

# Religion of Alcoholics Anonymous (AA): Applying the Clergy Privilege to Certain AA Communications

Ari J. Diaconis

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## NOTE

### THE RELIGION OF ALCOHOLICS ANONYMOUS (AA): APPLYING THE CLERGY PRIVILEGE TO CERTAIN AA COMMUNICATIONS

*Ari J. Diaconis*<sup>†</sup>

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INTRODUCTION

On December 30, 1988, Paul Cox crashed his car into a guardrail while driving drunk.<sup>1</sup> In an alcoholic blackout, Cox abandoned his car and began walking home.<sup>2</sup> Along the way, he broke into his old childhood house, found the current residents asleep, stabbed them to death, cleaned up the scene, continued home, and went to bed.<sup>3</sup> The crime went unsolved until 1993.<sup>4</sup>

In 1990, Cox joined Alcoholics Anonymous (AA).<sup>5</sup> As part of his AA recovery program, Cox confessed the murder to his AA mentor, known in AA as a “sponsor.”<sup>6</sup> Cox also confessed to at least six other AA members.<sup>7</sup> One of the six eventually informed the police, which led to Cox’s arrest in 1993.<sup>8</sup> A New York State jury found Cox guilty on two counts of manslaughter in the first degree.<sup>9</sup>

In 2004, Cox appealed to the Second Circuit, seeking reversal based on the trial court’s improper admission of AA members’ testimony.<sup>10</sup> He argued that information obtained from AA members was privileged under New York’s clergy-congregant privilege (clergy privi-

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1 Cox v. Miller, 296 F.3d 89, 93 (2d Cir. 2002) (detailing the Cox saga).  
 2 *Id.*  
 3 *Id.* at 93–94.  
 4 *Id.* at 96.  
 5 *Id.* at 94.  
 6 *Id.* at 95. For more detail on what AA “sponsorship” entails, see ALCOHOLICS ANONYMOUS, QUESTIONS & ANSWERS ON SPONSORSHIP [hereinafter Q&A ON SPONSORSHIP], available at [http://www.aa.org/pdf/products/p-15\\_Q&AonSpon.pdf](http://www.aa.org/pdf/products/p-15_Q&AonSpon.pdf); see also *infra* Part II.B (examining the sponsor-sponsee relationship).  
 7 See Cox, 296 F.3d at 95–96.  
 8 *Id.* at 96.  
 9 *Id.* at 96–97.  
 10 The case received (and still receives) heavy media coverage. See, e.g., Tony O’Neill, *Murder in the Rooms of AA*, THE FIX (Aug. 12, 2011), <http://www.thefix.com/content/sick-our-secrets4000?page=all> (discussing the Second Circuit’s ruling); see also Daniel J. Wakin, *Judge Bars Statements Made in A.A.*, N.Y. TIMES (Aug. 2, 2001), <http://www.nytimes.com/>

lege),<sup>11</sup> a statute protecting communications between clergy members and congregants who share information with the expectation of confidentiality.<sup>12</sup> Cox claimed that AA is a religious organization and as such New York's clergy privilege must extend to AA communications, lest it violate the Establishment Clause in discriminating against less conventional religions.<sup>13</sup>

The Second Circuit correctly declined to extend New York's clergy privilege to Cox's case, finding that Cox did not communicate with the requisite expectation of confidentiality needed for protection under New York's statute.<sup>14</sup> The court did not directly address whether AA is a religion for clergy privilege purposes, although in dicta it treated unfavorably the notion that AA would qualify.<sup>15</sup>

While every state has enacted some form of the clergy privilege,<sup>16</sup> research reveals no case directly deciding whether AA is sufficiently religious to qualify for protection. The need for such a decision is apparent.<sup>17</sup> Although AA is among the most cost-efficient and suc-

2001/08/02/nyregion/judge-bars-statements-made-in-aa.htm (summarizing the trial court's ruling in *Cox*).

<sup>11</sup> *Cox*, 296 F.3d at 97–98. Each state has its own clergy privilege statute. See *infra* note 163.

<sup>12</sup> The clergy privilege was traditionally referred to as the priest-penitent privilege. However, the term clergy privilege is more accurate, since the privilege is in fact non-denominational and thus not limited to communications with priests. See Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 225 n.1 (1998). Like other privileges (e.g., the attorney-client privilege or the marital privilege), the clergy privilege works to exclude and suppress what would otherwise be admissible testimony. See *infra* Part III. See generally MCCORMICK ON EVIDENCE 465–68 (John William Strong ed., 4th ed. 1992) (discussing the operation of and general principles behind privileges).

<sup>13</sup> See *Cox*, 296 F.3d at 97–98.

<sup>14</sup> See *id.* at 110–12. Indeed, even if AA was sufficiently religious, under New York's clergy privilege, communications are not protected unless spoken with the expectation of confidentiality. Here, Cox had confessed not just to his AA sponsor but also to a large group of people, thus waiving the privilege. See *id.*

<sup>15</sup> See *id.* at 107–10 (“We are not certain whether we would treat A.A. the same as we treat traditional religions in [the clergy privilege] context.”).

<sup>16</sup> See Colombo, *supra* note 12, at 231 & n.39 (collecting statutes).

<sup>17</sup> Despite the lack of judicial rulings on the issue, many commentators and AA members operate under the assumption that AA communications are not protected by clergy privileges—probably due in part to the Second Circuit's dicta in *Cox*. See, e.g., Daniel Hartill, *Secrets Kept, Secret Shared—AA Member's Murder Revelation Raises Confidentiality Question*, SUN J. (July 24, 2011), <http://www.sunjournal.com/city/story/1063631> (“Legally, secrets among Alcoholics Anonymous members aren't that secret.”). Dispelling this assumption might prove impactful, as criminal investigations often involve information obtained through AA members. See, e.g., Pete Kotz, *Bob Ryder Confesses to AA Sponsor that He Killed Danita Brown, but Neither Call Police*, TRUE CRIME REPORT (July 18, 2011, 10:17 AM), [http://www.truecrimereport.com/2011/07/bob\\_ryder\\_confesses\\_to\\_aa\\_spon.php](http://www.truecrimereport.com/2011/07/bob_ryder_confesses_to_aa_spon.php). Indeed, AA comes up frequently in criminal investigations. See JR Harris, *Murderpedia.org Highlights a Few of the Murderers in Alcoholics Anonymous—I Believe They Need a Few More Current Entries*, ORANGE PAPERS (July 5, 2012, 9:13 PM), <http://www.orange-papers.org/forum/node/1840>.

cessful means of addiction rehabilitation, AA is steadily decreasing in its effectiveness.<sup>18</sup> Evidence suggests this decrease stems from a lack of confidentiality within AA, which may be cured by extending the clergy privilege.<sup>19</sup>

This Note argues that courts and legislatures should apply the clergy privilege to those communications which AA sponsees make to their sponsors in confidence and in furtherance of spiritual advisement. A number of commentators expressly reject this argument.<sup>20</sup> In doing so, they disregard AA's relevant history, misconceive the relationship between AA sponsor and sponsee, and ignore the rigid and deeply religious process that is AA's Twelve Steps (12 Steps).<sup>21</sup> No legal commentator on the subject has provided a thorough portrayal of AA's 12 Steps.<sup>22</sup> This Note does, and in doing so highlights the appropriateness of applying the clergy privilege to certain AA communications.

Typical AA members engage in two primary practices: (1) attending hour-long AA meetings on a regular (often daily) basis; and (2) "working" AA's 12 Steps with their AA sponsor, which involves inducing "a spiritual experience" and "carrying [AA's] message to the alcoholic who still suffers."<sup>23</sup> Legal commentary to date fails in describing the nature of AA meetings and fails in understanding AA's highly intricate 12 Steps, thus making the correct application of law to fact impossible when asking whether the clergy privilege should encompass certain AA communications.

<sup>18</sup> See *infra* Part IV.B.1.b.

<sup>19</sup> See *infra* Part IV.B.1.b.

<sup>20</sup> See, e.g., Stacey A. Garber, Note, *Cox v. Miller: The Clergy Privilege and Alcoholics Anonymous*, 31 CAP U. L. REV 917, 918–19 (2003) (arguing that the clergy privilege should not apply to AA communications); Bree Schonbrun, Note, "In the Light of Reason and Experience": *The Scope of Evidentiary Privilege in the Self-Help Setting; Alcoholics Anonymous Examined*, 25 CARDOZO L. REV. 1203, 1208–09 (2004) (same).

<sup>21</sup> See, e.g., George J. Barry, Note, *Confidentiality in the Church of the Twelve Steps*, 10 J.L. & POL'Y 433, 443–45 (2002) (undertaking no thorough analysis of AA); Jessica G. Weiner, Comment, "And the Wisdom to Know the Difference": *Confidentiality vs. Privilege in the Self-Help Setting*, 144 U. PA. L. REV. 243, 248–50, 252–57 (1995) (reviewing AA only generally in the context of other self-help groups).

<sup>22</sup> See, e.g., Christopher M. Meissner, Note, *Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment*, 54 CLEV. ST. L. REV. 671, 681–83 (2006) (lacking in historical analysis).

<sup>23</sup> ALCOHOLICS ANONYMOUS WORLD SERVS., ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM 179, 183 (4th ed. 2001) [hereinafter ALCOHOLICS ANONYMOUS: THE STORY]. The notion of "working" the 12 Steps or developing an "AA program" is somewhat amorphous, although the concept will become clearer after reading this Note. For one AA member's description of the AA "program," see Dennis O., *Get With the Program*, AA GRAPEVINE (Jan. 1994) ("When I first got to AA, I heard a lot of talk centering around the word 'program'—as in, 'That's how I work my program.' But what the heck *was* a program, anyway?").

This Note seeks to contribute an in-depth exploration of AA. Rather than merely explain the 12 Steps in vague, sweeping statements,<sup>24</sup> this Note uses a number of unique, primary sources, including interviews with AA members, transcripts of AA meetings, and real life examples of 12 Step work.<sup>25</sup> This Note summarizes AA's background and processes and in turn inserts a much needed factual understanding of AA into legal commentary. Indeed, as many courts already acknowledge, AA—grounded in Protestantism and biblical Scripture—is far more religious than most realize.<sup>26</sup>

Part I of this Note explores the origins and formation of AA, focusing on those historical developments which created the deeply religious 12 Steps. Part II depicts what AA is like today, attempting to paint “a day in the life” of contemporary AA members. Turning to a legal analysis, Part III summarizes modern jurisprudence surrounding the clergy privilege.

Part IV contains the core of this Note's thesis and is separated into three arguments: (1) AA constitutes a religion under relevant case law, including the U.S. Supreme Court's “theist” and “non-theist” definitions of religion; (2) because AA is a religion, courts and legislatures must extend the clergy privilege to certain<sup>27</sup> AA communications, lest they violate the Establishment, Free Speech, and Equal Protection Clauses; and (3) the clergy privilege must extend to certain AA communications, lest it violate public policy and ultimately disrupt America's ability to rely on AA as a cost-effective means of addiction rehabilitation.

Part V anticipates objections to this Note's thesis and offers several thoughts in rebuttal. Last is a conclusion.

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<sup>24</sup> See, e.g., Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1159–60 (1997) (listing the 12 Steps without an accompanying explanation).

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 423 (2d Cir. 2001) (holding that state-funded AA violated the Establishment Clause); *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1075–77 (2d Cir. 1997) (holding that court-mandated AA violated the Establishment Clause); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1033–39 (E.D. Wis. 2001) (holding that mandated AA attendance in prison violated the Establishment Clause, although granting prison-official defendants qualified immunity); *Ross v. Keelings*, 2 F. Supp. 2d 810, 816–20 (E.D. Va. 1998) (similar). Many of these cases are discussed in detail *infra* Part IV.A.1.

<sup>27</sup> Again, this Note argues for a limited application of the clergy privilege. It argues that the clergy privilege should protect only those AA communications between sponsor and sponsee made in furtherance of spiritual advisement and with the expectation of privacy. This limited application should work to dispel many commentators' fears surrounding the creation of an overly broad clergy privilege. See, e.g., *supra* notes 20–21 for commentators fearing this overly broad application.

## I

## THE ORIGINS OF AA AND THE 12 STEPS

In explaining the development of AA and the 12 Steps, it helps to explore the respective stories of AA's two founders, Dr. Robert Smith (Dr. Bob) and William Wilson (Bill).<sup>28</sup> Dr. Bob's story is grounded in Protestant Christianity, while Bill's story is grounded in the Oxford Group, an institution dedicated to Christian evangelism and "faith in action."<sup>29</sup> The two men crossed paths in 1935, an encounter out of which grew a distinctly Christian movement now known as AA and the 12 Steps.<sup>30</sup>

This Part contains three subparts: (A) Bill's Story: The Oxford Group; (B) Dr. Bob's Story: The Jesus Element; and (C) AA's Formational Writings: The 12 Steps and the Big Book.

### A. Bill's Story: The Oxford Group

Born in 1885, Bill was eventually named by *Time* as among the one hundred most influential figures of the twentieth century.<sup>31</sup> A war veteran and once a successful financier, by the late 1920s Bill and his wife Lois had lost everything.<sup>32</sup> Although determined to stop drinking, Bill sank only further into alcoholic despair and destruction. Relevant historical scholarship paints a hopeless, frightening portrait.<sup>33</sup>

But Bill finally obtained sobriety in 1934 through participation in the Oxford Group.<sup>34</sup> Founded in or around 1908 by Christian mis-

<sup>28</sup> AA members refer to other members almost exclusively by first name only. This protects, among other things, the confidentiality and anonymity of each member. See ALCOHOLICS ANONYMOUS, A.A. *Guidelines: Internet*, available at [http://www.aa.org/en\\_pdfs/mg-18\\_internet.pdf](http://www.aa.org/en_pdfs/mg-18_internet.pdf).

<sup>29</sup> See David Patton, *Becoming a Living Witness: The Oxford Group Way of Life*, 6 QUODLIBET J. (2004), <http://www.quodlibet.net/articles/patton-oxford.shtml>.

<sup>30</sup> AA offers a helpful virtual timeline of its history, titled "Over 70 Years of Growth." The timeline dedicates a slide to the meeting of Bill and Dr. Bob, which occurred on May 12, 1935. *Alcoholics Anonymous: Over 70 Years of Growth*, ALCOHOLICS ANONYMOUS, <http://www.aa.org/aatimeline/> (last visited Apr. 7, 2014).

<sup>31</sup> *Time* refers to Bill as "The Healer." Susan Cheever, *Bill W.: The Healer*, TIME (June 14, 1999), <http://content.time.com/time/magazine/article/0,9171,991266,00.htm> ("From the rubble of a wasted life, he overcame alcoholism and founded the 12-step program that has helped millions of others do the same.").

<sup>32</sup> ERNEST KURTZ, NOT-GOD: A HISTORY OF ALCOHOLICS ANONYMOUS 13-17 (3d ed. 1980) (detailing Bill's life).

<sup>33</sup> See generally Barry Leach, *Factors in the Development of AA*, in TREATMENT AND REHABILITATION OF THE CHRONIC ALCOHOLIC (Benjamin Kissin & Henri Begleiter eds., 1977) (describing extramarital affairs, blackouts, interventions, trips to hospitals and clinics, etc.). For a Hollywood portrayal of Bill's story, see the film MY NAME IS BILL W. (Warner Bros. Pictures 1989).

<sup>34</sup> See ALCOHOLICS ANONYMOUS WORLD SERVS., ALCOHOLICS ANONYMOUS COMES OF AGE: A BRIEF HISTORY OF A.A., at vii (12th ed. 1986) [hereinafter ALCOHOLICS ANONYMOUS COMES OF AGE].

sonary Dr. Frank Buchman the Oxford Group envisioned “convert[ing] the world” and obtaining a “New World Order for Christ, the King.”<sup>35</sup> Easily confused by name with the Oxford Movement, which advocated reinstating the lost traditions and dogmas of Catholicism, the Oxford Group denounced liturgy altogether.<sup>36</sup> Whereas the Oxford Movement represents highly ritualized activity such as the Roman Catholic Communion ceremony, the Oxford Group celebrated Christianity “not as a dull habit, but as an acute fever.”<sup>37</sup>

Dr. Buchman molded the Oxford Group to be nonprofessional from its inception.<sup>38</sup> By embracing nonprofessionalism and rejecting liturgy, the Oxford Group positioned itself to best achieve widespread conversion.<sup>39</sup> The Oxford Group welcomed an array of faiths, inviting anyone to join “who acknowledges a Higher Power or whose mind is open to the possibility of such a Power, and who is willing to give the message of the [Oxford] Group a hearing.”<sup>40</sup>

The Oxford Group maintained as its cornerstone Dr. Buchman’s “five C’s”:<sup>41</sup> Confidence, Confession, Conviction, Conversion, and Continuance.<sup>42</sup> Under Confidence, in an effort to attract future converts, Oxford Group members established relationships with non-members.<sup>43</sup> Confession was a process in which sinners confessed their wrongdoings to other Oxford Group members, no matter how hei-

<sup>35</sup> THE LAYMAN WITH A NOTEBOOK, WHAT IS THE OXFORD GROUP? 6 (1933), available at [http://siestakeybeachmeeting.com/index\\_htm\\_files/What\\_Is\\_The\\_Oxford\\_Group.pdf](http://siestakeybeachmeeting.com/index_htm_files/What_Is_The_Oxford_Group.pdf); WALTER HOUSTON CLARK, THE OXFORD GROUP: ITS HISTORY AND SIGNIFICANCE 16 (1951).

<sup>36</sup> See Stewart J. Brown & Peter B. Nockles, *Introduction to THE OXFORD MOVEMENT: EUROPE AND THE WIDER WORLD 1830–1930*, 1–6 (Stewart J. Brown & Peter B. Nockles eds., 2012); CLARK, *supra* note 35, at 18.

<sup>37</sup> See CLARK, *supra* note 35, at 18; see also Eugene Williams, *Introduction to WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE* 17–20 (Triumph Books 1991) (detailing some of the historical events that led to the Oxford Group’s founding).

<sup>38</sup> See TOM DRIBERG, THE MYSTERY OF MORAL RE-ARMAMENT: A STUDY OF FRANK BUCHMAN AND HIS MOVEMENT 52 (1965) (noting the informal roots of Buchman’s movement).

<sup>39</sup> See CLARK, *supra* note 35, at 25.

<sup>40</sup> *Id.* at 18; see also ALCOHOLICS ANONYMOUS WORLD SERVS., ‘PASS IT ON’: THE STORY OF BILL WILSON AND HOW THE A.A. MESSAGE REACHED THE WORLD 170 (1994) (“The Oxford Group has no membership, no dues, no paid leaders. It has no new creed nor theological theories. It does not even have regular meetings. . . . A determination, not a denomination . . . . Identified with it are Roman Catholics, Episcopalians, Methodists, Presbyterians, Baptists—members of all churches and none.”).

<sup>41</sup> Here is a helpful summary of the Oxford Group: “Members of the Oxford Group sought to achieve spiritual regeneration by making a surrender to God through rigorous self-examination, confessing their character defects to another human being, making restitution for harm done to others, and giving without thought of reward—or, as they put it: ‘No pay for soul surgery.’” ALCOHOLICS ANONYMOUS WORLD SERVS., DR. BOB AND THE GOOD OLDTIMERS: A BIOGRAPHY, WITH RECOLLECTIONS OF EARLY A.A. IN THE MIDWEST 54 (1980) [hereinafter DR. BOB AND THE GOOD OLDTIMERS].

<sup>42</sup> See *id.* at 54–55; GARTH LEAN, FRANK BUCHMAN: A LIFE 79 (1985).

<sup>43</sup> See HAROLD BEGBIE, MORE TWICE-BORN MEN: NARRATIVES OF A RECENT MOVEMENT IN THE SPIRIT OF PERSONAL RELIGION vi–ix (1923).



nous or trivial.<sup>44</sup> Conviction involved the period after Confession in which the sinner developed shame surrounding his or her wrongdoings.<sup>45</sup> In Conversion, sinners undertook an affirmative act, “promis[ing] oneself, God, or another person that he would forsake his sins and follow God’s ‘Guidance.’”<sup>46</sup> Continuance, as the name suggests, involved members actively converting new members and seeking further “Guidance” from God.<sup>47</sup>

It was the Oxford Group process summarized here which led directly to Bill’s sobriety. In November 1934, a recently sobered Oxford Group convert named Ebby Thacher appeared at Bill’s home in Brooklyn, New York. Being old friends, Ebby intended to convert Bill by introducing him to the sobriety attainable through the Oxford Group.<sup>48</sup> As it so happens, Ebby ultimately succeeded. After begrudgingly attending one Oxford Group meeting, Bill checked himself into Towns Hospital<sup>49</sup> for detox.<sup>50</sup> At Towns Hospital, Bill cried out in “unbearabl[e]” depression, “If there is a God, let Him show Himself! I am ready to do anything, anything!”<sup>51</sup> Bill describes what happened next: “Suddenly the room lit up with a great white light. I was caught up into an ecstasy which there are no words to describe. It seemed to me, in the mind’s eye, that I was on a mountain and that a wind not of air but of spirit was blowing.”<sup>52</sup>

After this spiritual experience, Bill returned to the Oxford Group, entrenching himself in its process and developing close relationships with many important members. This included the Reverend Dr. Samuel Shoemaker, Chief American Publicist for the Oxford Group and Rector of Calvary Episcopal Church.<sup>53</sup> Shoemaker offered guidance on matters such as biblical interpretation, surrender to God,

<sup>44</sup> For a thorough discussion of Confession and “sharing,” see THE LAYMAN WITH A NOTEBOOK, *supra* note 35, at 18–22 (1933) (stating that Oxford Group Confession drew from principles found in the Bible—specifically, Acts 19:18, 26:22, and 2 Corinthians 13:1).

<sup>45</sup> See Dick B., *28 Oxford Group Principles from Anne Smiths Journal 1933–1939: A.A.’s Principles of Success*, available at <http://www.silkworth.net/dickb/oxfordgroup3.html> (discussing Conviction).

<sup>46</sup> See CLARK, *supra* note 35, at 28.

<sup>47</sup> See *id.* at 28.

<sup>48</sup> See Bible, THE 12 STEPS, <http://12step.org/bible/bible.htm> (last visited Apr. 8, 2014).

<sup>49</sup> Towns Hospital is something like a sacred site within the AA community. See, e.g., Howard Markel, *An Alcoholic’s Savior: God, Belladonna or Both?*, N.Y. TIMES (Apr. 19, 2010), [http://www.nytimes.com/2010/04/20/health/20drunk.htm?\\_r=0](http://www.nytimes.com/2010/04/20/health/20drunk.htm?_r=0) (describing some of AA’s shared history with the Towns Hospital).

<sup>50</sup> See ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 34, at 52.

<sup>51</sup> Bible, THE 12 STEPS, <http://12step.org/bible/bible.htm> (last visited Apr. 8, 2014).

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

<sup>53</sup> Dick B., *Rev. Sam Shoemaker: An A.A. “Co-Founder” and Spiritual Source*, A.A. HISTORY, <http://aa-history.com/samshoemaker.htm> (last visited Apr. 8, 2014).

and making amends for past wrongs.<sup>54</sup> Bill never drank again. Believing that a transformation had occurred in him, Bill sought to convert “all the drunks in New York City.”<sup>55</sup> Over the next three years, Bill developed the “alcoholic squad”<sup>56</sup> of the Oxford Group, which with the help of Dr. Bob eventually became AA.<sup>57</sup>

## B. Dr. Bob’s Story: The Jesus Element

Dr. Bob was born in 1879 in St. Johnsbury, Vermont.<sup>58</sup> He eventually opened a medical practice in Akron, Ohio.<sup>59</sup> But his drinking began to cause problems. One article in the *AA Grapevine*<sup>60</sup> described Dr. Bob’s drinking during the early 1900s:

[Dr. Bob] developed two distinct phobias. One was the fear of not sleeping and the other was the fear of running out of liquor. So began the squirrel-cage existence. Staying sober to earn enough money to get drunk, getting drunk to go to sleep, using sedatives to quiet the jitters, staying sober, earning money, getting drunk, smuggling home a bottle, hiding the bottle from [his wife] who became an expert at detecting hiding places.<sup>61</sup>

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<sup>54</sup> *Id.* (describing Shoemaker’s exact role in the formation of AA and its principles); see also KURTZ, *supra* note 32, at 44–46.

<sup>55</sup> STEPHEN BERGMAN & JANET SURREY, BILL W. AND DR. BOB 47 (2007).

<sup>56</sup> Dick B., *Roundtable Series on A.A.’s Biblical Roots (November 2001)*, ALCOHOLICS ANONYMOUS HISTORY: A.A.’s BIBLE ROOTS, [http://www.dickb.com/articles/bible\\_roots\\_dsb.shtml](http://www.dickb.com/articles/bible_roots_dsb.shtml) (last visited Apr. 7, 2014) [hereinafter *Roundtable Series*].

<sup>57</sup> See DICK B., TWELVE STEPS FOR YOU: TAKE THE 12 STEPS WITH THE BIG BOOK, A.A. HISTORY, AND THE GOOD BOOK AT YOUR SIDE, at ix–xv (2005).

<sup>58</sup> DR. BOB AND THE GOOD OLDTIMERS, *supra* note 41, at 9. Members of the North Congregational Church, Dr. Bob’s parents compelled his weekly attendance at numerous church services, Sunday schools, and prayer meetings. See DICK B. & KEN B., DR. BOB OF ALCOHOLICS ANONYMOUS: HIS EXCELLENT TRAINING IN THE GOOD BOOK AS A YOUNGSTER IN VERMONT 7–15 (2008); *Roundtable Series, supra* note 56. Despite his upbringing, Dr. Bob had his first drink at around age nine and developed alarming alcohol habits during his college and medical school years, consuming large amounts of alcohol on such a frequent basis as to compel his fraternity brothers to call Dr. Bob’s father for help. See AA GRAPEVINE, *Dr. Bob’s Story* (Nov. 1962), available at <http://www.silkworth.net/pdfDrBob/Dr-Bobs-Story-Nov-1962.pdf> [hereinafter *Dr. Bob’s Story*] (detailing Dr. Bob’s life story). Although drinking problems forced Dr. Bob’s departure from the University of Michigan Medical School, he eventually became a surgeon nonetheless. *Id.*

<sup>59</sup> See DR. BOB AND THE GOOD OLDTIMERS, *supra* note 41, at 28.

<sup>60</sup> Throughout this Note, I cite to the *AA Grapevine*. The *AA Grapevine* is a monthly publication aiming to bring subscribers an AA meeting “in print.” Its pages are filled with AA member–submitted material, outlining their daily struggles, triumphs, AA journeys, proposed solutions to AA problems, etc. See AA GRAPEVINE, THE LANGUAGE OF THE HEART: BILL W’S GRAPEVINE WRITINGS 384–85 (2011). The *AA Grapevine* is recognized by AA as the “[i]nternational [j]ournal of Alcoholics Anonymous.” AA GRAPEVINE, <http://www.aagrapevine.org/> (last visited Apr. 8, 2014).

<sup>61</sup> *Dr. Bob’s Story, supra* note 58. While Dr. Bob’s story is somewhat shocking, similar tales are not uncommon. See, e.g., *Tools for Life*, AA GRAPEVINE (Jan. 2006) (“My friends, many of them, went on to college or into various businesses, married, and had families. Grew up. Learned how to deal with the real world. I stayed focused on drinking, which I did as often as possible, and my world got smaller and smaller. After a while, all I thought

Possibly in hopes of obtaining sobriety, Dr. Bob reached out to the Oxford Group during the early 1930s.<sup>62</sup> The Group eventually arranged a meeting with Bill.<sup>63</sup> The two spoke for hours, during which time Bill described his spiritual experience at Towns Hospital, the Oxford Group process, and his new life as a sobered alcoholic.<sup>64</sup> Save for one binge immediately following their conversation, Dr. Bob never drank again.<sup>65</sup> Dr. Bob was Bill's first successful alcoholic convert, and many consider the meeting of Bill and Dr. Bob the founding of AA.<sup>66</sup>

In the mid-1930s, while Bill led the alcoholic squad of the Oxford Group in New York, Dr. Bob did the same in Ohio.<sup>67</sup> But while the New York group remained true to Oxford Group practices and precepts, the Ohio group diverged, ignoring the Oxford Group's rejection of liturgy and religious formalism. One scholar describes the Ohio meetings as follows:

Akron meetings opened with prayer. As mentioned, they were called old fashioned prayer meetings. Bible devotionals such as *The Upper Room*, *My Utmost for His Highest*, and *The Runner's Bible* were regular fare at the meetings . . . . Scripture was regularly read at meetings. In addition, Scripture passages, both from devotionals and from the Good Book itself, were often the fountainhead for topics discussed at [the] meetings. Bible study was particularly stressed for all. Dr. Bob called every meeting . . . a Christian Fellowship . . . .<sup>68</sup>

Whereas the New York alcoholic squad of the Oxford Group de-emphasized Christian traditions in an effort to attract more converts, the Ohio group actually required "accepting on one's knees Jesus Christ as Lord and Saviour."<sup>69</sup> There are other examples of divergence, such as older members in Ohio praying with newcomers<sup>70</sup> in specific accor-

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about was the next drink and where it was coming from. . . . I stopped showing up for work on a daily basis and came close to losing my apartment. . . . I drank out of pint bottles of scotch while sitting in public bathroom stalls . . . .")

<sup>62</sup> ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 34, at 66.

<sup>63</sup> *See id.* at 67.

<sup>64</sup> *See Dr. Bob's Story*, *supra* note 58; ERNEST KURTZ, A.A.: THE STORY 31 (1988).

<sup>65</sup> *See, e.g., Dr. Bob's Story*, *supra* note 58 ("There was one more short binge for Dr. Bob after that talk. On June 10, 1935, he took his last drink, remaining sober until his death on November 15, 1950.")

<sup>66</sup> *See* ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 34, at 71 (recounting the intervention from Bill's perspective and the pair's subsequent decision to reach out to other alcoholics).

<sup>67</sup> *See Roundtable Series*, *supra* note 56.

<sup>68</sup> *Id.* (internal quotation marks omitted).

<sup>69</sup> *Id.*

<sup>70</sup> AA members refer to those newly sober or new to AA as newcomers. *See, e.g.,* ALCOHOLICS ANONYMOUS WORLD SERVS., A NEWCOMER ASKS (1980), available at [http://www.aa.org/pdf/products/p-24\\_newcomerask.pdf](http://www.aa.org/pdf/products/p-24_newcomerask.pdf).

dance with the practice outlined in James 5:16, a practice the New York squad presumably disliked.<sup>71</sup>

Despite the differences between the Ohio and New York groups, together they left the Oxford Group in 1937, forming what is now AA.<sup>72</sup>

### C. AA's Formational Writings: The 12 Steps and the Big Book

AA's seminal writings are the 12 Steps and the book *Alcoholics Anonymous* (the Big Book). Written by Bill and Reverend Shoemaker with the guidance of Dr. Bob, these writings constitute AA's foundation, and a cursory study reveals the deeply Christian and evangelic nature of AA.<sup>73</sup>

Rather than summarize separately the dense and lengthy Big Book, I use its themes and central instructions throughout the below discussion of the 12 Steps. The concepts here are complex and abstract. For guidance through this process, AA newcomers rely heavily on their sponsors and the Big Book.<sup>74</sup> I provide only an introduction.<sup>75</sup>

*Step 1—We admitted we were powerless over alcohol—that our lives had become unmanageable.*<sup>76</sup> AA newcomers must first admit that “no human power could have relieved [their] alcoholism.”<sup>77</sup> The newcomer must admit that he or she is “beyond human aid.”<sup>78</sup> Step 1

<sup>71</sup> See Dick B., *God and Alcoholism*, RELIGION-ONLINE.ORG, <http://www.religion-online.org/showchapter.asp?title=3092&C=2617> (last visited Apr. 8, 2014). In fact, one scholar describes the Ohio meetings as representing not the Oxford Group but “First Century Christianity as found in the Book of Acts.” Dick B., *Alcoholics Anonymous History: A Christian Recovery Package that All Can Use*, available at [http://www.dickb.com/articles/Christian\\_Recovery\\_Package.shtml](http://www.dickb.com/articles/Christian_Recovery_Package.shtml).

<sup>72</sup> ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 34, at 74–77.

<sup>73</sup> See Richard G. Burns, *Studying the Christian Origins of the Recovery Movements*, DICK B.: THE REAL POWER BEHIND ALCOHOLICS ANONYMOUS (June 9, 2010, 9:04 PM), <http://mauihistorian.blogspot.com/2010/06/studying-christian-origins-of-recovery.htm>.

<sup>74</sup> See Q&A ON SPONSORSHIP, *supra* note 6, at 7–8.

<sup>75</sup> Throughout the following discussion, I describe in footnotes those biblical sections upon which scholars believe the 12 Steps are based. I should note that neither the Big Book nor the 12 Steps expressly mentions the Bible. However, most scholars with an understanding of AA history find no difficulty in declaring that AA's principles are predicated on the Bible, arguing that the absence of Bible citations in the Big Book was merely a marketing decision. See, e.g., Maia Szalavitz, *How Religion Was Edited Out of AA's Bible: Early 'Big Book' Manuscript Soon to be Published*, TIME (Sept. 23, 2010), <http://healthland.time.com/2010/09/23/how-religion-was-edited-out-of-aas-bible-early-big-book-manuscript-soon-to-be-published/> (noting how the original manuscript of the Big Book reveals an intense effort “to play down the religious nature of [AA]”).

<sup>76</sup> ALCOHOLICS ANONYMOUS WORLD SERVS., EXPERIENCE, STRENGTH, AND HOPE: STORIES FROM THE FIRST THREE EDITIONS OF ALCOHOLICS ANONYMOUS 432 (2003) [hereinafter EXPERIENCE, STRENGTH, AND HOPE].

<sup>77</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 60.

<sup>78</sup> *Id.* at 24. In admitting their powerlessness over alcohol, many AA members liken their drinking to an allergic reaction—once they pick up a drink, they cannot stop drink-

aims to break down the newcomer, creating a willingness to continue with the remaining Steps.<sup>79</sup> A popular, early AA prayer read, “Oh God, manage me because I cannot manage myself.”<sup>80</sup>

*Step 2—Came to believe that a Power greater than ourselves could restore us to sanity.*<sup>81</sup> After admitting powerlessness, newcomers must choose to believe in a higher power. The Big Book states: “Without help [alcohol] is too much for us. But there is One who has all power—that One is God. May you find Him now!”<sup>82</sup> For those newcomers skeptical of a higher power, the Big Book offers its fourth chapter, *We Agnostics*. While at first empathizing in the difficulty of choosing to believe, the chapter’s tone eventually shifts: “When we became alcoholics, crushed by a self-imposed crisis we could not postpone or evade, we had to fearlessly face the proposition that either God is everything or else He is nothing. God either is, or He isn’t. What was our choice to be?”<sup>83</sup> The discussion then continues, encouraging newcomers to abandon their stubbornness and rationalizations: “Imagine life without faith! Were nothing left but pure reason, it wouldn’t be life.”<sup>84</sup> The chapter goes on like this for some twelve pages: “Actually we were fooling ourselves, for deep down in every man, woman, and child, is the fundamental idea of God.”<sup>85</sup>

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ing on their own willpower. See, e.g., Francis G., *Circles of Sobriety: Abstinence Thinking Serenity*, AA GRAPEVINE (Jan. 2006) (“I am allergic to alcohol and must not put it into my digestive system.”).

<sup>79</sup> Indeed, many AA members find hope in admitting their powerlessness, a paradox that has become a bedrock AA principle. See, e.g., Jim B., *The Gift of Powerlessness*, AA GRAPEVINE (Dec. 1992).

<sup>80</sup> DICK B., TURNING POINT: A HISTORY OF EARLY A.A.’S SPIRITUAL ROOTS AND SUCCESSSES 483 (1997) (emphasis omitted). Scholars believe Step 1 derived from the Bible, in particular the book of Romans. See *Step 1 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-1-scriptures.htm> (last visited Apr. 8, 2014) (“I know that nothing good dwells in me, that is, in my flesh. For I have the desire to do what is right, but not the ability to carry it out.” (quoting Romans 7:18 (ESV))). For further analogous Biblical passages, see *Romans 7:25* (NIV) (“So then, I myself in my mind am a slave to God’s law, but in my sinful nature a slave to the law of sin.”).

<sup>81</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

<sup>82</sup> *Alcoholics Anonymous is Not a Self-Help Program*, BAREFOOT’S WORLD, <http://www.barefootworld.net/aanotselfhelp.htm> (last visited Apr. 8, 2014).

<sup>83</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 53.

<sup>84</sup> *Id.* at 54.

<sup>85</sup> *Id.* at 55. There are also essential Bible passages analogous to Step 2. See *Hebrews 11:6* (AV) (“But without faith it is impossible to please him: for he that cometh to God must believe that He is, and that He is a rewarder of them that diligently seek him.”); *Matthew 6:33* (AV) (“But seek ye first the kingdom of God, and his righteousness; and all these things shall be added unto you.”); see also Terry D., *The Biblical Roots of Early A.A.’s 12 Steps* (2011), available at <http://www.recoverytimes.com/The%20Biblical%20Roots%20of%20Early%20AA’s%2012%20Steps.pdf>.

*Step 3—Made a decision to turn our will and our lives over to the care of God as we understood him.*<sup>86</sup> The Big Book instructs that newcomers recite a prayer commemorating abandonment to their “Maker”:

God, I offer myself to Thee—to build with me and to do with me as Thou wilt. Relieve me of the bondage of self, that I may better do Thy will. Take away my difficulties, that victory over them may bear witness to those I would help of Thy Power, Thy Love, and Thy Way of life. May I do Thy will always!<sup>87</sup>

Newcomers must “decide[ ] that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children.”<sup>88</sup> The Big Book promises that upon taking Step 3 a “new power” will “flow in” and that those who took the Step were “reborn.”<sup>89</sup>

*Step 4—Made a searching and fearless moral inventory of ourselves.*<sup>90</sup> Much like the Confession process the Oxford Group implemented, Step 4 requires that newcomers “search[ ] out the flaws in our make-up which caused our failure. Being convinced that self, manifested in various ways, was what had defeated us, we considered its common manifestations.”<sup>91</sup> Newcomers enumerate and explore their fears, resentments, and wrongdoings during Step 4.<sup>92</sup> These Step 4 “inventories” often comprise pages upon pages of information, with newcomers spending months searching their childhood and adult memories and transposing their transgressions into organized lists.<sup>93</sup>

*Step 5—Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.*<sup>94</sup> Under Step 5, newcomers share their

<sup>86</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432 (emphasis omitted).

<sup>87</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 63.

<sup>88</sup> *Id.* at 62.

<sup>89</sup> *Id.* at 63. The Big Book derives its Step 3 discussion from numerous biblical verses. One such example is *Romans* 10:9 (AV) (“That if thou shalt confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved.”). See Terry D., *supra* note 85; *Step 3 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-3-scriptures.htm> (last visited Apr. 8, 2014). Other relevant biblical passages are readily apparent. For example, *1 John* 3:1 (ESV) states that “we [are] called God’s children; and so we are.” *2 Corinthians* 6:18 (NIV) states, “I will be a Father to you, and you will be my sons and daughters, says the LORD Almighty.”

<sup>90</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

<sup>91</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 64.

<sup>92</sup> See *id.*

<sup>93</sup> See, e.g., Roy Y., *Fourth Step Inventory Worksheet* (2006), available at <http://www.royy.com/step4.pdf>. For a tale of one man’s journey through Step 4, see Larry H., *Fear and the Fourth Step: An AA Describes How a Step Helped Him to Change His Attitudes and Feelings*, AA GRAPEVINE, available at <http://www.aagrapevine.org/feature/4933>. *Lamentations* 3:40 (AV) (“Let us search and try our ways, and turn again to the LORD.”), *Lamentations* 3:44 (AV) (“Thou hast covered thyself with a cloud, that our prayer should not pass through.”), and *Proverbs* 4:26 (AV) (“Ponder the path of thy feet, and let all thy ways be established.”) are all on point for Step 4. See Terry D., *supra* note 85; *Step 4 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-4-scriptures.htm> (last visited Apr. 8, 2014).

<sup>94</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

Step 4 inventories with a higher power and another person. The Big Book suggests sharing with one's AA sponsor or with one's religious leader, such as a priest.<sup>95</sup> Almost invariably, newcomers share their inventories with their AA sponsor.<sup>96</sup> The Big Book stresses that whoever the newcomer shares with: "It is important that he be able to keep a confidence; that he fully understand and approve what we are driving at . . . ." <sup>97</sup> The sharing partner must "realize that [the newcomer is] engaged upon a life-and-death errand."<sup>98</sup>

Honesty and forthrightness are essential in Step 5: "We pocket our pride and go to it, illuminating every twist of character, every dark cranny of the past. Once we have taken this step, withholding nothing, we are delighted."<sup>99</sup>

Note that confession is a concept central to Christianity and the Bible.<sup>100</sup> And as discussed earlier, confession was a fundamental aspect of the Oxford Group.<sup>101</sup>

*Steps 6 and 7—Were entirely ready to have God remove all these defects of character; Humbly asked Him to remove all of our shortcomings.*<sup>102</sup>

<sup>95</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 74.

<sup>96</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 7–8.

<sup>97</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 74.

<sup>98</sup> *Id.* at 75.

<sup>99</sup> *Id.*

<sup>100</sup> *Psalm* 32:5 (ESV) states, "I acknowledged my sin to you, and I did not cover my iniquity; I said 'I will confess my transgressions to the LORD,' and you forgave the iniquity of my sin." *James* 5:16 (ESV) states, "[t]herefore, confess your sins to one another and pray for one another, that you may be healed." See *Step 5 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-5-scriptures.htm> (last visited Apr. 8, 2014); see also Tim Challies, *The Practice of Confession*, CHRISTIAN LIVING (May 27, 2009), <http://www.challies.com/christian-living/the-practice-of-confession> (describing the role of confession in Christianity).

<sup>101</sup> See *supra* note 44.

<sup>102</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432. Having acknowledged their shortcomings during Steps 4 and 5, newcomers must now ask a higher power to remove these character defects, such as fear, resentment, and anger. The Big Book instructs that newcomers recite a prayer: "My Creator, I am now willing that you should have all of me, good and bad. I pray that you now remove from me every single defect of character which stands in the way of my usefulness to you and my fellows. Grant me strength, as I go out from here, to do your bidding. Amen." ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 76.

Biblical sources here are *Romans* 6:11 (ESV) ("So you also must consider yourselves dead to sin and alive to God in Christ Jesus."), *Ephesians* 4:18 (ESV) ("They are darkened in their understanding, alienated from the life of God because of the ignorance that is in them, due to their hardness of heart."), *Colossians* 3:5 (ESV) ("Put to death therefore what is earthly in you: sexual immorality, impurity, passion, evil desire, and covetousness, which is idolatry."), and *1 Peter* 5:6–7 (ESV) ("Humble yourselves, therefore, under the mighty hand of God so that at the proper time he may exalt you, casting all your anxieties on him, because he cares for you."). See *Step 6 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-6-scriptures.htm> (last visited Apr. 8, 2014); *Step 7 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-7-scriptures.htm> (last visited Apr. 8, 2014); Dick B., *supra* note 56; Dick B., *supra* note 71.

*Steps 8 and 9—Made a list of all persons we had harmed, and became willing to make amends to them all; Made direct amends to such people wherever possible, except when to do so would injure them or others.*<sup>103</sup> Many AA newcomers have stolen, lied, cheated, or murdered.<sup>104</sup> For those members, Steps 8 and 9 are no small task. Under Steps 8 and 9, and with guidance from their AA sponsor, newcomers will approach those they have wronged and make amends.<sup>105</sup> This may involve visiting places of prior employment to admit stealing from the cash register or escrow account.<sup>106</sup> Or it may involve confessing one's disloyalty to a loved one. It may mean confessing to murder.<sup>107</sup>

Steps 8 and 9 may take years to complete.<sup>108</sup> The Big Book states, “[o]ur real purpose is to fit ourselves to be of maximum service to God and the people about us.”<sup>109</sup> A newcomer should not “stand before his Creator guilty of such ruinous [sin].”<sup>110</sup>

*Step 10—Continued to take personal inventory and when we were wrong, promptly admitted it.*<sup>111</sup>

*Step 11—Sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us and the power to carry that out.*<sup>112</sup>

<sup>103</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

<sup>104</sup> See generally *id.* (compiling various AA members' stories).

<sup>105</sup> See DAN GRIFFIN, A MAN'S WAY THROUGH THE TWELVE STEPS 149–55 (2009).

<sup>106</sup> See *infra* Part II.C.

<sup>107</sup> See, e.g., *Cox v. Miller*, 296 F.3d 89, 95 (2d Cir. 2002) (detailing how Cox confessed murder to his AA sponsor (although not to the authorities)).

<sup>108</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>109</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 77.

<sup>110</sup> *Id.* at 80. *Leviticus* 6:2–7 (ESV) (“If anyone sins and commits a breach of faith against the LORD by deceiving his neighbor in a matter of deposit or security . . . he shall restore it in full . . . to whom it belongs on the day he realizes his guilt.”) and *Romans* 12:18 (ESV) (“If possible, so far as it depends on you, live peaceably with all.”) provide the basis for Steps 8 and 9. See *Step 8 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-8-scriptures.html> (last visited Apr. 8, 2014); *Step 9 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-9-scriptures.htm> (last visited Apr. 8, 2014).

<sup>111</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432. *2 John* 1:8 (ESV) (“Watch yourselves, so that you may not lose what we have worked for, but may win a full reward.”), *Romans* 12:2 (ESV) (“Do not be conformed to this world, but be transformed by the renewal of your mind, that by testing you may discern what is the will of God, what is good and acceptable and perfect.”), and *Romans* 12:3 (ESV) (“For by the grace given to me I say to everyone among you not to think of himself more highly than he ought to think, but to think with sober judgment, each according to the measure of faith that God has assigned.”) provide the basis for Step 10. See *Step 10 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-10-scriptures.htm> (last visited Apr. 8, 2014).

<sup>112</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432 (emphasis omitted). The Big Book states: “We shouldn’t be shy on this matter of prayer. . . . [W]e ask God’s forgiveness and inquire what corrective measures should be taken. . . . [W]e ask God to direct our thinking . . . .” ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 85–86.

*Philippians* 4:5–6 (ESV) (“Let your reasonableness be known to everyone. The Lord is at hand; do not be anxious about anything, but in everything by prayer and supplication with thanksgiving let your requests be made known to God.”) and *Philippians* 4:9 (ESV)



*Step 12—Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics and to practice these principles in all our affairs.*<sup>113</sup> The Big Book claims that having completed Steps 1 through 11, AA members will have had a “spiritual awakening.”<sup>114</sup> Now AA members must “carry the message to [other] alcoholics.”<sup>115</sup> The Big Book requires that AA members find prospective alcoholics through “doctors, ministers, priests or hospitals.”<sup>116</sup> The Big Book’s seventh chapter, *Working with Others*, provides detailed instructions on converting newcomers.<sup>117</sup>

The Big Book states: “Don’t start out as an evangelist or reformer. Unfortunately a lot of prejudice exists.”<sup>118</sup> Indeed, the Big Book encourages that the role of a higher power in AA be minimized at first, focusing instead on:

[G]eneral conversation. After a while, turn the talk to some phase of drinking. Tell [the new prospect] enough about your drinking habits, symptoms, and experiences to encourage him to speak of himself. . . . If he is not communicative, give him a sketch of your drinking career up to the time you quit. But say nothing, for the moment, of how that was accomplished.<sup>119</sup>

Only when the new prospect is truly eager to explore AA should AA members mention belief in a higher power. And even then, AA members should do so slyly: “If the man be agnostic or atheist, make it emphatic that he does not have to agree with your conception of God. . . . The main thing is that he be willing to believe in a Power greater than himself . . . .”<sup>120</sup>

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(“What you have learned and received and heard and seen in me—practice these things, and the God of peace will be with you.”) are the biblical sources here. See *Step 11 Scriptures*, 12STEP.ORG, <http://12step.org/bible/step-11-scriptures.htm> (last visited Apr. 8, 2014).

<sup>113</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

<sup>114</sup> *Id.* For a story of one AA member’s spiritual awakening, see Dani A., *Aunt Vida: A Beloved Relative Becomes Her Hero—For a Second Time*, AA GRAPEVINE (Sept. 2013), available at <http://www.aagrapevine.org/print/5271>.

<sup>115</sup> EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432.

<sup>116</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 89.

<sup>117</sup> See generally *id.* at 89–103 (providing step-by-step instructions on how to approach newcomers).

<sup>118</sup> *Id.* at 89.

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.* at 93 (emphasis omitted). Through this method, AA has been extremely successful in recruiting newcomers, currently having an estimated 2.1 million official worldwide members. See ALCOHOLICS ANONYMOUS, *Estimates of A.A. Groups and Members as of January 1, 2013*, [http://www.aa.org/en\\_pdfs/smf-53\\_en.pdf](http://www.aa.org/en_pdfs/smf-53_en.pdf) [hereinafter *Estimates*].

AA considers the process of conversion<sup>121</sup> its most important task.<sup>122</sup> AA states, “Our *primary purpose* is to stay sober and help other alcoholics to achieve sobriety.”<sup>123</sup>

A duty to convert exists throughout biblical and Oxford Group ideology. As discussed earlier, the Oxford Group called the process Continuanee, and it was one of the Group’s five fundamental elements.<sup>124</sup>

It is not merely the notion of conversion but also the style of conversion in AA that reveals its evangelical and Christian nature. The Oxford Group’s conversion style was nearly identical. In eschewing ritualism and religious formalism, the Oxford Group created avenues to Christianity for those unwilling at first to even acknowledge the existence of a higher power.<sup>125</sup> The Oxford Group required only a willingness to believe, just like the Big Book does when it requires from newcomers only a willingness “to believe in a Power greater than himself.”<sup>126</sup>

Just like in the Oxford Group, however, the Big Book’s openness is not a rejection of religion. The Oxford Group was thoroughly evangelical.<sup>127</sup> And as the 12 Steps make clear, AA is anything but nonreligious.<sup>128</sup>

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<sup>121</sup> Of course, AA members do not call the process “conversion” but rather “12 Step work,” “carrying the message,” “working with others,” or “passing it on.” See, e.g., AA GRAPEVINE, I AM RESPONSIBLE: THE HAND OF AA; SELECTED STORIES FROM THE AA GRAPEVINE, at vii (2005).

<sup>122</sup> See, e.g., Rich H., *Bright Spot in Tokyo: AA Buddies Start a Young Peoples’ Convention in Asia and Watch the Fellowship Erupt*, AA GRAPEVINE (Sept. 2013) (describing AA service as “the bright spot of [the author’s] life”).

<sup>123</sup> ALCOHOLICS ANONYMOUS, A.A. PREAMBLE, available at [http://www.aa.org/en\\_pdfs/smf-92\\_en.pdf](http://www.aa.org/en_pdfs/smf-92_en.pdf) (emphasis added). Some AA groups take the title “primary purpose” as their group name, as in the Primary Purpose Group of Austin, Texas. See AUSTIN PRIMARY PURPOSE GROUP, <http://austinppg.org/> (last visited Apr. 8, 2014).

<sup>124</sup> See *supra* note 47 and accompanying text.

<sup>125</sup> See generally PHILIP LEON, THE PHILOSOPHY OF COURAGE: THE OXFORD GROUP WAY 150–52 (1939) (portraying the Oxford Group as converting by means of casting a wide net).

<sup>126</sup> See *supra* text accompanying note 40; see also ALCOHOLICS ANONYMOUS: THE STORY, INC., *supra* note 23, at 93.

<sup>127</sup> See DRIBERG, *supra* note 38, at 61–62 (noting the “feverish revivalism” exercised by Oxford Group members).

<sup>128</sup> See *infra* Part IV.A.2.

## II

## AA TODAY—A DAY IN THE LIFE

While AA members today come from all walks of life,<sup>129</sup> their AA regiments are remarkably similar.<sup>130</sup> This Part paints a day in the life of an AA member. There are three subparts below: (A) What Happens at AA Meetings; (B) The Sponsor-Sponsee Relationship; and (C) Examples of Step Work and More on the Role of Sponsor.

## A. What Happens at AA Meetings

A newcomer's first AA encounter usually involves attending an AA meeting.<sup>131</sup> AA has over 63,000 local chapters scattered throughout the United States and Canada alone.<sup>132</sup> Each chapter holds anywhere from one to twenty or more meetings per week.<sup>133</sup> The vast majority of chapters hold meetings in churches, paying nominal rent or using the space free of charge.<sup>134</sup>

Signs hang from the walls of most AA meetings: "Let go and let God"; "But for the grace of God"; "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference."<sup>135</sup> Banners listing the 12 Steps and the Twelve Traditions (12 Traditions)<sup>136</sup> hang in front of

<sup>129</sup> This includes different jobs, regions, drinking habits, ages, genders, sexuality, etc. See Yu Ye & Lee Ann Kaskutas, *Using Propensity Scores to Adjust for Selection Bias When Assessing the Effectiveness of Alcoholics Anonymous in Observational Studies*, 104 DRUG & ALCOHOL DEPENDENCE 56, 57 (2009).

<sup>130</sup> See generally EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76 (telling the stories of dozens of AA members, who all practice very similar AA programs).

<sup>131</sup> See Floyd P. Garrett, *Your First AA Meeting: An Unofficial Guide for the Perplexed*, PSYCHIATRY & WELLNESS, [http://www.bma-wellness.com/papers/First\\_AA\\_Meeting.htm](http://www.bma-wellness.com/papers/First_AA_Meeting.htm) (last visited Apr. 12, 2014) (offering advice for potential newcomers on attending meetings).

<sup>132</sup> See *Estimates*, *supra* note 120.

<sup>133</sup> Telephone Interview with Alcoholics Anonymous Gen. Serv. Bd. Representative (Jan. 24, 2013).

<sup>134</sup> See Garrett, *supra* note 131.

<sup>135</sup> See Rich H., *If Walls Could Talk: AA Meetings Can Be Held Just About Anywhere*, AA GRAPEVINE (Oct. 2012) (showing photographs of various meeting locations); *A.A. Slogans and Quotes*, <http://aaslogans.com/> (last visited Apr. 12, 2014) (listing common AA slogans).

<sup>136</sup> For more information on the 12 Traditions, see ALCOHOLICS ANONYMOUS WORLD SERVS., INC., *The Twelve Traditions of Alcoholics Anonymous*, available at [http://www.aa.org/en\\_pdfs/smf-122\\_en.pdf](http://www.aa.org/en_pdfs/smf-122_en.pdf). Here are the 12 Traditions:

- (1) Our common welfare should come first; personal recovery depends upon A.A. unity;
- (2) For our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern;
- (3) The only requirement for A.A. membership is a desire to stop drinking;
- (4) Each group should be autonomous except in matters affecting other groups or A.A. as a whole;
- (5) Each group has but one primary purpose—to carry its message to the alcoholic who still suffers;
- (6) An A.A. group ought never endorse, finance, or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property, and prestige divert us from

the room, where the meeting leader sits.<sup>137</sup> In opening the meeting, the leader often reads “AA’s ABCs,” which synthesize Steps 1 through 3: “(a) [t]hat we were alcoholic and could not manage our own lives; (b) [t]hat probably no human power could have relieved our alcoholism; and (c) [t]hat God could and would if He were sought.”<sup>138</sup>

The meeting leader typically introduces a topic for discussion or invites members to share their “story.”<sup>139</sup> Discussion topics generally center around one of the 12 Steps or around a higher power in general.<sup>140</sup> At some point during the hour-long meeting, the meeting leader might ask newcomers to introduce themselves to the group. Group members will pass their phone numbers to newcomers, instructing them to call if they feel an urge to drink.<sup>141</sup> Meeting leaders instruct newcomers to obtain sponsorship as soon as possible from those members who have had a “spiritual awakening as the result of [the 12 Steps].”<sup>142</sup>

In closing the meeting, groups members often hold hands and recite a Christian prayer aloud and in unison.<sup>143</sup> This prayer is often either the Lord’s Prayer or the Serenity Prayer.<sup>144</sup>

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our primary purpose; (7) Every A.A. group ought to be fully self-supporting, declining outside contributions; (8) Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers; (9) A.A., as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve; (10) Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy; (11) Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio, and films; and (12) Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles before personalities.

*Id.*

<sup>137</sup> See Rich H., *supra* note 135.

<sup>138</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 60.

<sup>139</sup> A “story” is a narrative detailing an AA member’s upbringing, struggle with alcohol, and process of rebirth through the 12 Steps. See Garrett, *supra* note 131.

<sup>140</sup> For an idea of topics regularly discussed in an AA meeting, see ALCOHOLICS ANONYMOUS WORLD SERVS., INC., DAILY REFLECTIONS (1990) [hereinafter DAILY REFLECTIONS]. *Daily Reflections* is a small book designed for daily reading and meditation. For each day of the year, the book provides readers with a thought about a higher power, one of the 12 Steps, AA service, etc. AA meeting leaders often base group discussions on prompts from *Daily Reflections*. See *id.* at 7–8.

<sup>141</sup> See, e.g., Phone Card Pamphlet, AA Campus Group of Ithaca, N.Y. (on file with the author) (containing several prayers as well as space for veteran AA members to write their phone numbers—these pamphlets are given to newcomers).

<sup>142</sup> Bill L., *Working Step 12*, BAREFOOT’S WORLD, <http://www.barefootsworld.net/aaworkstep12.htm> (last visited Apr. 12, 2014).

<sup>143</sup> See Griffin v. Coughlin, 673 N.E.2d 98, 102–03 (N.Y. 1996) (noting the general importance of prayer to the AA framework).

<sup>144</sup> See *Frequently Asked Questions About A.A.’s History*, ALCOHOLICS ANONYMOUS, <http://www.aa.org/lang/en/subpage.cfm?page=287> (last visited Apr. 12, 2014); Lord, *Teach Us How to Pray*, BREAD ON THE WATERS, <http://www.cptryon.org/prayer/> (last visited Apr. 12,

## B. The Sponsor-Sponsee Relationship

In accordance with Step 12, those who have had a spiritual awakening as a result of the 12 Steps must find newcomers to sponsor.<sup>145</sup>

Sponsors and sponsees together read through the Big Book and other AA literature. The sponsor guides the sponsee through the 12 Steps one at a time, barring the sponsee from moving forward until each Step is completed to the sponsor's satisfaction.<sup>146</sup> Sponsors and sponsees talk daily, and they often pray together.<sup>147</sup> The sponsee shares and seeks spiritual advice on almost all aspects of the sponsee's life. A sponsor's goal is not to solve the sponsee's problems but to connect the sponsee to a higher power, whom he or she believes can.<sup>148</sup>

The Big Book makes clear that confidentiality is crucial within the sponsor-sponsee relationship. AA requires brutal or "rigorous" honesty.<sup>149</sup> While members may hesitate in sharing openly during a large AA meeting, they may not hesitate in revealing everything to their sponsor.<sup>150</sup> AA believes that honesty is a cornerstone to recovery and a process which involves admitting truths "to God, to ourselves, and to another human being."<sup>151</sup> An AA sponsor is that other human being and as such must keep matters confidential, lest the sponsor-sponsee relationship suffer from loss of trust.<sup>152</sup>

While AA does not formally train its sponsors, local chapters usually limit the sponsor role to those having achieved certain AA milestones, such as completing the 12 Steps or attaining certain lengths of

2014) (providing links to the Serenity Prayer). The Lord's Prayer is a central prayer in Christianity, appearing in the Gospel of Luke. *See Luke* 11:2-4.

<sup>145</sup> *See supra* notes 113-23 and accompanying text.

<sup>146</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>147</sup> For a story on the importance of making daily phone calls to fellow AA members and sponsors, see Judith H., *Just Call Me*, AA GRAPEVINE (May 2013). In general, working an AA program often involves developing habits centered around attending AA meetings, praying, and meditating, as well as communicating with one's sponsor and other people in one's AA "network." *See, e.g.*, Tina H., *Bad Habits: A Teenage AA Connects to Life*, AA GRAPEVINE (Nov. 2007) ("AA gave me good habits to replace my bad habits. Instead of sitting in self-pity, I was told to hit meetings early . . . . Instead of sitting in my head, I was told to go down my home group's phone list, call other members on their sobriety birthday, and wish them a wonderful day (thinking of others).").

<sup>148</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>149</sup> *See* ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 58.

<sup>150</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>151</sup> *See* EXPERIENCE, STRENGTH, AND HOPE, *supra* note 76, at 432 (emphasis added).

<sup>152</sup> *See* ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 74; *see also* Meeting Leader Notes, AA Campus Group of Ithaca, N.Y. (on file with author) (instructing the meeting leader to begin each meeting by stating, "[w]hat is said in this meeting, stays in this meeting—'here here.'").

sobriety.<sup>153</sup> And many AA chapters offer “sponsorship retreats,” where members conduct exercises and attend lectures on effective sponsorship methods.<sup>154</sup>

### C. Examples of Step Work and More on the Role of Sponsor

Here I examine a few real-life examples of “step work,” which expose the importance of sponsorship and the belief in a higher power within AA.

*Step 4 Examples.*<sup>155</sup> Reproducing an entire Step 4 inventory here is impossible, for they are often longer than this entire Note.<sup>156</sup> But here are a few highlights taken from actual Step 4 inventories:

#### Step 4 Harms to Others

“I cursed off and spat at a random old woman at the train station ten years ago.” “I stole food from [the restaurant where I work].” “I stole money out of the locker room at my gym.” “I cheated on my wife with [a number of women].” “I murdered [a family].” “I neglected my family while drinking—didn’t cook dinner or drive the kids to school.” “I drove drunk constantly.” “I ruined Christmas for my family so many times I can’t remember.” “I was a horrible roommate.” “I raped [a woman].” “I cheated on an exam.” “I pawned [my child’s] bike for drug money.” “I’ve been spending the child support money on booze.” “I didn’t show up to work for two weeks.” “I lied on my income taxes.”

#### Step 4 Fears

“I’m afraid of getting cancer from smoking.” “I’m afraid of being broke.” “I’m afraid of being celibate.” “I’m afraid of the purple monster in my dreams.” “I’m afraid of being shunned by others because I’m getting fat and ugly.” “I’m afraid women won’t be attracted to me.” “I’m afraid of dying alone.” “I’m afraid I’ll lose my job.” “I’m

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<sup>153</sup> These milestones are hard to achieve and only a rare few ever do. Indeed, AA retention is something like 3%. See *infra* Part IV.B.1.a. There is thus a relatively small pool of persons who are ideal for sponsorship.

<sup>154</sup> See, e.g., *Retreats*, CAMETOBELIEVE.ORG, <http://www.cametobelieve.org> (last visited Apr. 12, 2014).

<sup>155</sup> These examples derive in part from Step 4 inventories on file with the author, provided with the expectation of anonymity by members of various AA groups. Some examples derive from Step 4 samples provided by Internet resources, like discussion pages and informational sites. See, e.g., *Taking Step Four*, THE BIG BOOK BUNCH (June 9, 2000), <http://www.sober.org/Step4.htm>; *Step 4*, THE SPONSORS AIDE (June 17, 2008), <http://the.sponsorsaide.org/Step4.htm>.

<sup>156</sup> For the story of one woman’s Step 4 experience, see Sherry G., *Naming the Negatives*, AA GRAPEVINE (Apr. 1997) (“I came to AA full of guilt and remorse for all the bad things I’d done—for example, being an unfaithful wife, not doing my job to the best of my ability and still expecting the highest rewards, and being unresponsive to other people’s needs.”).

afraid [my son] won't get into college." "I'm afraid the police will arrest me for stuff I've done." "I'm afraid [my wife] will find out I cheated on her. I don't know whether or not to tell her."

*Steps 6 and 7 Examples.* Steps 6 and 7 involve enumerating one's shortcomings and becoming willing to have a higher power remove those shortcomings. Sponsor and sponsee compile this "list of shortcomings" from events and patterns witnessed in the sponsee's life. Shortcomings include being: angry, anxious, arrogant, closed minded, dependent on romance, depressed, dishonest, controlling, fearful, gluttonous, greedy, gossipy, impatient, addicted to smoking, intolerant, jealous, envious, lazy, prejudice, resentful, self-centered, self-pitying, abusive of others for enjoyment, aloof, apathetic, confrontation-avoiding, vain, coldhearted, cowardly, critical, crude, deceptive, destructive, devious, disorganized, and egotistical. The list goes on.<sup>157</sup>

*Step 9 Examples.* In Step 9, sponsees approach those that they have harmed and offer to make amends.<sup>158</sup> Before making an approach, the sponsee and sponsor develop a plan of action. Sometimes the sponsor helps develop a repayment plan for stolen goods or helps draft a letter of apology to a former employer.<sup>159</sup> In other instances, sponsors advise that sponsees not make amends—for example, when to do so would harm another (*e.g.*, telling another man that the sponsee had an affair with his wife).<sup>160</sup> The sponsee sometimes faces job loss or jail time should he confess his transgressions to the authorities.<sup>161</sup> It is the sponsor's role to guide the sponsee to a higher power during these difficult periods of decision making.<sup>162</sup>

### III

#### BACKGROUND ON THE CLERGY PRIVILEGE AND THE REQUIREMENT OF DENOMINATIONAL NEUTRALITY

##### A. Background on the Clergy Privilege

Legislatures in all states have enacted some form of the clergy privilege.<sup>163</sup> Although differing slightly between jurisdictions, the

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<sup>157</sup> Many of these examples again derive from Step 6 and Step 7 inventories on file with the author, provided with the expectation of anonymity by members of various AA groups. Internet sources again provide some examples as well. *See, e.g., 194 Character Defects*, REALISTIC RECOVERY (May 3, 2009), <http://realisticrecovery.wordpress.com/2009/05/03/194-character-defects/>.

<sup>158</sup> *See supra* notes 103–10 and accompanying text.

<sup>159</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 77–82.

<sup>160</sup> This is actually a classic AA no-amends situation. Interview with Anonymous AA Members in Ithaca, N.Y. (Jan. 2013).

<sup>161</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 77–82.

<sup>162</sup> *See id.* (providing examples of advice given to AA members seeking to make amends).

<sup>163</sup> *See Colombo, supra* note 12, at 231 & n.39 (collecting statutes). The clergy privilege has had an active history. Originally part of English common law, the privilege derives

privilege generally protects that information which is shared in confidence with a clergyperson in furtherance of spiritual advisement.<sup>164</sup> For a conversation to be protected, typically the clergy must be acting in their “professional character as spiritual advisor”<sup>165</sup>—*e.g.*, conversations with a priest on a leave of duty will probably not qualify.<sup>166</sup> For AA, this means that communications with someone other than one’s active sponsor would not qualify for protection, an issue I discuss below in Part V.

The clergy privilege serves two essential functions. First, it creates “privacy zones” within society. Second, it shows tolerance toward those religious practices that require confidential communication.<sup>167</sup> The New York legislature, for example, enacted its clergy privilege legislation<sup>168</sup> in “respon[se] to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one’s self and others can be realized.”<sup>169</sup>

The various state clergy privileges “differ in three principal respects: their definition of ‘clergy,’ their scope, and the question of to whom the privilege ‘belongs,’ *i.e.*, who may claim or waive, the privilege—the cleric, the congregant, or both.”<sup>170</sup>

New York’s privilege is representative of most others in that: (1) New York defines “clergy” widely; (2) New York limits the scope of the privilege to those communications which are made in confidence and for spiritual advisement; and (3) the parishioner holds waiver power.<sup>171</sup>

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from the canons of Roman Catholicism. See JOHN C. BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* 47–49 (3d ed. 1989) (discussing the importance of “the seal of confession” in the Roman Catholic Church). After the Protestant Reformation in England, the privilege fell into disuse. See *id.* at 111. Today, the privilege is widely accepted across the United States. See Claudia G. Catalano, Annotation, *Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser*, 93 A.L.R. 5th 327, 350 (2001).

<sup>164</sup> See generally *Nestle v. Commonwealth*, 470 S.E.2d 133, 137–38 (Va. Ct. App. 1996) (detailing the history of the clergy privilege).

<sup>165</sup> See N.Y. C.P.L.R. 4505 (McKinney 2012).

<sup>166</sup> See *United States v. Gordon*, 493 F. Supp 822, 822–24 (N.D.N.Y. 1980).

<sup>167</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The [clergy-penitent] privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”); see also 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2285 (McNaughton rev. ed. 1961) (discussing the general principles behind all privileges).

<sup>168</sup> N.Y. C.P.L.R. 4505 (“Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.”).

<sup>169</sup> See *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (N.Y. 1979).

<sup>170</sup> *Cox v. Miller*, 296 F.3d 89, 102 (2d Cir. 2002).

<sup>171</sup> See N.Y. C.P.L.R. 4505; Colombo, *supra* note 12, at 231 n.39 (collecting statutes).



Indeed, New York has played an important role in developing the clergy privilege. In 1813, a New York state court applied the clergy privilege to a grand jury proceeding, ordering that a Catholic priest “not . . . act at all” despite possessing information relevant to the proceeding.<sup>172</sup> The case was *People v. Phillips*,<sup>173</sup> a case one commentator refers to as a “central feature of one of the great stories concerning church and state in America.”<sup>174</sup> Daniel Phillips had confessed to Father Kohlman as to knowingly receiving stolen goods.<sup>175</sup> In trying to make amends, Phillips released the goods to Kohlman, who returned them to their rightful owner.<sup>176</sup> Still upset and hoping for criminal charges, the rightful owner informed the state of all events.<sup>177</sup> But as I stated, the state was unable to compel Kohlman’s testimony as to Phillips’ involvement, and the rightful owner went unappeased.<sup>178</sup>

Similar sagas play out in modern applications of the clergy privilege as well.<sup>179</sup>

## B. Introduction to Denominational Neutrality

The clergy privilege lies at a delicate intersection within the First Amendment. Many argue that recognition of the clergy privilege is required, lest government violate the Free Exercise Clause in disallow-

<sup>172</sup> See P. McGroarty, *The People v. Daniel Phillips and Wife*, 1 W. L.J. 109, 112 (1843) (summarizing *People v. Phillips*).

<sup>173</sup> N.Y. Ct. Gen. Sess. (1813) (unpublished); see McGroarty, *supra* note 172. The case is difficult to find, although some claim it is reproduced in full at WILLIAM SAMPSON, *THE CATHOLIC QUESTION IN AMERICA* (Da Capo Press 1974) (1813). See Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489, 489 n.1.

<sup>174</sup> Bailey, *supra* note 173, at 489.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* This story of wrongdoing, confession, and attempted amends is obviously analogous to AA’s Step 4, 5, and 9 processes. See *supra* Part II.C.

<sup>177</sup> See Bailey, *supra* note 173, at 489.

<sup>178</sup> Again, a full reproduction of *People v. Phillips* is difficult to locate. For another account of the case, see Terrence T. Kossegi & Barbara Stegun Phair, *The Clergy-Communicant Privilege in the Age of Electronic Surveillance*, 12 ST. JOHN’S J. LEGAL COMMENT. 241, 248 (1996).

<sup>179</sup> Although sometimes involving serious criminal charges such as murder, parties also invoke the clergy privilege in lower-profile cases such as child custody or inheritance suits. See generally Catalano, *supra* note 163, at 355–58 (summarizing cases). In *Ryan v. Ryan*, the Supreme Judicial Court of Massachusetts upheld a trial court’s application of the clergy privilege. 642 N.E.2d 1028, 1034–35 (Mass. 1994). Ryan, a divorced man, wanted to remarry. In order to do so, he sought to annul his previous marriage in the Catholic Church. The man’s previous wife agreed to the annulment on the condition that the man leave their joint children two-thirds of his estate upon death. The man agreed to this orally. After various meetings and document exchanges, the Catholic Church granted the annulment and the man remarried. Some years later, upon the man’s death, the joint children discovered they were not left two-thirds of their father’s estate. *Id.* at 1030–31. They sued and ultimately requested information from the Catholic Church, believing the annulment communications would prove their entitlement to the inheritance. The clergy privilege was invoked to preclude any such discovery or testimony. *Id.* at 1034.

ing certain religious practices (i.e., confession).<sup>180</sup> Yet the clergy privilege must remain fairly narrow in its reach, since a broad privilege would preference religion over nonreligion in violation of the Establishment Clause.<sup>181</sup> But in keeping the privilege narrow, legislatures and courts must be careful not to discriminate against fringe religions, say, by limiting the privilege to only major religions, like Catholicism or Judaism. Such a preference for mainstream religions over the less conventional ones is a clear violation of the Establishment Clause.<sup>182</sup>

I explore here briefly this last assertion: discriminating against fringe religions within the clergy privilege context violates the Establishment Clause. Pursuant to the Establishment Clause, “government must be neutral when it comes to competition between sects.”<sup>183</sup> “Neither a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another.”<sup>184</sup> Accordingly, any law that discriminates based on religion is subject to strict scrutiny, requiring that the government justify its action as the least restrictive means of furthering a compelling interest.<sup>185</sup>

This is generally true whether a law directly or indirectly discriminates among religions. In *Colorado Christian University v. Weaver*, the Tenth Circuit struck down under the Establishment Clause a state statute which directly discriminated between those religious educational organizations that were “sectarian” and those that were “‘pervasively’ sectarian.”<sup>186</sup> The court stated that the “sole function and purpose of the [statute] is to exclude some but not all religious institutions on the basis of [certain] criteria,” such as the religious composition of the organization’s directors or the degree of religiosity in the organization’s curriculum.<sup>187</sup> In *Larson v. Valente*, the Supreme Court invalidated a state statute that imposed registration

<sup>180</sup> The Supreme Court has not ruled on the issue. See Kossegi & Phair, *supra* note 178, at 243–45 & nn.12–25 (arguing that the clergy privilege is required by the Free Exercise Clause); Mary Harter Mitchell, *Must Clergy Tell?: Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 796–97 (1987) (same). See generally *In re Grand Jury Investigation*, 918 F.2d 374, 378–85 (3d Cir. 1990) (discussing the clergy privilege’s use in federal court and its relation to the United States Constitution).

<sup>181</sup> Indeed, an expansive clergy privilege could bestow an extraordinary benefit on religion. See generally *Lemon v. Kurtzman*, 403 U.S. 602, 614–20 (1971) (detailing when a statute unconstitutionally favors religion over nonreligion); see also *Larson v. Valente*, 456 U.S. 228, 251–53 (1982) (discussing the *Lemon* test and the Establishment Clause).

<sup>182</sup> See *Larson*, 456 U.S. at 251–53 & n.27 (discussing “denominational preference”); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–97 (1994) (stating that favoring one denomination over another violates the Establishment Clause); *Developments in the Law—Privileged Communications*, 98 HARV L. REV. 1450, 1556 (1985) (explaining how and why the New York legislature enacted a nondenominational clergy privilege).

<sup>183</sup> *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

<sup>184</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>185</sup> *Larson*, 456 U.S. at 245–47.

<sup>186</sup> 534 F.3d 1245, 1258 (10th Cir. 2008).

<sup>187</sup> *Id.* (citations omitted).

and reporting requirements only on those religious organizations that solicited more than fifty percent of their funds from nonmembers.<sup>188</sup> While the statute's discrimination was somewhat attenuated (attacking donation channels rather than the presence or absence of certain religious characteristics), the Court nevertheless declared it unconstitutional.<sup>189</sup>

These cases and others like them require that clergy privilege statutes protect all religions equally. A clergy privilege that protected, for example, communications with Catholic priests but not Jewish rabbis would defy this rule of denominational neutrality.<sup>190</sup> Indeed, several scholars have examined the precise issue of whether discriminating between religions within the clergy privilege violates the Establishment Clause.<sup>191</sup> They answer in the affirmative, recognizing that there exists no apparent compelling government interest which could immunize such discrimination.<sup>192</sup>

If AA is a religion, the clergy privilege must protect AA communications to the same extent it protects communications in mainstream religions. The question then is whether AA is properly categorized as a religion, an issue explored below in detail.

#### IV

##### THE CLERGY PRIVILEGE MUST EXTEND TO AA COMMUNICATIONS, LEST IT VIOLATE CONSTITUTIONAL PROTECTIONS AND PUBLIC POLICY

Arguments that the clergy privilege should not extend to AA communications fit into two general categories. In the first category, commentators simply assume that AA is a nonreligion and then argue that expanding the clergy privilege to include nonreligions would create a slippery slope.<sup>193</sup> In the second category, commentators actually conclude that AA is a nonreligion.<sup>194</sup> In neither category do commentators engage in a substantive examination of AA.<sup>195</sup> Commentators

<sup>188</sup> *Larson*, 456 U.S. at 255.

<sup>189</sup> *Id.* at 248.

<sup>190</sup> See Colombo, *supra* note 12, at 245 ("Under this formulation [of the clergy privilege], Christian and Jewish clergy are specifically favored over the clergy of other faiths, thereby violating the Establishment Clause.").

<sup>191</sup> See, e.g., Mitchell, *supra* note 180, at 779–80.

<sup>192</sup> See, e.g., *id.* at 780 ("The state could hardly judge constitutionally, for example, that some denominations' clergy are better counselors than others'."). But see R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1714–15 (2003) (arguing that a clergy privilege statute might constitutionally discriminate against some religions under certain circumstances).

<sup>193</sup> See, e.g., Garber, *supra* note 20, at 944.

<sup>194</sup> See, e.g., Barry, *supra* note 21, at 440–41.

<sup>195</sup> See *supra* notes 20–21.

instead base their conclusions on superficial premises—namely, emphasizing AA’s lack of formalism or AA’s willingness to include members who at first do not believe that a higher power exists.<sup>196</sup>

The lengthy AA examination offered above is more than mere background. This Note seeks to insert a substantive examination of AA into the clergy privilege conversation, without which there cannot be correct application of law to fact. What the information offered above reveals is that AA is a religion. Under the Establishment Clause, once deemed a religion, the clergy privilege must protect AA to the same extent it protects mainstream religions.<sup>197</sup> Moreover, once deemed a religion, certain protections attach under the Free Exercise and Equal Protection Clauses.

But regardless of the Constitutional arguments, there are many sound policy grounds for applying the clergy privilege to AA communications. Chief among these grounds is AA’s effectiveness as a means for alcohol and drug rehabilitation, an effectiveness which research shows may be lost without confidentiality.

This Part includes two subparts: (A) AA is a Religion, and the Clergy Privilege Must Protect Certain AA Communications, Lest It Violate Constitutional Protections; and (B) Public Policy Supports Extending the Clergy Privilege to Certain AA Communications.

#### A. AA is a Religion, and the Clergy Privilege Must Protect Certain AA Communications, Lest It Violate Constitutional Protections

##### 1. *Courts Already Categorize AA as a Religion*

Courts agree that AA is a religion for certain Establishment Clause purposes.<sup>198</sup> For example, neither courts nor government agencies may compel or coerce attendance at AA meetings.<sup>199</sup> Nor may taxpayer money fund private rehabilitation centers that coerce AA attendance.<sup>200</sup>

In *Griffin v. Coughlin*, the New York Court of Appeals barred state prisons from making family visits contingent on AA attendance.<sup>201</sup> The court found that AA methods and beliefs went far beyond mere “spirituality” and that compelled attendance constituted government

<sup>196</sup> See *id.*

<sup>197</sup> See *supra* notes 182, 185 and accompanying text; Barry, *supra* note 21, at 440 (agreeing implicitly); see also *Larson v. Valente*, 456 U.S. 228, 246 (1983) (stating that laws discriminating among religions are subject to strict scrutiny).

<sup>198</sup> See Garber, *supra* note 20, at 930; see also *Warner v. Orange Cnty. Dep’t of Prob.*, 115 F.3d 1068, 1074–77 (2d Cir. 1997).

<sup>199</sup> See, e.g., *Griffin v. Coughlin*, 673 N.E.2d 98, 99 (N.Y. 1996).

<sup>200</sup> *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 402 (2d Cir. 2001).

<sup>201</sup> 673 N.E.2d at 99.

mandated religion in violation of the Establishment Clause.<sup>202</sup> The court found specifically that “adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization,” since AA members must believe in a higher power, pray to that higher power, and confess their wrongdoings.<sup>203</sup>

In *Warner v. Orange County Department of Probation*, the Second Circuit ruled that mandating AA attendance as a condition of probation or prison release violates the Establishment Clause.<sup>204</sup> The *Warner* court explained that “the Constitution guarantees that government may not coerce anyone to . . . participate in religion.”<sup>205</sup> Accordingly, because the court found that AA was “intensely religious,” it ruled that government agencies acted unconstitutionally when they mandated or even coerced AA attendance.<sup>206</sup>

In *DeStefano v. Emergency Housing Group, Inc.*, the Second Circuit again recognized AA as a religion within the Establishment Clause context.<sup>207</sup> *DeStefano* held that state-funded drug and alcohol treatment facilities may not require attendance at AA meetings, even if the facility is privately operated. The court was quick to label AA a religion, emphasizing that AA instructs members to “turn [their] will and [their] lives over to the care of God.”<sup>208</sup>

It is not just courts from the Northeast that consider AA a religion for Establishment Clause purposes. Courts in many areas of the country recognize AA and programs modeled after AA as “fundamentally religious, based as it is on the concept of a higher power to which participants must submit.”<sup>209</sup>

While it is possible, conceptually, to categorize an institution as a religion for one purpose and as a nonreligion for another purpose, no court to date has done so.<sup>210</sup> Yet, in dicta, the Second Circuit has suggested doing just that—recognizing AA as a religion for Establishment Clause purposes, but deeming it nonreligious for clergy privilege purposes.<sup>211</sup> Such a split categorization would contravene the

<sup>202</sup> See *id.* at 101.

<sup>203</sup> *Id.* at 103.

<sup>204</sup> *Warner v. Orange Cnty. Dep’t of Prob.*, 115 F.3d 1068, 1076–77 (2d Cir. 1997).

<sup>205</sup> *Id.* at 1074.

<sup>206</sup> *Id.* at 1075, 1077–78.

<sup>207</sup> *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 423 (2d Cir. 2001).

<sup>208</sup> *Id.* at 407 (alteration in original) (internal quotation marks omitted).

<sup>209</sup> *Turner v. Hickman*, 342 F. Supp. 2d 887, 896 (E.D. Cal. 2004); see, e.g., *Cristee v. Norris*, No. 2:07CV00045JHL, 2008 WL 905616, at \*3 n.4 (E.D. Ark. Mar. 28, 2008) (accepting that AA is a religion under the Establishment Clause); *Farnworth v. Craven*, No. CV05-493-S-MHW, 2007 WL 4261930, at \*2 n.1 (D. Idaho Nov. 30, 2007) (same); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1031, 1034 (E.D. Wisc. 2001) (same).

<sup>210</sup> See *Cox v. Miller*, 296 F.3d 89, 105 (2d Cir. 2002) (describing the difficulty courts might have with such an interpretation).

<sup>211</sup> *Id.* at 107–10.

principles of regularity, predictability, and consistency to which courts endeavor to conform.<sup>212</sup>

This split would be especially upsetting in the Establishment Clause context. On the one hand, courts would categorize AA as a religion, denying it the benefit of state funding and increased participation through government-mandated programs. On the other hand, courts would categorize AA as nonreligious, denying it the protection and validation that accompany the clergy privilege. This unfair result would violate the Establishment Clause by discriminating along denominational grounds.<sup>213</sup> Indeed, to impose upon AA the burdens of religion but deny it the benefits is to, quite obviously, disprefer AA to other faiths or belief systems.

## 2. *AA Fits All Pertinent Definitions of Religion*

Regardless of how courts have categorized AA in the past, AA fits all pertinent definitions of a religion. Should courts review from scratch the question of whether AA is a religion, they should find that AA qualifies based on these definitions alone.

The Supreme Court has defined religion in a number of different and slightly contradictory ways. For our purposes, however, this is no matter, as AA fits every definition the Court has entertained.

In early cases, the Court defined religion using a theist definition: “ha[ving] reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>214</sup> In more recent cases, the Court has used a nontheist standard, giving religion a broader definition and stretching it to include those organizations which do not teach or believe in a higher power as typically understood in America—for example, Buddhism, Taoism, Ethical Culture, and Secular Humanism.<sup>215</sup>

When courts apply this nontheist definition, they typically require the presence of multiple indications of religion. Here, a court might require a strong tradition or history as well as a certain level of group organization, hierarchical structure, literary manifestations, worship, or ritual.<sup>216</sup> Additionally, courts might ask under the nontheist definition whether the beliefs in question “occup[y] the same place in the

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<sup>212</sup> See, e.g., *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 744 (2013) (describing consistency in the law as a “virtue”).

<sup>213</sup> See *supra* Part III.A.

<sup>214</sup> *Davis v. Beason*, 133 U.S. 333, 342 (1890); see *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1065 n.60 (1978).

<sup>215</sup> See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

<sup>216</sup> Jeffrey L. Oldham, *Constitutional “Religion”: A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 147 (2001).

lives of [their] holders that the orthodox beliefs occupy in the lives of believing majorities.”<sup>217</sup>

Thus, in *Africa v. Commonwealth of Pennsylvania*,<sup>218</sup> the Third Circuit analyzed over 100 years of Supreme Court precedent and ultimately concluded that MOVE was not a religion under the Free Exercise or Establishment Clauses.<sup>219</sup> MOVE, apparently short for “movement,” was an African American–based libertarian group. MOVE prescribed a regimented, “back-to-nature” existence, including communal living, a vegan diet, and a technology-free lifestyle.<sup>220</sup> Despite their almost militant adherence to MOVE ideology, members were not protected under the First Amendment because MOVE had no substantial body of literature, worship system, or hierarchical structure.<sup>221</sup> Importantly, MOVE was in no way a replacement for orthodox religion, since it did not answer questions “having to do with, among other things, life and death, right and wrong, and good and evil.”<sup>222</sup>

In *Wisconsin v. Yoder*, the Supreme Court applied a similar reasoning but declared that Old Order Amish was a religion protected under the First Amendment.<sup>223</sup> Similar to MOVE, Old Order Amish requires living “in harmony with nature,” totally rejecting modern society, including advanced technology and the “competitive spirit.”<sup>224</sup> Unlike the recently developed MOVE, however, Old Order Amish has its roots in the sixteenth century. Old Order Amish also offers rituals such as adult baptism, and it includes complete instructions for living, which are dictated by the “*Ordnung*, or rules, of the [Amish] church community.”<sup>225</sup> Old Order Amish establishes a hierarchy within its highly structured community, something MOVE notably lacked.<sup>226</sup> In short, whereas MOVE prescribed a “personal” moral code, Old Order Amish establishes mandatory communal practices for proper being.<sup>227</sup>

Note that when considering factors such as an organization’s historical origin, hierarchical structure, or ritualistic requirements, courts do not require complete uniformity of belief for categorization

<sup>217</sup> *Fellowship of Humanity v. Cnty. of Alameda*, 315 P.2d 394, 406 (Cal. Ct. App. 1957).

<sup>218</sup> 662 F.2d 1025, 1033 (3d Cir. 1981).

<sup>219</sup> *See id.* at 1025–27.

<sup>220</sup> *See id.*; *Philadelphia, City Officials Ordered to Pay \$1.5 Million in MOVE Case*, CNN (June 24, 1996), <http://www.cnn.com/US/9606/24/move.vertict/>.

<sup>221</sup> *See Africa*, 662 F.2d at 1033, 1035–36.

<sup>222</sup> *Id.* at 1033.

<sup>223</sup> 406 U.S. 205, 216 (1981).

<sup>224</sup> *See id.* at 210.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.* (noting the challenges one faces while moving from childhood through adult baptism within Amish communities).

<sup>227</sup> *Africa*, 662 F.2d at 1034.

as a religion. In *Thomas v. Review Board*, the Court deemed a Christianity-based group a religion despite some of its members “struggling” with the question of belief in a higher power and many disagreeing about the group’s essential principles.<sup>228</sup> The Supreme Court found that these facts were “irrelevant”<sup>229</sup> because religious beliefs need not be “consistent[ ] or comprehensible.”<sup>230</sup>

Indeed, courts may deem an organization religious even when the organization expressly rejects the classification, as in *Malnak v. Yogi*, where the nontheist Science of Creative Intelligence was declared a religion over its founder’s objections.<sup>231</sup>

AA fits both the theist and nontheist definitions of religion. First, AA clearly meets the theist definition of religion: “hav[ing] reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>232</sup> Second, even assuming away AA’s theistic aspects, AA meets the nontheistic definition of religion.

AA meets the theist definition by application of the Supreme Court’s plain language. AA principles “ha[ve] reference to one’s views of his relations to his Creator.”<sup>233</sup> The Big Book states that humans are “children” of a higher power and that that higher power is our “Maker.”<sup>234</sup> According to AA, humans should do the bidding of a higher power, for that higher power is our “Employer” and we “perform[ ] His work.”<sup>235</sup> We are “agents” and He is the “Principal.”<sup>236</sup>

AA principles impose “obligations . . . of reverence for his being and character.”<sup>237</sup> Step 3 requires that members “turn [their] will and [lives] over to the care of God.”<sup>238</sup> AA members promise to do the will of a higher power “always.”<sup>239</sup>

<sup>228</sup> 450 U.S. 707, 715 (1981).

<sup>229</sup> Oldham, *supra* note 216, at 134–35.

<sup>230</sup> *Thomas*, 450 U.S. at 714. Indeed, some AA members, especially newcomers, fight the idea of a higher power, sometimes (rarely) carrying atheist beliefs throughout their AA tenure. See, e.g., June L., *How an Atheist Works the Steps*, AA GRAPEVINE (Mar. 2003). Many atheists or agnostics, understandably, find AA difficult, if not impossible; they often struggle for a long time until ultimately choosing to believe that a higher power exists. See, e.g., Frank A., *I Can’t Fly That Kite Today*, AA GRAPEVINE (Apr. 2002). *Thomas* makes clear that AA is no less of a religion merely because some of its members question whether a higher power exists.

<sup>231</sup> See *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring).

<sup>232</sup> *Davis v. Beason*, 133 U.S. 333, 342 (1890); see *supra* note 214 and accompanying text.

<sup>233</sup> *Davis*, 133 U.S. at 342.

<sup>234</sup> See *supra* notes 86–89; ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 62.

<sup>235</sup> *Id.* at 62–63.

<sup>236</sup> See *id.*

<sup>237</sup> *Davis*, 133 U.S. at 342.

<sup>238</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 59.

<sup>239</sup> See *id.* at 63.



AA principles impose “obedience to his will.”<sup>240</sup> AA’s program requires that members create Step 4 inventories, confessing their sins to themselves, to a higher power, and to another person. AA requires that members compile lists of their character defects and ask that a higher power remove them.<sup>241</sup> AA requires that members make a list of all persons they have harmed and make amends wherever possible.<sup>242</sup> Through Steps 10 and 11, AA requires that members engage in daily prayer and meditation.<sup>243</sup> And in Step 12, AA requires that members spread the word of a higher power through sponsorship and the recruiting of new AA prospects.<sup>244</sup>

But even supposing that AA made no express mention of a higher power, it would nevertheless qualify as a religion under the nontheist definition.<sup>245</sup> Factors to consider here are AA’s history, organizational structure, literary manifestations, hierarchical structure, worship practices, and other ritualistic routines.

AA’s history is sufficient for classification as a religion. Courts here consider the age of the organization in question and the type of historical development associated with the organization (e.g., religious origins versus nonreligious origins).<sup>246</sup> AA itself is approximately eighty years old,<sup>247</sup> and its development history is even older. This Note has depicted the Christian and evangelical origins of AA, tracing AA’s development to the Oxford Group (dating from 1908) and to Scripture (dating from well before the Common Era).<sup>248</sup>

More persuasive than AA’s history are its literary manifestations and its worship and ritualistic routines. AA leaders and founders filled AA literature with detailed instructions on morality, spirituality, and the existence of a higher power. The 12 Steps and their accompanying explanations constitute a structured manual on proper conduct and living, with AA leaders defining proper conduct and living as that which involves complete reliance on a higher power.<sup>249</sup>

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<sup>240</sup> *Davis*, 133 U.S. at 342.

<sup>241</sup> *See supra* notes 90–93.

<sup>242</sup> *See supra* note 103.

<sup>243</sup> *See supra* note 111–12.

<sup>244</sup> *See supra* notes 113–20.

<sup>245</sup> *See supra* notes 215–17 and accompanying text.

<sup>246</sup> *See Oldham, supra* note 216, at 132–34 (discussing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which considered “organizational structure, established way of life, and long tradition as a religious group”).

<sup>247</sup> AA was founded around 1935. *See ALCOHOLICS ANONYMOUS COMES OF AGE, supra* note 34, at vii, 71–74. Nontheist organizations of substantially similar age have been declared religions. *See, e.g., Wash. Ethical Soc’y v. Dist. of Columbia*, 249 F.2d 127, 128–29 (D.C. Cir. 1957) (holding Washington Ethical Society sufficiently religious for tax exemption at a time when the Society was eighty-one years old).

<sup>248</sup> *See supra* Part I.A–B.

<sup>249</sup> *See supra* Part I.A–B.

AA's worship and prayer regiment rivals that of the most orthodox and liturgical religions.<sup>250</sup> AA members often attend up to seven AA meetings per week and talk with their sponsors daily.<sup>251</sup> Sponsors and sponsees pray together. AA meetings open and close with Christian prayer, spoken aloud and in unison.<sup>252</sup> These practices cannot be described merely as "personal" moral codes but are instead mandatory communal practices.

It is true that AA lacks in organization and hierarchical structure. But this alone is not sufficient to tip the balance. While not as ordered as, say, Catholicism, AA is certainly not void of organization or structure.<sup>253</sup> Local AA chapters pay millions of dollars each year to the larger AA General Service Office.<sup>254</sup> The larger AA Assembly in turn maintains data on virtually all local chapters, disseminates AA literature to requesting chapters, employs a sizable administrative staff, and oversees the drafting and printing of all AA literature.<sup>255</sup>

Furthermore, AA possesses a sufficient hierarchical structure. AA newcomers are treated differently than veterans. Meeting leaders, for example, often directly address newcomers, instructing them to share their story and find an AA sponsor.<sup>256</sup> AA sponsors might direct their sponsees on almost any aspect of life, walking them through the 12 Steps and discouraging advancement in the Steps until the sponsee satisfies certain expectations.<sup>257</sup>

### 3. *A Brief Note on Protections Other Than the Establishment Clause*

The natural home for AA protection is the Establishment Clause, as I have outlined above. But distinct from the Establishment Clause, the Free Exercise and Equal Protection Clauses might provide further protection for AA members.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."<sup>258</sup> Once deemed a religion, AA members' right to confidential commu-

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<sup>250</sup> See *How Often Should I Go to Church?*, PASTOR HUFF, <http://pastorhuff.com/2010/how-often-should-you-go-to-church/> (last visited Apr. 14, 2014) (describing one pastor's view that once-per-week church attendance is more than sufficient).

<sup>251</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>252</sup> See *supra* notes 143–44.

<sup>253</sup> Joining an AA group, for example, seems to be semiformal, requiring a firm commitment but no documentation or membership fee. See Ames S., *Centrifugal Force*, AA GRAPEVINE (Apr. 2004).

<sup>254</sup> ALCOHOLICS ANONYMOUS, GENERAL SERVICE OFFICE FINANCIAL OVERVIEW (2012), available at [http://www.aa.org/lang/en/en\\_pdfs/en\\_selectedgsoffinancialinfo.pdf](http://www.aa.org/lang/en/en_pdfs/en_selectedgsoffinancialinfo.pdf) (noting the contributions in millions to the General Service Office).

<sup>255</sup> See GEN. SERV. OFFICE OF ALCOHOLICS ANONYMOUS, A.A. FACT FILE, available at [http://www.aa.org/pdf/products/m-24\\_aafactfile.pdf](http://www.aa.org/pdf/products/m-24_aafactfile.pdf).

<sup>256</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>257</sup> See *id.*

<sup>258</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

nication could stem directly from the Free Exercise Clause.<sup>259</sup> This is especially true if AA members couple their free exercise rights with free speech rights, creating hybrid rights that receive heightened protection.<sup>260</sup>

The Equal Protection Clause might also provide protection for AA members, albeit awkwardly. Because religious practice is a fundamental right,<sup>261</sup> the argument goes, government must pass strict scrutiny before restricting the religious freedoms of only select religions.<sup>262</sup> And as discussed above, there is no apparent compelling interest which might justify discrimination among different types of religions for clergy privilege purposes.<sup>263</sup>

### B. Public Policy Supports Extending the Clergy Privilege to Certain AA Communications

The first section below highlights AA's effectiveness and importance as a means of drug and alcohol rehabilitation in the United States, arguing that courts and legislatures must support AA where possible. Facing consistently decreasing sobriety rates, possibly due to a lack of confidentiality among its members, AA needs support. One way courts and legislatures can support AA is through extending the clergy privilege to certain AA communications.

In the second section below, I argue that extending the clergy privilege to certain AA communications comports with the basic policy rationales underlying the clergy privilege.

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<sup>259</sup> See Paul Winters, Comment, *Whom Must the Clergy Protect?: The Interests of At-Risk Children in Conflict With Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 206–09 (2012) (acknowledging that free exercise rights protect confidential religious communications but proposing an exception for child-abuse reporting).

<sup>260</sup> See Christopher R. Pudelski, Note, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 NW. U. L. REV. 703, 720–21 (2002). Although not applicable to the states, when litigating against the federal government, AA members would receive heightened protection under the Religious Freedom Restoration Act. See 42 U.S.C. § 2000bb–4 (2012) (reinstating the compelling interest test that *Employment Division v. Smith* abrogated).

<sup>261</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (referring to religious practice as a fundamental right).

<sup>262</sup> The courts have not thoroughly navigated the intersection of the First Amendment and the Equal Protection Clause. However, there are a number of cases recognizing that such an intersection exists. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 & n.9 (1985); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 & n.3 (1972).

<sup>263</sup> See *supra* note 192 and accompanying text.

1. *While Among Our Most Effective Means of Rehabilitation, AA is Decreasing in Effectiveness and Needs Support from Courts and Legislatures*
  - a. *The United States Relies Heavily on AA and the 12 Steps as an Effective Means of Drug and Alcohol Rehabilitation*

The cost of drug and alcohol addiction in America is astonishing.<sup>264</sup> There are over one and a half million prisoners in jail for drug offenses, almost four million on probation, and another almost one million more on parole.<sup>265</sup> In any given year, police arrest over one million drunk drivers and there are over ten thousand alcohol-related fatalities.<sup>266</sup> Court programs, schools, public and private rehabilitation centers, and social workers all aggressively rely on AA as a cost-free, effective means of rehabilitation.<sup>267</sup> Indeed, AA is usually the first thought that comes to the mind of a counselor facing an addicted patient, and rehabilitation centers typically focus their programs primarily around AA exposure and immersion.

This is because AA—a free service—is among the most effective means of recovery.<sup>268</sup> Studies suggest that as many as 55% of those who survive the first ninety days in AA will stay sober for a full year.<sup>269</sup> Of those who stay sober for a full year, 50% will stay sober for five years.<sup>270</sup> Of course, making it past the first ninety days is the most challenging aspect of sobriety, and AA’s success rate is closer to 5% when asking what percentage of those attending their first AA meet-

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<sup>264</sup> Erik Eckholm, *Government’s Drug-Abuse Costs Hit \$468 Billion, Study Says*, N.Y. TIMES (May 28, 2009), [http://www.nytimes.com/2009/05/28/us/28addiction.htm?\\_r=0](http://www.nytimes.com/2009/05/28/us/28addiction.htm?_r=0) (“Government spending related to smoking and the abuse of alcohol and illegal drugs reached \$468 billion in 2005, accounting for more than one-tenth of combined federal, state and local expenditures for all purposes, according to a new study.”).

<sup>265</sup> *Drug Offenders in the Correctional System*, DRUGWARFACTS.ORG (Jan. 9, 2008, 2:27 PM), <http://drugwarfacts.org/cms/?qnode/63/pdf>.

<sup>266</sup> See *Drunk Driving Statistics*, DUI-USA, [http://www.dui-usa.drinkdriving.org/dui\\_drunkdriving\\_statistics.php](http://www.dui-usa.drinkdriving.org/dui_drunkdriving_statistics.php) (last visited Apr. 13, 2014) (detailing statistics from 1998 through 2008).

<sup>267</sup> See Kristina N. Rynes & J. Scott Tonigan, *Does Pathway into 12-Step Programs Influence 12-Step-Related Benefit?*, 30 ALCOHOLISM TREATMENT Q. 179, 179–80 (2012); Emily M. Gallas, Comment, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U. L. REV. 1063, 1067, 1070 & nn.34–35 (“One of the common features of [drug court] is assignment to a 12-Step program.”).

<sup>268</sup> See Patricia L. Owen et al., *Participation in Alcoholics Anonymous: Intended and Unintended Change Mechanisms*, 27 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RES. 524, 526 (Mar. 2003) (“Twelve-step therapy has been reported to be equally effective as more research-based therapies and it may be superior when total abstinence is the desired outcome.”).

<sup>269</sup> Don McIntire, *How Well Does A.A. Work?: An Analysis of Published A.A. Surveys (1968–1996) and Related Analyses/Comments*, 18 ALCOHOLISM TREATMENT Q. 1, 14 (2000).

<sup>270</sup> *Id.*

ing stay sober.<sup>271</sup> Although 5% may seem low, it is quite high within the field of drug and alcohol treatment.<sup>272</sup>

But AA is only effective, research shows, when newcomers attack the AA program with rigor, find a sponsor, and quickly engage with the 12 Steps.<sup>273</sup> Those who attend AA meetings casually, not sharing openly and honestly, have virtually no chance at recovery.<sup>274</sup> On the other hand, those who can participate in the spiritual elements of the 12 Steps have a far greater chance of recovery. Those too who prepare Step 4 inventories, make proper Step 9 amends, and sponsor newcomers have increased chances at recovery.<sup>275</sup>

Thus, it is not just AA which constitutes our most relied upon means of rehabilitation. It is AA performed with strict adherence to AA's traditions and principles.

b. *AA is Decreasing in its Effectiveness, and One Cause may be Lack of Confidentiality*

It is clear that AA's effectiveness has decreased dramatically since its inception in 1935. Whereas in 1950 approximately 75% of AA newcomers obtained permanent sobriety, today only 19% will last thirty days, and only 5% will obtain long-lasting sobriety.<sup>276</sup> At least two possible factors contribute to AA's decreased effectiveness. First, the number of persons attending AA meetings today is exceedingly greater than in 1950. Many attending meetings today are simply nonalcoholics, attending meetings with no real need or intention to stop drinking.<sup>277</sup> Those attending meetings in 1950, however, were

<sup>271</sup> *Id.* at 5–10.

<sup>272</sup> Analyzing AA's effectiveness is a difficult task. Nevertheless, sources suggest that AA is at least as effective as other rehabilitation methods. *See, e.g.,* Ye & Kaskutas, *supra* note 129, at 61 (analyzing the "robustness of AA effectiveness").

<sup>273</sup> Indeed, new research suggests that AA's theories related to the root causes of and correct treatments for alcoholism are accurate. *See, e.g.,* Rebecca R. Carter et al., *Addiction and "Generation Me": Narcissistic and Prosocial Behaviors of Adolescents with Substance Dependency Disorder in Comparison to Normative Adolescents*, 30 ALCOHOLISM TREATMENT Q. 163, 173 (Apr. 2012) ("Findings of [this] study provide preliminary support for AA's theory of egocentrism as a root cause of addiction.") (citations omitted).

<sup>274</sup> *See* Ye & Kaskutas, *supra* note 129, at 61 (suggesting consistent AA attendance is needed for success: "This aspect of our results confirm the robustness of AA effectiveness overall, because the results for higher abstinence associated with AA attendance following either type of propensity score adjustment were not greatly different from the unadjusted effect for AA attendance").

<sup>275</sup> *See* John F. Kelly et al., *Facilitating Comprehensive Assessment of 12-Step Experiences: A Multidimensional Measure of Mutual-Help Activity*, 29 ALCOHOLISM TREATMENT Q. 181, 183–84, 188–92 (2011) (citing research finding that personal recovery is correlated with active engagement in AA's spiritual process); *see also* Amy R. Krentzman et al., *How Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) Work: Cross-Disciplinary Perspectives*, 29 ALCOHOLISM TREATMENT Q. 75, 82–83 (2011) (supporting the views that participating in various types of AA support is correlated with better recovery).

<sup>276</sup> *See supra* note 271, at 7.

<sup>277</sup> *See id.* at 6–7, 11–12.

almost always “bad cases”—persons who needed and wanted to stop drinking. Research shows that the bad cases are, counterintuitively, more successful in AA than less severe cases.<sup>278</sup> This is because those who “have hit rock bottom” are more likely to attack AA’s 12 Steps rigorously.<sup>279</sup> And those who attack the 12 Steps rigorously have vastly superior chances of recovery.<sup>280</sup>

Second, while increased overall attendance contributes to AA’s decreased effectiveness, many commentators believe a lack of confidentiality in AA also contributes.<sup>281</sup> Lack of confidentiality, the theory goes, makes newcomers unwilling to engage in open and honest 12 Step work. This unwillingness ultimately ends in relapse into alcohol or drugs resulting from a failure to work the 12 Steps honestly.<sup>282</sup>

Proving a causal relationship between decreased confidentiality and a failure to work the 12 Steps is virtually impossible, but circumstantial evidence suggests the phenomenon is very real.<sup>283</sup> As AA expands in size, its members become less and less familiar with each other. Accordingly, AA members are less and less comfortable sharing openly about intimate matters in AA meetings. The sponsor-sponsee relationship has therefore become the most important vehicle for honest 12 Step work, as sponsees should generally feel comfortable with their sponsor one on one.<sup>284</sup>

But the sponsor-sponsee relationship is also suffering from a lack of confidentiality. After *Cox v. Miller*’s negative treatment of AA in 2002, many sponsors inform sponsees that their communications are not wholly confidential and not protected by law.<sup>285</sup> Some sponsors actually believe the law requires them to inform authorities upon a sponsee’s communicating incriminating information.<sup>286</sup> Many sponsors fear that police will charge them with obstruction of justice

<sup>278</sup> Krentzman et al., *supra* note 275, at 79–80, 82–84 (summarizing research on the positive correlation between addiction severity and rehabilitation).

<sup>279</sup> See ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 59 (“Half measures availed us nothing.”).

<sup>280</sup> See *supra* notes 273–75.

<sup>281</sup> See, e.g., Hartill, *supra* note 17 (noting that drug counselors consider confidentiality a necessity in treating people with substance abuse problems).

<sup>282</sup> See Chris R., Address at the Fellowship of the Spirit, *4th Step*, XA-SPEAKER.ORG (2001), <http://xa-speakers.org/pafiledb.php?action=file&id=308> (arguing that AA’s decrease in effectiveness stems from poor sponsorship as well as newcomers’ unwillingness to write open and honest Step 4 inventories); Peter M., Address at the Wilson House, XA-SPEAKER.ORG (2006), <http://xa-speakers.org/pafiledb.php?action=file&id=1565> (similar).

<sup>283</sup> Some legal advocacy groups are apparently informing AA members that they need to report certain information to authorities and that AA communications are not privileged. See, e.g., O’Neill, *supra* note 10.

<sup>284</sup> See Chris R., *supra* note 282.

<sup>285</sup> See O’Neill, *supra* note 10.

<sup>286</sup> See *id.* In truth, the status of AA communication as privileged is an undecided question. See *supra* notes 16–17 and accompanying text.

should they refuse cooperation in criminal proceedings or investigations.<sup>287</sup>

This newfound lack of confidentiality may be turning AA on its head. How can an institution predicated on anonymity and privacy function without confidentiality? Some say it cannot and point to lack of confidentiality as a source of AA's decreased effectiveness.<sup>288</sup>

Extending the clergy privilege to sponsor-sponsee communications could ease AA's ever-increasing anxiety surrounding confidentiality. Extending the clergy privilege could in turn foster the rigorous 12 Step work needed to increase AA's effectiveness, upon which authorities in the United States have come to rely.

## 2. *Extending the Clergy Privilege to Certain AA Communications Comports With the Basic Policy Rationales Underlying the Clergy Privilege*

Scholars have identified at least two justifications for evidence privileges in general, the utilitarian rationale and the privacy rationale.<sup>289</sup> For simplicity, I examine here only the utilitarian rationale.

"The utilitarian approach theorizes that the protection of confidentiality is justified because the benefits to society are greater than the costs associated with confidentiality."<sup>290</sup> The utilitarian rationale thus presents a balancing test. John Henry Wigmore developed a four-factor standard for determining the applicability of the utilitarian rationale, a standard which has gained universal acceptance.<sup>291</sup>

The Wigmore standard asks: (1) whether the communications at issue is predicated on an expectation of confidentiality; (2) whether confidentiality is essential to the full and satisfactory maintenance of the relations between parties; (3) whether the relationship between those communicating is a relationship the community at large wishes to foster; and (4) whether the injury that would inure to the relationship by disclosing the communications is greater than the benefit thereby gained for the correct disposal of litigation.<sup>292</sup>

Under Wigmore's standard, it is clear that the clergy privilege should extend to certain AA communications—namely, those between sponsor and sponsee made in confidence and in furtherance of spiritual advisement. First, AA communications made from sponsee

<sup>287</sup> See O'Neill, *supra* note 10.

<sup>288</sup> See *supra* note 282.

<sup>289</sup> See Schonbrun, *supra* note 20, at 1212–13.

<sup>290</sup> Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 Ky. L. J. 473, 477 (1987).

<sup>291</sup> See Schonbrun, *supra* note 20, at 1213–14.

<sup>292</sup> See WIGMORE, *supra* note 167, at 527; Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 893–94 (1982).

to sponsor are made with the utmost expectation of privacy. AA predicated itself on confidentiality and anonymity. AA's name is *Alcoholics Anonymous*. AA meetings start with a reminder that "what you hear here stays here."<sup>293</sup> And although many sponsors are now defecting from this approach in light of cases like *Cox v. Miller*, many sponsors tell sponsees, in substance, "I'll keep everything you tell me in strict confidence."<sup>294</sup> Indeed, when discussing how newcomers should choose Step 5 partners (i.e., sponsors), the Big Book states, "[i]t is important that he be able to keep confidence; that he fully understand and approve what we are driving at."<sup>295</sup>

Second, confidentiality is essential to the full and satisfactory maintenance of the relationship between sponsor and sponsee. This is self-evident. Sponsees are unwilling to engage in open and revealing confessions with those sponsors unable to keep matters confidential. Many Step 4 and Step 5 inventories reveal dark, life-altering secrets—extramarital affairs, commission of crimes, tales about having been sexually abused, etc. While scholars have performed no studies within the AA context, research shows that when confidentiality is abandoned, patients become far less willing to share productively with therapists and doctors.<sup>296</sup> There is no reason to think the sponsor-sponsee context would produce a different result. And as stated earlier, circumstantial evidence already suggests that lack of confidentiality is resulting in weakened sponsor-sponsee relationships.

Third, the relationship between sponsor and sponsee is one the community wishes to foster. AA enjoys wide acceptance across the United States.<sup>297</sup> National membership approaches two million.<sup>298</sup> Therapists and doctors are quick to recommend AA to anyone struggling with addiction.<sup>299</sup> While the Establishment Clause bars courts from *mandating* criminals to AA, courts and various court-avoidance programs rely heavily on AA for rehabilitation, as do private and public addiction rehabilitation centers.<sup>300</sup> Although courts and legislatures are often uninformed as to the inner workings of AA—

<sup>293</sup> *AA Meeting Structure*, DARV SMITH, <http://www.darvsmith.com/dox/aa.htm> (last visited Apr. 13, 2014).

<sup>294</sup> Interviews with Anonymous AA Members, in Ithaca, N.Y. (Jan. 2013).

<sup>295</sup> ALCOHOLICS ANONYMOUS: THE STORY, *supra* note 23, at 74.

<sup>296</sup> See generally Anita L. Allen, *Confidentiality: An Expectation in Health Care*, FACULTY SCHOLARSHIP 1, 5, 7, 11–12 (2008), available at [http://lsr.nellco.org/upenn\\_wps/195](http://lsr.nellco.org/upenn_wps/195) (describing the various benefits of confidentiality for medical treatment).

<sup>297</sup> See Salamanca, *supra* note 24, at 1154 (noting the wide availability and convenience of AA).

<sup>298</sup> See *supra* note 120.

<sup>299</sup> See Owen et al., *supra* note 268, at 524 ("[12 Step therapy] is the prevailing alcohol treatment model in the United States and a majority of individuals receiving formal treatment . . . will attend Alcohol[s] Anonymous [sic] (AA), if only for a limited time.")

<sup>300</sup> See Byron K. Henry, In "A Higher Power" We Trust: *Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 443, 462 (1997).



a problem this Note seeks to correct—it is apparent that they defer to AA and recognize AA as a central aspect of rehabilitation.<sup>301</sup> Thus, to the extent AA wishes to foster the sponsor-sponsee relationship, it seems the community does as well. And as discussed above, AA does wish to foster the sponsor-sponsee relationship, as it often declares the sponsor-sponsee relationship to be the most important of all AA relationships.<sup>302</sup>

Fourth, the injury to the sponsor-sponsee relationship resulting from a lack of confidentiality would outweigh the benefits gained in the litigation arena. Only a handful of cases turn on evidence acquired through AA channels.<sup>303</sup> And when the rare case does turn on such information, the clergy privilege would likely not hinder the litigation process anyway. That is, this Note proposes protecting via the clergy privilege only those communications between sponsor and sponsee, not communications made in AA meetings at large. Indeed, cases implicating information acquired through AA almost invariably involve information divulged to AA meetings at large, not information divulged only to sponsors.<sup>304</sup> Thus, extending the clergy privilege to AA in the manner this Note proposes might not injure the litigation process whatsoever.

And while extending the clergy privilege might not injure the litigation process, it would surely benefit the sponsee-sponsor relationship. Sponsors are beginning to fear their roles, fearing implication in crimes or obstruction of justice charges.<sup>305</sup> Circumstantial evidence suggests that cases like *Cox v. Miller* cast a shadow on AA, making the AA process feel less confidential and trustworthy. A declaration from courts or legislatures that sponsor-sponsee communications are protected may help revitalize AA, breathing confidence and validation into AA rooms across the country.

## V

### BRIEF REBUTTAL

Objections to this Note's proposal may include: (1) AA does not consider itself a religion; (2) AA sponsors are not "professional" spiritual advisors as required by many clergy privilege statutes; and (3) recognizing AA as a religion will require expanding the clergy privilege

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<sup>301</sup> See Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do?: The Rise of Religious Programs in the United States Prison System*, 52 HOW. L. REV. 459, 499 (2009).

<sup>302</sup> See *supra* Part II.B.

<sup>303</sup> Searches on Lexis and Westlaw reveal hardly any cases occurring after *Cox v. Miller*. But see O'Neill, *supra* note 10 (suggesting some cases turn on information acquired from AA sources).

<sup>304</sup> See, e.g., *Cox v. Miller*, 296 F.3d 89, 94–95 (2d Cir. 2002) (a case turning on the fact that information was divulged to an AA group at large).

<sup>305</sup> See *supra* notes 17–19 and accompanying text.

to all 12 Step programs, like, for example, Narcotics Anonymous (NA) or Gamblers Anonymous (GA).

*First.* AA has no genuine opinion on its Constitutional categorization as a religion or a nonreligion, making the issue moot.<sup>306</sup> AA's internal regulations require that it take no position on "outside issues," a requirement AA observes unwaveringly.<sup>307</sup> Because AA's classification for Constitutional purposes constitutes an outside issue, AA will not take a stance on the controversial areas into which this Note probes. Moreover, AA's self-identification is not particularly relevant, as courts may classify an organization as a religion notwithstanding the organization's express objection.<sup>308</sup> Conversely, courts may refuse a religious classification notwithstanding an organization's express request.<sup>309</sup> In any event, courts already classify AA as a religion with minimal or no inquiry into AA's self-identification.<sup>310</sup>

*Second.* Clergy privilege statutes often require that communications be directed at spiritual advisors acting in their "professional character."<sup>311</sup> Some might claim that the privilege does not protect AA because AA sponsors earn no fee or salary for their services and are therefore not "professional." The word professional, however, should not preclude those who earn no fee. Rather, the word should preclude those communications which are made informally and thus likely without the intention of confidentiality and spiritual guidance.<sup>312</sup> For example, should a priest in his nonprofessional capacity go grocery shopping, a confession blurted out to him while in the checkout line would not deserve protection. In the case of AA, the word professional merely limits the potential for protection, requiring that sponsees make their communication to their sponsor while they engage formally in AA work, be it 12 Step work, prayer time, a meditation session, or anything else.

*Third.* Although AA is a religion, it does not follow that other 12 Step programs are as well. All 12 Step programs develop under unique circumstances. Thus, both NA and GA require an individual

<sup>306</sup> See *supra* notes 113–28.

<sup>307</sup> See ALCOHOLICS ANONYMOUS WORLD SERVS., INC., THE TWELVE TRADITIONS ILLUSTRATED, available at [http://www.aa.org/pdf/products/p-43\\_thetwelvetradiillustrated.pdf](http://www.aa.org/pdf/products/p-43_thetwelvetradiillustrated.pdf).

<sup>308</sup> See *supra* note 231.

<sup>309</sup> See *id.*

<sup>310</sup> See *supra* Part IV.A.1.

<sup>311</sup> See, e.g., N.Y. C.P.L.R. 4505 (McKinney 2012) (detailing New York's clergy privilege).

<sup>312</sup> See, e.g., *United States v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981) (holding that a clergy member was not acting in his professional capacity when on leave of absence and when consulting on business affairs). Some may argue that the term "professional" provides protection to only those spiritual advisors who by mandate from their religion must hear certain statements or confessions. See, e.g., Winters, *supra* note 259, at 200. Such a formulation is not problematic for AA, as Step 12 requires that sponsors take sponsees through the Steps, including Steps 4 and 5.

factual inquiry before courts declare them religions.<sup>313</sup> Additionally, AA derives from Protestantism and the Oxford Group, whereas NA and GA are AA derivatives and thus derivatives of a derivative.<sup>314</sup> On first blush, it seems this attenuated historical connection to traditional religions cuts against the conclusion that other 12 Step programs may piggyback on AA's religious classification.

#### CONCLUSION

In the debate about AA's status as a religion for clergy privilege purposes, there has been a lack of accurate information.<sup>315</sup> AA originated from among the most evangelic of Christian movements, the Oxford Group. AA's 12 Step program is so centered on a higher power as to preclude an atheist from moving beyond Step 2, let alone complete the entire 12 Step program.<sup>316</sup>

AA's historical origins and program of recovery are so faith based as to render it a religion under virtually any First Amendment definition.<sup>317</sup> Indeed, courts have already defined AA as a religion in certain Establishment Clause contexts. To categorize AA as a religion in those contexts and not in more beneficial contexts (like the clergy privilege context) violates the Establishment Clause and other Constitutional protections.<sup>318</sup>

Constitutional arguments aside, public policy requires that courts and legislatures extend the clergy privilege. AA is an integral, cost-effective aspect of the United States's addiction rehabilitation movement. But AA is decreasing in effectiveness and may continue its decline without the help of courts and legislatures.<sup>319</sup>

Courts and legislatures should step in, and they need not fear any abuse of the clergy privilege. By limiting clergy protection to those AA communications between sponsor and sponsee, the judicial process will remain adequately protected. In fact, it seems applying the clergy privilege to these AA communications may have no negative consequences, while it is bound to have untold beneficial results within AA.<sup>320</sup>

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<sup>313</sup> For example, Overeaters Anonymous was founded as a derivate of GA when two neighbors decided in 1960 to lose weight together. *See About OA, OVEREATERS ANONYMOUS*, <http://www.aa.org/newcomers/about-aa/> (last visited Apr. 13, 2014).

<sup>314</sup> *See, e.g.*, History of N.A., VERDE VALLEY ARIZONA, [http://www.vvana.info/History\\_of\\_N.php](http://www.vvana.info/History_of_N.php) (last visited Apr. 13, 2014) (explaining that NA derived from AA).

<sup>315</sup> *See supra* notes 20–22 and accompanying text.

<sup>316</sup> *See supra* Part I.C.

<sup>317</sup> *See supra* Part IV.

<sup>318</sup> *See supra* Part IV.A.1.

<sup>319</sup> *See supra* Part IV.B.1.

<sup>320</sup> *See supra* Part IV.B.2.