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Atheist, Agnostic or "Secular Humanist" Prisoners, And the "Establishment of Religion"

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Introduction

Prior articles in this multi-part series on religious freedom in correctional facilities have addressed the general legal standard to be applied in accommodating prisoners' religious practices and religious issues that arise in the context of prisoner appearance and apparel, and protection for "unconventional" religions. This article addresses issues connected with atheist, agnostic, or "secular humanist" prisoners and "Establishment of Religion" issues. Atheists are those who express disbelief in the existence of God or a "higher power," while agnostics express uncertainty. "Secular humanism," according to an encyclopedia article cited in the "resources" section at the end of this article, is a humanist philosophy that says it is based on reason, ethics, and justice, and rejects the supernatural and the spiritual as the basis of morals or decision-making.

Religious freedom for non-religious prisoners?

Having shown, in previous articles in this series, how the Constitution (and relevant federal and state statutes) provides protection for a wide array of sincerely held religious beliefs and practices, even if compelling needs of prison security and related concerns must sometimes justify restrictions and limitations on prisoners' exercise of religious freedom, we now turn to the puzzling question of atheistic beliefs. Can prisoners who claim to be sincere adherents of atheism---rejecting, by definition, a belief in God, however denominated, or a "higher power," nevertheless claim the mantle of constitutional protection for their beliefs as the equivalent of a "religion"?

Some courts have indicated that the answer to this question is yes. In Kaufman v. McCaughtry, #04-1914, 419 F.3d 678 (7th Cir. 2005), for instance, a federal appeals court reinstated a prisoner's lawsuit claiming that prison officials violated his right to religious freedom by refusing to allow him to organize an inmate study group to discuss atheism. Atheism, the court ruled, qualified as the prisoner's "religion" for purposes of a First Amendment claim. Further, the defendant officials failed to show that they had a secular purpose for their decision, since they allow group meetings of other faiths, the court concluded.

The case involved a Wisconsin inmate who claimed that prison officials infringed on his First Amendment right to "practice his religion" by refusing to allow him to create an inmate group to study and discuss atheism. The lawsuit was filed seeking damages against the then warden of Waupun Correctional Institution, an institution run by the Wisconsin Department of Corrections.

While there, the prisoner submitted an official form titled "Request for New Religious Practice," in which he asked to form an inmate group interested in humanism, atheism, and free speaking. He stated that the group would work "to stimulate and promote Freedom of Thought and inquiry concerning religious beliefs, creeds, dogmas, tenets, rituals and practices[, and to] educate and provide information concerning religious beliefs, creeds, dogmas, tenets, rituals, and practices." He also submitted a list of atheist groups and literature.

Prison officials concluded that the request was not motivated by "religious" beliefs. Therefore, rather than evaluating the request under a relatively more flexible policy for new religious groups, it was considered under the procedure for forming a new inmate activity group, and the request was denied, on the basis that they were "not forming new activity groups at that time."

The prison officials did not treat atheism as a "religion," the appeals court noted, which was "perhaps in keeping" with the prisoner's own insistence that "it is the antithesis of religion."

> "But whether atheism is a 'religion' for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture. The Supreme Court has said that a religion, for purposes of the First Amendment, is distinct from a 'way of life,' even if that way of life is inspired by philosophical beliefs or other secular concerns. A religion need not be based on a belief in the existence of a supreme being (or beings, for polytheistic faiths), nor must it be a mainstream faith."

The appeals court noted that it had suggested in the past that a person's sincere beliefs dealing with issues of "ultimate concern" that occupy for them "a place parallel to that

filled by" God in traditionally religious persons, those beliefs are their religion, and that atheism may be considered, in that manner, a religion, since it takes a "position on divinity." The plaintiff prisoner claimed that his atheist beliefs play a central role in his life, and the defendants did not dispute that his beliefs were sincerely held.

The decision noted further that the U.S. Supreme Court has recognized atheism as equivalent to a "religion" for purposes of the First Amendment on numerous occasions, most recently in McCreary County v. ACLU, #03-1693, 545 U.S. 844 (2005). The right protected by the First Amendment includes the right to select any religious faith "or none at all."

Accordingly, the court found that atheism qualified as the plaintiff's "religion" for purposes of his First Amendment claim.

Still, the court found that in the context of the Free Exercise Clause of the First Amendment, the prisoner had failed to show that his right to practice atheism was "burdened in a significant way." He had introduced no evidence showing that he would be unable to practice atheism effectively without the benefit of a weekly study group, and the defendants apparently allowed him to study atheist literature on his own, consult informally with other atheist inmates, and correspond with members of the atheist groups he identified.

Further, the defendant officials presented evidence stating that allowing any group of inmates to congregate for a meeting raised security concerns and required staff members to supervise the group. The appeals court found that the trial court properly granted summary judgment on the prisoner's Free Exercise Clause claim, since the court could not say that the denial of the request for a study group was not rationally related to a legitimate interest in maintaining institutional security.

The same was not true, however, the appeals court stated, as to a claim by the prisoner that the denial violated the clause of the First Amendment prohibiting an Establishment of Religion.

> "A government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. The Establishment Clause also prohibits the government from favoring one religion over another without a legitimate secular reason."

The trial court improperly failed to recognize that the prisoner was trying to start a "religious" group, and that atheism was his religion, the court found. It was undisputed that other religious groups are permitted to meet at the prison, and the defendants "have advanced no secular reason why the security concerns they cited as a reason to deny his

request for an atheist group do not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates."

Since the defendants failed "even to articulate" a secular reason why a meeting of atheist inmates would pose a greater security risk than meetings of inmates of other faiths, their rejection of the request for a study group on atheism could not survive the requirement that there be a secular reason for the policy. The court therefore ordered further proceedings on the plaintiff's Establishment Clause claim.

In a later decision in the same case, in Kaufman v. McCaughtry, #03-C-027, 422 F. Supp. 2d 1016 (W.D. Wis. 2006), a federal trial court found that the defendant officials were entitled to qualified immunity from liability for damages since it was not clearly established at the time of the denial, 2002, that atheism was a "religion," and the prisoner did not tell the defendants that he was a member of any non-theistic belief system, such as secular humanism, which the court said had previously been held to be protected by the First Amendment's free exercise of religion clause.

It should be noted that, just as the fact that a prisoner is an adherent of a long recognized conventional religion can not be used to justify a request for accommodation of a request that is not religiously motivated, an atheist prisoner's request which is not motivated by his or her philosophical belief system need not be honored under the guise of religious accommodation. In a later proceeding involving the same prisoner, Kaufman v. Karlen, #07-2712, 2008 U.S. App. Lexis 6181 (Unpub. 7th Cir.), for instance, the court found that he failed to show that his religious freedom rights were violated because prison officials refused to let him receive a silver circle, free publications, and other books he ordered, and delayed processing and placing atheistic books in the library.

The court ruled that the "silver circle" did not have anything to do with the practice of any religion or philosophy, and that a policy of allowing prisoners possession of only generally accepted religious symbols was supported by a "valid secular and penological" purpose that did not advance any religion. The defendant officials also adequately provided legitimate reasons for any delay in the processing of atheist books for the library, as well as why certain other materials had been excluded.

"Establishment of Religion" Issues

The First Amendment, as noted earlier, in addition to a clause protecting the "free exercise" of religion, also contains a provision prohibiting a government "establishment of religion," imposing a particular religion, or religion in general, on people against their will.

A number of courts have relied on the Establishment Clause of the First Amendment to support claims of atheist prisoners (or others) against forced participation in 12-step programs on the basis that they constitute forced participation in religion.

See Turner v. Hickman, #CIVS-99-1869, 342 F. Supp. 2d 887 (E.D. Cal. 2004), for instance, ruling that the requirement that a prisoner participate in Narcotics Anonymous, a 12-step program requiring acknowledgment of a belief in a "higher power," or else not be eligible for parole, was an unconstitutional establishment of religion, in violation of the First Amendment.

Similarly, in Griffin v. Coughlin, 88 N.Y.2d 674, 673 N.E.2d 98, 649 N.Y.S.2d 903, 1996 N.Y. Lexis 1522, the highest court in New York ruled that the Alcoholics Anonymous (A.A.) credo is religious, and that an atheist or agnostic inmate could not be punished by losing eligibility for a conjugal visit program based on his refusal to participate in a substance abuse program at a facility which used the A.A. 12 steps. Such an action was held to violate the First Amendment prohibition on "Establishment of Religion." In Kerr v. Farrey, #95-184, 95 F.3d 472 (7th Cir. 1996), a federal appeals court ruled that coerced attendance at Narcotics Anonymous meetings that emphasized religion could violate the Establishment Clause.

When religion permeates a program in a correctional institution, courts have been very troubled. In Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc., #06-2741, 509 F.3d 406 (8th Cir. 2007), a federal appeals court found that a religiously-oriented rehabilitation program run by two non-profit organizations under a contract with the Iowa Department of Corrections violated the Establishment of Religion clause of the First Amendment by improperly using tax money to pay for what was characterized as a 24-hour-a-day, Christ-centered, biblically-based program that promotes "personal transformation of prisoners through the power of the Gospel." Even though the government did not act for the purpose of advancing religion, the direct aid to the operators of the program was unconstitutional in that it funded proselytizing activity. Injunctive relief was appropriate, but the trial court abused its discretion in ordering repayment from the non-profit organizations for services previously rendered. Further funding of the program was properly barred.

Similarly, in Williams v. Huff, #99-0273, 52 S.W.3d 171 (Tex. 2001), the Texas Supreme Court ruled that a religious instruction housing unit at a county jail, popularly called the "God Pod," was an unconstitutional establishment of religion since it constituted a government endorsement of a particular religious view.

On the other hand, programs whose concepts and philosophy may ultimately flow from a religious heritage, but that do not explicitly demand an adherence to belief in God or a higher power, may not constitute an establishment of religion. In Bader v. Wren, #06-CV-137, 532 F. Supp. 2d 308 (D.N.H. 2008), a court held that, even though a

rehabilitation program called the Alternatives to Violence Program was “rooted in” Quaker philosophy, it was a secular rather than religious program, so that the recommendation, by a prison, that a prisoner participate in the program did not violate the Establishment of Religion clause of the First Amendment.

The fact that “thou shall not kill” is a component part of the Ten Commandments,” in other words, hardly prohibits a governmental program from counseling against violence and killing.

Other cases of interest in this area include:

* Fabricius v. Maricopa County, #CV-06-1105, 2008 U.S. Dist. Lexis 37569 (D. Ariz.), holding that a prisoner could pursue his claim that a county sheriff and county violated his First Amendment rights by allegedly playing Christmas music daily in the jail, and forcing inmates to listen to Judeo/Christian religious doctrine. The court rejected the argument that the First Amendment claim should be dismissed based on the failure to show that the prisoner suffered a physical injury, ruling that 42 U.S.C. Sec. 1997e(c) of the Prison Litigation Reform Act, barring recovery of damages for mental distress in the absence of a physical injury, did not apply to the prisoner's claim.

* Inouye v. Kemna, #06-15474, 504 F.3d 705 (9th Cir. 2007), in which a federal appeals court overturned a decision granting qualified immunity to a parole officer who allegedly required a parolee with a methamphetamine addiction to participated in a religion-based drug treatment program over his objections. The appeals court found that the law on the issue was clearly established, and that a jury could conclude that the parole officer actually had notice that his actions were unconstitutional because of the parolee's letter objecting to compulsory placement in the program.

* Travillion v. Leon, #06-2136, 2007 U.S. App. Lexis 22203 (Unpub. 3rd Cir.), in which the court said that a prisoner failed to show that the serving of vegetarian meals to all inmates at a jail during Lent improperly forced him to practice a religious tenet of the Catholic religion. The jail did not engage in the serving of the vegetarian meals for the purpose of advancing Catholicism or inhibiting other religions, but for the secular purpose of feeding the prisoners. The prisoner's “equal protection” claim lacked merit, because all inmates were served such meals, regardless of their religion. Finally, the prisoner's refusal to eat vegetarian meals was not constitutionally protected conduct. See also related proceeding at Travillion v. Coffee, #06-1873, 2007 U.S. App. Lexis 21959 (Unpub. 3rd Cir.), rejecting similar claims against the private company which provided the meals to the jail.

* Munson v. Norris, #04-3938, 435 F.3d 877 (8th Cir. 2006), rehearing denied, 2006 U.S. App. Lexis 5248, holding that a parolee's claim that his First Amendment rights were violated when he was required, during a mandated sex offenders' program, to recite a

prayer with the word “God” in it should have been analyzed under the Establishment Clause, prohibiting coercion to participate in religious activity, rather than on the basis of whether his belief that he should only say “God” while praying at home at night was a “serious” religious belief.

* Torricellas v. Poole, #95-0230, 954 F. Supp. 1405 (C.D. Cal. 1997), adopted in Torricellas v. Poole, #97-55379, 143 F.3d 1179 (Table 9th Cir.), concluding that an inmate group's Christmas party in prison visitation room, which included singing of Christmas carols, did not violate First Amendment rights of a prisoner receiving a visitor who objected to it. The party did not constitute an “establishment of religion” when the primary purpose was secular, and prison officials did not control its content.

* O'Connor v. California, #92-817, 855 F. Supp. 303 (C.D. Cal. 1994), ruling that there was no violation of the Establishment Clause in making an AA program one of a variety of options available to satisfy the conditions of probation.

Resources

The following are a few useful resources on religion and prisoners. Inclusion of an item does not indicate agreement with its viewpoint.

- Religious Freedom in Correctional Facilities (I) --Legal Standard 2007 (3) AELE Mo. L. J. 301.

- Religious Freedom in Correctional Facilities (II) --Appearance and Apparel 2007 (4) AELE Mo. L. J. 301.

- Prisoner Diet Legal Issues, 2007 (7) AELE Mo. L.J. 301. [Contains a section of religious issues arising in the context of prisoner diet].

- Religious Freedom in Correctional Facilities (III): Protection for “Unconventional” Religions?, 2009 (3) AELE Mo. L. J. 301.

- Secular Coalition for America, self-described as a “national lobby representing the interests of atheists, humanists, agnostics, freethinkers and other nontheistic Americans.” The organization, a coalition of a number of groups, has taken the position that Congress should revise the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act because they “privilege specific religious sects while leaving other religious groups and the nonreligious in a state of second-class citizenship.”

- Americans United for Separation of Church and State, a frequent litigant on issues concerning the “establishment of religion.”

- Religious Freedom Home Page. A website dedicated to opposing the separation of church and state, and the argument that the founding fathers wanted religion completely divorced from government.

- Wikipedia article on Atheism.

- Wikipedia article on Agnosticism.

- Wikipedia article on Secular Humanism.

- The Constitutional Principle: Separation of Church and State. A website containing discussion of the general history law on this subject, including Supreme Court cases. Included is a discussion of the controversy over whether or not the U.S, Supreme Court has or has not recognized "secular humanism" as a religion, and, if so, for what purposes.

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