

QUESTION 2

County Jail has prominently posted in the inmate dining hall quotations from three of the Ten Commandments as follow: “You shall not kill.” “You shall not steal.” “You shall not give false testimony against your neighbor.” County officials thought these were “good moral principles” that would assist prisoners when they were released.

The Jail makes available to inmates copies of the Bible and the Quran (Koran), but no other religious books. Inmate Ivan requested a copy of a religious book central to his recognized, but relatively small, sect. This book urges the religious use of a hallucinogenic sacramental tea. Ivan has requested permission to have the hallucinogenic sacramental tea on a weekly basis as part of his religious observances.

Ivan’s request for the book was denied on the basis that it encourages illegal drug usage. His request for permission to have the hallucinogenic sacramental tea was denied for the same reason.

1. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the dining hall quotations, and what is the likely outcome? Discuss.
2. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the denial of his requests for the book and the tea, and what is the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

Constitutional Law

In general, there must be a separation of Church and State.

Dining Hall Quotations

Establishment Clause

The issue is whether Ivan could assert a violation of the Establishment Clause with regards to the dining hall quotations.

First, to bring a claim under the U.S. Constitution and the Establishment Clause, there must be a government action. Here, the action of posting three of the Ten Commandments was done by the county jail. A county is considered a government actor. Thus, there has been a government action in this case.

Under the Establishment Clause, the government cannot take action or promulgate a rule that has the effect of establishing or inhibiting religion. In order to determine whether government action violates the Establishment clause, the court will apply the *Lemon* test. The *Lemon* test has three factors. To meet these three factors, the government must show that (i) the action has a secular purpose, (ii) that the action's primary effect is not to advance or inhibit religion, and (iii) there is not excessive entanglement between the government action and religion.

Secular Purpose

First, the government must show that its action has a secular purpose. Here, the county officials stated that the three commandments it posted were "good moral principles" that would assist prisoners when released. It appears that the county officials meant for the purpose of posting the commandments to be secular. Their goal was to assist prisoners when they are released from prison. Likely to ensure that they do not commit further crimes such as killing or stealing, and also telling them not to lie. If this was the sole purpose in posting those three commandments, that is likely considered a secular

purpose.

Primary Effect

The primary effect of the action must not be to advance or inhibit religion. Ivan will likely argue that anytime someone posts all or part of the Ten Commandments, the primary effect is to advance religion. More specifically, that the Ten Commandments are inherently religious because they are from the bible. Thus, the primary effect is to advance the religions that believe in the Ten Commandments, while inhibiting the religions that do not believe in the Ten Commandments.

Conversely, the county officials will likely argue that they only posted three of the Ten Commandments. That, coupled with the purpose in posting the three commandments, indicates that the primary effect is not to advance or inhibit religion. Rather, it was intended as a way to help morally guide the prisoners. That the primary effect is to advance good morals.

This will be a close factor and something for the fact finder to decide. It is possible the fact finder could go either way on this particular issue.

Excessive Entanglement

Even if the county is successful on the first two factors of the *Lemon* test, it will likely fail on this factor. Under this prong, the government action cannot be excessively entangled with religion. Ivan will argue (successfully) that the Ten Commandments are inherently religious. And it does not matter that the county posted only three of the commandments, or that their purpose was not religious. Posting the Ten Commandments would likely be the same as hanging a cross or a prayer on the wall. The government's action of posting the ten commandments entangles itself with religion. Even if they do not intend to promote religion, the association of the ten commandments with the government action results in that entanglement. The county officials will have a hard time arguing that their action was separate from religion.

In sum, although a court could find that the county official's purpose in posting the three commandments was secular, and that the primary effect did not advance or inhibit religion, it is likely a court would conclude that posting those commandments resulted in

an excessive entanglement between the government and religion. Therefore, Ivan will be successful in his claim that the county jail has violated the Establishment Clause.

Denial of Ivan's Book

Free Exercise of Religion Clause

The issue is whether the jail's denial of Ivan's request for his book violates the Free Exercise Clause of the U.S. Constitution.

Under the 1st Amendment of the Constitution, every person has the right to the free exercise of his or her religion.

Sincerely Held Religious Belief

The first issue here is whether Ivan's religious belief is protected.

Whether a religion is protected under the Constitution is not based on whether the particular religion is well known or well established. Rather, the court will look at whether the individual has a sincerely held religious belief. Put another way, the question is whether the individual's belief and whether that belief has a similar role in the individual's life as a typical religion would.

In this case, the facts state that Ivan was requesting a religious book related to his recognized, but relatively small sect of his religion. The fact that Ivan's sect is small does not mean that his belief is not protected. Based on the limited facts, it indicates that his sect is recognized, and that he holds a sincere belief in it. His sincerity is evidenced in his request for a book, as well as his request for the religious use of tea (analyzed below). This indicates that Ivan's religious belief, although based on a small sect, is sincerely held and thus subject to constitutional protections.

Free Exercise

The issue is whether the county jail's action of denying Ivan's book violates the Free Exercise Clause of the 1st Amendment of the Constitution.

When a government action or regulation is based on or discriminates against religion, it must pass strict scrutiny. Strict Scrutiny requires that the government action is

necessary to achieve a compelling government interest.

Here, the government's stated interest is that the book encourages illegal drug usage. The reduction or elimination of illegal drug is likely considered a compelling government interest so they will have met this prong of the test. However, the actions necessary to achieve that is to outlaw or prohibit the actual use of drugs. In this case, the county jail is denying Ivan a religious book. The act of denying that book is likely not necessary to achieve the stated purpose of preventing illegal drug use. The action of not allowing illegal drug use is the action necessary to prevent illegal drug use (analyzed below).

As such, a court will likely consider the county jail's action of not providing Ivan his book to not pass strict scrutiny. Specifically because it is not necessary to achieve their purpose. As discussed below, they have other means to achieve their purpose.

Ivan will likely be successful in his challenge that the county jail has violated his 1st Amendment right to Free Exercise of his religion based on their denial of his religious book.

Equal Protection

The issue is whether the jail's failure to provide Ivan his religious book violates the Equal Protection Clause of the Constitution.

Citizens are entitled to equal protection of the laws of the United States. This applies to the federal government under the 5th Amendment, and is applicable to the states under the 14th Amendment.

Here, the jail provides copies of the Bible and the Quran (Koran) to prisoners, but it does not provide any other religious books. Providing religious books for some religions and not others is not equal. Under the Equal Protection Clause, an action or law that discriminates against a suspect class must pass strict scrutiny. Actions based on religion, as mentioned, must pass strict scrutiny. Thus, because the government action is not equal and it is based on religion, it must pass strict scrutiny.

Similar to the above analysis, failing to provide Ivan his book does not pass strict scrutiny. There is no stated basis for why the Jail provides inmates with copies of the

Bible and the Quran, but not other books. The jail offers no reasons why it should be allowed to provide books based on some religions, while denying books for other religions. Although the jail's interest of preventing illegal drug use is compelling, denying the book is not necessary to achieve that purpose.

The jail is required to either provide all of the requested religious books (assuming they are sincerely held religious beliefs) or they can offer none. That is the only way that they can ensure equal protection of the laws to the various religions.

The county jail's offering of certain religious books and not others violates equal protection. The jail's action does not pass strict scrutiny, and thus Ivan would be successful on this claim.

Denial of Ivan's Tea

Free Exercise

The issue is whether the denial of Ivan's request for hallucinogenic sacramental tea violated his 1st Amendment right to free exercise of his religion.

As stated above, a government action that discriminated against religion must pass strict scrutiny. Unlike the book request, the jail's denial of Ivan's request for hallucinogenic tea will pass strict scrutiny.

As mentioned previously, the government's interest is to eliminate or outlaw the use of illegal drugs - a compelling government interest. That interest is no more compelling than in a jail setting. Illegal drug use is not allowed by the general public, and absolutely should not be allowed by prisoners in a jail. Here, Ivan is specifically asking to use hallucinogenic tea, which is assumed to be an illegal drug. As such, not providing that tea is necessary to accomplish its stated goal. The fact that the tea is sacramental does not matter. The Supreme Court previously upheld a similar government action that outlawed the use of drugs (i.e. peyote) by Native Americans. Although Native Americans are still allowed to practice their stated religions, use of sacramental drugs was not allowed. The same analysis applies here. Although Ivan is allowed to practice his religion, including use of a religious book,

the county jail is not required to provide him with illegal hallucinogenic tea.

Denying Ivan his hallucinogenic sacramental tea is necessary to achieve the jail's compelling interest of outlawing and eliminating illegal drug use in its prison.

Ivan will not be successful in his challenge of the government's denial of his hallucinogenic tea.

Equal Protection

The issue here is whether the jail's denial of Ivan's tea violates equal protection. See above for the rules regarding equal protection.

Unlike the book situation, where the jail offers some religious books but not others, there is not the same issue here. There is no indication that the jail has offered the use of teas or other drinks for other religious. Thus, without more, the Equal Protection Clause is not invoked here. Even if it were, for the same reasons as the analysis under the Free Exercise Clause, the government's action passes strict scrutiny.

Ivan will not be successful in his claim that the jail's denial of his sacramental hallucinogenic tea violates equal protection of the laws.

QUESTION 2: SELECTED ANSWER B

Ivan's Constitutional Challenges to the Dining Hall Quotations

Ivan can challenge the quotations on the dining hall as a violation of the Establishment Clause.

A. Establishment Clause

The Establishment Clause prohibits the government from engaging in actions that constitute an establishment of a religion. The clause is applicable to state (and county) officials through the Fourteenth Amendment. When government conduct potentially implicates the establishment clause, courts apply the *Lemon* test to determine if there has been a constitutional violation. The *Lemon* test is a three-step approach whereby government conduct will be found to violate the establishment clause unless it has a secular purpose, the primary effect neither advances nor prohibits religion, and there is no excessive entanglement with religion.

1. Secular Purpose

First, County will need to show that the quotations on the dining hall have a secular purpose. The dining hall quotations contain three quotes from the Ten Commandments: "You shall not kill"; "You shall not steal"; and "You shall not give false testimony to your neighbor." The Ten Commandments is a religious document, and thus appears to have a religious, not a secular purpose. The County will argue that the officials chose these quotes, however, because they emphasized "good moral principles." Ivan may argue that this reason is not a meaningful distinction because the moral principles it purports to support are Christian, and religious, not secular. However, because emphasizing good moral principles is arguably a secular purpose, the County may be able to succeed in showing that the first prong of the *Lemon* test is satisfied.

2. Advances or Prohibits Religion

For the second prong of the *Lemon* test, the primary issue is whether the quotes could

be said to advance religion. There does not appear to be any real issue with the quotes prohibiting a religion. It's unclear from the facts if the dining hall quotations even make clear that the source of the material is the Ten Commandments. If the quotes are clearly attributable to the Ten Commandments, which as noted above is well-known religious text, then the quotations would clearly appear to advance a particular religion. If they do not, then arguably the quotes do not advance or prohibit a particular religion. The County may further argue that the quotes that were chosen do not reference a religion, nor do they expressly support a higher being. The first two quotes relate to common principles that are codified in the state law--all states prohibit killing and stealing. The last quote is arguably more specific to Christianity. While the law prohibits giving false testimony under oath, the actual quote relates to a more specific concept of not giving false testimony about your neighbor that appears to be more amorphous and arguably is readily identifiable as tied to a particular religion. Additionally, the quotes are prominently posted in the inmate dining hall, which suggests that the County is supporting these religious beliefs. While this issue is a closer call, Ivan may still prevail in showing that the primary effect of these quotes is to advance religion.

3. Excessive Entanglement

Finally, Ivan can argue that the quotes constitute excessive entanglement with religion. Many of the arguments discussed above with regard to prong two of the *Lemon* test would also be relevant as to whether the chosen quotes constitute excessive entanglement. However, if the County succeeds in arguing that the quotes relate to core principles of society that are not inherently tied to a religion, the County may succeed in arguing that there is no excessive entanglement.

In summary, for the reasons explained above, Ivan is likely to prevail on his Establishment Clause claim because it appears that the three prongs of the *Lemon* test have not been satisfied.

B. Government Speech

The County may respond to Ivan's Establishment Clause claim by arguing that the quotations constitute government speech. The Establishment Clause claim is part of

the First Amendment, and the First Amendment does not generally apply to government speech. However, when the speech at issue involves religious issues, the Supreme Court has held that the government may not engage in conduct that appears to disproportionately favor one religion. For example, the Supreme Court has held that governments may place a display in a city hall that depicts a menorah and a Christmas tree, two well-known religious symbols, because there are multiple religions recognized, not just one. Similarly, the government may include a religious text in a display that includes other types of texts as well. This exception, therefore, would not appear to help the County here because the dining hall only contains quotations from the Ten Commandments. Because the County has chosen only to display quotations from a religious text, it will not be able to claim that this is acceptable government speech.

(2) Ivan's Constitutional Challenges to the Denial of Requests for Book and Tea

Ivan can challenge the denial of his requests for the book and tea under the First Amendment's Free Exercise Clause (incorporated against the states (and counties) via the Fourteenth Amendment), Equal Protection Clause of the Fourteenth Amendment, and Due Process Clause. For the reasons explained below, Ivan is likely to succeed in challenging the denial of his book, but not the denial of the hallucinogenic tea.

A. Free Exercise Clause

There are three potential issues that arise with Ivan's claim under the Free Exercise Clause: (1) whether Ivan's beliefs are religious, (2) whether Ivan's beliefs are sincere, and (3) whether the County's conduct is discriminatory. Each is discussed below.

1. Whether Ivan's Beliefs Are Religious

The Free Exercise Clause protects religious beliefs. An individual does not give up this right merely because he is in jail. The Supreme Court has never clearly defined what constitutes a "religious" belief protected by the Free Exercise Clause, but it has made clear that it extends beyond the traditional religions. The general test is whether the belief holds a place in the individual's life parallel to that of traditional religious beliefs.

We have very little information about Ivan's religion. We know that it is a relatively small sect with a religious book and that it has weekly religious observances, including use of a hallucinogenic sacramental tea. The Supreme Court has made clear that courts have very little power to question the validity of a religion. Here, it is likely that a court will find that Ivan's beliefs are religious, and thus he may bring a claim under the Free Exercise Clause.

2. Whether Ivan's Beliefs Are Sincere

Assuming Ivan's beliefs are "religious," the court may assess whether Ivan sincerely holds these beliefs. We again have very little information to determine whether Ivan's beliefs are sincere. But there are no facts indicating that Ivan's requests are some kind of ruse or that he does not sincerely believe in this religion. A court, therefore, would likely find that Ivan's beliefs are sincere.

3. Whether County's Conduct is Discriminatory

Because Ivan will likely be able to show that his requests were based on sincere, religious beliefs, the next issue is whether the County's conduct is discriminatory. The Free Exercise Clause affords strong protections for religious beliefs. Any government action that discriminates against religion is subject to strict scrutiny, meaning the government will have the burden of showing it is necessary to achieve a compelling interest. However, government action that is facially neutral may not be subject to strict scrutiny in the otherwise absence of an intent to discriminate. The Supreme Court has recognized as well that the government need not provide religious exceptions if a facially neutral policy incidentally burdens the exercise of a religion. For example, the Supreme Court upheld as constitutional a ban on illegal drugs that prohibited a Native American from using peyote as part of a religious ceremony.

Here, the stated reason for the denial of the book and the tea is that they promote illegal drug usage. We don't have any information as to whether this is an official policy, but since this is a County jail it seems safe to assume that the County would have a policy against illegal drug usage in the jail. The policy on its face appears to be neutral and there is no evidence that it was passed intentionally to interfere with Ivan's religion. While the policy does incidentally burden Ivan's ability to practice his religion, this

seems to be a similar situation to the peyote case discussed above.

4. FEC Conclusion

In summary, as to the tea, a court almost certainly would find that the County does not have to make an exception for Ivan's religion, and would likely not find that the denial of the tea constitutes a violation of the Free Exercise Clause. As to the book, this is a closer call because the book itself is not a hallucinogenic. Ivan's stronger arguments, however, are probably based on the First Amendment and the Equal Protection Clause, for the reasons explained below.

B. Due Process Clause

Ivan may reasonably challenge the denial of his requests as a violation of the Due Process Clause, which prohibits the government from engaging in arbitrary and capricious conduct. Under the DPC, government action that infringes on a fundamental right must satisfy strict scrutiny, meaning the government must show that it is necessary to achieve a compelling purpose. If a fundamental right is not implicated, then the government action is subject only to rational basis review, meaning the burden is on the challenger (in this case Ivan) to show that the government action is not rationally related to a legitimate government purpose. As a practical matter, most government action will satisfy rational basis review.

Here, Ivan can argue that the County's conduct infringes on his fundamental rights of religious freedom. The County, therefore, would have the burden to show that its actions are necessary to achieve a compelling interest. The County has a strong argument that denial of the tea is constitutional. The tea is a hallucinogenic, and assuming hallucinogens are considered illegal drugs, then the County's denial seems to be necessary to uphold the policy against illegal drug usage (which a court would likely find is a compelling purpose).

However, the County would likely not prevail on the book. As noted above, preventing illegal drug usage in jail is likely to be deemed a compelling purpose. But denial of the book is not necessary to achieve this purpose. While the book may urge the use of the tea, there are less restrictive means to prevent illegal drug usage (including denial of the illegal drugs). Reading the book in and of itself will not lead to illegal drug usage. The

County, therefore, will likely not prevail in showing that denial of the book satisfies strict scrutiny.

Accordingly, Ivan is likely to prevail on his challenge that the denial of the book violates the Due Process Clause.

C. Equal Protection Clause

Ivan may also argue that the County's denial of the book violates the Equal Protection Clause because the County allows other inmates to have copies of the Bible and the Quran but will not make available Ivan's religious sect. The EPC analysis depends on whether a suspect, quasi-suspect, or fundamental right is implicated. Government conduct that discriminates on the basis of a suspect class (such as race or national origin), as well as government conduct that implicates a fundamental right, is subject to strict scrutiny, which means the government must show it is necessary to achieve a compelling purpose. Government conduct that implicates a quasi-suspect class (such as gender) is subject to intermediate scrutiny, meaning the government must show it is substantially related to an important purpose (and in the case of gender must also show an exceedingly persuasive justification). All other government conduct is subject to rational basis review, meaning the challenger must show that it is not rationally related to a legitimate government purpose.

Here, Ivan can argue that the County discriminates against his religion because the County allows inmates to have access to the Bible and Quran but not his religious text. Because freedom of religion is a fundamental right, the court is likely to apply strict scrutiny. In that case, the analysis would be the same as described above for the DPC, and County is unlikely to be able to show that the denial of the book was constitutional.

Finally, there does not appear to be an EPC argument based on the tea because we have no facts indicating that the County allows other inmates religious tea or the equivalent. Even if there was, as explained above, because the tea is a hallucinogenic, the County would have a strong argument that strict scrutiny is satisfied because denial is necessary to prevent illegal drug usage.

D. Establishment Clause

Because the County allows inmates access to the Bible and Quran, but denied Ivan access to his religious text, Ivan may also argue that the County's conduct violates the Establishment Clause. The test is discussed above. It is unclear whether the County has a policy of only allowing these two religious texts. If it does, we do not have sufficient facts to analyze whether there is a secular purpose for this policy (such as budgetary constraints). Thus, it is difficult to tell whether Ivan can prevail on this claim, and it is not as strong an argument as the ones discussed above challenging the denial of his book.