S.W.3d at 804.

241. This is in stark contrast to the twelve-step treatment method which denies that change is possible without submitting to a higher power. *See* Henry, *supra* note 57, at 446 ("reliance on [a higher] power is the key to recovery"). *Id.*

242. The decision that MOSOP does not excessively entangle the government with religion because of its secular legislative purpose has already been added to the annotations under MO. REV. STAT. § 589.040 (2004) (citing *Boone*, 147 S.W.3d 801).

filed which are based on the assertion that Secular Humanism is a religion, courts should not continue to duck the issue. References in dicta that Secular Humanism may be a religion,[243] and Judge Hand's decision that it is in fact a religion,[244] add to the uncertainty. This uncertainty should be resolved in order to decide cases like Boone's and those regarding school textbooks and curricula. While defining religion is admittedly "a most delicate question,"[245] a framework that separates a belief system that is religious from one that is "essentially political, sociological, or philosophical"[246] is not unrealistic.[247]

Additionally, the Supreme Court should settle on a consistent test for use in Establishment Clause cases. Despite the fact that the *Lemon* test has been widely criticized by commentators[248] and Justices,[249] it has never been expressly overruled, leaving the courts in confusion over what test to apply. The Court should announce a test that takes into account secondary effects and the element of coercion, whether direct or indirect, in addition to primary purpose, effect, and excessive entanglement.

In the case of sexual offenders, as well as convicted criminals in general, there are strong policy reasons in protecting the public. Obviously, behavioral modification of inmates to eliminate the tendency to commit crimes is desirable from society's point of view. Programs like MOSOP strive to produce that result by changing the way inmates think. When that compelled change contradicts the person's legitimately held religious beliefs, the program has violated the First Amendment. The state's limited right to burden the exercise of religious activity does not

243. Torcaso v. Watkins, 367 U.S. 488, 495, n.11 (1961).

244. Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939 (D. Ala. 1987), *rev'd on other grounds*, 827 F.2d 684, 692 (11th Cir. 1987).

245. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

246. *See* Unites States v. Seeger, 380 U.S. 163, 165 (1965).

247. *See* Eli A. Echols, Note, *Defining Religion for Constitutional Purposes: A New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. PUB. INT. L.J. 117, 121 (2003). Echols suggests a three-part definition of religion: (1) It recognizes what is divine; (2) It includes rules governing behavior, traceable to what is divine, that do not contradict the "golden rule"; and (3) It calls on its participants to conform to the rules of the divine. *Id.* This approach, however, just seems to shift the uncertainty from defining "religion" to defining "divine."

248. *See, e.g.*, Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987); Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915 (1990).

249. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 655–56, 672–73, (1989) (Kennedy, J., concurring in part and dissenting in part); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); Committee for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

extend to the realm of an individual's thoughts. Freedom to believe is absolute.