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## Respecting an Establishment of Religion

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# RESPECTING AN ESTABLISHMENT OF RELIGION

Richard Hamilton

## Introduction

A striking feature of minimally well-functioning legal systems is their ability to decide cases which turn on morally contested concepts. A natural lawyer, for whom there is an intimate connection between law and morality, may view this as proof of an underlying moral consensus which obtains despite the superficial appearance of moral disagreement<sup>1</sup> It is more plausible, I suggest, to view this facility in terms of the legal positivist insight that law is a mechanism for social control and regulation, which operates despite the lack of moral consensus. In the present climate, there can be few concepts more contested than that of religion. On the one hand, the barbarians are at the gate, in the form of the “new atheists,” such as Richard Dawkins, Daniel Dennett and Sam Harris, whose increasingly raucous diatribes against religion weigh down newspaper columns and websites. On the other, messianic zanies of all persuasions seem determined to fulfil scriptural prophecies of Apocalypse. Both sides hold wildly differing views on the nature of religious belief which in turn diverge dramatically from mainstream views. Nevertheless, in the context of this chapter, I will examine a few instances, where it seems to me that the American legal system is able to work reasonably well despite the profound disagreement that bedevils American society over issues of religion and spirituality. This is all the more striking given that some of the cases involve Americans’ peculiarly infantile attitude to drugs and alcohol.

As should become clear, this is not some abstruse issue in jurisprudence: fundamental questions of personal liberty are at stake for both believers and non-believers alike.

Let me begin with a caveat. My claim requires nothing more than that the legal system works when judged by internal criteria. In other words, I assume a broadly positivist conception of the separability of law and morals. While the law may in certain areas coincide with the norms of morality, legal and moral norms remain logically distinct. The primary purpose of law is to solve the problems of co-ordination to which a highly complex society gives rise, including areas of profound moral and political disagreement. I am not arguing that the law works well when judged by some external standard, such as morality, politics or the promotion of God’s kingdom on earth. By any of these standards, the American system can doubtless be found wanting. What I am suggesting is that given the inescapable fact of moral and religious diversity, it is remarkable that legal outcomes in matters of religion can be achieved at all. The legal system enables judges to decide where philosophers simply agonise.

My discussion begins with the landmark *Lemon v. Kurtzman* case and its elucidation of the famous ‘three-pronged test’ for cases involving the first amendment’s ‘Establishment Clause,’ the clause which insists upon the separation of church and state. Although this test has come under sustained challenge from conservatives in recent years, it is still in routine use (Conkle 1993: 865-882). The discussion will conclude with a series of civil rights cases brought in defence of imbibing freethinkers who have been forced to submit to religiously-inspired twelve step programmes. These cases are particularly interesting, since they involve a distinction between religion and spirituality which has troubled theologians and philosophers of religion. I propose that a careful examination of the reasoning involved in these cases may throw light upon that problematic question.

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<sup>1</sup> For the benefit of those unfamiliar with the terminology of legal philosophy a natural law theorist asserts a necessary connection between law and morality whereas a legal positivist denies that any such connection is a necessary one. Some legal positivists, such as H.L.A. Hart (1961) are prepared to acknowledge a “minimal moral content to the law.”

## 1. Religion as a contested concept

In typically gnomic fashion, Wittgenstein once remarked: “I am not a religious man, but I can’t help approaching every question from a religious point of view.”<sup>2</sup> Since then, various scholars have puzzled over what this might mean, given that Wittgenstein was clearly a classically ascetic man, a devotee of Tolstoy and Kierkegaard, someone who believed in the last judgement and constantly reflected on his alleged sins. Yet he felt compelled to deny that he was religious. The point of raising the example of Wittgenstein, however, is not to engage in one further foray into the realms of biographical speculation but rather to highlight the way in which the quotation indicates the ambivalence of the concept of religion. For some, religion consists in a set of doctrinal beliefs, filtered through a historical interpretative tradition. For others, it involves a personal encounter with transcendent reality. Advocates of the first approach would doubtless claim that the second confuses religion with spirituality, while those who favour the latter would say that a pre-occupation with doctrine is a matter of institutional politics rather than faith.

Of course, this is only one way of drawing the distinction. For instance, religion could be understood in terms of a philosophical belief in a Supreme Being. But depending upon how this is defined, it would exclude a substantial proportion of the world that adhere to some variety of Buddhism, which typically does not posit a Supreme Being. Many see religion in terms of a distinctive set of religious practices such as prayer, meditation or attendance at church service while others see it as something less formal that gives meaning to their life.

What should be abundantly clear is that people disagree about the meaning of religion and spirituality.<sup>3</sup> It is possible that at least some of them are confused and they simply do not understand what these words mean. There is a wickedly funny spoof on Creationism currently doing the rounds on the internet called the ‘Church of the Flying Spaghetti Monster’ whose followers refer to themselves as ‘Pastafarians’ and whose core beliefs include positing a relationship between global warming and the decline in the number of pirates. At the risk of offending adherents of this ‘faith’ anyone who seriously claimed that Pastafarianism was a religion could be accused of confusion. More problematic are groups such as Mormons or Scientologists, which even the most ecumenical Christian, Jew or Muslim would find difficult to admit into the fold. Scientology in particular has played fast and loose with the distinction between religion and science depending upon whether the matter at stake is tax exemption or the Establishment Clause.

How might we settle such questions? A strategy that was popular many years ago, particularly around Oxford, was to point to the ordinary uses of a word. Anyone who veered to far from that ordinary use committed a cardinal philosophical sin. Much unhelpful philosophical baggage was sifted out in this manner, for instance, thanks to J. L. Austin (1962) discussions of perception are no longer lumbered by the arcane terminology of ‘sense data’. However, if ordinary language philosophy debunked a certain kind of philosophical hubris (the view of the philosopher as some strange hybrid of poet and super-scientist) at its worst, it replaced it with another (the philosopher as pedantic grammar teacher arbitrating the correct uses of concepts). Ordinary language philosophers were not wrong to highlight the normativity of the vernacular; they simply misunderstood the nature and authority of its prescriptions. An appeal to ordinary language does play a role in law, which we will consider below; but it certainly does not constitute a panacea for all philosophical ills.

Nevertheless, oxonian linguistic Philosophy did provide a helpful framework for understanding moral and political disagreements. In his later work Wittgenstein (1958) introduces the notion of family resemblance concepts. According to Wittgenstein, it is often the case that there is no core meaning to which one can

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<sup>2</sup> In conversation with M.O.C. Dury. For two very different interpretations of Wittgenstein’s comments see Malcolm (1997) and Peter Winch’s response to Malcolm which forms the appendix to this volume.

<sup>3</sup> A classic discussion can be found in Philip E. Devine (1986: 270-284). See also T. Jeremy Gunn (2003).

point in order to settle disputes about complex concepts. There is instead a loose family of uses, some more closely related than others. Friedrich Waissman (1945) interpreted this idea in ways that would prove highly fruitful for legal philosophy. Waissman takes as his example a concept like 'gold' which,

though its actual use may not be vague, is nonexhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in. Open texture, then, is something like *possibility of vagueness*. Vagueness can be remedied by giving more accurate rules, open texture cannot. An alternative way of stating this would be to say that definitions of open terms are always corrigible or emendable. Open texture is a very fundamental characteristic of most, though not of all, empirical concepts.

In extending this insight to the legal sphere, H.L.A. Hart suggests that the open-textured nature of legal language stems from a twofold source. On the one hand, there is indeterminacy as to fact; on the other, indeterminacy as to aim (1961: 128). No judge is in possession of all of the facts of the matter, neither is s/he aware of all the purposes to which a law might be put. Thus "when we are bold enough to frame some general rule of conduct (e.g. a rule that no vehicle may be taken into the park), the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds" (Hart 1961: 129). Nevertheless, rogue cases arise based upon situations unforeseen by those who originally legislated or ruled on a matter. It is unlikely those who framed the original law on vehicles in a park could have anticipated the question of whether skateboards or rollerblades constituted a vehicle. Hart suggests that legal formalists labour under the illusion that some perfect rule may be formulated which would allow us to anticipate and adjudicate in even the most bizarre instances. It is understandable then that some, in recoil from this pretentious aspiration, despair of rules altogether.

As Hart notes, the rule-sceptic is often a "disappointed absolutist: he has found that rules are not all that they would be in a formalist's heaven, or in a world where men were like gods and could anticipate possible combinations of fact, so that open texture was not a necessary feature of rules" (Hart 1961: 139). Thus disappointed he draws the equally absurd conclusion that there are no rules merely *ad hoc* predictions of arbitrary judicial decisions. Hart rejects this claim and argues that, for the most part the law, understood as a combination of primary and secondary rules, does determine outcomes. In cases where they do not, cases which occur in the penumbra of uncertainty, the judge exercises his/her discretion.

This is illustrated well by the case of *Garner v Burr*, a perennial favourite in courses on legal interpretation.<sup>4</sup> A farmer, Lawrence Burr, had decided to wheel his chicken coop along the road adjoining his property and fitted it with castors in order to do so. The local council discovered this and prosecuted him under section one of the Road Traffic Act 1930 which states that any vehicle travelling on a public highway must be fitted with pneumatic tyres. The Magistrates court initially found for the defendant arguing that a chicken coop, albeit a mobile one, fell outside of the ordinary meaning of the word 'vehicle.' The High Court overturned this decision asserting that the magistrates interpreted the act too narrowly and ought to have attended to the mischief that the Act was designed to prevent, namely damage to the road surface. They consequently found that Burr's chicken coop did constitute a vehicle for the purposes of the act.<sup>5</sup>

It is not that the term 'vehicle' is necessarily vague in its everyday employment it is simply that no-one could formulate a rule so exhaustive that it would cover issues such as those raised by *Garner v Burr*. This does not imply that no rule obtains, it simply tells us something about the nature of rules as they apply in a legal setting. One possible source of this confusion is the assimilation of all rules to the laws of nature upon which the Natural Law tradition rests. While an anomaly or an exception is potentially devastating in the case of a putative law of nature, as Hart notes, "a rule that ends with the word 'unless.....' is still a rule" (Hart 1961: 139). Part of the reason why legal rules must admit of exception is that in some cases

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<sup>4</sup> [1951] 1 KB 31

<sup>5</sup> ([1951] 1 KB 31 at 33)

there is scope for disagreement between two reasonable people about the meaning and application of the law in question. This is particularly the case when the law turns on some matter such as ‘rape,’ ‘abortion,’ ‘genocide,’ or in our case ‘religion,’ where reasonable and sincere people can argue about the application of the terms in question.

W.D. Gallie’s elucidation of “essentially contested concepts” may be useful here. It is important to distinguish concepts which form the basis of moral and political disagreement from those empirical concepts whose reference may be unclear. In the case of concepts such as gold, some consensus may obtain “as to the *kind* of use that is appropriate to the concept in question” (Gallie 1956: 167). In the case of essentially contested concepts no such consensus obtains. Gallie’s important observation needs to be balanced against an Aristotelian observation that any genuine dispute relies upon the existence of *endoxa* those core meanings upon which the ‘many or the wise agree.’ In the case of a contested concept such as rape, few would dispute the stereotypical cases where, for example, a stranger violently assaults a woman (Reitans 2001: 43-66). The problematic cases, legally if not morally speaking, are those where the assailant is known to the woman and where they have previously had a sexual relationship. It may well be the case that the man has committed a grievous moral offence, the question from the legal point of view is whether his actions satisfy certain evidentiary tests.<sup>6</sup> The problem, as feminists scholars have argued, is that these evidentiary tests may have been constructed on the basis of certain assumptions about what constitutes a ‘proper’ case of rape. If, for instance, non-consensual sex is not considered an intrinsic harm and may, in the traditional approach to marital rape, be considered a man’s ‘right,’ then too heavy an emphasis will be placed on physical assault that accompanies the rape and too little on the victim’s experience of violation.

What should be clear is that a concept like ‘rape’ is essentially contested because it lies at the nexus of a whole series of other disputed areas. The all too gradual evolution of the law has moved from a consideration of rape as a property crime against men, through a paternalistic concern with preventing harm to the vulnerable, to a position today where most jurisdictions grudgingly accept that it represents a violation of a woman’s autonomy.<sup>7</sup> Such an evolution requires changes in a whole series of other areas, such as our approach to property and the broader role of women within society. The same goes *mutatis mutandis* for any contested concept. It is likely to be implicated in a variety of debates within society not simply the one in which it is currently being discussed. As we shall see this certainly holds for the concept of religion.

## **2. Lemon v. Kurtzman and the establishment of the three-pronged test.**

The First Amendment to the American constitution stipulates that: “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.” From the outset there has been debate about how best to interpret this clause whether, for instance, it promotes freedom of, or also freedom from, religion. The weasel word in the clause is “respecting” since even the most conservative jurist cannot, in good conscience, claim that the framers of the Constitution intended the actual Establishment of a state religion along English lines. The questions typically turn on what measures, short of the actual declaration and financial promotion of a state religion, would count as “respecting” the establishment of such. This in turn involves some criteria being offered for what constitutes a religion. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15-16 (1947) interprets religion primarily, though not exclusively, in terms of public displays of religious adherence. The judges argued that as a bare

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<sup>6</sup> See the recent debate in Scotland over the particularly restrictive definition then used in Scottish law.

<sup>7</sup> ‘The Legal Definition of Rape’ Scottish Parliament Information Centre Research Note 01/46 September 2001. [www.scottish.parliament.uk/business/research/pdf\\_res\\_notes/rn01-46.pdf](http://www.scottish.parliament.uk/business/research/pdf_res_notes/rn01-46.pdf)

<sup>7</sup> This process is neatly described in the deliberations of the Scottish High Court of Justiciary over the definition of rape. *Opinion Of The Lord Justice General In Lord Advocate's Reference No. 1 Of 2001 By Her Majesty's Advocate In Terms Of Section 123 Of The Criminal Procedure (Scotland) Act 1995 Referring For The Opinion Of The High Court Points Of Law Arising In Relation To A Charge Upon Which, On Trial In The High Court At Aberdeen There Was Acquitted Edward Richard Watt.*

minimum the Establishment clause entails that “[n]either a state nor the Federal Government ... can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.” Thus *Everson* appears to consider religion largely in terms of a set of public confessional activities. One might object that religion is much more than this. The state might do all manner of things to promote a religion which fall short of mandating attendance at Church. For this reason, while *Everson* forms a crucial element in First Amendment jurisprudence, it has been supplemented by several other precedents.

Although it has recently come under sustained challenge from conservative jurists, a relatively settled interpretation was found in the “three-pronged test” established in *Lemon v. Kurtzman* (1971). This landmark case clarifies the implications of the Establishment clause for matters of public policy. The facts surrounding the case are as follows: faced with a staffing crisis in public schools the Rhode Island Education department arranged for a 15% salary supplement to be paid to teachers in private schools in exchange for the schools accepting a quota of public school students. Pennsylvania, in a similar move, attempted to purchase secular educational services from private providers. Teachers selected for this supplement were to teach only courses offered in public schools using mandated materials. No religious instruction was to be offered and students were exempted from compulsory religious observance. The problem arose because a significant proportion of these private schools were religiously oriented, predominantly Roman Catholic.

Despite these safeguards, Lemon, a Pennsylvania parent, sued the education board on the ground that the measures violated the establishment clause. Initial rulings upheld the constitutionality of the Pennsylvania and Rhode Island Statutes. Upon appeal, the Supreme Court ruled that the measures constituted an “excessive entanglement” between church and state and thereby constituted the kind of mischief which the authors of the Constitution sought to prevent. *Lemon v. Kurtzman* establishes what has come to be known as the “three-pronged test” namely:

1. The government's action must have a legitimate secular purpose;
2. The government's action must not have the primary effect of either advancing or inhibiting religion;
3. The government's action must not result in an "excessive government entanglement" with religion.<sup>8</sup>

While the judges agreed that the intentions of the respective school boards clearly had secular intent, they were less convinced that they satisfied the third test. They reasoned as follows:

(a) The entanglement in the Rhode Island program arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspects of elementary education in such schools. These factors require continuing state surveillance to ensure that the statutory restrictions are obeyed and the First Amendment otherwise respected. Furthermore, under the Act the government must inspect school records to determine what part of the expenditures is attributable to secular education as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools (pp. 615-20).

(b) The entanglement in the Pennsylvania program also arises from the restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education. In addition, the Pennsylvania statute has the further defect of providing

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<sup>8</sup> *Lemon v. Kurtzman* 403 US (602) 1971.

continuing financial aid directly to the church-related schools. Historically governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state (pp. 620-2).

(c) Political division along religious lines was one of the evils at which the First Amendment aimed, and in these programs, where successive and probably permanent annual appropriations that benefit relatively few religious groups are involved, political [403 U.S. 602, 604] fragmentation and divisiveness on religious lines are likely to be intensified (pp. 622-4).

(d) Unlike the tax exemption for places of religious worship, upheld in *Walz v. Tax Commission*, 397 U.S. 664, which was based on a practice of 200 years, these innovative programs have self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion (pp. 624-5).

Perhaps the most interesting argument was advanced by Justice Brennan in a concurring opinion.<sup>9</sup> He argues that in a religious school, the religious spirit of instruction extends far beyond that of formal religious education, and for understandable reasons. The Catholic school is central to the parochial mission of the Church and as such it is to be expected that Catholic faith and values will inform all aspects of the curriculum. Moreover, while it is possible to police textbooks for content it is impossible to police teachers in non-religious subjects in regard to whether their delivery implicitly inculcates religious values. To re-iterate, one would expect a good Catholic teacher to be doing precisely this: witnessing to Catholic faith and values in whatever subject he or she was teaching. Indeed, Brennan acknowledges that the threat of “excessive entanglement” is also relevant to the Free Exercise clause. If we permit the existence of parochial schools, then *ipso facto*, we permit them to fulfil their mission in whichever way they see fit. The only way to guarantee that public schoolchildren would be free of indoctrination would be to have government inspectors in every classroom, an intolerable violation of religious freedom. As Brennan acknowledges, since there is no way to enforce them in ways that would equally respect the rights of believers and non-believers, the Pennsylvania and Rhode Island statutes are unconstitutional. He thus concurs with the majority decision to strike them down.

One striking feature of the *Lemon v. Kurtzman* test is that it has survived despite significant changes in the political climate since it was first articulated. That is not to say that the judgement itself is universally welcomed: liberals on the whole favour it, while conservatives despise it as enshrining secularism as a *de facto* state religion in violation of the original intent of the founding fathers.<sup>10</sup> Nevertheless, its citation as recently as September 2007 in a case we discuss below indicates its continued relevance and usefulness.

### 3. The Establishment Clause and 12-step coercion

Based largely on self-aggrandisement, the Alcoholics Anonymous movement, and its various offshoots such as Narcotics Anonymous, has established itself as the most prominent treatment regime for alcoholism and other addictions.<sup>11</sup> In the United States particularly, the 12 step model of treatment is the only model routinely offered to addicts in recovery. Many participants in these programmes (and even more of the movement’s supporters on the outside) are unaware of the fact that from its inception, AA has been an overtly and militantly religious organisation. Alcoholics Anonymous was an offspring of the Evangelical Protestant ‘Oxford Movement’ of the 1930s. Two inveterate drunkards, Bill Wilson and Bob Smith met following Bill’s recent conversion to Evangelical Protestantism. The conversion experience which he had undergone enabled him to break with a lifetime of alcohol abuse, although the facts show

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<sup>9</sup> Op. cit.

<sup>10</sup> For a liberal defence of *Lemon* see Audi (1989: 259-296). For a very different interpretation see Gabriel Moens (2004: 535-574).

<sup>11</sup> For a summary of the Anti-AA case see Charles Bufe (1998).

that this happened at a substantially later point and even then was somewhat tentative.<sup>12</sup> They endeavoured to build upon this experience and formed the fellowship which is now known as Alcoholics Anonymous.

A.A. embodies two key tenets: firstly, alcoholism and other similar disorders are viewed as diseases which may well have a genetic basis; they are progressive, incurable and ultimately fatal. A central symptom of the disease is the phenomenon of 'denial', which is the unwillingness of the sufferer to acknowledge their diseased status. Much of the work of AA meetings involves getting participants to acknowledge their 'disease' and reconstruct their life history according to a soteriological template. This links into the second fundamental tenet: the only 'cure' for alcoholism is lifelong abstinence accompanied by a quasi-religious conversion experience. This religiosity sits oddly with the more familiar biological rhetoric of much AA literature, perhaps giving credence to the claim that AA is not really a religious movement.

Careful attention to the 12 step programme suggests otherwise. Six of the twelve steps make overt reference to "God" or a "higher power", albeit with the qualification, "as you understand Him." This has enabled advocates to suggest that AA is spiritual and not religious in character and hence not covered by the Establishment clause. Nevertheless, meetings begin and end with Judaeo-Christian style prayers and have all the character of a Protestant revivalist meeting. The covertly religious character of AA leads to problems when atheists or members of non-Christian religious traditions are compelled to attend as a condition of parole or regaining a driver's license after a DUI. Several such parties have brought First Amendment civil rights violation cases and a significant proportion of these have been successful. In what follows, I will concentrate on a recent case, *Inouye vs. Kenma* (2007) which was heard in the Ninth Circuit of the Supreme Court in San Francisco.<sup>13</sup>

The case was brought by Ricky Inouye, who by the time of the appeal was deceased. The proceedings were continued by his son, Zenn, as executor of his estate. Inouye Sr. had been a methamphetamine user, jailed for drug-related crimes. The appellant alleged that his parole officer, Mark Namamori, violated his First Amendment rights by insisting upon his attendance at NA/AA meetings as a condition of his parole.

Inouye had been forced to attend NA/AA meetings while in prison. Prior to his release his attorney had written to the parole board explaining that, as a Buddhist, Inouye objected to the religious content of meetings including but not limited to the large role that prayer played in them. The letter asked the parole board to "assure that there is no religious content in any substance abuse program that is imposed as a requirement of Mr. Inouye's parole."<sup>14</sup> That is, while there was no principled objection to Inouye's undergoing some form of treatment regime, he did object to being forced to attend a religious programme as a condition of his parole.

Upon his release, and following a positive drug test, Namamori insisted that Inouye attend a Salvation Army run branch of NA. Inouye initially participated but after a few months refused to continue with the programme. On this basis, Namamori issued a warrant for his arrest for parole violation and Inouye was returned to prison. Two years later, Inouye lodged a First Amendment rights violation appeal with the San Francisco district court. The court found that Namamori had violated Inouye's First Amendment rights but that he had qualified immunity from suit. The Ninth Circuit of the Supreme Court overturned this decision and found for the appellant.

Let us turn to the reasoning of the judges in this case. Ruling *de novo* the judges accepted that as a material fact, Inouye had been coerced into participation in NA/AA meetings. Further, Namamori did not claim that such coercion was constitutional. Rather, the point at issue was whether the law was settled at the time of Inouye's appeal and therefore whether Namamori could be held liable. The Supreme Court ruled

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<sup>12</sup> He allegedly begged for alcohol from his deathbed throwing doubt on the success of his 'cure.'

<sup>13</sup> No. 06-15474

<sup>14</sup> *Inouye v. Kenma* United States Court of Appeals for the Ninth Circuit District of Hawaii, No. 06-15474 (2007)



that “the law was and is very clear, precluding qualified immunity.”<sup>15</sup> Qualified immunity “is available to government officials performing discretionary functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>16</sup> The Supreme Court judges employed a “reasonable man test” according to which they considered whether, Namamori’s “subjective beliefs” notwithstanding, based upon the information in his possession “a reasonable official in a particular factual situation should have been on notice that his or her conduct was illegal.”<sup>17</sup>

In determining this, the Court held that while the Ninth Circuit had not ruled on this matter previously, there was “a march of uniformity” in related jurisdictions, establishing firstly that the state cannot coerce anyone to participate in religious gatherings and that secondly AA/NA meetings constitute such a gathering.<sup>18</sup> One relevant precedent highlights the “intensely religious character” of meetings, while the Seventh Circuit ruled in *Kerr* that AA/NA is “fundamentally based on a religious concept of a Higher Power.”<sup>19</sup> The judges here do not suggest that AA/NA is itself a religion, simply that its activities and beliefs are of a religious character. This is particularly interesting since AA typically denies that it is religious, arguing instead that its programme is spiritual in nature. The judges in *Warner*, which forms an important precedent to this case, reject this distinction, an important question to which I will return in my discussion below. Thus what emerges from *Inouye vs. Kenma* is the recognition that a growing body of jurisprudence recognises that forcing someone to participate in a meeting of AA/NA constitutes a violation of First Amendment rights.

#### 4. Concluding thoughts

Let us now turn to the central question at issue. How is it possible that a court can rule on the vexed question of the distinction between religion and spirituality, one over which theologians and philosophers have agonized for generations? As we have seen, *Kerr vs. Farrey* has become a crucial precedent in AA/NA related, First Amendment rights violation cases. It is worth considering the reasoning of the judges in this case. In overturning the decision of the District Court, the judges in the Supreme Court reject the claim that AA/NA is “spiritual” and not “religious.”

The district court thought that the NA program escaped the "religious" label because the twelve steps used phrases like "God, as we understood Him," and because the warden indicated that the concept of God could include the non-religious idea of willpower within the individual. We are unable to agree with this interpretation. A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the twelve steps consistently refer to "God, as we understood Him." Even if we expanded the steps to include polytheistic ideals, or animistic philosophies, they are still fundamentally based on a religious concept of a Higher Power. Kerr alleged, furthermore, that the meetings were permeated with explicit religious content. [...] Because that is true, the program runs afoul of the prohibition against the state's favoring religion in general over non-religion.<sup>20</sup>

It would seem from this that the basis of the distinction between religion and spirituality is epistemic, that is, religion is characterised by specific propositional beliefs whereas spirituality can be viewed in terms of a more amorphous orientation towards the world. Surely this is too narrow a definition to be helpful.

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<sup>15</sup> Op. cit.

<sup>16</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>17</sup> *Anderson*, 483 U.S. at 641; *Sorrels*, 290 F.3d at 970.

<sup>18</sup> 11891

<sup>19</sup> *Warner* (2<sup>nd</sup> Cir. 1997) 115 F.3d at 1075; *Kerr* 95 F.3d at 480.

<sup>20</sup> *Kerr v. Farrey* United States Court of Appeals For the Seventh Circuit No. 95-1843 (1996).

Taken as a whole, however, First Amendment jurisprudence appears to have established the following characteristics of a religion: it must involve some public manifestation, specifically prayer or some equivalent and it must entail some belief in a Deity viewed either as a unified entity or set of entities in the Polytheistic sense. This would therefore exclude Buddhism and various New Age forms of spirituality but would include all the major monotheistic religions including the various Christian sects. It would also, interestingly enough, include Satanism. But, of course, someone might object, this is an entirely arbitrary and prescriptive definition of no relevance to philosophical or theological discussion. Surely, they might continue, offering prescriptive definitions is part of what the judicial process involves. There is something right about this objection but it also misses something important about the way in which legal systems function. In what follows I attempt to explain why.

My initial claim was that despite profound moral and philosophical disagreements on certain concepts, the law works. Obviously, as it stands this is question begging. Someone is entitled to ask: by what standards can the law be said to work? In response, we should resist the temptation to think that there is any one way in which the law works, such as upholding a common morality or promoting economic efficiency. Even if in particular cases the law can be shown to do these things, as it doubtless can, this does not necessarily mean that promoting economic efficiency or upholding virtue is the primary function of the law. Any such effect may be a consequence of some other office that the law is called upon to perform. It is important to bear in mind the Wittgensteinian insight, put to such fruitful use by Hart, that in any complex social practice such as law, there is unlikely to be one way in which it relates to other complex social practices. So, in order to press my case, I need to elucidate the sense in which the law can be said to work. My claim is that a successful legal decision in relation to a contested concept, while not putting a stop to discussion, puts an end to fruitless disputation; outlines boundaries in which such a discussion might fruitfully proceed; and gives guidance to future courts to decide in similar cases. This thereby saves them some of the work of deliberating about the concept in question.

I will imagine that my opponent here is a vexatious Legal Realist (or perhaps one of his Critical progeny).<sup>21</sup> Against me he asserts that the law only works as a function of judicial power. Given the ubiquitous nature of legal indeterminacy, judges effectively get to say what words mean. But we should not be seduced by the legal rhetoric into thinking that this is anything more than definition by *fiat*. A skilful judge will employ a selective reading of precedent to create a veneer of legitimacy to cover up his/her exercise of judicial authority. This would, of course, be true were it the case that judicial decision was unconstrained.<sup>22</sup> One relevant constraint, I would suggest is the way in which terms function in ordinary language. It is not for philosophical reasons alone that the ordinary use of a word should constrain legal uses. It is a presumption of any constitutional democracy that the law governs the doings of ordinary citizens and, since ignorance of a law is no defence, the law must be constructed in such a way as to be intelligible to them. If the technical legal usage of a term strays too far from its everyday use, this fundamental presumption is in peril. That is not to say that the law does not, on occasion, broach the bounds of sense and it is open to criticism for so doing. Such cases notwithstanding, some degree of fidelity to the vernacular is a regulative ideal of the legal system.

In the case of the distinction between religion and spirituality, the courts adopt a broadly Aristotelian methodology. They examine a series of *endoxa*: opinions upon which “the many or the wise” are in broad accord, and determine which of these are most relevant for their purposes.<sup>23</sup> One salient criterion for

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<sup>21</sup> Legal Realists and Critical Legal Studies theorists are typically rule skeptics who deny that the judicial decisions are made on the basis of specifically legal rules. They argue instead that legal decisions are made on extra legal grounds and subsequently justified using legal rhetoric.

<sup>22</sup> In their more sober moments Legal Realists recognise this and restrict their claim to a rejection of the legal formalist view that laws in and of themselves are rationally or causally determinate. In response, we should recall Hart’s view of Realists as frustrated absolutists.

<sup>23</sup> Cf. Aristotle *Topica* I: I 100b 21-23 **This is the standard format for citing classical texts as I am not relying upon a particular translation of the term it should suffice.**

making their determinations is evidentiary in character. The emphasis upon public activities and overt declarations of religious belief reflects the obvious fact that courts cannot rule on private matters of the heart. Another peculiarly legal consideration is the question of original intent. The question of the definition of religion is bound up with the mischief that the framers of the Constitution sought to prevent. The settled doctrine on this matter is expressed in the combination of *Everson* and *Lemon v. Kurtzman*. The state cannot promote attendance of religious events nor can it financially sponsor any activity that has a primarily religious purpose.

Nevertheless, to claim that the matter was entirely settled would be to diminish the significant role of the Supreme Court in this matter. The Legal Realists have it right in a sense when they assert that the judge sometimes gets to say what words mean; they err when they take this to imply something akin to Humpty-Dumpty's assertion in *Alice Through the Looking Glass* that "words mean whatever I want them to mean." Once again, Hart is illuminating. He suggests that "a supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequence within the system: no one's rights or duties are thereby altered" (1961: 141). Hart draws a parallel between the Supreme body in a legislature and the umpire, or other final arbiter, in a sporting event. The institution of a final arbiter does not diminish the institution of rules for the "rule remains what it was before and it is the scorer's duty to apply it as best he can" (1961).

It is possible to imagine a game of 'scorer's discretion' which was played entirely on the basis of the umpire's decision but this would be a radically different game from the tennis, cricket or football with which we are familiar. So too the existence of a Supreme body within a legal system means that disputations of its rulings have the same status in law as disgruntled fans and players' post-match grumbling. None of this need entail that Supreme Court judgements cannot be challenged by the legislature or criticised on moral or political grounds. It simply means that once a case has reached the appellate phase of the Supreme Court, any decision is final from a legal point of view. Hart recognises that imbuing fallible human beings with such authority carries risks in its wake.

In this sense and in this sense alone can the law be said to settle contested moral concepts. It certainly does not produce solutions which are satisfactory from a philosophical or ethical point of view, though sometimes, as in the cases we have discussed; it provides solutions that should satisfy most reasonable people. In the quagmire which religion in public life represents in the American context it is remarkable that any resolution is possible. Nevertheless, American constitutional jurisprudence provides a means of ending certain kinds of disputes or pointing to ways in which they might be better pursued. It has always struck me that the processes of philosophical arbitration, first proposed by Plato, in which philosophers attempt to adjudicate the use of concepts, has many parallels with law. One salient parallel is absent, however. There is no Supreme Court for philosophical matters. My personal and professional acquaintance with philosophers persuades me that that is no bad thing. Philosophers can be scarcely trusted to run a university department. Imagine the horror that would confront us were they to be given the power of Supreme Court justices, particularly in the troubled area of religion and spirituality.

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